



**Memorandum of evidence to the Localism Bill Committee.  
British Humanist Association, January 2011.**

**1 Localism Bill Committee Call for Evidence**

The British Humanist Association (BHA) is delighted to submit evidence to the Localism Bill Committee's call for written evidence. We are keen to give oral evidence to the Committee. We are happy to provide further detail and evidence on request.

In October 2010 we were pleased also to submit a memorandum to the Communities and Local Government Committee's Inquiry into Localism.

In support of this memorandum to the Localism Bill Committee, we attach at Appendix A our January 2011 response to the Cabinet Office Green Paper *Modernising Commissioning: Increasing the role of charities, social enterprises, mutual and cooperatives in public service delivery*. We believe that this is relevant to the Committee's scrutiny of the Localism Bill. That submission provides more evidence in support of our concerns regarding equalities, liberties and human rights implications of the delivery of public service contracts by religious organisations. It also contains recommendations for commissioners which may be of interest to the Committee.

We believe that, without amendments to suspend the exceptions for religious groups in the Equality Act 2010 during delivery of public service contracts, the Localism Bill will increase greatly the risk and practice of unnecessary and unjustified religious discrimination in local public services.

We urge the Committee to look at possibilities to amend the Localism Bill to ensure equality and protect against religious discrimination, including through the new community 'right to challenge'.

**2 The Localism Bill**

The Localism Bill provides the legislative foundation for the government's plans to decentralise power to local communities, as part of its 'Big Society' agenda. The Localism Bill covers a large number of areas, from community empowerment to homelessness housing.

The government 'is committed to ensuring that charities, social enterprises and cooperatives have a much greater role in the running of public services'<sup>1</sup>, with an aim of awarding '25 per cent of government contracts to SMEs, which will also benefit small and medium civil society organisations'<sup>2</sup>. Particularly under the new provisions for 'community empowerment' and the 'community right to challenge'<sup>3</sup>, the Localism Bill opens up local public services to competition from local bidders including voluntary and community bodies.

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<sup>1</sup> *Building a Stronger Civil Society: A strategy for voluntary and community groups, charities and social enterprises*. Office of Civil Society, 2010

<sup>2</sup> *Modernising Commissioning: Increasing the role of charities, social enterprises, mutual and cooperatives in public service deliver*. Green Paper. Cabinet Office, 2010

<sup>3</sup> Part 4, Chapter 3

### 3 Public services

Effective and adequate public services are essential in a modern society. They can promote wellbeing, combat serious inequality and enable people to be effective as citizens and so ensure greater social cohesion. In brief, public services can enhance social capital. However, if they are not fairly provided and fairly distributed they may instead be the occasion of dissatisfaction and resentment, creating division rather than helping create a healthy and happy community.

The BHA makes no judgment on the desirability or otherwise of a mixed economy policy in the provision of public services. However, the placing of contracts with religious organisations, for example, commissioning public services including ‘free schools’ from faith groups, gives rise to significant issues of principle and to substantial practical problems. Our concern is the freedom granted to religious organisations under present law to discriminate against both employees and service users on grounds of religion or belief.

We believe that, without amendments to suspend the exceptions for religious groups in the Equality Act 2010 during delivery of public service contracts, the Localism Bill will increase greatly the risk and practice of unnecessary and unjustified religious discrimination in local public services.

We urge the Committee to look at possibilities to amend the Bill to ensure equality and protect against religious discrimination, including through the new community ‘right to challenge’.

### 4 Part 4, Chapter 3: Community ‘right to challenge’

The provisions in this section of the Localism Bill create a new right to challenge for contracts to deliver public services on behalf of a public or local authority. In chapter 4, a similar right is created for a community right to buy assets of value.

#### Localism Bill Terminology

A relevant authority must consider an expression of interest by a relevant body, if that request meets basic time and format requirements.

‘Relevant authority’ means: (a) a county council in England, (b) a district council, (c) a London borough council, or (d) such other person or body carrying on functions of a public nature as the Secretary of State may specify by regulations.

*Given d), this definition could extend to private organisations that are performing public functions.*

‘Relevant body’ means: (a) a voluntary or community body, (b) a body of persons or a trust which is established for charitable purposes only, (c) a parish council, (d) in relation to a relevant authority, two or more employees of that authority, or (e) such other person or body as may be specified by the Secretary of State by regulations.

‘Voluntary body’ refers to not-for-profit organisations and ‘community body’ means a body that carries on activities primarily for the benefit of the community.

These definitions are broad – for example, not-for-profit organisations are not necessarily registered charities and (e) allows further extension at the discretion of the Secretary of State to any individual or group.

We can expect further regulations with more details about these provisions which are not already in this Bill.

## **Free schools and ‘right to challenge’**

The government sees this new right to challenge as part of its wider programme to diversify the supply of public services, which also includes its new ‘free schools’ policy<sup>4</sup>. Free schools can be established by anyone approved by the Education Secretary. There are particular concerns with religious free schools: they are largely unregulated and outside local authority control, so that there is little to prevent groups with an extreme or discriminatory religious beliefs and agendas taking over schools and running them at public expense.

Similar concern must arise over religious groups using the new ‘community right to challenge’: will there be any requirement that they are fully committed to equality and diversity, that they will not use the service as a vehicle through which to promote their own religious perspective or practice?

There are no current legislative or policy measures to prevent groups with extreme agendas from making expressions of interest, nor to assist relevant authorities in identifying such groups or excluding them.

We recommend that the Committee takes this into consideration during its scrutiny of the Localism Bill.

## **5 Public services and equality law**

The Equality Act 2010 contains significant contentious exceptions that exempt religious organisations from parts of the law, permitting potentially wide discrimination by those organisations against their employees and against service users.

### **Discrimination in employment**

In employment, the Equality Act 2010 fails adequately to protect the rights of employees working for religious organisations, even organisations working under public contract. Religious organisations are granted an exception under Schedule 9 of the Equality Act 2010 to allow them to discriminate widely in employment on religious grounds, even against workers transferred from the public authority. TUPE protections (see below) may not apply in a number of circumstances, including if a contracted religious organisation chooses to place a religious requirement on a previously secular position<sup>5</sup>.

Without amendments to prevent discrimination by religious groups, through the new community ‘right to challenge’, the Localism Bill could potentially permit subjecting large number of posts currently in the public sector to religious tests. The effects of this could include: providing favourable employment prospects (in promotion, training etc) to small numbers of religious believers; ruling out large numbers of posts for those with the ‘wrong’ religion or none (by putting religious requirements on those directly providing services, from welfare advisers to care staff); threatening the employment and/or promotion of staff transferred under a contract from a public sector employer to a religious one (see ‘TUPE’ below).

Our concerns are widely shared, including by trade unions, progressive religious groups and by the former Parliamentary Joint Committee on Human Rights (JCHR) which scrutinised the Equality Bill as it made its passage through parliament in 2009-210.

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<sup>4</sup> ‘Decentralisation and Localism Bill: an essential guide’

<sup>5</sup> For more details on TUPE and contracting with religious organisations, please see the BHA’s response to *Modernising Commissioning* <http://www.humanism.org.uk/documents/4789>

When religious organisations take on public service contracts, such as expected under the Localism Bill's community 'right to challenge', this means that the number of jobs that are restricted to religious people is potentially very high. 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. 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.

## TUPE

During the passage of the Equality Act 2010, Lord Warner of Brockley raised a number of concerns about the rights of workers transferred to a new, religious employer. The previous government's detailed, written response<sup>6</sup> suggests that the law is not intended to be read widely and so discrimination against transferred workers should not be commonplace. However, there is little to prevent discrimination by religious organisations working under contract that place religious occupational requirements on positions and work outside of the TUPE Regulations in some circumstances. Without legislative change or strict contractual stipulations, the main recourse to justice for transferred workers who face religious discrimination by a new religious employer working under contract is through expensive, retrospective and individual court action because the area of law is not well defined or tested through case law.

Our concerns are as follows.

- i. When working under contract with, or on behalf of, a public authority, organisations with a religious ethos are permitted in some circumstances to put a religious occupational requirement on a previously secular position. Moreover, they can require that employees have to have 'respect for the faith in question'<sup>7</sup> in taking up what would previously have been a secular position if not provided by religious contractor. The TUPE Regulations do not protect workers against these actions which, at best, constitute an infringement of the right to freedom of belief for transferred workers
- ii. TUPE Regulations have a limited range of protection in employment, dealing with dismissal or loss of job as result of transfer. Public sector workers transferred from a public authority to a contracted religious organisation remain at risk of being made redundant or of dismissal if their new posts have religious requirements attached to them, as the TUPE protections would not apply if the duties of the employee had changed for an organisational reason<sup>8</sup>.

For example, a religious employer could try to defend such action by making the case that it was vital for the organisation that all care workers sign a statement of faith and pray with patients and so dismiss any transferred staff who didn't fit. This would be different to dismissing someone directly on grounds of their religion, which would likely be unlawful.

- iii. The exception in the Equality Act allows religious employers, even when working under public contract, to impose a requirement that the person be of a particular religion or belief in relation to access to training and other benefits. In these circumstances, transferred workers are not protected by the TUPE Regulations and may find their opportunities at work restricted because of their lack of required beliefs.

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<sup>6</sup> Response from Baroness Thornton on behalf of the Labour government, available in House of Lords library, February 2010.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

- iv. TUPE protections would similarly not apply if employees had to reapply for their position with a new, religious employer and found that their lack of required beliefs rendered them ineligible for the very post they have previously held, if the religious employer made the case that the changes in the role were for organisational reasons and also had placed an occupational requirement on the role – another barrier to employment for people of no religion or of the wrong religion.

Public sector workers who are transferred to a contracted religious organisation from a public authority are at risk of having their career prospects restricted when more senior positions have religious requirements attached to them. In its response to a question on this subject<sup>9</sup>, the previous government said that, in practice, a religion or belief occupational requirement applies only in a small number of cases. However, there is not much evidence for this. The fact is, we do not know how many positions religious occupational requirements are applied to because there is pretty much no monitoring or recording of it, including for religious organisations that are working under public contract.

There is no set definition of what constitutes an organisation with a religious ethos but the term is broad and encompasses a wide range of organisations. Organisations with a religious ethos are not solely churches or mosques for example, but the term refers to a whole range of organisations with different functions, such as charities and service providers. This means that the exceptions in law to allow discrimination in employment by organisations with a religious ethos can potentially apply to a wide range of positions, including to frontline staff such as care workers and employment advisers.

In 2008 an employment tribunal found that an employer's religious ethos was not necessarily determined by the religious beliefs of its staff<sup>10</sup>. Although the Tribunal ruled comprehensively against the employer, a Christian charity called Prospects, 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.

When religious organisations take on public service contracts, this means that the number of jobs that are restricted to religious people is potentially very high.

For public services to be truly inclusive, accessible and representative, we do not believe that organisations which place religious occupational requirements on positions involved in service delivery or which seek to restrict the career prospects of transferred workers if they do not profess the 'right' religion should not be considered for the public service contract.

We believe that the surest way to prevent against such unjustified and unnecessary discrimination is to amend the Localism Bill to suspend the exceptions in the Equality Act 2010 permitting discrimination by religious groups when working under contract to provide public services.

### **Discrimination in service provision**

Service users are also put at risk of religious discrimination if the public service they are accessing, such as a local healthcare service, has been contracted out to a religious provider.

Religious organisations are granted an exception under Schedule 23 in the Equality Act 2010 to allow them to discriminate in the provision of services on religious grounds, even when working under contract to provide public services, which they are not permitted to do on other grounds including sexual orientation.

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<sup>9</sup> Ibid.

<sup>10</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'. See notes here for judgment <http://www.humanism.org.uk/news/view/104>

We are not objecting to the valid discrimination when commissioning services for particular groups, such as gay men's sexual health outreach work, or providing women-only refuges, which are covered by other, generic exceptions in the Equality Act 2010. Our concern is to prevent unnecessary and unjustified discrimination against service users by religious groups working under contract through having the specific exceptions suspended.

Unless the Localism Bill is amended to override the specific exception under Schedule 23 in the Equality Act 2010, service users face real risks of discrimination, against which they will have little or no remedy. When public authorities contract out provision of services, and certainly as envisioned under the new community right to challenge, 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 on the basis of their religion or belief, either through having the 'wrong' religion or none. Moreover, many service users are vulnerable or are even 'captive' audience such as in some social care services and cannot easily find another provider, and they deserve to be protected from discrimination.

There can be no rationale for this. 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. If religious organisations choose to enter a contract to provide such services they should make them available and accessible to all. Contractual provisions to debar religious discrimination are not a suitable substitute for legislative restriction on discrimination: they would lack consistency across providers and, in any case, would provide no direct redress for service users since they would not be parties to the contract.

Unless the Localism Bill is amended to suspend the Equality Act 2010 exception, there is also a risk that religious groups which have won their bid to run public services under the community 'right to challenge' might restrict the service they provided in compliance with religious doctrine. There are many examples of this kind of practice abroad: for example, hospitals run by Catholics do not provide family planning or abortion services; or religious residential homes do not allow gay couples to have private time together.

## **Evidence**

There is an urgent need for legislative reform to make such discrimination the provision of public services unlawful. It is not known how many religious organisations are already working under public contract to provide services. Local authorities and government departments do not even know, ask or record if bodies they are contracting with are religious.

In 2010, the BHA made a Freedom of Information request to over 300 local authorities asking them about their contractual relationships with religious organisations. Of those that replied, 81% did not know if any of the organisations with which they had contracts to run services were religious. They therefore had no way of monitoring to see if such organisations were using – let alone using legitimately – their legal exemptions in delivering services on behalf of and at the expense of the council. Only 3% of the local authorities which answered our request said that their contracts with external organisations running services on their behalf explicitly disallowed any discrimination in delivery and employment above that of legal duties.<sup>11</sup>

This indicates that there may be many authorities that are contracting with religious organisations, or could be in the future, but have no way of monitoring or knowing if they are using their legal exemptions to discriminate.

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<sup>11</sup> Contact BHA for more details

In the context of the government's commitment to increasing the role of voluntary and community sector and civil society in the provision of public services, including a focus on handing the provision of public services to religious organisations, it is more urgent than ever before to ensure that staff and service users are treated equally regardless of religion or belief.

Under *Clause 68, 'Consideration of expression of interest'*, the relevant authority must consider 'social, economic or environmental well-being of the authority's area'. However, this is vague as set out in the Bill, which states that grounds for rejection are specified by the Secretary of State through regulations which are not yet published.

If the Bill is not amended to prevent religious groups discriminating in the provision of public services, we believe that relevant authorities will have difficulties in meeting their duties under *Clause 68*. Religious discrimination in public services, whether in employment, against service users, or by preferring religious groups over secular groups, will be damaging socially and economically to local areas. For example, if there is a religious test for receiving a service (something permitted under the Equality Act 2010), then the service will not be inclusive nor accessible to all people in the area. Similarly, if a group will only hire staff of their own religious denomination, only a minority of people in the area would ever be able to apply for a job, severely restricting economic opportunities and potentially leading to the appointment of less qualified staff, as has happened already in cases of which we know.

Amendments to the Localism Bill to overrule the exceptions in the Equality Act 2010 when religious organisations providing public services under contract are necessary in order to prevent unnecessary and unjustified discrimination occurring.

They are also necessary to reduce the burden and bureaucracy on 'relevant authorities' as defined in the Bill, who will not then have to invoke costly monitoring to find out if a 'relevant body' discriminates on religious grounds.

Such amendments would also help relevant authorities meet their duties under Clause 68, as they would not have to take into consideration the impact of religious discrimination on the social, economic or environmental well-being of their area.

We recommend that the Committee take these suggested amendments to the Localism Bill into account in its scrutiny of the Bill.

## **7 Single equality duty**

The Equality Act 2010 contains a single public sector equality duty across the protected characteristics, as defined by the Act. The duty is set to come into force in England and Scotland in April 2011 and in spring/summer in Wales.

Provisions in the Equality Act 2010 under Schedule 23 allow religious organisations to discriminate widely on religious grounds in service provision, even when working under contract, which we strongly oppose. This together with a requirement on public authorities to advance equality of opportunity through meeting the needs of persons who share a religion or belief, risks a balkanisation of public services. In order to meet their new duties, relevant authorities may feel under pressure to contract with religious groups in preference to inclusive secular groups if they exercise their new 'right to bid', in a mistaken attempt to meet the 'needs' of faith groups<sup>12</sup>.

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<sup>12</sup> The Joint Committee on Human Rights warned of this misinterpretation of the duty combined with the exception. See BHA Briefing on public sector duty for Equality Bill, Lords Committee Stage, for more details <http://www.humanism.org.uk/documents/4583>.

In its report on its legislative scrutiny of the Equality Bill, the former JCHR expressed its concerns that the duty to meet needs could lead to the undesirable situation of parallel, separate services for different religious groups:

‘However, we remain concerned that the duty may be understood by public authorities as requiring separate provision to be made for the “needs” of faith communities, even in the absence of a pressing justification for such separate provision. The absence of a purpose clause means that the main thrust of the Bill taken as a whole and of the positive duty in particular may be misunderstood or misinterpreted. We recommend that Clause 145 be amended to clarify the nature of a public authority’s obligations under the duty with regards to religion or belief (our emphasis). Clear guidance from the EHRC should also emphasise that public authorities may be required under the duty to give due regard to ensuring that individuals from different faith communities have equal access to common public services, but not to provide separate services for each different faith group’<sup>13</sup> (para 269).

It may be claimed that needs arising in particular communities can be better addressed by religious organisations that it claims represent ‘their’ communities than by public bodies (there is no evidence to support this claim, however). But if one religion is so favoured, others may demand the same special treatment – especially when the new equality duty takes force. For most 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, who would be expected to rely on separate services.

Moreover, once there is a service which is religiously selective, then that automatically creates a pressure on local authorities to allow all religious groups their own services.

The creation of parallel religious and secular services is surely antithetical to the government’s aims of modernising and making more efficient, representative and responsive public services.

We believe that the existence of these exemptions from equality law, and many religious organisations’ desire to use them, even when working under contract, will make it difficult for public bodies to work to the highest equalities standards however much they wish to do so.

We recommend to the Committee that the Localism Bill is amended to ensure that these exceptions for religious organisations do not apply when religious organisations are working under contract to provide public services.

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<sup>13</sup> Joint Committee on Human Rights (2009) Legislative Scrutiny: Equality Bill. Twenty-sixth Report of Session 2008-09. HL Paper 169, HC 736.

## **About the BHA**

The British Humanist Association (BHA) is the national charity representing the interests of the large and growing population of ethically concerned non-religious people living in the UK. It exists to support and represent people who seek to live good and responsible lives without religious or superstitious beliefs.

The BHA is deeply committed to human rights, equality, democracy, and an end to irrelevant discrimination, and has a long history of active engagement in work for an open and inclusive society. In such a society, people of all beliefs would have equal treatment before the law, and the rights of those with all beliefs to hold and live by them would be reasonably accommodated within a legal framework setting minimum common legal standards.

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 also work closely with others on wider equalities issues in a range of forums.

For more details, information and evidence, contact the British Humanist Association:

**Naomi Phillips**  
**Head of Public Affairs**  
**07540 257101**  
**020 7079 3585**  
**naomi@humanism.org.uk**  
**[www.humanism.org.uk](http://www.humanism.org.uk)**

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