

## BHA BRIEFING 2009/1: Equality Bill 2<sup>nd</sup> Reading

*Commons 2<sup>nd</sup> Reading. 11<sup>th</sup> May 2009. Briefing from the British Humanist Association*

### Introduction

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.

We welcome the Equality Bill, as representing a single charter for equality, which will be better understood by citizens than previous fragmented law and around which a new culture of equality can cohere with the Equality and Human Rights Commission (EHRC) as its watchdog.

However, we have serious objections to some provisions in the Bill. These include the extension of the Public Sector Equality Duty to the 'religion or belief' equality strand and the wide and numerous exceptions from equality law for religious organisations and faith schools. We also support the addition of a 'Purpose Clause' to the Bill: a provision at the start of a Bill which states the goals and underlying principles of the Bill. This would be a useful tool in clarifying the law and particularly helpful in ensuring legislation is not misinterpreted.

Below are our detailed concerns, together with suggested amendments.

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#### A: Clauses

- Harassment: clauses 27, 31, 33, 80
- Public Sector Equality Duty – Advancing equality of opportunity in relation to religion or belief: clause 143
- Positive Action: clause 153
- Charities: clause 186

#### B: Schedules

- Services and Public functions: Exceptions: Schedule 3
- Application of the public sector equality duty: Schedule 19
- Employment: Schedule 9
- Schools: Exceptions: Schedule 11
- Statutory provisions – employment in schools with a religious character: Schedule 22
- Organisations relating to religion or belief: Schedule 23
- Discriminatory advertisements: Schedule 26

## A: Clauses

### Harassment

There are provisions in the Bill prohibiting harassment in employment across all protected characteristics, which we welcome. We also welcome the exclusion of religion or belief from the prohibition on harassment to religion or belief outside the employment context (except for young people in education, see Clause 80 below), but **we believe that a total prohibition of harassment on grounds of sexual orientation is justified.**

**We recommend that '(b) sexual orientation' is removed from the following Clauses:**

**Clause 27 (8)** (provision of services or exercising public functions);

**Clause 31 (6)** (disposal of premises);

**Clause 33 (4)** (management of premises);

**Clause 80** prohibits harassment by the responsible body of a school of a pupil or prospective pupil but does not cover the protected grounds of gender reassignment, sexual orientation or religion or belief. We do not believe there can be any justification for children and young people to be harassed in the context of their schooling on any grounds.

**We recommend that Clause 80(10) is removed.**

### Public Sector Equality Duty – Advancing equality of opportunity in relation to 'religion or belief'

The Bill extends the public sector duty to promote equality to age, religion or belief, sexual orientation and gender reassignment.

**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.

**We believe that a public duty to eliminate unlawful discrimination and to foster good relations should be supported.**

**However, for the reasons given below we recommend that 'limb' B (advancing equality of opportunity) should not apply to religion or belief.**

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 extremely problematic in the context of 'religion or belief'.

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 view or assert themselves in terms of religious or non-religious identity in order to receive differentiated or special treatment, services or assistance.

Such treatment is also 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 people who may or may not self-identify with a belief group – needs which cannot at all safely be assumed, given the wide diversity of beliefs, practice and associated needs in any identity-based group.

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. In fact, the religion question in the Census is explicitly treated by the ONS as a proxy for ethnicity<sup>1</sup>.
- The Government itself recognises that reliable statistics on religion or belief (and on sexual orientation) 'are not available'<sup>2</sup>. Religion or belief can be measured in many ways – in terms of convictions, in terms of practices and in terms of affiliation or identity. Even within these indicators there are widely differing categories. 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.**

There is, besides, a huge difference in the importance individuals assign to their religion

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

<sup>2</sup> *The Equality Bill – Government Response To The Consultation*, 7.25

or belief. For some it is all important, for others it is a minor aspect of their identity<sup>3</sup>. 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.

Requiring public authorities to promote or 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.'<sup>4</sup>

We are further concerned that exceptions provided for 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.**

### **Positive Action**

**Clause 153** allows preferential treatment in recruitment and promotion between equally qualified candidates if one is from an under-represented group. We believe that such preferential treatment, on any protected ground, is antithetical to the aims of equality and would result in practice in unjustifiable direct discrimination against individuals. It would be particularly invidious – and liable positively to create trouble – if applied on grounds of religion or belief. We believe there are other and better ways to addressing inequality than positive action measures that disadvantage individuals.

**We recommend that Clause 153 is removed or that religion or belief is exempted from its provisions**

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

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

## Charities

**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.

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, unless (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). For the law to assist them in this hypocrisy and to sanction discriminatory behaviour (which, be it noted, particularly affects some of the most *conscientious* young people) is wrong.

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

## B: Schedules

### Services and Public functions: Exceptions

**Schedule 3, Paragraph 11**, exempts public authorities or those performing public functions from prohibitions on religion or belief discrimination in relation to schools.

We do not believe that the admission arrangements of schools with a religious ethos should be exempted from the general prohibition.

**We recommend that (b) is removed from Schedule 3, Paragraph 11.**

~~(b) admission to a school which has a religious ethos~~

We do not believe that acts of worship or other religious observance organised by or on behalf of a school (whether or not forming part of the curriculum) should be exempted from the general prohibition.

**We recommend that (c) is removed from Schedule 3, Paragraph 11.**

### Employment

**Schedule 9** defines circumstances in which discrimination on grounds of religion or belief is to be permitted in the field of employment. Broadly, any employer may discriminate where the job requires a person of a particular religion or belief; and organisations with an ethos based on a religion or belief are given wider circumstances to discriminate on those grounds and that would apply even when organisations are working under contract to provide public services.

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 and those with an ethos based on religion or belief. We recommend that any attempt to water down the provisions under Schedule 9 be strongly resisted.

We do not believe that the any organisation working under contract with a public authority should be allowed to discriminate on grounds of religion or belief or on grounds of sexual orientation when working under contract with a public authority to provide a service.

**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.**

## **Schools: Exceptions**

We believe that all maintained schools, including academies, should be inclusive and not be allowed to discriminate in their admissions, or in other ways, against pupils on grounds of religion or belief.

**Schedule 11, Part 2**, relates to religious or belief discrimination in schools. We believe that maintained schools with a religious character (“faith schools”) should not be exempted from prohibitions on such discrimination against pupils in terms of admissions, benefits and services (Section 80).

In **Paragraph 5, Schedule 11**, (a), (c), (d) and (e) exempt schools with a religious character from the provisions of Section 80 (1) and (2)(a) to (d).

**We recommend that (a), (c), (d) and (e) are removed from Paragraph 5, Schedule 11.**

**Paragraph 6, Schedule 11** exempts the responsible body of a school from prohibitions against discrimination relating to religion or belief against pupils in relation to anything done in connection with acts of worship or other religious observance organised by or on behalf of a school (whether or not forming part of the curriculum). We cannot see any reason for this exemption.

**We recommend that Paragraph 6, Schedule 11, is removed.**

## **Application of the public sector equality duty**

**Schedule 19** provides a list of public authorities to which the duty applies. Subsection (2) of clause 143 applies the public sector equality duty to other persons who are not listed under Schedule 19, but who are carrying out public functions, but only with regard to the exercise of those functions. When secondary legislation is brought forward, specific duties will be imposed, but they will only apply to those public authorities that are listed under Schedule 19.

Under Schedule 19, only the governing bodies of maintained schools are listed as public authorities. We see no reason why the governing bodies of academies should not similarly be included under Schedule 19 for the purpose of this Bill.

**We recommend adding the governing bodies of Academies into Schedule 19.**

## **Statutory provisions – employment in schools with a religious character**

**Paragraph 4, Schedule 22** provides that it is not unlawful for schools with a religious character to discriminate in their employment against their staff on grounds of religion or belief in ways as permitted by the Schools Standards and Framework Act 1998 (as amended by Section 37 of the Education and Inspections Act 2006). Schools with a

religious character are allowed to discriminate on grounds of religion or belief against staff and potential staff, with the extent of permitted discrimination dependent on the type of school.

There is, however, no need for specific exemptions for employment in schools with a religious character as those with a religious ethos will in any case be permitted under the Bill (Paragraph 3, Schedule 9) to apply a requirement to be of a particular 'religion or belief' if it is '**an occupational requirement**' and '**a proportionate means of meeting a legitimate aim**'.

We believe this test is sufficient and that the specific power given to faith schools to discriminate can and should be removed, and should simultaneously be repealed in the School Standards and Framework Act 1998.

**We recommend:**

**Remove (a) and (b) of Paragraph 4, Schedule 22.**

**Repeal the associated sections of the School Standards and Framework Act (1998), namely Section 58 (6) and (7), and Section 60 (4) and (5).**

**Organisations relating to religion or belief**

**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.

Religious organisations working under contract with public authorities to provide services etc. are not permitted, however, to discriminate on grounds of sexual orientation. We believe there should also be a prohibition on discrimination in the provision of services on grounds of religion or belief when organisations are working under contract with public authorities to provide services etc.

**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.**

## **Discriminatory advertisements**

**Schedule 26** amends the Equality Act 2006 and the role of the Equality and Human Rights Commission (EHRC) in enforcing the ban on discriminatory advertisements. The Equality Act 2006 provides the EHRC with powers of enforcement only against advertisements which are not related to employment and which are discriminatory on grounds of religion or belief. However it is extremely important that the EHRC does have the power to enforce advertisements which are related to employment and which are discriminatory on grounds of religion or belief.

**We are not clear whether the EHRC is to be endowed with such powers, and this needs to be clarified with the government in debate.**

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