

## **BHA BRIEFING 2009: Equality Bill Commons Report Stage**

Briefing from the British Humanist Association:

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

#### **Amendment**

*In schedule 9, page 162, line 32, at end insert—*  
**'4 Paragraph 3 does not apply when A is operating—**  
**(a) on behalf of a public authority, and**  
**(b) under the terms of contract between the organisation and the public authority**

***An amendment to prevent organisations with a religious ethos that are working on behalf of public authorities using the exception under paragraph 3, which allows discrimination in employment.***

This amendment would protect current staff, employees transferred from the public sector and job applicants from discrimination against them on religious grounds by religious organisations working under contract to a public authority to provide a public service on its behalf.

Schedule 9 of the Bill 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 believe:**

- (a) The new definition of exemptions for religious employers is welcome.**
- (b) The exemptions allowing religious discrimination in employment must not be extended to religious organisations working under contract to a public authority to provide a public service on its behalf.**

**(a) New definition:** At present, organisations with an ethos based on religion or belief are given some wider scope to discriminate in their employment practices on grounds of religion or belief than other employers, being allowed to refer to their ethos to justify discrimination. We welcome the new definition of exemptions for religious employers in the Equality Bill which clarifies the present law. **This is not a narrowing of the law<sup>1</sup>.**

Such clarification is badly needed, for employers and employees. At the moment, the law can be interpreted widely and differently by different organisations and so the extent of discrimination by religious employers, including those working under contract with public authorities (see below), is variable. It may cover almost all positions and not only, for example, the Chief Executive<sup>2</sup>. For example, Crossreach, one of the largest social care agencies in Scotland, which is funded almost entirely by public money through

<sup>1</sup> See Government's explanation in 12<sup>th</sup> Sitting of the Commons Equality Bill Committee, 23/06/2009, where the Solicitor General makes clear that the 'proportionality test' has simply been imported from the European Directive in order to make the law more explicit, and that courts have to interpret the legislation now as such anyway.

<sup>2</sup> 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'.

local authorities, places religious requirements on almost all its posts, including care workers and support assistants – even the posts of ‘gardener/handyman’ and ‘housekeeping assistant’ require applicants to be ‘in sympathy with [Crossreach’s] Christian ethos and values’<sup>3</sup>.

In 2008 an employment tribunal found that an employer’s religious ethos was not necessarily determined by the religious beliefs of its staff<sup>4</sup>. The Tribunal ruled comprehensively against the employer, a Christian charity called Prospects, finding that it had substantially exceeded its legal permission to discriminate. Prospects did not appeal. However, this was the first (and so far only) 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.

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.

### **(b) Religious Organisations in Contracts to Provide Public Services**

As the Bill is drafted, the exceptions described above would apply even when a religious organisation was working under contract to a public authority to provide a public service on its behalf.

We see this as totally unacceptable. It could potentially subject a large number of posts currently in the public sector to religious tests. This would:

- (a) provide favourable employment prospects to small numbers of religious believers
- (b) rule out large numbers of posts for those with the ‘wrong’ religion or none
- (c) threaten the employment and/or promotion of staff transferred under a contract from a public sector employer to a religious one.

In its report on its legislative scrutiny of the Equality Bill, the Parliamentary Joint Committee on Human Rights (JCHR) expressed its concerns about the extension of the exception to religious organisations working under contract:

‘We are concerned about the status of employees of organisations delivering public services who find themselves as employees of organisations with a religious ethos who have been contracted to provide the public service. *They have a right not to be subjected to religious discrimination on the basis of the ethos of the contracting organisation if they are otherwise performing their job satisfactorily* (our emphasis). We are concerned that the widespread use of the “religious ethos” exception set out in Schedule 9(3) by organisations based on a particular religion or belief who are contracted to deliver services on behalf of public authorities could result in public functions being discharged by organisations in receipt of public funds who are nevertheless perceived to discriminate on the basis of religion or belief’<sup>5</sup> (para 176).

The Government intends to allow this discrimination. During Commons Committee Stage, Vera Baird QC MP, speaking on behalf of the Government regarding this section, said, ‘*the Government do not want to interfere with the religious ethos of the organisations, even though they deliver public services.*’<sup>6</sup>

This ‘non-interference’ which in effect permits potentially wide discrimination of the sort that the JCHR warns, is already happening. In answer to a Parliamentary Question on 13<sup>th</sup> January 2009, for example, the

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<sup>3</sup> <http://www.crossreach.org.uk/recruitment/vacancies.asp>, accessed 18/05/2009.

<sup>4</sup> Judgment in the Employment Tribunal of Mr Mark Sheridan and Prospects for People with Learning Disabilities, May 2008 – a case involving religious discrimination by a religious employer working under contract with the local authority to provide health and social care services. See in particular, ‘Stage 3 – proportionality’.

<sup>5</sup> Joint Committee on Human Rights (2009) *Legislative Scrutiny: Equality Bill. Twenty-sixth Report of Session 2008-09*. HL Paper 169, HC 736.

<sup>6</sup> 12<sup>th</sup> Sitting of the Commons Equality Bill Committee, 23/06/2009

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 employment<sup>7</sup>.

This policy has been adopted without any examination of or intent to monitor the extent of such religious discrimination in the public service. Ministers from the Cabinet Office, the Home Office and the Department for International Development all stated in response to PQs from Graham Allen MP asking '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'<sup>8</sup>.

The effect of the policy will (as stated) be:

(a) to provide favourable employment prospects to small numbers of religious believers

In a recent case evidence was given to an industrial tribunal<sup>9</sup> that a Christian organisation that had taken over delivery of a service previously provided by a local authority was restricting promotion to employees who shared its narrowly evangelical Christian beliefs

(b) rule out large numbers of posts for those with the 'wrong' religion or none

The Government seeks to transfer major parts of the public service to third sector organisations, of which many may be religious. All these posts will potentially be closed to a large proportion of the population, notably those with no religion or with non-Christian religions, as well as non-practising Christians. This is not only unacceptable discrimination but calculated to impair efficiency by restricting employment to a small subsection of the public. As already in religious schools, there will be difficulty in finding enough well qualified staff to fill senior positions<sup>10</sup>.

(c) threaten the employment and/or promotion of staff transferred under a contract from a public sector employer to a religious one.

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<sup>7</sup> Commons Hansard, 13<sup>th</sup> 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.

<sup>8</sup> Commons Hansard, 12<sup>th</sup> and 13<sup>th</sup> January, Written Answers.

<sup>9</sup> The Employment Tribunal judgment in *Mr Mark Sheridan and Prospects for People with Learning Disabilities*, May 2008. <http://www.humanism.org.uk/news/view/104>

<sup>10</sup> See, for example, *Education Data Surveys (2007) 22nd Annual Survey of Senior Staff Appointments in Schools in England and Wales*. Oxford: Education Data Surveys Ltd

When services are contracted out, public sector jobs will often 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.

If the new provider of the service is a religious organisation, existing staff may be faced with a choice between redundancy and working for an organisation whose ethos they may find oppressive and whose practices – some of which may be discriminatory<sup>11</sup> – they may 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 or at least debarred from any promotion. 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.

These problems will be especially acute if large-scale contracts are placed with religious organisations, where a large proportion of (especially senior) posts will forever be 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 on the list of potential contractors<sup>12</sup>. 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 with equalities legislation and practice<sup>13</sup> and which has campaigned against the Human Rights Act extending to protect its service users. To have such an organisation taking on large contracts could pose real difficulties, as set out above, for transferred staff, potential staff and for service users.

There are further problems. The law is open to different interpretations by different religious organisations with little prospect for years of any adequate basis of case law to reduce the uncertainty. Meantime it will not be clear what constitutes proportionate discrimination in employment with regard to a religious ethos.

Further, we know from contact with various local authorities that many believe that the contracts they use actually forbid religious organisations from discriminating. This is because the contracts<sup>14</sup> will stipulate, for example, that the contracted organisations must behave lawfully and be bound by various equality laws – but local authorities are unaware that religious organisations would still be acting within the law at present if they discriminate in their employment, because they have 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.

It would never be legitimate for a public authority to place a religious requirement on the post of employment advisor in a job centre, or porter in a nursing home, or 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? It does not.

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<sup>11</sup> 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 on grounds of religion, was detrimental to both his physical and mental health.

<sup>12</sup> [http://indusdelta.co.uk/provider/birmingham\\_faith\\_action](http://indusdelta.co.uk/provider/birmingham_faith_action), accessed 18/05/2009

<sup>13</sup> 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.

<sup>14</sup> Which vary from authority to authority

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

**About us**

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.

For more detail and evidence on our position on the below amendments, please contact us:

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