

Memorandum to the Equality Bill Committee from the British Humanist Association.

21st May 2009.

The British Humanist Association (BHA) is the national charity representing and supporting the non-religious and campaigning for an end to religious privilege and discrimination based on religion or belief. Our expertise lies in the religion or belief equality strand, which includes non-religious beliefs such as Humanism, and how that strand relates to and intersects with other protected characteristics.

As MPs, members of the Equality Bill Committee will have already received our briefing for Second Reading of the Equality Bill, which is attached at Annex A for ease of reference. In that briefing we set out a number of areas of concern and suggested amendments to Clauses and Schedules.

We are members of the Accord coalition and as such wish to associate ourselves with the contents of the memorandum they have submitted.

In this memorandum, we take the opportunity to focus on four key aspects of the Equality Bill that we believe it is crucial for the Equality Bill Committee to scrutinise and amend, to do with discrimination,

these are:

1. **Clause 143** – the public sector equality duty and advancing equality of opportunity in relation to religion or belief;
2. **Schedule 9** – employment by organisations based on religion or belief working under contract with public authorities and;
3. **Schedule 23** – services provided by organisations based on religion or belief working under contract with public authorities.
4. **Clause 186** – certain secular charities discriminating on religious grounds

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1 Clause 143 – Public Sector Equality Duty – Advancing equality of opportunity in relation to religion or belief

- 1.1 The Bill extends the public sector duty to promote equality to age, religion or belief, sexual orientation and gender reassignment.
- 1.2 **Clause 143** imposes the public sector equality duty on public authorities to have due regard to three specified matters:
- a) eliminating conduct that is prohibited by the Bill;
 - b) advancing equality of opportunity between people who share a protected characteristic and people who do not share it; and
 - c) fostering good relations between people who share a protected characteristic and people who do not share it.
- 1.3 For religion or belief, as for the other protected characteristics, we believe that a public duty (a) to eliminate unlawful discrimination and (c) to foster good relations should be supported.
- 1.4 However, for the reasons given below we do not believe that ‘limb’ (b), advancing equality of opportunity, should apply to religion or belief.
- 1.5 In order to advance equality of opportunity public authorities would need to ‘remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic’; ‘meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it’; and ‘encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low’. We believe that all these actions are problematic in the context of ‘religion or belief’. There would inevitably be unintended consequences.
- 1.6 Religious and non-religious people are extremely heterogeneous in their beliefs, practices and experiences – unlike the other protected characteristics, religion or belief is not fixed or innate and is highly personal to individuals. The above actions, however, would undoubtedly treat religious and non-religious people as if they are part of fixed, identifiable groups with clear, identifiable needs, and not as individuals. This is extremely

undesirable. It is not for government or other public authorities to view and treat people as part of an identity community, nor to encourage people to organise themselves in terms of religious or non-religious identity in order to receive differentiated or special treatment, services or assistance.

1.7 We see such treatment as against principles of human rights, which require that people be helped and assisted in terms of their individual circumstances and needs (needs arising from religious practice included) and not on assumed needs of a group with which they may or may not identify – needs which cannot at all safely be assumed, given the wide diversity of beliefs, practice and associated needs within any belief-based group.

1.8 Further, this would undoubtedly involve collecting data on people’s religious or non-religious beliefs, which raises both principled and practical difficulties.

- It is an invasion of privacy – for many, religion or belief is a private matter and putting pressure on people to declare a ‘religion or belief’ publicly and express it more openly than they may wish is undesirable. This is especially detrimental for those individuals who may be perceived by their peers as having a particular belief when they have in fact rejected that belief, but feel unable to tell anyone, including their family.
- There is insufficient evidence that religion or belief specifically, rather than race or ethnicity, is a useful marker of disadvantage. This is to so great an extent that the religion question in the Census is explicitly treated by the ONS as a proxy for ethnicity¹.
- The Government itself recognises that reliable statistics on religion or belief ‘are not available’². Religion or belief can be measured in many ways – in terms of convictions, in terms of practices and in terms of affiliation or identity – producing hugely different results. Even within each of these indicators, the results will vary significantly with quite subtle variations in the wording of the questions asked. If unreliable data – such as 2001 census – are used by public authorities as the basis for action in the area of religion or belief, they may well take inappropriate actions. Since census data are the most likely to be used, we are very concerned.

¹ Office for National Statistics (ONS) *Information Paper. Recommended questions for the 2009 Census Rehearsal and 2011 Census. Religion*. March 2009

² *The Equality Bill – Government Response To The Consultation*, 7.25

- 1.9 There is, besides, a huge difference in the importance individuals assign to their religion or belief. For some it is all important, for others it is a minor aspect of their identity³. Extending the duty to religion or belief may lead to particular religious minorities being given too strong a voice, and so might lead to some prominent and perhaps unrepresentative individuals getting a disproportionate voice, creating resentment on the part of others and so damaging social cohesion.
- 1.10 This effect may, in practice, lead to the advancement of particular religions or beliefs – not least those groups which are most vociferous and vocal in their claims of underrepresentation and discrimination. It would be wrong for a public sector equality duty on religion or belief to facilitate a state-sponsored promotion of religion, or any particular religion, as opposed to tackling unlawful discrimination.
- 1.11 Requiring public authorities to advance equality of opportunity in relation to religion or belief may also encourage the separate provision of public services according to religious affiliation. ‘A duty to promote equality of opportunity among believers and non-believers might cause central or local government or statutory bodies to provide funding to all religious service providers, thus increasing the areas of life touched by religion, or to withdraw funding from all religious organisations. Neither outcome is desirable.’⁴
- 1.12 We are further concerned that exceptions provided for religion in the Equality Bill would exacerbate the potentially unequal position of humanists within the general public sector duty. The exceptions currently permitted in the law on religion or belief are very wide and largely guarantee inferior treatment of the non-religious and often also of minority religions. Other laws, such as the Education Acts, effectively pre-empt any positive impact for the non-religious and those of minority religions of an equality duty in precisely the areas where discrimination is most common.

We believe this ‘limb’ of the duty should not be extended to religion or belief.

³ Home Office Research Study 274: *Religion in England and Wales: findings from the 2001 Home Office Citizenship Survey*

⁴ Lester, A. and Uccellari, P. (2008) *Extending the Equality Duty to Religion, Conscience, and Belief: Proceed with Caution*. *European Human Rights Law Review*, 5

2 Schedule 9 – employment by organisations based on religion or belief working under contract with public authorities

- 2.1 **Schedule 9** defines circumstances in which discrimination on grounds of religion or belief is to be permitted in the field of employment. The wording of the work exceptions has been harmonised, and any requirement that an applicant or employee must be of a particular religion or belief must be ‘an occupational requirement’ and ‘a proportionate means of meeting a legitimate aim’ – and this applies to all employers including those with an ethos based on religion or belief. We strongly support this.
- 2.2 However, as at present, organisations with an ethos based on religion or belief are given wider circumstances to discriminate on those grounds than other employers – and that would apply even when working under contract to provide public services. Unlike other employers, organisations based on religion or belief may refer to their ethos in order to discriminate in employment. While the test of whether they can place a religious requirement on their positions does seem more rigorous than the present law⁵, it remains vital that such discrimination is prohibited if that organisation is working under contract with and on behalf of a public authority to provide a public service.
- 2.3 What is ‘proportionate’ in order to meet the aim of maintaining or supporting an organisation’s religious ethos through religious discrimination in employment is not obvious or clear. In 2008 an employment tribunal in a case involving religious discrimination by a religious employer working under contract with the local authority to provide health and social care services, found that an organisation’s religious ethos is not necessarily determined by the religious beliefs of its staff⁶. In fact, that case was the first time an employment tribunal has been called on to decide the extent to which an organisation with a religious ethos is allowed to discriminate on grounds of religion or belief.
- 2.4 However, we know that because the law can be interpreted widely and differently by different organisations, the degrees and depth of discrimination by religious employers,

⁵ Part 2, Paragraph 7 of the Employment Equality (Religion or Belief) Regulations 2003, which Schedule 9 will replace, provides exceptions for employers to apply a religious requirement on a position if it is a ‘genuine and determining’ requirement for the job. The exception provided for organisations based on religion or belief is much wider, and such employers need only show that it is a ‘genuine occupational requirement’ in order to apply a religious requirement to a post – it need not be ‘determining’.

⁶ Judgment in the Employment Tribunal of Mr Mark Sheridan and Prospects for People with Learning Disabilities, May 2008. See in particular, ‘Stage 3 – proportionality’

including those working under contract with public authorities is also varied but may cover almost all positions and not only, for example, the Chief Executive⁷. For example, Crossreach, one of the largest social care agencies in Scotland and which is funded almost entirely by local authorities, places religious requirements on almost all its positions, including care workers and support assistants. In fact, even the positions of ‘gardener/handyperson’ and ‘housekeeping assistant’ require applicants to be ‘in sympathy with [Crossreach’s] Christian ethos and values’⁸.

2.5 We very much hope that the harmonised requirements in the Equality Bill which provide for exceptions to allow discrimination by religious employers will prevent such wide discrimination as by Crossreach or Prospects – especially if an organisation is working under contract with a public authority. However, we do not believe that it is the Government’s intention to require contracted organisations not to discriminate on grounds of religion or belief when working under contract. In answer to a Parliamentary Question on 13th January 2009, for example, the Minister for the Department for Work and Pensions made it clear that contracted organisations may still use exceptions in law to discriminate on religious grounds in their employment⁹.

⁷ The Explanatory Notes to Schedule 9, Paragraph 3 of the Equality Bill state that ‘A religious organisation may wish to restrict applicants for the post of head of its organisation to those people that adhere to that faith. This is because to represent the views of that organisation accurately it is felt that the person in charge of that organisation must have an in-depth understanding of the religion’s doctrines. This type of discrimination could be lawful. However, other posts that do not require this kind of in-depth understanding, such as administrative posts, should be open to all people regardless of their religion or belief’

⁸ <http://www.crossreach.org.uk/recruitment/vacancies.asp>, accessed 18/05/2009

⁹ Commons Hansard, 13th January 2009, **Departmental Contracts**

Mr. Allen: To ask the Secretary of State for Work and Pensions (1) if he will ensure that his Department does not enter into contracts with faith-based organisations which have policies and procedures which do not comply with equalities legislation;

(2) what his Department’s policy is on whether contracts may be awarded to faith-based organisations which engage the exemptions for religious organisations provided for by the (a) Employment Equality (Religion or Belief) Regulations 2003 and (b) Employment Equality (Sexual Orientation) Regulations 2003;

(3) what measures are in place to ensure religious organisations working under contract with his Department do not discriminate in their employment practices on grounds of (a) religious belief or (b) sexual orientation.

Jonathan Shaw: The Department has a separate contract with an independent external organisation to check that providers have appropriate diversity and equality policies in place; these checks are made before contracts are awarded, and repeated annually thereafter.

Contracts are awarded in accordance with existing EU and UK law including those relevant to equality including faith and sexual orientation. Successful suppliers to the Department are required to act lawfully and in accordance with relevant legislation *including any provisions regarding unlawful discrimination, and exceptions regarding genuine occupational requirements and proportionality*. A potential supplier failing to agree to the terms of contract would not be successful at contract award. (Our emphasis).

The compliance of external providers with standards of diversity and equality is regularly monitored by my Department’s contract management staff. Contracts can be terminated in the event of a serious breach of these standards.

- 2.6 This lack of willingness to tackle religious discrimination in employment by contracted organisations is further compounded by a failure by local and central government to monitor whether their contractors are religious organisations, let alone whether they apply religious requirements to their positions. For example, Ministers from the Cabinet Office, the Home Office and the Department for International Development all stated in response to Graham Allen MP's Parliamentary Question 'with how many faith-based organisations [the] Department has contracts to provide public services', that 'The extent to which such organisations are faith-based is not evident in every case', hence 'an accurate total or comprehensive list could therefore be provided only at disproportionate cost'¹⁰.
- 2.7 **Our principal concern is that the exception for organisations based on religion or belief to have regard for its ethos in applying a religious requirement to a position should not apply when that organisation is working under contract with a public authority.** Given that the law may be interpreted differently by different religious organisations, and that it is not objective or clear what constitutes proportionate discrimination in employment with regard to a religious ethos, it is vital that the Equality Bill is amended to prohibit the ability of organisations based on religion or belief to use their exception under Schedule 9.
- 2.8 Further, we know from contact with various local authorities that many are unaware that the contracts they use actually permit religious organisations to use the exceptions in law. This is because the contracts¹¹ will list, for example, that the contracted organisations must behave lawfully and be bound by various equality laws – but those organisations would still be acting within the law at present if they discriminate in their employment because they have legal exceptions from the law. An amendment to the Equality Bill to overrule those exceptions if an organisation is working on behalf of a public authority would create consistency and clarity for public authorities and religious organisations alike.
- 2.9 It would never be legitimate for a public authority to place a religious requirement on the position for an employment advisor in a job centre, or on the position for a porter in

¹⁰ Commons Hansard, 12th and 13th January, Written Answers.

¹¹ Which vary from authority to authority

a nursing home, or on the position for an NHS dental nurse. If a religious organisation is to provide such services on behalf of a public authority how can it suddenly become legitimate to place a religious requirement on those jobs?

- 2.10 When services are contracted out, it will not necessarily be that new jobs will be created. Rather, it is likely that public sector jobs will be taken over by the contracted organisation, with many public sector workers having their employment transferred from public authorities into the private and third sectors
- 2.11 If the new provider of the service is a religious organisation, they may be faced with a choice between redundancy and working for an organisation with an ethos that they may find oppressive and practices – some of which may be discriminatory¹² – they find objectionable. Moreover, if the religious employer applies religious requirements to its positions, transferred employees may find themselves at risk of dismissal on the basis of their religion or belief. Although in theory transferred employees should be covered by the TUPE Regulations, some may be required to reapply for their positions with the religious employer, and they may find that their lack of required beliefs renders them ineligible for the very post they have previously held. Further, there is nothing to prevent the religious organisation from beginning to discriminate having ‘regard for their ethos’ at any time, even if they had not done so previously.
- 2.12 These problems will be especially acute if large-scale contracts are placed with religious organisations, where a large proportion of (especially senior) posts are forever reserved for people with the ‘right’ beliefs. Although it failed in its recent bid for a large contract to provide welfare to work services, Birmingham Faith in Action was shortlisted by the DWP as a possible provider and continues to be on the list of potential contractors¹³. One of the member organisations of Birmingham Faith in Action is the Salvation Army, which discriminates in its employment, has discriminatory internal policies that would not be ‘in line’ equalities legislation and practice¹⁴ and which has been resistant to having HRA extended to it when providing contracts. To have such an organisation taking on large

¹² The Employment Tribunal of Mr Mark Sheridan and Prospects for People with Learning Disabilities, May 2008, heard that working within such a highly discriminatory employment policy, where the manager was instructed to discriminate against his staff, was detrimental to both his physical and mental health

¹³ http://indusdelta.co.uk/provider/birmingham_faith_action, accessed 18/05/2009

¹⁴ The Salvation Army’s position statement on homosexuality, for example, details homosexual behaviour as ‘self-evidently abnormal’ and condemns gay people to a life of celibacy.

contracts could pose real difficulties, the type as set out above, for transferred staff, potential staff and for service users.¹⁵

- 2.13 There can be no justification for allowing religious organisations performing public functions on behalf of and under contract with a public authority to apply religious requirements to their jobs.

We recommend that the following sub-paragraph is inserted into after paragraph 3 of schedule 9:

This paragraph does not apply when A is operating:

(a) on behalf of a public authority, and

(b) under the terms of a contract between the organisation and the public authority.

3 Organisations relating to religion or belief

- 3.1 **Schedule 23, Paragraph 2**, provides an exception for religion or belief organisations from the provisions in the Bill relating to services and public functions, premises and associations. The exception allows an organisation (or a person acting on its behalf) to impose restrictions on grounds of religion or belief or sexual orientation on membership of the organisation; participation in its activities; the use of any goods, facilities or services that it provides; and the use of its premises. This replicates similar existing provisions.
- 3.2 Religious organisations working under contract with public authorities to provide services etc. are not permitted, however, to discriminate on grounds of sexual orientation (see 2(10)). We believe the same prohibition should apply to discrimination on grounds of religion or belief.
- 3.3 Parliament voted decisively in favour of the prohibition of discrimination on grounds of sexual orientation in the provision of goods and services, in order to ensure that service users, whatever their sexual orientation and whoever their public service provider, were guaranteed equality of access to and type and level of service in vital public services, such as adoption services.

¹⁵ Salvation Army, memorandum to the Joint Committee on Human Rights for its inquiry on The Meaning of Public Authority under the Human Rights Act. Printed March 19th 2007.

- 3.4 However, the law permits religious organisations, even when they are performing public functions and providing vital public services, to discriminate against service users on grounds of religion or belief. In practice this means that while an organisation such as a Catholic adoption agency may not discriminate against gay couples, it may be allowed to discriminate against prospective adopters if they are atheist, or humanist, or Muslim, or Jewish etc.
- 3.5 One danger of permitting such discrimination in the performance of a public function, combined with having a public sector duty to advance equality on grounds of religion or belief (which we strongly oppose, see section 1 above), is that this could lead to a balkanisation of public services. Government might claim that needs arising in particular communities could be better addressed by religious organisations that it (and they) claim represent ‘their’ communities than by the Government itself – and with a new equality duty may indeed be mandated to contract with such organisations. But for many services – health, for example – it would be hugely inefficient to have overlapping and duplicated services. It would lead to unavoidable discrepancies in provision: different groups of people, demarcated irrelevantly by religion (which a Home Office study has shown is barely in the top ten features of their identity people would choose to characterise themselves¹⁶) relying on separate services.
- 3.6 Further, such parallel provision is inherently undesirable. We are already on the brink of having parallel Anglican, Catholic, Muslim and other religious school systems and should have learnt the lesson of how this approach is at the least damaging to social cohesion and exacerbates inequalities¹⁷. Further, discrepancies in levels of service between parallel religious and secular services would exacerbate ill-feeling between religiously (and hence often ethnically) defined groups.
- 3.7 Not only would this be socially divisive, it may also drive people to stay even more within their own religious groups. Even those seeking to separate themselves from their religious affiliation would be driven back in order to access services from the right

¹⁶ Home Office (2004) *Religion in England and Wales: findings from the 2001 Home Office Citizenship Survey. Home Office Research Study 274, March 2004*. London: Home Office

¹⁷ There is growing academic evidence to support this. See, for example: Institute for Public Policy Research (ippr) (2007) *School Admissions: Fair choice for parents and pupils*. London: ippr; and Allen, R. and West, A. (2007) ‘*Religious schools in London: school admissions, religious composition and selectivity?*’ Paper presented at the British Educational Research Association Conference, London. September.

organisations¹⁸.

- 3.8 The second and perhaps more immediately concerning problem with the exception for religious organisations to discriminate on religious grounds even when performing a public function, is that service users face real risks of discrimination to which they will have little or no recourse against, unless the law is amended.
- 3.9 When public authorities contract out their services, service users are placed in a lottery as to whether their new service provider is a religious organisation or not. This means that service users are arbitrarily put at risk of discrimination in access to or the provision of a public service on the basis of their non-religious beliefs, or on the basis of their religious beliefs if they are of the 'wrong' religion.
- 3.10 There can be no rationale for this exception from the law in the provision of services. Public services, whether they are delivered directly by the public authority or by a contracted organisation, should be open and accessible to all, and on an equal basis.
- 3.11 Some organisations bidding for and being awarded public service contracts, such as the Salvation Army, are clear that they do not intend to provide services in an open and inclusive way. For example, in written evidence to the Joint Committee on Human Rights, the Salvation Army stated, 'Whilst it is appropriate for the state to be religiously neutral, *this is impossible* for an organisation such as The Salvation Army, which delivers its services as a direct outworking of the Christian faith'. (Our emphasis)¹⁹.
- 3.12 Given that (as far as we are aware, see section 2 above), most local authorities and central government departments do not keep a record of whether their contractors are religious organisations, it is very difficult to assess the extent of religious discrimination that may already be occurring against service users by religious providers providing public functions. Even if contractual provisions were used to seek to deal with this injustice, this would be piecemeal in that they would lack consistency across providers and, in any case, would be quite inadequate, providing no redress for service users. It is urgently necessary to amend legislation to prohibit discrimination on grounds of religion or belief in the provision of services by religious organisations, to make clear that such

¹⁸ British Humanist Association (2007) *Quality and Equality: Human Rights, Public Services and Religious Organisations*. London: BHA

¹⁹ Salvation Army, memorandum to the Joint Committee on Human Rights for its inquiry on The Meaning of Public Authority under the Human Rights Act. Printed March 19th 2007.

discrimination is unacceptable.

- 3.13 The present situation is not only blatantly unfair, it cannot be justified in the context of the Equality Bill which seeks to harmonise and level up equality across all protected characteristics.

We recommend inserting the term 'or religion or belief' into Schedule 23, 2(10) as follows:

(10) This paragraph does not permit anything which is prohibited by section 27, so far as relating to sexual orientation OR RELIGION OR BELIEF, if it is done -

(a) on behalf of a public authority, and

(b) under the terms of a contract between the organisation and the public authority.

4 Clause 186 – certain secular charities discriminating on religious grounds

- 4.1 **Clause 186** allows certain secular charities to make acceptance of a religion or belief a condition of membership, if they have done so since before 18 May 2005. This has the (sole and intended) effect of allowing the Scouts and Guides to impose a test for admission on boys and girls, requiring them to promise to do their duty to God.
- 4.2 The Scouts and Guides are both in receipt of public funds and in some areas they are effectively the only youth activities available. They disingenuously and loudly claim to be inclusive while refusing membership to humanists and other atheists. For example, in an article, Denise King was reported as saying that 'guiding and atheism do not go together'²⁰.
- 4.3 However, they will admit atheists if (and they often positively urge this) the intending member is willing to give a dishonest and false promise. Meantime they refuse to categorise themselves as religious organisations, even though they admit only religious members. (NB that Scout and Guide organisations in some other countries admit atheists).
- 4.4 One of the most common reasons that people contact us for advice is because they are or wish to be involved with the Scouts or Guides as a leader and are facing discrimination because of their atheist beliefs or from parents, whose children are unable to participate in their local Scout or guide group because they are atheist and refuse to lie in order to be a member.

²⁰ Third Sector Magazine 'Guiding the Way', 2nd May 2007.

4.5 For the law to assist the Scouts and Guides in this hypocrisy and to sanction discriminatory behaviour (which, be it noted, particularly affects some of the most *conscientious* young people) is wrong and must be excised from the Equality Bill.

We recommend that Clause 186(5), (6)(a) and (6)(b) are removed.