



*Consultation response to 'A Framework for Fairness' from the  
British Humanist Association*

September 2007

### ***The British Humanist Association (BHA)***

1. The BHA is the national charity representing the interests of the large and growing population of ethically concerned non-religious people living in the UK. It exists to support and represent such people, who seek to live good lives without religious or superstitious beliefs. Humanism is a 'belief', within the meaning of the ECHR, the Employment Equality (Religion or Belief) Regulations 2003 and the Equality Act 2006.
2. The BHA is committed to equality, human rights and democracy, and has a long history of active engagement in work for an open and inclusive society, and an end to irrelevant discrimination of all sorts. As a member organisation of both the Equality and Diversity Forum (EDF) and the Discrimination Law Association, the BHA has worked with other organisations to advance equal treatment on every ground. In recent years the BHA has participated in consultations and prepared submissions on such issues as the Employment Equality Regulations 2003 on Religion or Belief and Sexual Orientation, and the Equality Act of 2006, and our Chief Executive served on the Commission for Equality and Human Rights Steering Group and the Reference Group for the Equalities Review and Discrimination Law Review.
3. We welcome the opportunity to respond to the green paper, *A Framework for Fairness*, and are happy to be contacted at any time by those working on the draft Single Equality Bill.

### ***Single Equality Bill***

4. We welcome proposals to introduce a Single Equality Bill just as we have welcomed the Government's overall commitment to equality and the positive developments of the last ten years. We believe a Single Equality Bill will build on existing discrimination and equality law and make it more readily accessible to service providers and employers. It will also represent a single charter for equality, which will be better understood by citizens and around which a new culture of equality can cohere with the CEHR as its watchdog.
5. Although we welcome the publication of 'A Framework for Fairness', we must express some disappointment that the way forward proposed is not as radical or coherent as it could be. We believe it is unfortunate, for example, that the proposals maintain so many exceptions from the proposed law which will serve to perpetuate discrimination and inequality and that issues around multiple discrimination will not be specifically and so insufficiently addressed.
6. In addition, we are disappointed that the ratification of protocol 12 to the ECHR is not being considered as a means of extending UK law on equality. We would urge the review to considering recommending a ratification. We also agree with the CRE that it would be advisable to give the Single Equality Act a 'constitutional' status, analogous to that held by the Human Rights Act.

7. Although we welcome the publication of the present consultation document, we urge the DLR team also to publish a draft Bill for consultation in due course, so that there can be further consultation on what will be complex issues.

### ***Our response to ‘A Framework for Fairness’***

8. We organise our response below according to the order of the questions in the consultation document. We concentrate on those issues of most concern to our members and to the non-religious generally and our direct answers to questions posed in the green paper appear below underlined.

## ***PART ONE***

### ***Chapter one***

#### ***Gender Reassignment***

9. We agree that there should be an extension of the law to protect against discrimination on the grounds of association with transsexual people.
10. We agree with the proposal to extend indirect discrimination to cover gender reassignment.

#### ***Requirement for a comparator and harmonising the law***

11. In terms of issues raised here, we agree with the recommendations in the section of the EDF response to the green paper, ‘Common definitions, tests and exceptions for all grounds’, with the addition of our specific comments on ‘genuine service requirements’ and ‘exceptions from discrimination law’ below.

#### ***Genuine Service Requirements***

12. In our original note to the review team of January 2006 we urged the consideration of ‘genuine service requirements’ as a feature of a Single Equality Bill and we welcome the indication in the green paper that this is being considered. We see GSRs as an alternative to the current practice in UK discrimination law (especially on grounds of religion or belief) of exempting whole classes of organisation from what should be universally applied principles of equality and as a way of introducing consistency and a harmonised approach to exemptions across the grounds.
13. We are very concerned about the exemptions from prohibitions on discrimination granted to religion or belief groups in part 2 of the Equality Act, which were hard-fought in both the Commons and the Lords, and which we address below. In the specific case of religion or belief, therefore, a ‘genuine service requirement’ could provide a test that depended on the nature of what was being done rather than the identity or beliefs espoused by the organisation providing it or the individual doing it,

and so minimise the risk that too-wide an exception was being created.

14. We believe any GSR included in a Single Equality Bill should not be, as suggested by the green paper, one requiring that ‘the objective was legitimate and the requirement was a proportionate means of achieving that objective’ (1.73). We believe such a test would run the risk of making it too easy to justify discrimination.
15. We agree with the EDF suggestion that the wording for any test should be ‘that the objective was legitimate and the means of achieving that aim are appropriate and necessary’ and that this is usefully close to the wording of the European directive.

### ***Exceptions from discrimination law***

16. ‘A Framework for Fairness’ offers no rationale for retaining many of the exceptions listed in Table 1 of Annex A and we oppose the retention of many of them, on the grounds that they allow real discrimination blighting the lives of many citizens to continue unchallenged. Instead of the exceptions in the Equality Act which we highlight as requiring repeal below, we suggest that a ‘genuine service requirement’ be introduced which we believe represents a far more proportionate way of allowing necessary exceptions while avoiding the licence to discriminate which blanket exceptions create. The removal of most of the exceptions contained in the Equality Act and their replacement with a genuine service requirement would provide a necessary increase in the protection from discrimination offered to individuals. In the case of the R/B Regulations, we believe the exception must be narrowed.

### *Equality Act 2006*

17. **Equality Act Part 2 s50:** This section permits state and independent schools designated as having a religious character to discriminate against children on grounds of their religion or belief or their parent[s]’s religion or belief. They can discriminate against pupils in decisions about whether to admit them to the school, the terms of admission, and the access they afford them to any benefit, facility or service.
18. We understand (though we regret) that it is the policy of the Government to continue to allow discrimination against children and their parents in admissions to state schools with a religious character. However, we do not believe that any school should be permitted to discriminate against a child once she is a pupil. Many pupils in state schools will not be of the religion or belief of the school. We argue at the very least therefore, for a repeal of the exception allowing schools to discriminate in the access they afford to children to any ‘benefit, facility or service’. However, we believe that a genuine service requirement would be sufficient to replace the whole of s50.
19. **Equality Act Part 2 s52(4)(k):** This section permits discrimination by public authorities if their actions are in relation to the curriculum of an

educational institution, admission to an educational institution which has a religious ethos, acts of worship or other religious observance organised by or on behalf of an educational institution (whether or not forming part of the curriculum), the governing body of an educational institution which has a religious ethos, transport to or from an educational institution, or the establishment, alteration or closure of educational institutions.

20. Again, we realise that this exception is designed to protect the discriminatory provisions of other statutes and that the Government does not intend to repeal or amend those discriminatory statutes. However, as with s50, we believe this objective could be achieved through a single genuine service requirement without the risks of discrimination unintended by the Government presented by the current blanket exception.
21. **Equality Act Part 2 s57:** This section permits certain organisations to discriminate against people in admission to membership, participation in activities, the provision of goods, facilities and services and the use or disposal of premises.
22. We recognise that organisations such as the BHA, related to a 'belief' in the terms of the law, are covered by this clause too, but we see no reason why the required exceptions in this area could not be provided more simply and with fewer possibilities for unwarranted discrimination by the use of a genuine service requirement as recommended above.
23. **Equality Act Part 2 s59:** This section permits educational institutions established or conducted for the purpose of providing education relating to, or within the framework of, a specified religion or belief to restrict the provision of non-educational goods, facilities or services, and the use or disposal of premises for non-educational purposes on the grounds of the purpose of the institution, or in order to avoid 'causing offence, on grounds of the religion or belief to which the institution relates, to persons connected with the institution'.
24. We do not believe that 'offence' is a sufficient reason to permit discrimination, but we do recognise that there are circumstances covered by s59 in which discrimination may be warranted. Again, we believe that all such legitimate actions would be covered by a genuine service requirement.
25. **Equality Act Part 2 s60:** This section, rushed into the Bill without due consideration, permits secular charities that discriminate in requirements for membership on the grounds of religion or belief to continue to do so. We do not know how many organisations this applies to, but it was inserted into the Equality Act to allow the Scouts and Guides to continue to discriminate against humanists and other atheists in the conditions for membership. Complaints about the discrimination by the Scouts and Guides and requests for assistance are the second most commonly received by the BHA, following complaints about discrimination in education, and it is clear that the Scouts and Guides are two of the most

discriminatory organisations in terms of the non-religious and the impact on their lives.

26. The Scouts and Guides are both in receipt of public funds and in some areas they represent the only youth activities available. They disingenuously claim to be inclusive while refusing membership from humanists and other atheists, and refusing to categorise themselves as religious organisations, even though they admit only religious members (although their analogous organisations in other countries admit atheists). For the law to assist them in this hypocrisy and to sanction their discriminatory behaviour is quite wrong. The removal of this exception and the leaving of the Scouts' and Guides' discrimination to stand or fall in the context of a genuine service requirement is the only way to either offer the many people suffering disadvantage at their hands some element of protection or compel the Scouts and Guides to clarify their status as religious organisations, to the benefit of public understanding.
27. **Equality Act Part 2 s51(2)(3):** This section permits a local education authority or an education authority to discriminate in the provision of schools and functions related to transport. It could easily be repealed if a genuine service requirement were to be introduced.

*R/B Regulations 2003*

28. **R/B Regulation 7(3):** This regulation permits employers with 'an ethos based on religion or belief' to discriminate in cases where 'being of a particular religion or belief is a genuine occupational requirement for the job' and 'it is proportionate to apply that requirement in the particular case'. These employers have a less rigorous test to prove than employers who do not have a particular 'ethos based on religion or belief' which, under regulation 7(2), must show a 'genuine and determining occupational requirement'.
29. The test in the Employment Equality (Religion or Belief) Regulations 2003 to justify genuine occupational requirement is less rigorous than in the Directive and legislation on race and other grounds. We believe this is a serious infringement of the rights of people not to be discriminated against on the grounds of their religion or belief, particularly in view of the fact that large religious organisations are the most likely discriminators. Already there is DTI funded guidance from the Christian organisation Faithworks which advises organisations how even their coffee shop manager post can be reserved for a Christian. In our view, this is not what was intended by the law<sup>1</sup>. There is some evidence that an unintended consequence of the Regulations has been an increase in discrimination suffered by humanists and others in the employ of organisations choosing to 'clarify' their ethos as religious and take advantage of the newly explicit

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<sup>1</sup> See again art 4 above, and see also Opinion no. 4-2005 of the EU Network of Independent Experts on Fundamental Rights: "Churches or religious organisations may not require from an individual working for them, but whose occupation presents no relationship to his or her religion or belief (for instance, a doctor in a catholic hospital), that he or she shares that religion or belief."

ability they have to discriminate. This must be addressed by the review. For historical and other reasons, most of these organisations, including most of the largest employers, are Christian; hence it is not only the non-religious, but also adherents of minority religions who are discriminated against. Even organisations in receipt of public money to provide services are operating this wide discrimination.

30. **R/B Regulation 39:** This regulation permits the discrimination allowed by sections 58 to 60 of the School Standards and Framework Act 1998 to continue.
31. We believe that the fact that the law prohibiting discrimination on grounds of religion or belief in Great Britain is subject to ss. 58 – 60 School Standards and Framework Act 1998 is a serious infringement of the rights of people not to be discriminated against on the grounds of their religion or belief and is arguably inconsistent with the EU Employment Directive. We note that it is also not very good for schools and their pupils – the most re-advertised headteacher posts are those with a religious requirement attached. We believe that sections of education law allowing discrimination should be repealed.
32. We agree that the exceptions listed in Table 2 of Annex A should be removed.

## ***PART TWO***

### ***Need for a purpose clause***

33. We strongly support the inclusion of a purpose clause in any Single Equality Bill. A statement of purpose for the Bill will give the new provisions an overall coherence, which can only be of benefit to the new culture of equality which we should be aiming to create and sustain. It will be useful in clarifying the fact that discrimination law is for everyone, not just those seen as members of traditionally disadvantaged groups, and we agree with the consultation response from the Equality and Diversity Forum (EDF) that ‘It would set out the objectives and goals of the Act and thus provide guidance to those seeking to interpret the Act, both Courts and Tribunals and employers and businesses.’ Together with the arguments presented by Colm O’Cinneide in his paper, ‘Purpose Clauses – Giving Coherence And Direction To Anti-Discrimination Law’<sup>2</sup>, we believe a persuasive case has been made *for* a purpose clause. We also endorse the DRC, EOC and CRE proposals concerning purpose clauses.<sup>3</sup>
34. The fundamental duty given to the CEHR in the Equality Act 2006 has, we believe, been invaluable in clarifying the wider purpose of that new body, and a comparable clause in any Single Equality Bill will fulfil the same necessary purpose.

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<sup>2</sup> [http://www.drc-gb.org/docs/COC\\_final\\_purpose\\_clause\\_paper.doc](http://www.drc-gb.org/docs/COC_final_purpose_clause_paper.doc)

<sup>3</sup> [http://www.drc-gb.org/docs/purpose\\_principles\\_for\\_sea\\_sumreport0507.doc](http://www.drc-gb.org/docs/purpose_principles_for_sea_sumreport0507.doc)

## ***Chapter four***

### ***Balancing measures and positive action***

35. Without knowing precisely what is being proposed in terms of positive action, it is difficult to give our view on these issues.
36. Although we can see the value of reasonable adjustments on grounds of religion or belief in many contexts, we have doubts about the practicality of positive action on grounds of religion or belief. Data such as are used for race or gender, derived from the census, do not exist in any meaningful sense for religion or belief, not least because wildly differing answers will be given to the question of an individual's religion or belief depending on the wording and context of the question. Religion or belief can be measured in many ways – for example, in terms of beliefs, in terms of practices and in terms of identity – and even within these indicators there are widely differing categories. We do not see religion or belief as a characteristic that can be meaningfully treated as analogous to race or gender in this regard.
37. The mutability of religion or belief contrasts with the immutability of gender and race in this context. Furthermore, religions and beliefs themselves are almost impossible to categorise. Will we use 'Christian' as our category of choice, or 'Evangelical Christian', 'Protestant', 'Methodist' etc (there are thousands of Christian denominations in the UK); 'Muslim' or 'Sufi', 'Shia' etc; 'Not religious' or 'Humanist', 'rationalist', 'atheist' etc?
38. We do not believe that the extension of permission to use balancing measures to religion or belief is a priority, or even desirable.

### ***Selection of candidates by political parties***

39. We do not agree that the scope of voluntary positive measures for political parties to target the selection of candidates beyond gender should be widened. We do not believe any evidence has been presented to support such a widening and we can see no justification for positive action in this area beyond gender. In addition, we believe that such a move risks raising public antagonism to aims of equality because it will be seen as positive discrimination in one of the most important contexts possible.
40. In terms of religion or belief in particular, we believe it would be a grave mistake to allow political parties to target the selection of candidates on these grounds. In a secular political system, it would be of grave concern if political parties began to operate religious quotas and it would also be almost impossible. In addition, many people believe (rightly or wrongly) that their religious or non-religious beliefs are a private matter, and would be unwilling to be monitored on these grounds.

### ***Role of the CEHR in positive action***

41. The usefulness of positive action strategies, especially those produced by small organisations without experience in this area, will certainly depend on how well worked out they are, how committed the organisation is to equality of opportunity, how much support there is for a scheme by existing staff and so on. If such strategies are badly targeted (for example, focussed on Muslims in a given area, rather than on a socio-economically deprived class of which the majority of Muslims locally are part and which is the real group suffering disadvantage locally), misinformed or lack support, then having positive action measures could actually cause resentment within organisations and possibly even exacerbate inequalities if the 'right' people are being missed.
42. Because of this, it is tempting to say that the CEHR should have some role in approving all positive action schemes, although this would doubtless be burdensome. Certainly we agree that they should have a role in producing guidance. We would urge that some way be found of making the guidance produced by the CEHR as binding as possible on organisations planning positive action, and for it to contain clear advice on common mistakes that organisations planning such action should be alert to avoid.

### ***Chapter five***

#### ***Cross-strand public sector equality duty***

43. In principle, we believe that the public sector duty should apply across all protected grounds, but we believe that the detailed requirements need to differ according to the nature and characteristics of each strand. There is certainly no justification for having a duty solely for the three established strands where such a duty already exists.
44. This leads us to agree in principle that the race, disability and gender duties should be replaced with a single duty but this must not lead to any diminution of the strength of the existing duties. We do not agree that it will be sufficient to set out principles to inform implementation of the duty, and we agree with those elements of the response made by the EDF to the green paper on the general question of how a single duty should be worded.

#### ***Extension of public sector duty to religion or belief***

45. There are clear disadvantages to and practical difficulties in extending the duty to include religion or belief. For many, religion or belief is a private matter and the putting of pressure on people to declare a religion or belief publicly and express that more openly than they may wish is undesirable; religion or belief is also a changeable characteristic. Furthermore, there is insufficient evidence that religion or belief is a useful marker of disadvantage.

46. We agree with para 5.69 of the green paper that the data public authorities would use to target or monitor their operation of such a duty is not reliable. We doubt in fact that it ever could be. Religion or belief can be measured in many ways – in terms of beliefs, in terms of practices and in terms of identity. Even within these indicators there are widely differing categories. Census data is certainly not sufficient and in fact, the ONS has recognised this and is looking at this question even now in terms of the 2011 census. We believe that qualitative data, in the clear absence of reliable quantitative data, may assist in the implementation or monitoring of and duty covering religion or belief, though any procedure to gather such data would have to be adopted with the risks we identify in para. 48 below.
47. If unreliable data – such as census data – is used by public authorities as the basis for action in the area of religion or belief, they may well take inappropriate actions.
48. Extending the duty to religion or belief may lead to particular groups being given too strong a voice, and so might lead to some prominent and perhaps unrepresentative individuals getting a disproportionate voice and influence. This leads us to agree with para. 5.69 of the green paper that there are concerns about the negative impact of a religion or belief duty on provision and cohesion.
49. We are not reassured by para 5.70 of the green paper, which states that any different treatment would be ‘limited to what is permitted through exceptions provided for in the law’. The current exceptions permitted in the law on religion or belief are very wide and largely guarantee inferior treatment of humanists, and the non-religious more generally. Other laws, such as the Education Acts as amended, largely prevent the full enjoyment by humanists of any positive impact of a future duty in the areas where discrimination is being suffered.
50. We believe it should nonetheless be possible for a duty concerned with religion or belief to cover the eliminating of unlawful discrimination and harassment, and the promoting of equality of opportunity could certainly be included, as could the promotion of good relations; guidance to public authorities would need to stress the risks and difficulties they will face in implementing this duty.
51. However, we would stress that our support for such a limited duty on religion or belief is dependent on what sort of modified law on religion or belief the other elements of the Single Equality Bill introduce. If, for example, there were to be no repeal of the current exceptions listed in para 17-32 above, our grave concern would be that the introduction of a duty obliging public authorities to implement such an unsatisfactory law would merely exacerbate the unequal treatment faced by the non-religious.

## ***Proposed statement of purpose***

52. We agree that a clear statement of purpose would be an essential part of any single public sector duty and we believe it could usefully be coupled with an overall purpose clause for the Bill as a whole (see 'Purpose Clause', above, para. 33-34).
53. We agree that the four areas proposed are the right ones, although we believe some elements of them may need further elaboration. For example, what are our 'shared values'?

## ***General***

54. We agree that public authorities should be required to review their priority equality objectives at least every three years.
55. We agree that public authorities should be given the option to implement any new approach in advance of it becoming a legal requirement, provided that they do so after full and complete guidance has been published so that there will be uniformity between those who begin early and those who begin after it becomes a legal requirement. In addition to being useful for those authorities which have already begun to take an integrated approach, it would be beneficial as a way of exploring best practice early for timely dissemination.
56. We believe that any new duty should apply to *all* public authorities including *all* schools. We believe it is also important that organisations under contract to public authorities to provide public services should have the same obligations on them as are on public bodies, and we believe the definition of public authority for this purpose needs to be far wider than that which has been unfortunately developed by the courts in the context of the Human Rights Act.
57. We believe that public sector procurement must be addressed on the face of the Bill, along the lines suggested by the EDF in its submission to the consultation.
58. The Greater London Authority Act 1999 should be amended to read 'religion or belief' rather than 'religion', in line with developing equality and discrimination law.

## ***Chapter six***

### ***The private sector***

59. We urge the DLR to look again at the issue of private sector and address the disparity developing between the public and private sector, which we see as undesirable. We agree with the recommendations of the EDF response on these questions.

## ***Chapter seven***

### ***Representative actions***

60. We very much support the empowering of groups to bring representative actions. We believe, for example, that the fact that there is no provision in the Employment Equality (Religion or Belief) Regulations 2003 allowing NGOs to initiate proceedings on behalf of a complainant is inconsistent with the European directive. The benefits of representative actions in clarifying the law and increasing both access to justice and the likelihood of a new culture of equality are immense.

## ***PART THREE***

### ***Chapter nine***

#### ***Age discrimination***

61. We believe that the evidence of discrimination on grounds of age presented by Age Concern and others must be addressed and that legislation to counter age discrimination in access to goods, facilities and services is a necessary part of establishing a more equal society and eliminating irrelevant discrimination.
62. We also believe that children and young people must fall within the protection of the discrimination law on grounds of age and that existing tests for establishing the competency of young people will allow the development of rational law without fear of the unintended consequences referred to in the green paper.

### ***Chapter ten***

#### ***Gender reassignment***

63. We agree that the law should prohibit discrimination on grounds of gender reassignment in the exercise of public functions.
64. We do not agree that it is unnecessary to include education in schools in any extension to protection on grounds of gender reassignment.
65. There are no circumstances in which we consider that it is necessary for organised religions to treat people differently on grounds of gender reassignment.

## **Chapter twelve**

### **Clubs**

66. We agree it should be permitted to have clubs set up for the purpose of offering the benefits of membership to members of a particular religion or belief where the purpose of the club is in some way connected with that religion or belief.
67. We do not believe that clubs of whatever size (other than single sex clubs or those set up for members who are of a particular religion or belief) should be permitted to discriminate against members or guests on any grounds.

## **Chapter fourteen**

### **Harassment on grounds of religion or belief**

68. There is no doubt that many humanists suffer harassment on the grounds of not being religious which, if suffered by them on a ground such as race or gender outside the workplace would be illegal. Extending protection against harassment would certainly therefore deal with 'real issues which people face', as required by the consultation document.
69. We are gravely concerned, however, that the Government would never legislate to prohibit harassment in those areas where it is most prevalent, such as in 'faith' schools, and would instead make exceptions within the law for the worst discriminators and so the law would never protect humanists where they need protection.
70. We are also concerned by the risk that legislating to prohibit harassment on grounds of religion or belief outside the workplace might endanger freedom of speech. We recognise that the HRA requires courts to interpret all legislation compatibly with convention rights and that this includes the right to freedom of thought, conscience and religion and the right to freedom of expression. However, we are concerned whether the balance would be interpreted appropriately in light of growing demands for protection against 'offence' on religious grounds. We also believe that the risk of creating a culture of *self-censorship* in some contexts remains, where individuals and organisations felt unable to voice opinions and advance arguments to do with religion and belief which some may find distressing, but which it is nonetheless important be heard in the interests of an open society.
71. We do not believe that a prohibition on harassment could be introduced at the same level as one might be required on grounds of, for example, race. However, we believe there may be a useful distinction to be made between 'closed' environments, such as schools, prisons, hospitals and hospices (where service users are 'captive' with limited choice and control over their environment) and other extra-employment contexts. Harassment by

public authorities (including organisations operating under contract), therefore, seems a reasonable activity to prohibit. If religious charities or organisations increasingly provide such services under contract, the incidence of harassment, often of very vulnerable people, on religion or belief grounds will increase. In any case, we do not see any scope for exemptions from any future law on harassment in this area.

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4<sup>th</sup> September 2006

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