

# THE ‘RELIGION OR BELIEF’ EQUALITY STRAND IN LAW AND POLICY:

## Current Implications for Equalities and Human Rights

### Executive Summary

#### INTRODUCTION

This ‘state of the nation’ report has been commissioned by the British Humanist Association (BHA) to examine the equality and human rights implications of the ‘religion or belief’ equality strand, as it is presently enshrined in law, policy and practice.

The report is part of a wider BHA project – funded by the Equality and Human Rights Commission (EHRC) – which aims to increase understanding of issues of ‘religion or belief’ in the context of equality and human rights. The report was written by brap, a national equality and human rights charity based in Birmingham.

The aims of the report are: to help provide a clear basis for understanding of current issues; to inform the future work and thinking of the BHA and other organisations active in the ‘religion or belief’ strand; and to make recommendations to key stakeholders in relation to the fair and equitable implementation and development of the ‘religion or belief’ equality strand.

#### APPROACH TO RESEARCH

The research that informed the report involved a programme of work conducted in three phases:

##### ***Phase 1: Secondary research***

A desk-based literature review to consider and analyse existing research, reports, policies and other sources relevant to the ‘religion or belief’ equality strand. The literature review focused on the following broad themes: legislation; demography; government policy; education; ‘conflicting rights’; public service delivery; employment.

### ***Phase 2: Primary Research***

A series of telephone interviews with a variety of stakeholder organisations and institutions that have an interest in or are engaged in activities that influence and shape implementation and practice of the 'religion or belief' strand.

### ***Phase 3: Analysis, interpretation and report writing***

The production of the final report.

## **FINDINGS AND RECOMMENDATIONS**

The findings in the report show there is a need to improve our approaches to policy and law on 'religion or belief' if we are to ensure equity for a range of people in the UK (and not just those with particular religions or beliefs, but also other groups that may be affected by religious or belief groups).

A particular challenge will be integrating approaches to equality across equality strands ('gender', 'race' etc) to ensure that the rights of all people are protected in similar ways. Developing a better knowledge of when 'religion or belief' related equality issues 'intersect' with other equality issues and the rights of others will help to achieve this. The report also notes the need for an open and honest debate about the role 'faith' or belief plays in public service reform to inform future policy. And of course, these issues are not easily addressed. The close relationship between religion and politics, particularly in recent years, has led the Government to discuss a number of potentially explosive issues (such as foreign policy, race relations and community cohesion). There is no sign of this trend abating and the recommendations included in the report are written with that in mind.

Findings and Recommendations are organised in relation to the seven key issues explored in secondary research:

### **Legislation**

Legislation considered in the findings section includes:

- Human Rights Act 1998
- Employment Equality (Religion or Belief) Regulations 2003
- Employment Equality (Sexual Orientation) Regulations 2003
- Racial and Religious Hatred Act 2006
- Equality Act 2006

Essentially this body of legislation protects the right of individuals to hold their own religious or non-religious beliefs and includes the right to have no 'religion or belief'. In practice this means that, with defined exceptions, it is unlawful for someone to discriminate against you because of your 'religion or belief', or because you do not have a particular 'religion or belief' in any aspect of employment, when providing goods, facilities and services, when providing education, in using or disposing of premises, or when exercising public functions.<sup>1</sup> It gives individuals the right to practise and manifest their 'religion or belief' and live their

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<sup>1</sup> [Guidance on new measures to outlaw discrimination on grounds of religion or belief \(CLG, 2007\).](#)

lives without experiencing threats or discrimination on the basis of 'religion or belief', including not having a particular 'religion or belief'.

This is an area of much debate and political interest, and a report of this type could not hope to cover detailed recommendations on every specific area of legislation. However, a number of common themes do emerge in the report regarding 'religion or belief' related legislation that will need to be addressed in the future. This report recommends:

- An extended definition of 'public function' in the Human Rights Act to cover private and third sector organisations providing public services.
- The collection of more evidence and data on indirect discrimination in relation to 'religion or belief'.
- Development of a wider range of case studies, drawing on issues faced by those with non-religious beliefs and minority religious beliefs would be useful in improving awareness of legislative requirements.
- That, even though Government has clearly indicated that equality law is applicable to those that have been contracted to deliver public services, there is a need for closer scrutiny and regulation of 'religion or belief' based organisations that have exemptions from equality legislation to ensure that this is not having a discriminatory impact on service users or staff.
- The application of Genuine Occupational Requirements (GORs) in the future should involve robust tests to ensure that discrimination is legitimate and proportionate. Surveys of their use could potentially be conducted periodically by a body like the EHRC to ensure robustness and transparency. An open and inclusive debate about the appropriateness of exemptions under the Religion or Belief Regulations would be a useful long-term contribution to this process.
- Awareness-raising and training on relevant laws.

## Demography

The notion that census data, as currently collected, can accurately reveal the religious attitudes of contemporary Britain is highly problematic. The nature of the question used – 'What is your religion?' – gives an inaccurate picture of the religious or non-religious beliefs of census respondents. And yet the data is repeatedly used to underpin policy making. This makes it much more than simply an 'academic' issue. The direct use of census data to inform government policy has implications for the inclusiveness of policy on the 'religion or belief' strand as a whole. A debate regarding future questions on 'religion or belief' in the census to inform future policy is a pressing need.

To address this, the report offers two broad recommendations:

- ONS should thoroughly review the degree to which the proposed question on religion (for the 2011 census) is unlawful under the Human Rights Act 1998 and the Equality Act 2006, identifying in particular any potential discrimination against those with non-religious beliefs. A more thorough and robust equality impact assessment of this issue would help to achieve this.
- Public authorities should give closer consideration to how census data on this issue is used to make funding or policy decisions. Given some of the drawbacks to current demographic data on 'religion or belief', it will be important to understand the impact of its use by policy makers and funders. At worst, the use of inaccurate data may

lead to: the exclusion of non-religious people from a variety of community initiatives; the disproportionate allocation of resources to those perceived as religious, and exclusion of non-religious people from democratic processes and civic engagement.

## Government Policy

In recent years there has been increasing emphasis on the contribution of religious groups to public policy. For a number of political reasons, which are explored more fully in the report, particular policy themes have received more attention than others and include:

- Greater engagement with 'religion or belief' stakeholders in the formation of public policy;
- The role of religious organisations in delivery of public services;
- The role of religious groups in building civic society, social capital and community cohesion;
- The role of religion and 'inter-faith' activities in preventing violent extremism and radicalisation and in maintaining social order;
- The role of religion in education provision.

The 'religion or belief' equality implications of the following key policies are considered in this report:

- *Working Together: Co-operation between Government and Faith Communities*, (Home Office, 2004)
- *Face to Face, Side by Side: A Framework for Partnership in our multi-faith society*, (CLG, 2008)
- *Our Shared Future*, (Commission on Integration and Cohesion, 2007)
- *Fairness and Freedom: The Final Report of the Equalities Review*, (Equalities Review, 2007)
- *Communities in Control*, (CLG, 2008)

The report's recommendations are arranged in relation to 3 core areas:

### **Practical & Appropriate Engagement Mechanisms**

- The need to develop alternative spaces and/or forums where 'religion or belief' stakeholders can come together. While additional to existing regional and national 'inter-faith' and equalities networks, these smaller groups could be complementary 'sub-sets' of equality networks, with their participants reflecting both religious and non-religious perspectives.
- Identify 'religion or belief' sub-group participants by interview rather than election or self-appointment. In this way, emphasis could be placed on seeking particular skill-sets, expertise and competence rather than religious, cultural or ethnic 'identity'.
- Ensure that any interview processes are accessible (in terms of resources and time) and target a broad range of expertise/skills so those with competence in related areas can still get involved.
- Ensure that the purpose of these sub-groups is widely understood and that there is an emphasis on:
  - Building an evidence base regarding 'religion or belief' discrimination;
  - Sharing skills and experience in a spirit of mutuality and shared endeavour;
  - Creating a space where difficult equalities issues can be discussed and resolved.

- Work with public agencies to:
  - Develop a constituency for and trust in the ‘religion or belief’ sub-groups;
  - And encourage inter-faith networks (in particular) to engage with these alternative forums.

### ***Identifying and Using Evidence***

Working through the proposed ‘religion or belief’ sub-groups and with other statutory and voluntary regional partners, the EHRC and other relevant partners should:

- Commission work and activities that can assist in building the evidence and knowledge base of ‘religion or belief’ discrimination and how it interacts with other issues (e.g. ‘race’, class, ‘gender’).
- Assist in assessing the robustness of regional stakeholders’ input by encouraging generation of fresh evidence and data as a means of developing evidence-driven reasons for policy interventions.
- Assist the proposed ‘religion or belief’ sub-groups (which can in turn work with other local, regional and national partners/stakeholders) to develop a clear rationale and guidance for when ‘religion or belief’ perspectives are legitimate and/or required and when they are not (e.g. in which policy areas, contexts or initiatives).

### ***Developing Capacity, Access and Communication***

There is a clear argument for additional resources and support (training, capacity-building etc) to help build skills at a local and regional level of both religious and non-religious belief groups. Work in this area should include:

- Equal recognition, for funding purposes, of religious minority and non-religious groups – and all other third sector organisations. Approaches to making funding decisions should be open, transparent and based on robust evidence of need. Third sector organisations should be judged on the basis of their expertise and ability to deliver particular services, or to offer advice on particular issues. This will help to address any discrepancies or inequality in access to funding for ‘religion or belief’ groups.
- Ensuring equality of access to information and to local, regional and national decision-making processes.
- Building skills, knowledge and expertise of non-religious and religious individuals to engage with each other in a non-confrontational way on contentious issues. This might include mediation and conflict resolution techniques or customised ‘advocacy’ courses to develop a new cohort of regional advocates on ‘religion or belief’ issues.
- Support for local and regional public agencies, equality networks and ‘inter-faith’ organisations / networks to:
  - Establish safe, neutral environments where contentious issues can be discussed;
  - Support to develop clearer guidance on inclusive engagement and consultation as well as clear rationale for which policy areas require the input of ‘religion or belief’ perspectives.

### **Education**

A range of connected issues are covered in the report. Firstly, the law and practice that shapes approaches to ‘religion or belief’ in education, secondly, religious education and collective worship in schools, and thirdly, publicly funded religious schools (focusing

specifically on cohesion implications, admissions policies and academic achievement). The report identifies examples of inequalities and human rights breaches that result from current approaches to this issue. In recommending solutions to these challenges, the report advocates a rights-based approach to religious education and religious schools that involves putting the pupil at the centre of this debate. Promoting the freedom to choose the nature of one's own engagement with 'religion or belief' will be paramount. As will the longer term challenge of developing a more equitable education service, so that outcomes do not differ so widely according to the type of school one attends – be that a religious school or not.

A 'shortlist' of recommendations is included in the report:

- Inspection and monitoring of equalities and human rights breaches in education should be improved.
- 'Religious Education' should be made part of the National Curriculum. This would open it up to similar levels of evaluation and monitoring.
- More evidence and research is needed to understand levels and breadth of discrimination – including bullying on the basis of 'religion or belief' (including lack of any particular 'religion or belief'). This type of bullying should be more closely monitored.
- Improved guidance for dealing with the 'religion or belief' strand of equalities for schools is needed.
- Publicly funded religious schools should be more accountable to external public authorities in design of admission procedures. Improved evidence and regulation of their compliance with equalities legislation is required.
- Clearer evidence of the value and impact of religious schools is required.
- Compulsory worship in schools should be replaced by broader assemblies for pupils that do not contravene the rights of pupils to freedom of 'religion or belief'.

### **Conflicting Rights**

This section in the report covers the issue of conflicting rights and the competing needs and interests of different groups in society. Of all of the equality strands, it is arguably issues of 'religion or belief' that have received most attention in the media in this area – from the refusal of adoption services to same sex couples on the grounds of religious belief, to the religious and ethnic profiling of potential terrorist suspects. Inconsistencies in approaches to dealing with these conflicts appear in increasingly stark relief when set against the Government's desire to promote human rights for all and a shared notion of Britishness.

The report recognises that approaches to resolving conflicts between groups are informed heavily by a pervasive political context. Particular attention is paid to the influence of multiculturalism, cohesion and new approaches to equality (including the creation of the EHRC and a 'single equality bill').

Conflicting rights' is a broad term. In the context of the report it refers to (a) conflicts that exist between the rights of more than one group as protected in equality laws (e.g. through exemptions in equality law), and (b) conflicts that arise when freedom of 'religion or belief' conflicts with other people's rights to things not covered in equality law (e.g. freedom of expression).

Examples of conflicting rights in relation to ‘religion or belief’ are explored in the report including:

- Blasphemy
- Gay adoption
- Smacking children
- Religious dress
- School admissions

Similarly, the report considers how conflicting rights have been managed when creating exemptions in equality law. This includes a consideration of the principle of ‘proportionality’ as used in law and policy to resolve problems of competing needs and rights.

Recommendations focus mainly on the need to develop better approaches to responding to conflicting rights outside of the courts (e.g. local authorities that are making difficult decisions about funding or policy that involve balancing the needs and rights of different groups of people). The report advocates the use of human rights principles to facilitate discussions about ‘balancing rights’ of different *groups of interest* in society:

- The concept of ‘proportionality’ is not something that should be limited to the courts and could help to shape more proportionate and legitimate decisions in other settings – for example, within local strategic partnership structures, in the development of equality initiatives, and in the funding (and commissioning) of third sector organisations working with specific groups. But a key challenge for public officials will be developing the skills needed to facilitate and mediate debates and decision-making processes that involve competing claims of social groups for influence or resources. Much greater investment would be needed in training and development in this regard.
- Public officials should play a central role in empowering communities and ensuring that a wide range of local people are able to express those things that they find valuable and will help them to flourish in life (those with religious and non-religious beliefs alike). Yet public officials should play an equally important role in supporting communities to recognise the limitations to those freedoms – a notion that may be pushed further up the agenda once we begin to see the full implications of the *Community Empowerment White Paper* implemented. Of course, often this process of resolving conflicting rights is not a straightforward one. It is not necessarily a matter of deciding that one right ‘trumps’ another one, but is instead a matter of identifying particular circumstances when a particular compromise is appropriate, though subject to review. Developing skills amongst public officials to understand this process will be critical.
- There are implications too for the way issues of ‘religion or belief’ are handled in public debate. For example, in local SACREs, local authority representatives could play a role in ensuring the voices of both religious and non-religious stakeholders are heard, that participants maintain levels of respect and dignity for each other, and that decisions are made on the basis of reasoned and proportionate evidence-based arguments that take into account the rights of children.

### **Public Service Delivery**

The Government’s current emphasis on religious organisations is part of broader policy objectives which include third sector public service delivery, the ‘third sector commissioning’ agenda, and the potential for diversification in public service delivery to help bring about

public service reform. In addition, the unique nature of faith-based third sector work to improve the lives of local people has been emphasised by a number of commentators. On the other hand, assumptions about the coherence of the 'faith sector' and its potential contribution to public service delivery have not gone unchallenged.

The indications are that the Government is firmly committed to recognising a 'faith sector' as a distinct partner in delivering public services. Assessing the appropriateness or impact of this policy is difficult to do because of a lack of evidence. It is still extremely difficult to analyse the scope of funding for or service commissioning from 'faithbased' third sector organisations compared to other types of organisation. Robust data about the 'added value' of this 'sub-sector' of the third sector are few and far between. Similarly, there are a number of concerns about the potentially discriminatory nature of service provision by religious organisations, yet there is limited access to robust evidence on the scope and nature of this problem.

Previous analysis of the issue has been informed by a limited evidence base and the report's recommendations focus largely on the need to improve intelligence on this issue, along with an urge to investigate potential discrimination by 'religion or belief' based organisations:

- More evidence is needed about the impact of third sector organisations on public service outcomes generally, and this is particularly true in relation to understanding the impact of religious organisations.
- Available research and evidence does not substantiate that discrimination in public services delivered by faith organisations is the common experience of all users, nor does that research fully explore the views of the providers of those services. The available evidence does, however, highlight a number of examples of discrimination and clearly demonstrates the potential for discrimination. Given that this clearly contravenes the purposes of public service delivery and equalities and human rights legislation, it is an issue that requires further investigation.
- Further research is needed regarding the impact that such discrimination is having on potential service users. Without substantial evidence, the fears that some people have about religious organisations and public service delivery will continue. In addition, clear guidance needs to be produced to ensure that religious organizations are certain of their role and responsibilities and that their legal responsibilities are fully understood.
- Public officials must develop effective approaches to monitoring the compliance of contracted 'religion or belief' based organisations with equality law.
- New approaches to ensuring equity in commissioning practice are being developed in a number of areas of public service delivery. A notable example is in the health sector. These can be used to inform better approaches to commissioning 'religion or belief' based organisations.

## Employment

The number of employment tribunal cases covering discrimination on the grounds of 'religion or belief' has increased year by year since the introduction of legal protections in 2003. Yet when compared with cases in other areas of equality law, a relatively large percentage of claims are not successful: for example 17% of sex discrimination cases were successful at tribunal in 2005-06 compared with 3% of 'religion or belief' cases. While this

may relate to the relative novelty of law on 'religion or belief' discrimination, a number of other concerns have been raised about the application of 'religion or belief' law in the context of employment and these may be affecting the outcomes of tribunals:

Firstly, since the introduction of the Employment Equality (Religion or Belief) Regulations there have been a number of challenges to the definition of 'religion or belief'. Whilst confusion and disagreement on this issue has now been resolved to a large extent, available Government guidance on the issue does not reflect these developments.

Secondly, courts are able to employ a rational balancing of rights because the right to expression of 'religion or belief' is not absolute. It is unsurprising that decisions regarding proportionality are made on a case-by-case basis because of the need to determine whether an organisation has sought to make reasonable adjustments and is pursuing a legitimate aim. Yet the range of judgements and the subjectivity involved in making decisions of this type arguably make it much harder for employment tribunals to apply consistent approaches to testing the proportionality of GORs. The law in practice does not seem to offer clarity for either employees or employers and could therefore result in discrimination being perpetuated.

Thirdly, there are a number of concerns about how the exemptions relating to a GOR are being applied, with fears that many organisations and companies with a religious ethos are overlooking the narrowness of the exemptions.

The report's recommendations focus on the key challenge of developing more consistent approaches to implementing the law at employment tribunal level. It also recommends closer monitoring of the effectiveness and fairness of tribunal decisions in order to gauge the effectiveness of implementing GOR cases in particular:

- Training for tribunal members should help to ensure the consistent and comprehensive application of proportionality principles in making tribunal decisions.
- There should be increased monitoring of tribunals to ensure that the quality of decisions on this issue is high and that GORs are being applied consistently across the country. New and more authoritative advice from Government on how to apply GORs for employers would be particularly helpful, and indeed this has been outlined as important in consultations for the new Single Equality Bill. Consultation with tribunals regarding application of GORs across the country would help to understand specific issues that should be included in such guidance.