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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION FOR JUDICIAL REVIEW BY

(1) THE CHRISTIAN INSTITUTE
(2) THE REFORMED PRESBYTERIAN CHURCH IN IRELAND
(3) THE CONGREGATIONAL UNION OF IRELAND
(4) THE EVANGELICAL PRESBYTERIAN CHURCH OF IRELAND
(5) THE ASSOCIATION OF BAPTIST CHURCHES IN IRELAND
(6) THE FELLOWSHIP OF INDEPENDENT METHODIST CHURCHES
(7) CHRISTIAN CAMPING INTERNATIONAL (UK) LIMITED

WEATHERUP J

The application.

[1] This is an application for judicial review of the making of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 ("the Regulations") by the Office of the First Minister and Deputy First Minister ("OFMDFM").

[2] The applicants are seven named individuals, each representing one of the seven organisations listed above, but for convenience the applicants will be referred to by the name of the organisation. The first applicant, The Christian Institute, is described as a registered charity which seeks to promote the Christian faith and was set up in 1990 by a group of church leaders and Christian professionals who were concerned about the lack of a Christian voice to respond to major ethical debates. The second applicant, The Reformed Presbyterian Church in Ireland, is described as having 31 churches in Northern Ireland, runs a Christian bookshop in Belfast, is closely associated with the Covenanter Residential Association which administers a youth hostel in Belfast and sheltered housing accommodation for the elderly in

Ballymoney, runs residential camps for young adults, publishes a monthly magazine and has members who work as teachers and social workers. The third applicant, The Evangelical Presbyterian Church of Ireland, is described as having 11 churches in Northern Ireland, runs residential camps for young people and a café for students, is closely associated with a Christian bookshop in Belfast, publishes a magazine 6 times a year and has members who include teachers and social workers. The fourth applicant, The Congregational Union of Ireland, is described as having 25 churches in Northern Ireland and its members include those who work in wedding photography and as teachers. The fifth applicant, The Association of Baptist Churches in Ireland, is described as having 95 churches in Northern Ireland and has members who are employed as teachers. The sixth applicant, The Fellowship of Independent Methodist Churches, is described as having 15 churches in Northern Ireland and owns a house in Magherafelt which is rented to tenants, it runs residential camps for young adults, publishes a regular magazine and has members who work in the photograph industry including wedding photography. The seventh applicant, The Christian Camping International (UK) Limited, is described as a registered charity involved in camps, holidays, conferences and outdoor activity ministries of which many are church based residential events. Mr Dingemans QC and Mr Scoffield appeared for the applicants. Mr McCluskey QC and Mr McMillan appeared for the respondent, the OFMDFM.

[3] Four interveners were given leave to make written submissions and ultimately to make oral submissions. The first intervener, Archbishop Sean Brady, Archbishop of Armagh and Primate of All Ireland, acted on his own behalf and on behalf of the Bishop of Down and Connor, the Bishop of Derry, the Bishop of Clogher and the Bishop of Dromore ("the Northern Bishops"). The Northern Bishops supported the applicants. The Roman Catholic Church comprises 211 parishes in Northern Ireland, is trustee of 550 Catholic primary and second level schools and teacher training at St Mary's University College, provides chaplaincy facilities at Queen's University Belfast and the University of Ulster at Coleraine and Jordanstown, contributes to the teaching of post graduate certificate course in Religious Education at the University of Ulster. The Catholic Church operates a Catholic marriage care service, social and leisure services with church based youth agencies providing education counselling and personal development programmes, runs an adoption agency, operates a number of residential facilities and a number of diocesan and parish based bookshops. Mr Larkin QC, Mr Lockhart QC and Ms Harvey appeared for the Northern Bishops.

[4] The other interveners broadly supported the respondent. The second intervener, the Northern Ireland Human Rights Commission ("NIHRC") is statutorily charged with responsibility for keeping under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights. The Commission was established under Part

VII of the Northern Ireland Act 1998. Ms Higgins QC and Ms McMahon appeared for the NIHRC.

The third intervener, the Equality Commission for Northern Ireland was established by Section 73 of the Northern Ireland Act 1998 and took over the functions formerly exercised by the Fair Employment Commission for Northern Ireland, the Equality Opportunities Commission for Northern Ireland, the Commission for Racial Equality for Northern Ireland and the Northern Ireland Disability Council. Mr Wolff appeared for the Equality Commission.

The fourth intervener, the Coalition on Sexual Orientation ("COSO"), is a coalition of member organisations representing the lesbian, gay, bisexual and transgender community in Northern Ireland and is a non profit company limited by guarantee. The member organisations include Gay and Lesbian Youth Northern Ireland, Gay Helpline – Cara Friend, the Gay Police Association Northern Ireland, the LGBT Branch of the National Union of Students – Union of Students in Ireland, the LGBT Branch of Unison Northern Ireland and Northern Ireland Gay Rights Association and also has an association with the Lesbian and Gay Christian Movement. Dr McGleenan appeared for COSO.

The Regulations.

[5] The Equality Act 2006 section 82 provides that the Office of the First Minister and Deputy First Minister may by regulations make provision about discrimination or harassment on grounds of sexual orientation. The regulations may in particular make provision of a kind similar to the Race Relations (Northern Ireland) Order 1997 in relation to discrimination other than in the employment field. By section 82(5) regulations may not be made unless a draft has been laid before and approved by resolution of the Northern Ireland Assembly. Further to the powers conferred by section 82 of the 2006 Act the Office of First Minister and Deputy First Minister made the Regulations on 8 November 2006 coming into operation on 1 January 2007. The Regulations were laid before Parliament under paragraph 7(3) of the schedule to the Northern Ireland Act 2000. As provided by section 82 of the 2006 Act the Regulations take their form from the Race Relations (Northern Ireland) Order 1997.

[6] Regulation 3 provides a definition of discrimination and harassment on grounds of sexual orientation that extends to direct discrimination, indirect discrimination and harassment. The prohibited areas of discrimination and harassment on grounds of sexual orientation extend to the provision of goods, facilities and services to the public or a section of the public (Regulation 5), the disposal or management of premises (Regulation 6), specified areas of education (Regulations 9, 10 and 11), specified public authority functions (Regulation 12) and provision for associations and private members clubs

(Regulation 17). Regulation 36 provides for claims under Regulations 5 to 17 to be made by way of civil proceedings in the County Court, with all such remedies as would be obtainable in such proceedings in the High Court.

[7] Exceptions are provided for organisations relating to religion or belief (Regulation 16). It is not unlawful for a religious organisation to restrict membership, participation in activities, the provision of goods, services or activities, or the use or disposal of premises on the ground of sexual orientation. Nor is it unlawful for a minister of religion, in the performance of his functions, to restrict participation in activities or the provision of goods, services or facilities on the ground of sexual orientation. The exceptions do not apply to an organisation whose sole or main purpose is commercial or in relation to regulations 9, 10 and 11 dealing with education. Further, and a matter about which the applicants make particular complaint, the exceptions do not apply to goods, facilities or services or to the specified public authority functions, where the provision was made on behalf of a public authority under a contract between the religious organisation and the public authority.

[8] The general position of the applicants, supported by the Northern Bishops, is that the orthodox belief of Christians and of the other major world religions is that homosexual practice is sinful and that the Regulations impose on those who hold such orthodox beliefs certain duties that are inconsistent with the practice of their religious belief. I shall refer to the applicants' position as the orthodox Christian belief. As expressed by Archbishop Brady the Northern Bishops have particular apostolic obligations to teach and bear witness to Christian truth and the Regulations expose to civil liability those Christians who bear witness to orthodox Christian belief in the field of sexuality. The applicants are not opposed to the principle of equality legislation relating to sexual orientation but rather object to many aspects of the form of the legislation that has been adopted. In essence the applicants and the Northern Bishops contend that there has not been equality of treatment between the anti-discrimination measures on the grounds of sexual orientation on the one hand and orthodox religious beliefs on the other hand. In summary the respondent contends, supported by NIHRC, the Equality Commission and COSO, that the Regulations relating to sexual orientation were designed to fill a significant and unsupportable gap in the framework of equality legislation and that the exemptions from the Regulations which have been introduced for all religious groups achieve a fair balance between the competing interests.

[9] Callum Webster, the Northern Ireland Officer of the first applicant, Christian Institute, gave examples of the areas where he considers the Regulations will have an unwarranted effect. As illustrations of the consequences of the Regulations Archbishop Brady set out a number of examples as follows:-

"A. Under the harassment provisions, Catholic teachers, volunteers, staff, or priests in schools, youth clubs, parishes, St Mary's University College or university chaplaincies who seek to present the Catholic Church's teaching on sexual orientation, marriage and the family could be subject to claims of harassment on the basis of `violating the dignity' of persons with a homosexual orientation who are present or `creating an intimating, hostile, degrading, humiliating or offensive environment". This scenario becomes particularly problematic when, as is often the case, the person making the presentation of Catholic doctrine is doing so by invitation and outside of a Catholic institution, or during a church organised course or event which is open to the general public and held in a non church building.

B. The likelihood of such claims is heightened when in the context of maintaining an environment consistent with the ethos of a Catholic institution, the management or staff of that institution take preventative or proactive action in support of that ethos which may be regarded by a person with a homosexual orientation as either harassment or indirect discrimination. For example, if the management of St Mary's University College, in the interests of maintaining the Catholic ethos of the institution and thereby upholding the teaching of the church, were to issue a directive forbidding the Students' Union, of say an affiliate of the Union of Students of Ireland (USI) from inviting a gay and lesbian lobby group supported by the USI to make a presentation to students of the college, the management may be subject to an action under the regulations. The same might apply if the management of the college removed posters within the college grounds promoting such an event. Parallel scenarios could easily be multiplied for Catholic schools, youth clubs and parishes. The regulations have the potential to become particularly problematic in terms of actions taken by the management of a Catholic school, youth club or chaplaincy in the interests of the ethos of

the institution, in response to displays of physical affection and intimacy by a homosexual couple over the age of consent, even if such actions would also have been taken in response to similar behaviour by a heterosexual couple. The scale of the services provided by the church to young people in second and third level education as well as youth organisations is such that this could become a significant source of such actions, especially if pursued in organising a coordinated fashion by a lobby group. This opens up the real possibility of Catholic staff being harassed because of their religious belief.

C. As indicated earlier in this submission, it is not clear whether in giving an explanation, based on the magisterial teaching of the Catholic church, for a lawful action taken under the exemptions provided for the ministers of religion, the explanation itself could become the source of a claim for harassment.

D. A potential problem arises in respect of access sought by same sex couples, whether civilly registered or not, to marriage and relationship counselling courses offered by Accord or Diocese and Family Ministry Services. Acceptance of same sex couples for relationship counselling on the same terms as married couples would be in contravention of the doctrinal principles by granting public and de facto equivalence to a same sex union. Yet, if the Catholic agency, in compliance with its doctrinal position, was to decline such services to a same sex couple they may become subject to an action on the basis of the current regulations, either on the basis of the refusal to provide the service and/or on the basis of the explanation given for such action.

E. A similar problem arises in relation to adoption placement and access to parenting courses run by the Catholic Church related institutions. If a Catholic adoption agency was to consider a same sex couple as a potential adoptive couple, on the same terms as a married couple, this would be in contravention of the doctrinal

principles. As the court will be aware, the political debate around the parallel legislation to be introduced in Britain has already conceded that the consequence of the legislation is the likely closure of Catholic adoption agencies. A similar principle applies in regard to the increasingly likely situation whereupon a same sex couple will seek to be accepted on a parenting course run by a church based agency, or even as trainee volunteers to work in support of a family ministry programme. Again, in each of these cases, both the refusal to allow participation, on the basis of implying equivalence, as well as the explanation for the action, could give rise to court action under the regulations.

F. Given the high number of youths and other groups using church owned halls and facilities to host their events, situations may arise where such groups will organise activities or permit behaviour which, in terms of the doctrinal position of the church, the church management of such facilities, in the interests of protecting the ethos of their organisation, may feel it necessary to withdraw permission to use the facilities or to direct the manner in which they are being used. It is possible to envisage situations where this may give rise to actions under the legislation.

G. Should a same sex couple seek to be placed in a Catholic nursing home on a shared room basis, or one party explicitly seeks to make a conjugal visit to their resident partner and this was forbidden by the management of the Catholic institution on the basis of the doctrinal position it is foreseeable (as in F above) that litigation could similarly result.

H. In relation to Catholic bookshops, it is possible to envisage a situation in which a Catholic bookshop manager is asked to sell some books, videos and other resources which are incompatible with the doctrinal position set out above and in refusing to do so becomes subject to an action under the regulations on the basis either of the refusal to do so or as a result of the doctrinal

explanation offered for such results. Similarly in the same bookshop persons could bring proceedings under the regulations founded on an asserted affront to dignity arising from the contents of the morality or family life sections of the bookshop."

The grounds for judicial review.

[10] The grounds for judicial review are stated as follows:-

(a) OFMDFM in breach of its duty to act in a procedurally fair manner and/or in breach of the applicants procedural legitimate expectations failed to properly consult interested parties about the content of the Regulations and in particular (but without prejudice to the generality of the foregoing) did so in the following ways:

(i) Failing to allow sufficient time for the consultation period;

(ii) Failing to allow the standard minimum period of 12 weeks for the consultation period;

(iii) Providing for the consultation period to fall during a period when many organisations would not be aware of the consultation exercise;

(iv) Initiating a consultation exercise when the proposals were no longer at a formative stage; and

(v) Consulting upon proposals which are fundamentally different from the Regulations in their current form in regard to the provisions relating to harassment.

(b) OFMDFM failed to take into account (or gave manifestly insufficient weight to) the consultation responses so that it breached its public law obligation to conscientiously take into account the product of consultation before finalising the drafting of the Regulations.

(c) The Regulations are necessarily inconsistent with and in violation of the rights of the applicants under Articles 9, 10, 14 and/or 17 of the European Convention ("the Convention") and/or Article 2 of the First Protocol to the Convention by virtue of representing infringements of those rights which are neither proportionate nor necessary in a democratic society and are accordingly in breach of

OFMDFM's obligations under Section 6 of the Human Rights Act 1998 and ultra vires by virtue of Section 24 of the Northern Ireland Act 1998.

(d) The Regulations discriminate against a person or class of persons on the ground of religious belief and for this reason also are ultra vires by virtue of Section 24 of the Northern Ireland Act 1998.

(e) OFMDFM has erred in law and/or has misdirected itself in relation to the nature and effect of the Regulations and in particular has erred in considering that the effect of the Regulations will be such as to "bring protection from sexual orientation discrimination into line with existing legislation that prohibits discrimination on the grounds of … religious belief (and) political opinion."

(f) OFMDFM has erred in law and/or misdirected itself in the following further matters:-

(i) By purporting to treat discrimination on the grounds of sexual orientation (as a state of being) in a manner different from discrimination on the grounds of religion when such an approach is neither justified nor permissible in law;

(ii) By considering that it was constrained in determining the length of the consultation period in relation to the Regulations;

(iii) Keep pace with the then "Great Britain timetable for equivalent legislation" (which represented misdirection or an irrelevant consideration).

(iv) By considering that the nature and effect of the Regulations would be such that discrimination on the grounds of marriage would be permissible under the Regulations; and

(v) By accepting legal advice that "the Government could potentially leave itself open to legal challenge for not including (harassment) protection, when the protection existed for other areas and was well defined in Northern Ireland's anti discrimination legislation."

[11] The applicants reduced the grounds to consideration of four issues. First, consultation prior to the making of the Regulations.

Second, breach of the applicants' rights under the European Convention on Human Rights.

Third, the respondent's misunderstanding of the nature and effect of the Regulations.

Fourth, breach of Section 24 of the Northern Ireland Act 1998 in relation to the competence of OFMDFM to make the Regulations.

(1) Consultation

[12] In July 2006 the respondent issued a consultation document "Getting Equal = Proposals to outlaw discrimination on the ground of sexual orientation in the provision of goods and services in Northern Ireland". The consultation period ran from 29 July 2006 to 25 September 2006. The start date for consultation was chosen to avoid "the twelfth fortnight" around 12 July. The closing date was determined by a desire to lay the Regulations before Parliament at the same time as the equivalent Great Britain Regulations were to be laid before Parliament. In the event a decision was taken on 3 October 2006 to delay the Great Britain Regulations. The Regulations were made on 8 November 2006. Analysis of the consultation was published on 27 November 2006.

- legitimate expectation of adequate consultation.

[13] The applicants claim a legitimate expectation of adequate consultation in relation to the making of the Regulations. Reference was made to three consultation documents. The Cabinet Office "Code of Practice on Consultation" (January 2004) applies to all UK public consultations by Government departments and agencies and devolved administrations are free to adopt the Code, but it does not apply to consultation documents issued by them unless they do so. The Code was not adopted by the respondent but was taken into account. It sets out six consultation criteria with criterion 1 stating "Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy." Paragraph 1.6 states that where a consultation takes place over a holiday period, or lasts less than 12 weeks, extra effort should be made to ensure that the consultation is still effective by supplementing the written exercise with other methods of consultation. Further, where a consultation period is less than 12 weeks this must be highlighted in the consultation document which should explain the reasons and the extra efforts taken to ensure that the consultation is as effective as possible.

[14] The OFMDFM publication "A Practical Guide to Policy Making in Northern Ireland" was framed by the Northern Ireland Executive. This includes general guidance on consultation which includes at paragraph 8.5 the statement that the minimum period for a formal consultation exercise is 8 weeks, with 12 weeks being the standard period.

[15] The Guidance on making regulations issued to departments (known as the "Red Book") provides at paragraph 7.2.13 under the heading "Need for consultation" - "Department should consider as a matter of course the need for public consultation on the content of a statutory rule…. In certain circumstances such consultation is a precondition to the Department exercising a power to make a statutory rule. In other cases it is merely a matter of good practice." In the present case consultation was not a precondition to the OFMDFM exercising the power to make the Regulations.

[16] The general issue of consultation in relation to legislation was considered in General Consumer Council's Application (2006) NIQB 86 at paragraphs 28-36. In Bates v Lord Hailsham [1972] 3 All ER 1019 Megarry J held that the rules of procedural fairness did not apply to the process of legislation. Since 1972 there have been legal developments in the principle of legitimate expectation and political developments in the practice of consultation on proposals for legislation. There is no general legal duty of consultation in relation to legislation but such a duty may arise under statute, which is not this case, or may arise by legitimate expectation or other special circumstances. In the General Consumer Council's Application it was stated at paragraph 36 that a combination of considerations had led to a legitimate expectation of consultation with the GCC in relation to the draft Water and Sewage Services (Northern Ireland) Order 2006 –

> "First of all this arose because a programme of consultation with the applicant was announced in advance of the process. Secondly, the applicant was regarded as a key party to and a major stakeholder in this process. Thirdly, the applicant has a special statutory position in relation to consumer issues and thus a particular statutory interest in the matters which are the subject matter of this draft order. Fourthly the applicant has a special position in the new legislative scheme set up by the draft order as a guardian of the consumer interest."

[17] The particular combination of considerations that applied to the GCC does not apply in the present case. More recently the issue has been considered in England by Stanley-Burnton J in R (BAPIO Action Limited & Ors) v Secretary of State for the Home Department [2007] EWHC 199 (QB). New immigration rules were challenged by the British Association of Physicians of Indian Origin (BAPIO). The immigration rules are rules of practice laid down for the guidance of those entrusted to the administration of the immigration legislation and a statement of the rules is laid before Parliament and may be disapproved by resolution. Stanley-Burnton J stated at paragraph 47 that "It is not clear to me that the principle enunciated by Megarry J (in Bates v Lord Hailsham) is not still good law, at least as far as the

present case is concerned." Further he went on in paragraph 48 to recognise that "On any basis, however, a duty to consult, if not expressly or impliedly imposed by the legislation (and it is not suggested that there is any obligation necessarily implied), must be based on special circumstances. One of those circumstances may be an established practice of prior consultation." The applicants were required to identify a practice of consultation sufficiently settled or uniform as to give rise to an expectation and an obligation that they would continue to be consulted. It was held that there had been no consistent practice of consultations such as could have created an obligation to consult BAPIO.

[18] The applicants sought to identify special circumstances in the present case. They relied on the controversial nature of the provisions, the suspension of the Northern Ireland Assembly, the processing of the measures by negative resolution and the absence of political agreement on the proper balance of rights. I do not accept that these matters amounted to special circumstances giving rise to a public law duty to consult. In the present case, while there exists general guidance in relation to the nature of consultation and that was taken into account by the respondent, there was no established practice of consultation, nor were there other special circumstances that could have created an obligation in public law to consult any of the applicants.

- the duty to consult properly.

[19] However, the applicants contend that, even if there was no duty to consult the applicants in relation to the Regulations, the respondent did engage in consultation and thereby was under a duty to consult properly. In R (Coughlan) v North & East Devon Health Authority [2001] QB 213 at paragraph 108 it was stated "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly." The respondent notes that it was by concession that consultation that is carried out must be carried out properly. Thus the respondent contends that, in the absence of such a concession in the present case, there was no such obligation on the respondent. I do not accept the respondent's contention that the obligation to consult properly only arose by concession. The principle was stated more broadly than as a concession by Auld LJ in the Court of Appeal in R (Edwards) v Environment Agency [2006] EWCA Civ 877 at paragraph 90 that "It is an accepted general principle of administrative law that a public body undertaking consultation must do so fairly as required by the circumstances of the case." If consultation is embarked upon it must be carried out properly.

[20] It is not in doubt that a consultation process was undertaken by the respondent. The consultation paper at page 2 states that it "… seeks views on specific points 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." The foreword from the Minister at page 7 states - "We look forward to hearing your views on our proposals; so that we can take these into account and bring regulations into force later this year that prohibit unfair sexual orientation discrimination in a way that is workable and effective."

[21] The four requirements of consultation were stated in R (Coughlan) v North & East Devon Health Authority [2001] QB 213 at para 108 –

> "To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

[22] The first requirement is that consultation must be undertaken at a time when proposals are still at a formative stage. The applicants contend that there was a breach of this requirement in that the Secretary of State's special advisor had already decided on 23 June 2006 that the Regulations that would be made would be no less favourable to gay, lesbian and bisexual people than the Regulations for Great Britain. I am not satisfied that this comment by a special adviser illustrated that the respondent had closed its mind to the outcome of the consultation process. Rather, the actual outcome illustrates otherwise.

[23] The second requirement is that the consultation document includes sufficient reasons for particular proposals. To the extent that a complaint is made about the proposals relating to harassment the issue is dealt with below. On all other matters I am not satisfied that there was any deficiency in the reasons for particular proposals.

[24] The third requirement is that adequate time must be given for consultation. The consultation period was 8 weeks and 2 days and included the holiday period from 29 July to the end of August. Several interested bodies claimed there was no adequate opportunity to respond to the consultation document in the time available.

[25] In addition, the applicants complain of political considerations informing the decision as to timing. It was intended, before the decision was taken to withhold the Great Britain regulations, that November would be the date for the coming into operation of such regulations throughout the United Kingdom. That target date dictated the decision as to the completion of the

consultation period. In dealing with legislative measures, political decisions will inevitably influence the form, content and timing of the measures. In R (Association of Metropolitan Authorities) v Secretary of State for Social Services [1986] 1 WLR 1 Webster J considered regulations constituting the housing benefits scheme. At page 6H he noted that both the form and substance of new regulations and the time allowed for consulting, before making them, may well depend in whole or in part on matters of a political nature, as to the force and implications of which it would be reasonable to expect the Secretary of State, rather than the Court, to be the best judge.

[26] Apart from the consultation document there were letters forwarded to many individuals and organisations and meetings were held. The consultation documents are guidance only and are not to be applied rigidly. Ultimately the issue is one of fairness in the circumstances. While a minimum period was adopted that included a part of the summer months, overall I am not satisfied that the consultation period was inadequate in the circumstances.

[27] The fourth requirement is that the product of consultation must be conscientiously taken into account. The Regulations were made on 8 November 2006 being 6 weeks and 2 days after the close of the consultation period. The respondent's analysis of the consultation was published on 27 November 2006, being 2 weeks and 5 days after the Regulations were made. 370 responses were received by the respondent. One organisation asked for an extension of the consultation period but this request was refused. A number of responses were accepted after the formal end of the consultation period and the final response was accepted on 4 October 2006. The Regulations contained changes from the proposals in the consultation document. I have not been satisfied that the product of the consultation was not conscientiously taken into account.

- consultation on the harassment provisions.

[28] The harassment provisions in the Regulations require separate consideration. The applicants contend that there is a fundamental difference between the proposals consulted on and those adopted by the respondent in the Regulations. The consultation document under the heading "Harassment" stated as follows:

> "4.13 The Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 make harassment unlawful on the grounds of sexual orientation in the workplace and in institutions of further and higher education. Harassment is defined as where one person's unwanted conduct violates another's dignity, or

> creates an intimidating, hostile, degrading, humiliating or offensive environment for that person.
>
> 4.14 There is, therefore, existing provision within Northern Ireland's anti discrimination legislation covering protection on the ground of harassment. However, during the passage of the Equality Act 2006, Members of the House of Lords argued strongly that, while the concept sat more easily within the employment sphere, it was extremely difficult to define what constitutes violation of dignity in terms of goods or service provision. The importance of balancing an individual's basic human rights to freedom of speech and expression with the need to protect individuals from acts that violate their dignity is an important element in this debate.
>
> 4.15 On the basis of the complex arguments put forward we are minded to accept that it is not appropriate to legislate for harassment within these Regulations. We feel that the future Single Equality Bill will provide a more appropriate vehicle to consider harassment in terms of goods, facilities and services, and allow more time to deal with the complex arguments that have been put forward. We would, however, welcome respondents' views on whether they feel harassment should be included now and their reasons for doing so."

[29] Accordingly, at the consultation stage the respondent was "minded to accept" that there would be no harassment provisions as future legislation was "a more appropriate vehicle" and would allow "more time to deal with the complex arguments". However the consultation paper did invite views and reasons for the inclusion of harassment provisions. In the event some consultees advocated the inclusion of harassment provisions and the respondent accepted their arguments and with the aid of legal advice introduced the harassment provisions.

[30] Harassment is defined in Regulation 3(3). Under the Regulations it is unlawful for any person concerned with the provision of goods, facilities or services to subject to harassment a person who seeks to obtain or use those goods, facilities or services or a person to whom he provides those goods, facilities or services (Regulation 5(2)). It is unlawful for a person in the

disposal or management of premises to subject to harassment a person who applies for or occupies such premises (Regulation 6(4)). It is unlawful for a specified education establishment to subject to harassment a person who applies for admission to the establishment as a pupil or a pupil at the establishment (Regulation 9(2)). It is unlawful for a public authority to subject a person to harassment in the course of carrying out any function of the authority which consists of the provision of specified services (Regulation 12(1)).

[31] The approach to the need for re-consultation was considered in R (Smith) v East Kent Hospital NHS Trust (2002) EWHC 2640 (Admin). The hospital Trust made recommendations to the Secretary of State for the reduction of services at a local hospital. The consultation document suggested four options but in the event the proposal selected had a number of elements in common with all the options. Silber J stated at paragraph 45 that the concept of fairness should determine whether there was a need to re-consult if the decision-maker wished to accept a fresh proposal but the Court should not be too liberal in the use of the power of judicial review to compel further consultation on any change. He concluded, "…. there should only be re-consultation if there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt." There was held to be no such fundamental difference in that case.

[32] The respondent relies on R (Greenpeace Limited) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin), which involved a challenge to the decision to support nuclear new build as part of the United Kingdom's future electricity generating mix. There was found to be procedural unfairness as the consultation document was manifestly inadequate. It contained no proposals as such and no information of any substance on the two issues of critical importance namely the economics of new nuclear build and the disposal of nuclear waste. Sullivan J at paragraphs 62 and 63 stated -

> "A consultation exercise which is flawed in one, or even a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. That is most emphatically not the test. It must also be recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out."
>
> "In reality, a conclusion that a consultation exercise was unlawful in the grounds of unfairness

> will be based upon a finding by the court, not merely that something went wrong, but that something went 'clearly and radically' wrong."

[33] The applicants' contend that there is a fundamental difference between the consultation paper and the Regulations in relation to harassment. The respondent contends that the harassment section of the consultation document invited comment on the inclusion of harassment in the Regulations and that the introduction of the harassment provisions does not mean that anything has gone clearly and radically wrong.

[34] I am satisfied that there was an absence of proper consultation in relation to the harassment provisions. The consultation document was drawn in a manner that pointed to the issue of harassment on the grounds of sexual orientation being addressed by other means. The Regulations are fundamentally different from the scheme of the consultation paper. It was unfair to the consultees who agreed with the proposed deferral of harassment to induce them not to address their objections to the respondent and then to introduce harassment provisions. The remedy for that procedural shortcoming will be considered below.

- harassment generally.

[35] The respondent contends that harassment on grounds of sexual orientation would be unlawful in any event and that harassment provisions are an established part of the general framework of equality legislation. The respondent contends that harassment finds a place in domestic law as an aspect of discrimination, referring to the examples in Strathclyde Regional Council v Porchelli [1986] IRLR 134 and Kelly v Tate & Swift Transport Training (NI) Limited (Unreported 29/4/1998). In addition, statutory harassment arises under Article 3 of the Protection from Harassment (Northern Ireland) Order 1997. The applicants contend that the provisions in relation to general and statutory harassment are less intrusive than those adopted under the Regulations. The applicants agree that there should not be any form of bullying on grounds of sexual orientation but contend that the form of harassment provided for in the Regulations is so widely drawn as to render an expression of the orthodox Christian belief on homosexuality subject to the harassment provisions.

[36] Council Directive 2000/78/EC of 27 November 2000 established a general framework for equal treatment in employment and occupation and stated the purpose of the Directive as being to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation with a view

to putting into effect in the Member States the principle of equal treatment. Article 2.1 provided that the principle of equal treatment meant that there should be no direct or indirect discrimination on any of the specified grounds. Article 2.3 provided that -

> "Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context the concept of harassment may be defined in accordance with the national laws and practice of the Member States."

[37] Harassment is defined in Regulation 3(3) and (4) as follows:

> "(3) A person ('A') subjects another person ('B') to harassment in any circumstances relevant for the purposes of any provision referred to in these Regulations 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, humiliating or offensive environment for B.
>
> (4) Conduct shall be regarded as having the effect specified in sub-paragraphs (a) and (b) (of paragraph (3)) only if, having regard to all the circumstances, including, in particular, the perception of ('B'), it should reasonably be considered as having that effect."

[38] The applicants note that the European definition uses the conjunctive "and" after the reference to violating the dignity of a person whereas the Regulations use the disjunctive "or". Further the applicants note the words of Regulation 3(4) which are not found in the European version. In addition the applicants note that particular regard is to be had to the perception of the victim.

[39] The version of harassment found in the Regulations entered Northern Ireland legislation in 2003 by amendment of the existing equality legislation. Accordingly the same wording as to harassment is to be found in relation to employment in Article 6A of the Sex Discrimination (Northern Ireland) Order 1976, Article 3A of the Fair Employment and Treatment (Northern Ireland) Order 1998 and the Employment Equality (Sexual Orientation) Regulations 2003. In addition the harassment provision was introduced as Article 4A of the Race Relations (Northern Ireland) Order 1997 in relation to the provision of goods, facilities and services, this being the statutory model for the Regulations.

[40] The applicants' concern about the harassment provisions is shared by the House of Lords and House of Commons Joint Committee on Human Rights in their sixth report of Session 2006-07 on Legislative Scrutiny: Sexual Orientation Regulations, which was ordered to be printed on 26 February 2007. At paragraph 57 the Joint Committee expresses the concern that the harassment provision is drawn too widely and defined too vaguely. In paragraph 58 it is stated:

> "The width and vagueness of the definition of harassment in the Northern Ireland Regulations give rise to a risk of incompatibility with both freedom of speech in Article 10 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 is a violation of their dignity or is 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 organisations 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."

[41] The Joint Committee recommended that the new regulations for Great Britain contain a more precise and narrower definition of harassment so as to reduce the risk of incompatibility with the right to freedom of speech and freedom of religion and belief.

[42] The experience of the 2003 amendments to the equality legislation has not demonstrated any excessive reach of the harassment provisions in relation to gender, race, religious belief or political opinion or sexual orientation in employment. The outlawing of harassment in relation to race, religion and gender involves interference with freedom of speech and a fair balance of rights has been sought to be achieved by permitting interference with such freedom of speech on the ground of the rights of others not to be subject to harassment on the basis of gender or race or religious belief. However in outlawing harassment on the ground of sexual orientation the competing right may not only be the right to freedom of speech but may in addition be the right to manifest a religious belief. Where the exercise of the right to freedom of speech also involves the manifestation of a religious belief there will be an added basis on which to seek to justify the action. This provides an added consideration in the case of sexual orientation that may not apply in relation to harassment on the grounds of gender, race or religious belief. This was a difference accepted by the respondent. It is not clear that any consideration was given to this difference when deciding to introduce the harassment provisions into the Regulations.

[43] I have found an absence of proper consultation on the harassment provisions. By reason of that finding and of the extended reach of the harassment provisions beyond that of discrimination and statutory harassment, the wider definition of harassment than that appearing in the European Directive, the concerns of the Joint Committee and the added consideration required when the offending matter is grounded in religious belief, the harassment provisions in the Regulations will be quashed.

(2) The European Convention.

[44] The rights in relation to sexual orientation involve Articles 8 and 14 of the European Convention. Article 8 provides for the right to respect for private and family life as follows:-

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 provides for the prohibition of discrimination as follows:-

> "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."

[45] The applicants claim that the Regulations involve breaches of rights under Articles 9, 10, 14, 17 and Article 2 of the First Protocol to the European Convention. Article 9 provides for freedom of thought, conscience and religion as follows:-

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only 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."

Article 10 provides for freedom of expression as follows:-

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 17 provides for the prohibition of abuse of rights as follows:-

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Article 2 of the First Protocol provides for the right to education as follows:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

[46] Articles 8, 9 and 10 are qualified rights that may be subject to limitations. The essential right in question on the applicants' case is the applicants' right under Article 9(1) to manifest religious belief. The applicants also rely on the right to freedom of expression under Article 10, which is a

free standing right, although it may also impact on consideration of the right to manifest religious belief. An applicant claiming a breach of a right must establish interference with the right. The respondent defending the claim must establish justification for such interference under Article 9(2) or Article 10(2), as the case may be, namely that the restriction is prescribed by law, that it is for a legitimate aim and that it is necessary in a democratic society.

- manifestation of religious belief.

[47] At the heart of the applicants' approach is the freedom to manifest religious belief in worship, teaching, practice and observance under Article 9. The right to thought, conscience and religion is absolute. The right to manifest religion or belief may be subject to limitations. In Kokkinakis v Greece [1993] 17 EHRR 397 the European Court of Human Rights stated:-

> "31. As enshrined in Article 9 freedom of thought, conscience and religion is one of the foundations of a `democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.
>
> While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to `manifest (one's) religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions.
>
> According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, `in public' and within the circle of those whose faith one shares, but can also be asserted `alone' and `in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through `teaching', failing which, moreover, `freedom to change (one's) religion or belief', enshrined in Article 9, would be likely to remain a dead letter."

[48] Article 9 was considered by the House of Lords in R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246 in relation to teachers and parents in independent private schools who supported

corporal punishment. From Lord Nicholls at paragraphs 23 and 32 a number of propositions may be stated. First, when the genuineness of a professed belief is an issue the Court will inquire into and decide as a question of fact that an assertion of religious belief is made in good faith. That is not an issue in the present case. Second, it is not for the Court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard, as freedom of religion protects the subjective belief of an individual. Third, issues as to the manifestation of a belief must satisfy certain modest objective minimum requirements. The "threshold requirements" are that the belief must be consistent with basic standards of human dignity or integrity, it must possess an adequate degree of seriousness and importance and it must be intelligible and capable of being understood. Fourth, the conduct that constitutes the manifestation of a belief must be intimately connected to the belief. In deciding whether the conduct constitutes manifesting a belief in practice it is first necessary to identify the nature and scope of the belief. If the belief takes the form of a perceived obligation to act in a specific way then the act will be intimately linked to the belief and will be a manifestation of that belief. However a perceived obligation is not a prerequisite to manifestation of a belief in practice.

[49] In relation to the third proposition above the NIHRC contends that the applicants' religious beliefs concerning homosexuality do not satisfy the threshold requirements for protection under Article 9 because the belief is not consistent with the basic standards of human dignity and integrity. This position Mr Larkin for the Northern Bishops described as 'fundamental secularism', as it involved the rejection of what was regarded as orthodox religious belief. Ms Higgins for NIHRC described her position as 'liberal secularism', recognising the protection that must be accorded to religious belief in a democratic society but rejecting protection for the manifestation of a belief that involves discrimination against others.

[50] The belief in question is the orthodox Christian belief that the practice of homosexuality is sinful. The manifestation in question is by teaching, practice and observance to maintain the choice not to accept, endorse or encourage homosexuality. Whether the belief is to be accepted or rejected is not the issue. The belief is a long established part of the belief system of the world's major religions. This is not a belief that is unworthy of recognition. I am satisfied that Article 9 is engaged in the present case. The extent to which the manifestation of the belief may be limited is a different issue.

- freedom to impart information and ideas.

[51] Freedom of expression under Article 10 extends not only to information and ideas with which the audience would agree but also to information and ideas that would offend, shock or disturb the audience. The right to manifest religious belief by worship, teaching, practice and

observance must also be considered in the light of Article 10, as the protection of opinions and the freedom to express them must be one of the objectives of the freedom to manifest religious belief. This overlap was stated by the ECtHR in Ollinger v Austria (29/9/2006) in relation to Articles 10 and 11. The applicant proposed to hold a meeting at the Saltzburg Municipal Cemetery in front of the War Memorial to commemorate the Saltzburg Jews killed by the SS during the Second World War. The meeting was to coincide with a gathering of Comradeship IV in memory of SS soldiers killed in the Second World War. The applicant's meeting was banned and the ECtHR held the prohibition to be disproportionate. The applicant relied on Articles 10 and 11 and the ECtHR considered the case under Article 11. However the ECtHR stated that Article 11 had to be considered in the light of Article 10 as the protection of opinions and the freedom to express them was one of the objectives of freedom of assembly and association enshrined in Article 11.

- the role of this Court in the challenge to the operation of the Regulations.

[52] The applicants contend that the Regulations are necessarily inconsistent with and in violation of the applicants' rights to manifest their religious beliefs. Any such interference would require to be justified by the respondent. In general the applicants contend that the Regulations have the effect that the protection afforded to sexual orientation in accordance with the right to respect for private life under Article 8 and Article 14 of the Convention outweighs the protection afforded to the manifestation of religious belief under Article 9 and 14 of the European Convention so that there is a lack of fair balance between the respective rights.

[53] On the other hand the respondent contends that this Court should not undertake an examination of the Regulations in the abstract, as civil liability under the Regulations will be fact specific and should be determined on a case by case basis as challenges are made by way of proceedings in the County Court.

[54] Before addressing the rival contentions as to the role of the judicial review Court in relation to the challenge to the Regulations under the European Convention it can be said that issues of statutory interpretation are a different matter that the Court can address. Accordingly, before considering the Regulations generally, it is proposed to deal with the interpretation of the qualification of the exemption for religious organisations under regulation 16(8) and the application of the education provisions to teaching and the school curriculum.

- interpretation of regulation 16(8).

[55] Regulation 16 provides for the exceptions for organisations relating to religion or belief. The applicants contend that Regulation 16(8) has the effect of undermining the exemption provided for religious organisations. Regulation 16 (8) provides as follows –

> "This regulation shall not apply where an organisation-
>
> (a) makes provision of a kind referred to in regulation 5; or
>
> (b) makes provision of a kind referred to in regulation 12,
>
> on behalf of a public authority under the terms of a contract for provision of that kind made between that authority and an organisation referred to in paragraph (1)."

[56] The applicants contend that any religious organisation which contracts with a public authority to provide the specified matters thereby forfeits its exemption in respect of all its activities and not merely those of the kind referred to in regulations 5 and 12. The respondent contends that such a consequence was not intended and is not the affect of regulation 16(8).

[57] I am satisfied that Section 16(8) is to be interpreted as meaning that the religious exemption does not apply where the religious organisation contracts with the public authority in respect of the specified matters under regulations 5 and 12 and only to the extent that it affects those activities and that other activities of the religious organisation are not removed from any exemption to which they are otherwise entitled under regulation 16.

- teaching and the school curriculum.

[58] Regulations 9, 10 and 11 deal with education. The applicants contend that the Regulations extend to teaching and the curriculum so that a teacher in a faith school articulating the orthodox religious view on homosexuality may offend the Regulations. The respondent contends that the Regulations were not intended to and do not have the effect of impacting on teaching and the curriculum.

[59] Regulation 9 relates to the responsible bodies in charge of the specified education establishments. The discrimination provisions under regulation 9(1) concern first of all access by a pupil to an establishment and secondly, for those who are pupils, access the benefits (which includes facilities and services) of the establishment and the absence of detriment. The applicants are concerned that the "benefits" of the establishment or the "detriment" to

which the pupil would be subjected extend to teaching and the curriculum. I am satisfied that articulating the orthodox religious view on homosexuality in the classroom does not relate to access, a benefit or a detriment under regulation 9(1).

[60] In addition, the harassment provisions in regulation 9(2) apply to the specified responsible bodies and extend to an applicant for admission and to a pupil at the establishment. The respondent contends that the harassment provisions apply to the actions of the management of the establishment in relation to the matters covered by regulation 9(1), namely access, benefit and detriment and would not extend to teaching and the curriculum. However regulation 9(2) is expressed in the wide terms of harassment of "a pupil at the establishment" and may therefore extend to teaching and the curriculum at the establishment and the articulation of the orthodox religious view on homosexuality. In the event the harassment provisions are being set aside.

- the general approach to the remaining Regulations

[61] I return to the respondent's contention that the Regulations should not be examined in the abstract and that challenges to the operation of particular provisions should only be considered in the traditional manner of a specific factual setting and not a generalised example. It is the position that the Court cannot make determinations on all fact specific issues that may arise under the Regulations. A great variety of circumstances will inform the decision in a particular case as to the application of the Regulations. It is not a practical proposition to attempt a comprehensive analysis of the application of the Regulations. Some general matters may be addressed that may inform the approach to particular circumstances.

[62] The courts will resist the consideration of issues in the abstract. Chapman v United Kingdom [2001] 33 EHRR 18 described the applicant as a gypsy and she was refused planning permission for a caravan on land that she owned. The ECtHR found there was interference with her Article 8 right to respect to private and family life and a home by the refusal of planning permission but the interference was for the legitimate aim of environmental protection and was not disproportionate. The applicant made the additional claim of interference with her rights in that the framework of legislation and planning policy and regulations effectively made it impossible for her to live securely according to her preferred lifestyle. The ECHR at paragraph 77 considered that "…. it cannot examine legislation and policy in the abstract, its task rather being to examine the application of specific measures or policies to the facts of each individual case." The ECHR stated that, unlike Dudgeon v United Kingdom [1982] 4 EHRR 149, a case from Northern Ireland which concerned legislation rendering adult consensual homosexual relations

a criminal offence, there was no direct measure of "criminalisation" of a particular lifestyle.

[63] There may be specific issues that the courts will consider other than in a fact specific setting. The applicants rely on R(Amicus) v Secretary of State for Trade and Industry [2004] IRLR 430 where Richards J considered and upheld the compatibility of regulations 7(2), 7(3), 20(3) and 25 of the Employment Equality (Sexual Orientation) Regulations 2003 with the Framework Employment Directive and the European Convention. A group of trade unions objected to what they considered to be the broad scope of the regulations in issue, which implemented the genuine occupational requirement exceptions that are permitted under the Directive. In addition the unions contended that the regulations in issue were not compatible with Articles 8 (right to respect for private life) and 14 (non discrimination) of the Convention. The Court found that the regulations did not interfere with Article 8(1) as they added to existing rights and the exceptions limited the scope of what was added, but did not interfere with any rights. Further the Court found that, for the purposes of Article 14, the regulations did not produce any difference of treatment in the enjoyment of rights falling within the ambit of the Convention, but simply conferred certain rights not to be discriminated against.

[64] The scope of the Regulations gives rise to a multitude of circumstances that would require consideration. It is not possible to give a considered response to such extensive circumstances. Nor should judgments be prepared as an academic exercise based on hypothetical facts. Experience has shown that attempts to address academic issues often become a false economy. Judicial decisions are grounded on the particular facts of a dispute between opposing parties. That groundwork must be evidence based. Even within each of the examples given by the applicants there may be different outcomes depending on factual variations that might be introduced into the example. Accordingly I accept the respondent's approach that the Regulations should be examined in fact specific cases and not as an abstract exercise based on chosen examples. However it is possible to outline the general approach that applies to consideration of alleged breaches of rights under the European Convention which might give indications as to how particular instances might be dealt with, while at the same time illustrating the fine dividing lines that may be drawn in particular cases depending on all the circumstances of a particular case.

[65] The issues of "interference" with the applicants' rights and the respondent's "justification" for any such interference raise matters that depend on the particular circumstances. The requirement for evidence based decision making is particularly acute in those cases where the defendant to a particular claim seeks to establish justification. The balance of interests that would then be in play requires close consideration of issues such as the

actions of the parties, the measures in question, the value of the policy being promoted and the right being diminished and the effects of the introduction or the failure to introduce the measures. The examination of the balance of interests requires an evidential base that is not present when a series of examples are offered of predicted consequences. The discussion that follows of the ingredients of "justification" for interference with the right to manifest religious belief demonstrates the detailed response that would be required from a defendant in any particular case. There is the potential in the Regulations for some provisions to operate in a manner that is not compatible with the European Convention while in other circumstances they may result in civil liability being established under the Regulations compatibly with the Convention. A Court considering a particular case will be obliged to apply the Regulations in a compatible manner and give effect to Convention rights.

- interference with the manifestation of religious belief.

[66] It is not every impact on the manifestation of religious belief that constitutes "interference" for the purposes of Article 9. To constitute sufficient interference for the purposes of Article 9 it must be shown that the Regulations interfere "materially, that is, to an extent which was significant in practice, with the claimant's freedom to manifest their beliefs in this way" per Lord Nicholls in R (Williamson) v Secretary of State for Education and Employment. Section 548 of the Education Act 1996 was amended in 1998 to provide that corporal punishment by teaching staff in independent and State schools could not be justified. The Secretary of State contended that there was no interference with the manifestation of a belief in corporal punishment because section 548 did not interfere materially with the claimants parents manifestation of their beliefs as it left open to the parents several adequate alternative courses of action. The House of Lords did not accept that the suggested alternatives would be adequate and held that there had been interference with the belief.

[67] By contrast R (Begum) v Head Teacher and Governors of Denbeigh High School [2006] 2 All ER 487 concerned a school uniform requirement prohibiting the use of a Jilbab, a form of female dress which concealed the shape of arms and legs. The applicant had attended the school for two years and adhered to the dress code but then changed her position on the basis of religious belief. The majority of the House of Lords found that there had been no interference with her right to manifest her belief in practice or observance. It was noted that the Strasbourg institutions had not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person had voluntarily accepted an employment or role which did not accommodate that practice or observance and there were other means open to the person to practice or observe his or her religion without undue hardship or inconvenience.

[68] The position in which persons seeking to manifest religious belief have placed themselves may bear on whether the matter to which they object constitutes interference. In Kalac v Turkey [1997] EHRR 552 the applicant was subject to compulsory retirement from the military as his alleged involvement with a fundamental Muslim sect was contrary to the secular nature of the Turkish State. The ECtHR stated at paragraph 27 that "Article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an applicant may need to take his specific situation into account." In choosing a military career the applicant was accepting a military system that placed limitations on individuals that would not be imposed on civilians. In choosing to attend Denbeigh High School Ms Begum found limitations imposed on the manifestation of her religious belief, but was otherwise uninhibited in that regard. By electing to participate in certain activities individuals may find that those activities engage others of different sexual orientation. There will be instances where the impact on the individual does not amount to an interference with the right to manifest religious belief.

[69] I am satisfied that the introduction of the Regulations will result in instances of material interference, that is interference to an extent which is significant in practice, with the applicant's freedom to manifest the religious belief in question. However, as indicated above, it is not practicable and it is not proposed to attempt to set out all the circumstances in which this will arise.

-limitations prescribed by law.

[70] The qualified rights in Articles 8, 9, 10 and 11 may be subject to limitations. It is a preliminary requirement that all limitations be prescribed by law, thus importing a requirement of legal certainty. Accordingly such limitations as are imposed by the Regulations on the right to manifest religious belief must be prescribed by law. The Northern Bishops contend that the limitations introduced in the present case do not accord with the requirement of legal certainty. This requires first that the interference must have some basis in domestic law. In the present case the domestic basis is to be found in the Regulations. Secondly the law must be adequately accessible, that is that the citizen has access to the legal rules applicable to a given case. In the instant case there is no issue on accessibility. Thirdly the law must be formulated with sufficient precision to enable the citizen to regulate his conduct, that is, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Mr Larkin QC for the Northern Bishops contends that sufficient precision cannot be attained in the present case. It is not possible to attain absolute certainty in the framing of laws. Any laws are inevitably couched in terms which to a greater or lesser

extent are vague and whose interpretation and application are questions of practice. Silver v United Kingdom [1983] 5 EHRR 347 paras 85-88.

[71] There are different views on the boundaries set by the Regulations. I am satisfied that the inevitable lack of certainty as to the scope of the Regulations is not such as to offend the principle of foreseeability and the requirement that the interference occasioned by the Regulations be prescribed by law.

- proportionality.

[72] The limitations must pursue a legitimate aim and the permitted aims are specified in the second part of Article 9. The specified aims include the protection of the rights of others. The limitations must be necessary in a democratic society in the interests of the specified aim. The basis of interference with the qualified rights is that of necessity. This introduces the principle of proportionality, although it is not a word used in the Convention.

[73] The principle of proportionality has been restated by the House of Lords in Huang v Secretary of State for the Home Department [2007] UKHL 11. The overarching approach is "….the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted." It has been stated to be inherent in the whole of the European Convention that a fair balance be struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights (ECtHR in Sporrong v Sweden [1982] 5 EHRR 35 at para 69 and the House of Lords in Razgar v Secretary of State for Home Department [2004] UKHL 27 para 20).

[74] The ingredients of proportionality were stated in Huang at paragraph 19 to be -

> "Whether (1) the legislative objective is sufficiently important to justify limiting a fundamental right;
> (2) the measures designed to meet the legislative objective are rationally connected to it; and
> (3) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

[75] As noted in Huang the ingredients of proportionality had been set out by the Privy Council in De Freitas v Permanent Secretary of the Ministry of Agriculture Fisheries, Lands and Housing [1999] 1 AC 69 drawing on Canadian, South African and Zimbabwean authority that included the judgment of Dickson CJ in R v Oakes [1986] 1 SCR 103 in the Supreme Court

of Canada. In place of the third ingredient, sometimes described as minimal impairment, Canada and South Africa have outlined two matters, considered below, that may be described as proportionate means and proportionate effects.

[76] The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms as set out in the Charter "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In R v Oakes Dickson CJ stated at page 227 that to establish that a limit was reasonably and demonstrably justified in a free and democratic society two central criteria had to be satisfied. First the objective which the measures responsible for a limit on a Charter right were designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right. Secondly the party relying on the limit on the right must show that the means chosen were reasonable and demonstrably justified, this being a form of proportionality test. In considering the proportionality test Dickson CJ referred to the Court being required to balance the interests of society with those of individuals and groups. He then set out three important components of a proportionality test:

> "First the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary unfair or based on irrational consideration. In short, they must be rationally connected to the objective.
> Secondly, the means, even if rationally connected to the objective in this first sense should impair `as little as possible' the right or freedom in question. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

[77] The South African Constitution provides for entrenched rights that include freedom of expression. The Constitution also provides for the limitation of entrenched rights provided that such limitation will be permissible only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality and is necessary. In Government of the Republic of South Africa v The Sunday Times Newspaper [1995] 2 BCLR 182(T) the Supreme Court, Transval Provincial Division, interpreted the provisions of the South African Constitution by reference to R v Oakes and to Hogg in Constitutional Law of Canada (3rd Edition) which stated that in summary there were four criteria to be satisfied by a law that qualifies as a reasonable limit that can be demonstrably justified in a free and democratic society namely:

(i) Sufficiently important objective – the law must pursue an objective that is sufficiently important to justify limiting a Charter right.

(ii) Rational connection – the law must be rationally connected to the objective.

(iii) Least drastic means – the law must impair the right no more than is necessary to accomplish the objective.

(iv) Proportionate effect – the law must not have a disproportionately severe effect on the person to whom it applies.

[78] On the other hand the Supreme Court of Zimbawbe set out the ingredients of proportionality in the manner that came to be adopted by the Privy Council and the House of Lords. The Constitution of Zimbabwe protects against deprivation of property "except so far as (such) was shown not to be reasonably justifiable in a democratic society." In Nyambirai v National Social Security Authority [1996] 1 LHC 64 Gubbay CJ relied on R v Oakes and stated:

> "In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:
>
> 1. The legislative objective is sufficiently important to justify limiting a fundamental right.
>
> 2. The measures designed to meet the legislative objective are rationally connected to it.
>
> 3. The means used to impair the right or freedom are no more than is necessary to accomplish the objective."

In relation to the third ingredient, minimal impairment, Gubbay CJ stated in Nyambirai at page 76f:

> "Under this part of the inquiry into the means by which the objective is attained, the court must weigh the impact of the limit upon the right of the applicant against the importance of the legislative objective. There must be a balancing process. The

> importance of the objective, the reasonableness of the manner in which it is achieved must be measured against the gravity of the infringement of the protected right. Generally, this involves weighing the significance of the public interest in the limit against the seriousness of the infringement of the private right protected by the Constitution. This is so in this case. One asks is the infringement too high a price to pay for the benefit of the law?"

[79] It will be noted that this third ingredient, while expressed in terms of minimal interference, is explained in broader terms as a balance of public and private interests involving a weighing of the impact of the limitation on the right and the importance of the objective in limiting the right. R v Oakes is acknowledged as the common parentage of the ingredients of proportionality in Canada, South Africa, Zimbabwe, the Privy Council and the House of Lords and it would appear that the different formulations are intended to convey the same concepts.

[80] The third ingredient, while expressed in terms of minimal impairment, also embraces a requirement for proportionate effect. Both aspects have been developed in Canada since propounded by Dickson CJ in R v Oakes. In relation to minimal impairment RJR-McDonald v Canada [1995] 3 SCR 1999 in the Supreme Court of Canada stated that "the relevance of context cannot be understated" and that the minimal impairment requirement does not impose an obligation on the Government to employ the least intrusive measures available. "Rather, it only requires it to demonstrate that the measures employed are the least intrusive, in light of both the legislative objective and the infringed right" (underlining added). The Court should consider whether the law that limits the right "…. falls within a range of reasonable alternatives …." thus according significant latitude to legislative choices, especially in social, economic and political matters.

[81] In relation to proportionate effect, Dickson CJ stated in R v Oakes that "Regard must be had to the nature of the right violated, the extent of the violation and the degree to which the measures impact upon the integral principles of a free and democratic society. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society." In Dagenais v Canadian Broadcasting Corporation [1994] 3 SCR 835 the Supreme Court of Canada expanded this ingredient to include a balance between the deleterious effects of a measure and the beneficial effects of a measure.

[82] It is well recognised that legislative and other decision makers enjoy a discretionary area of judgment, also described as deference, although that may have become unfashionable because of its connotation, and more recently being described as latitude. Lord Carswell in Tweed v Parades Commission [2006] UKHL referred to the expression of the principle in Fordham, *Judicial Review Handbook,* (3rd ed, 2001), para 58.2,

> "Hand in hand with proportionality principles is a concept of 'latitude', which recognises that the Court does not become the primary decision-maker on matters of policy, judgment and discretion, so that public authorities should be left with room to make legitimate choices. The width of the latitude (and the intensity of review which it dictates) can change, depending on the context and circumstances. In other words, proportionality is a 'flexi-principle'. The latitude connotes the degree of deference by court to public body."

[83] In summary the approach to proportionality requires consideration of-

(1) The overarching need to balance the interests of society with those of individuals and groups.
(2) The recognition of the latitude that must be accorded to legislative and executive choices in relation to the balance of public and private interests.
(3) The legislative objective being sufficiently important to justify limiting the fundamental right.
(4) The measures designed to meet the legislative objective being rationally connected to it, that is, the measures must not be arbitrary, unfair or based on irrational considerations.
(5) The need for proportionate means being used so as to impair the right or freedom no more than necessary to accomplish the objective, that is, that the measures are the least intrusive, in light of both the legislative objective and the infringed right. The Court should consider whether the measures fall within a range of reasonable alternatives, rather than seeking to ascertain whether a lesser degree of interference is a possibility.
(6) The need for proportionate effect in relation to the detrimental effects and the advantageous effects of the measures and the importance of the objective.

- explaining the orthodox religious belief.

[84] Throughout many of the examples put forward by the applicants and the Northern Bishops was a concern that the explanation of the orthodox belief would be regarded as harassment under the Regulations, whether the explanation was given as an outline of the religious position or as a reason for the lawful refusal of a service. As the harassment provisions are to be set aside the issue will no longer arise under the present Regulations. The applicants' arguments as to the scope of any future harassment provisions can be advanced in any future consultation process. However the respondent accepted that a reasonable explanation of the religious belief would not have amounted to harassment under the Regulations. While the boundaries of "harassment" will be reconsidered, all parties agreed that "bullying" was unacceptable and there could be circumstances in which an explanation of the religious belief would amount to what would be commonly understood as bullying.

- promotion of homosexuality.

[85] The applicant contents that in the provision of goods, facilities and services, the management of premises and the provision of services by a public authority those who subscribe to the orthodox religious belief on homosexuality will be required to promote that to which they have religious objection. The example offered is that of the Christian printer who would not object to printing material for a person who was homosexual but would object on the grounds of the orthodox religious belief, to being required to print material that promoted homosexuality. The applicants contend that under regulation 5(1) it would be unlawful to refuse to provide such a service on the ground of sexual orientation. Further the exemption for religious organisations under regulation 16 permits the organisation to restrict the provision of services on the ground of sexual orientation but that does not extend to an organisation whose sole or main purpose is commercial.

[86] The issue arose in Canada in Ontario Human Rights Commission v. Brockie [2002] 22 DLR (4th) 174. Imaging Excellence Inc was a company that carried on business as a commercial printer. Mr Brockie, president and directing mind of the company, held the religious belief that homosexual conduct was sinful. He acted for customers who were homosexuals but he would not assist in the dissemination of information intended to spread the acceptance of a gay or lesbian lifestyle. He refused to print blank letterheads, envelopes and business cards for a company called Archives. Archives, whose directors were required to be homosexual, promoted publications, information and records by and about homosexuals. The Ontario Human Rights Code prohibited discrimination on the basis of sexual orientation. Further the Code protected the right to manifest religious belief subject to

limitations that are similar to those that arise under Article 9.2 of the European Convention. A statutory Board ordered Mr Brockie and his company to provide the same printing services to lesbians, gays and to organisations in existence for their benefit as they provided to others. On appeal to the Ontario Superior Court of Justice it was held that Mr Brockie, as the mind of the company, had discriminated against the director of Archives in the provision of services on the basis of sexual orientation. However the Court held that the Board's order went further than was necessary to protect the rights of Archives and its director in that it could extend to the printing of materials espousing causes or activities clearly repugnant to Mr Brockie's fundamental religious tenents. Accordingly the Court added a condition to the Board's order to the effect that the order should not require Mr Brockie to print material of a nature that could reasonably be considered to be in direct conflict with the core elements of his religious beliefs.

[87] The judgment of the Court found that there had been interference with Mr Brockie's freedom of religion in that he was being forced to act in a manner contrary to his religious belief. One of the interveners in the case, The Equality Coalition, took the position that religious freedom did not extend to the commercial arena. The Court did not exclude rights to religious freedom from the commercial arena but did place commercial activity on the periphery of rights to religious freedom. The Court undertook an analysis of the interference with religious belief in accordance with the approach in R v. Oakes. The legitimate aim of the Board's order was stated to be that discrimination on the grounds of sexual orientation had the effect of demeaning the self worth, personality and dignity of homosexuals, with adverse psychological effects and social and economic disadvantages. The objective was found to be both pressing and substantial.

On the issue of rational connection between the measures and the objective the Court found that the Code prohibited discrimination arising from denial of services because of certain characteristics of the person requesting the service thereby encouraging equality of treatment in the market place and that if the order of the Board went further the order would cease to be rationally connected to the objective of removing discrimination.

On the issue of proportionate means it was noted that service of the public in a commercial service must be considered at the periphery of activities protected by freedom of religion. However the order of the Board could have been less intrusive while at the same time achieving its objectives.

On the issue of proportionate effects the Court stated that if any particular printing project contained material that conveyed a message proselytizing and promoting the gay and lesbian lifestyle and ridiculed Mr Brockie's religious beliefs such material might reasonably be held to be in direct conflict with the core elements of his religious beliefs. On the other hand if the particular printed object contained a directory of goods and services that might be of interest to the gay and lesbian community that material might reasonably be held not to be in direct conflict with the core

elements of Mr Brockie's religious beliefs. The order of the Board was qualified to read –

> "Provided that this order shall not require Mr Brockie or Imaging Excellence to print material of a nature that could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed."

[88] On the above approach the believer is not required to undertake action that promotes that which the essence of the belief teaches to be wrong. Even after consideration of the fact specific case of Mr Brockie some further definition would be required as to the precise material that he could refuse to print. The test for permitted action is objective in that it is only material that could "reasonably" be considered to be in direct conflict that he may refuse to print. That he was engaged in commercial activity was not a complete bar to protection of religious belief. Such an approach is clearly not consistent with the loss of protection for a religious organisation whose sole or main purpose is commercial, as provided by regulation 16(2)(a). The approach to Mr Brockie may provide a basis for the approach to some of the examples suggested by the applicants and the Northern Bishops in relation to the provision of goods facilities and services, the use of premises and the provision of public services.

- *the applicants' examples*

[89] The applicants' illustrations of the impact of the Regulations, set out at paragraph 9 above, cover a number of different areas.

First, explanations of the religious belief amounting to harassment under the present Regulations will not arise with the harassment provisions being set aside.

Second, examples of the activities in the context of religious organisations will be protected by the exemption under regulation 16. This will be subject to the qualifications for commercial activity (and consideration of the Brockie approach to commercial activity) and education (to the extent that regulations 9, 10 and 11 apply) and public authority contracts (with regulation 16(8) being limited to provision made under such contracts and not barring the religious organisation generally).

Third, to the extent that the examples may concern activities by those who are not covered by the exemption for religious organisations, such as colleges and halls, a balance of rights will be required. This may involve some realignment of the previous balance between the manifestation of religious belief and sexual orientation. Thus gay groups may have to be accorded a platform along with other groups, all displays of affection may have to be

prohibited if there is disapproval of same sex affection, counselling may have to be offered to homosexual as well as heterosexual couples.

Fourth, individuals running the commercial provision of services, such as printers, photographers or booksellers, may find that under a Brockie approach they are not required to undertake activities that could reasonably be considered to be in direct conflict with the core of the orthodox religious belief on homosexuality.

Fifth, agencies that are in effect providing services on behalf of the State, such as adoptions or nursing home places, may have to choose between complying with the requirements of the State or otherwise realigning the manner in which the services can be provided.

[90] The applicants object to the provision of accommodation for same sex couples contrary to the religious beliefs of the owners. The respondent contends that the Regulations were not intended to and do not have the effect of rendering unlawful the refusal of accommodation to same sex couples on the basis of religious belief. The owner may impose a requirement, says the respondent, that those sharing accommodation be married. The applicants respond that this would amount to discrimination under regulation 3(1)(c) –

> "A applies to B a requirement or condition which he applies or would apply equally to persons not of the same sexual orientation as B; but –
>
> > (i) which is such that the proportion of persons of the same sexual orientation as B who can comply with it is considerably smaller than the proportion of persons not of that sexual orientation who can comply with it; and
> >
> > (ii) which he cannot show to be justifiable irrespective of the sexual orientation of the person to whom it is applied; and
> >
> > (iii) which is to the detriment of B because he cannot comply with it."

[91] The marriage requirement would be such that the proportion of persons of homosexual orientation who could be married to the homosexual partner would be nil and the proportion of persons of a heterosexual orientation who could be married to the heterosexual partner would be substantial. Thus the owner would have to show that the marriage requirement was justifiable irrespective of sexual orientation. This issue was discussed in R (Amicus) v Secretary of State for Trade and Industry {2004} IRLR 430, referred to above. Richards J was inclined to the view that there was no direct or indirect discrimination as married and unmarried couples are not in a materially

similar situation and married partners are not in a comparable position to same sex partners. This is not a matter on which it is proposed to offer a generalised answer as it is not a matter that should be approached in the abstract.

[92] Further, the applicants make general complaints about the Regulations reflecting a lack of balance between competing rights, a preference for the Article 8 rights of those sought to be protected by the Regulations over the Article 9 rights of the applicants and the introduction of more limited exemptions for religious belief than applied in other legislation. There are inevitably different views about the proper balance between the respective interests and about the balance achieved by the Regulations. This balance is essentially a matter for the legislative decision makers, subject to compatibility with other legal obligations. For the reasons appearing above I do not accept any generalised complaints about the Regulations.

(3) Misunderstanding of the Regulations.

[93] The applicants' third ground of challenge alleges a misunderstanding by the respondent of the nature and effect of the Regulations. These matters are referred to briefly as they do not add substantially to the issues arising under the other grounds. First of all there is said to be a misdirection in relation to the level of protection afforded to religious belief. The instances are the inclusion of the harassment provisions and the failure to exempt the schools curriculum. I have found above a procedural irregularity in relation to the harassment provisions arising from the absence of adequate consultation. Further I have found above that the Regulations do not apply to the school curriculum.

[94] Secondly the applicants contend that there has been a misdirection in relation to discrimination on the grounds of marriage. I have referred above to the issue of discrimination in the context of a requirement that accommodation is provided on the basis of a marriage requirement.

[95] Thirdly the applicants contend that there has been a misdirection by the respondent in relation to the need for the inclusion of the harassment provisions. The complaint relates to the content of legal advice received by the respondent and to the nature of the distinction drawn by the respondent between sexual orientation being a state of "being" and being a matter of "choice". These points do not add to the debate.

(4) The Northern Ireland Act 1998.

[96] The applicants' fourth claim relates to Section 24 of the Northern Ireland Act 1998 which provides as follows –

> (1) 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;
>
> (b) is incompatible with Community law;
>
> (c) discriminates against a person or class of person on the ground of religious belief or political opinion;
>
> (d) in the case of an Act, aids or incites another person to discriminate against a person or class of persons on that ground; or
>
> (e) In the case of legislation, modifies an enactment in breach of Section 7.

[97] The applicant relies on section 24(1)(a) on the basis that the OFMDFM is a Northern Ireland department which had no power to make regulations that are incompatible with any of the Convention rights. This issue has been discussed above and nothing is added by relying on this provision of the 1998 Act.

[98] Further the applicant contends that under section 24(1)(c) there was no power to make regulations that discriminate against a person or class of person on the grounds of religious belief. Section 98(4) of the 1998 Act provides that –

> "For the purposes of this Act, a provision of an Act of the Assembly or of subordinate legislation discriminates against any person or class of person if it treats that person or that class less favourably in any circumstances than other persons are treated in those circumstances by the law for the time being in force in Northern Ireland."

[99] The applicants contend that the regulations treat evangelical Christians less favourably than other persons to the extent that they are subject to civil liability for manifesting the orthodox religious belief in relation to homosexuality. I am satisfied that the Regulations do not treat evangelical Christians less favourably than others.

[100] On the applicants first broad ground, consultation, the harassment provisions in the Regulations will be set aside; on the second broad ground, in essence a breach of the right to manifest religious belief, the challenge to the Regulations must be made within any civil proceedings undertaken in the County Court under the Regulations; on the third broad ground, misunderstanding of the Regulations, nothing is added to the first and second grounds; on the fourth broad ground, relying on section 24 of the Northern Ireland Act 1998, there are no grounds for interfering with the Regulations.