The British Humanist Association

Comments on the Draft
Employment Equality (Religion or Belief) Regulations 2003

Summary

1. The British Humanist Association welcomes the introduction of Regulations on Religion or Belief Discrimination. These comments on the draft Regulations outline our concerns in specific areas:

   (a) the proposal to define ‘religion or belief’, and the narrowness of the definition provided;

   (b) the impact of the regulations relating to harassment on the right to freedom of speech,

   (c) and the provision that allows employers with an ethos based on religion or belief to discriminate where there is no genuine and determining occupational requirement.

2. Our key recommendations are summarised at the end of this document (paragraph 43).

The British Humanist Association

3. The British Humanist Association (BHA) is the principal organisation representing the interests of the large and growing population of ethically concerned but 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. It is committed to human rights and democracy, and has a long history of active engagement in work for an open and inclusive society.

4. The BHA’s policies are informed by its members, who include eminent authorities in many fields, and by other specialists and experts who share humanist values and concerns. These include a Humanist Philosophers’ Group, a body composed of academic philosophers whose purpose is to promote a critical, rational and humanist approach to public and ethical issues.

5. The BHA is deeply committed to the concept of the ‘Open Society’ - a community in which respect for individual freedoms including those of belief and speech sits alongside recognition of the importance of cooperation, shared values and endeavours, and in which the government and official bodies maintain a disinterested impartiality towards the many groups within society so long as they conform to the minimum conventions of the society. While, therefore, we seek to promote the Humanist lifestance as an alternative to (among others) religious beliefs, we do not seek any privilege in so doing, but rely on the persuasiveness of our arguments and the attractiveness of our position. Correspondingly, while we recognise and respect the deep commitment of other people to religious and other non-Humanist views, we reject
any claims they may make to privileged positions by virtue of their beliefs.

6. We are at the present time much exercised by a growing deference on the part of the Government and society at large towards sectarian claims for such privileged positions and separate provision of services. This is manifest most obviously in the favour shown towards religious schools and the Government’s encouragement of faith groups in the provision of public services (both commented on below). We see in this trend a serious threat to shared community values and ultimately the cohesion of society. The relevance of these principles to the present consultation is manifest.

**Consultation on ‘The Way Ahead’**

7. We note with some concern that the response form for the ‘The Way Ahead’ consultation does not cover the specific issues in relation to discrimination on the grounds of religion or belief on which the BHA would wish to comment, and have therefore chosen to make our comments in a written submission. We trust that this will not prevent our views from being considered as part of this consultation exercise.

**General Comments**

8. The BHA welcomes the introduction of Regulations on Religion or Belief Discrimination, and is pleased to note that some of the concerns we expressed in our response to the ‘Towards Equality and Diversity’ consultation have been addressed in the Draft Regulations.

9. However, we regret that the government has chosen to restrict these Regulations, and indeed the associated Regulations on discrimination on grounds of sexual orientation, to the fields of employment and vocational training. We believe that the requirement to legislate to implement the EU Framework Directive provided an excellent opportunity to introduce consistent equality legislation covering all the discrimination grounds already covered in UK law and the new grounds of sexual orientation, religion and age. We fail to understand the Government’s unwillingness to tackle discrimination in such areas as the provision of services, where there is also evidence of unfair and unjustifiable discrimination, and would urge the Government to bring in consistent legislation at the very earliest opportunity.

10. The BHA believes that the different legal requirements for the various grounds for discrimination will inevitably result in misunderstanding and confusion, particularly where individuals are discriminated against on a number of possible grounds, and will complicate the work of the courts and the proposed single equality commission. The differing requirements also create a ‘hierarchy of discrimination’ and send out a message that discrimination on the ‘new’ grounds of religion and belief, sexuality and age somehow matters less than discrimination on the grounds of race, gender or disability.

11. Our detailed comments on the draft Employment Equality (Religion or Belief) Regulations 2003 concentrate on three matters: the proposal to define ‘religion or belief’, the question of harassment, and the provisions concerning ‘genuine occupational requirements’.
Definition of ‘Religion or Belief’

12. Regulation 2(1) defines ‘religion or belief’ as ‘any religion, religious belief, or similar philosophical belief’.

13. The European Convention on Human Rights (and hence the Human Rights Act) uphold the individual’s right to ‘freedom of thought, conscience and religion . . . includ[ing] freedom to change his religion or belief . . . ’ (Article 9) and debar discrimination by public authorities on grounds of ‘religion, political or other opinion’. ‘Religion or belief’ is left undefined and therefore unrestricted save by the courts. EU Council Directive 2000/78/EC, which these draft Regulations seek to implement, likewise leaves the phrase undefined.

14. Case law has given it a wide definition:

‘As enshrined in Article 9, freedom of thought conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, sceptics and the unconcerned.’ - Kokkinakis v Greece (1994) 17 EHRR 397, para 31.

‘The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.’ - Manoussakis v Greece: (1996), EHRR 387, para 47.

Thus, Humanism has been recognised as a ‘religion or belief’ in terms of Article 9.1

15. Article 9 has been followed and developed in the later provisions dealing with belief discrimination, notably Article 182 of the International Covenant on Civil and Political Rights in 1966. This, ratified by the UK in 1976, provides that ‘Everyone shall have the right to freedom of thought, conscience and religion’.

16. In 1993 the UN Human Rights Committee in commenting on Article 18 ruled that:

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1 re Crawley Green Road Cemetery, Luton - St Alban's Consistory Court, December 2000.

2 This reads:

1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice or teaching.

2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3) Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4) The States parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.'
Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The term ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.3

17. It is in the light of these provisions that the proposal to introduce a definition of ‘religion or belief’ must be seen. The risk is that any definition may limit the interpretation of ‘religion or belief’ by excluding beliefs that would be included if the courts were left to interpret the Directive against the background of the Convention and other relevant provisions.

18. The proposed definition is arguably exclusive in this way. Atheistic, naturalistic beliefs are precisely not ‘similar to a religious belief’: the nature of a religious belief is a belief held by faith, for example as a result of revelation or reliance on a sacred text. Atheism is more similar (if anything) to a scientific belief than to a religious one, being often the result of an inability to reconcile religious belief with a rational outlook.

19. It is not only the notion of similarity to religious belief that creates difficulty: ‘philosophical belief’ is also potentially troublesome. ‘Philosophy’ is a word open to very broad views - in Campbell & Cosans, about a parent’s rejection of corporal punishment, brought under Article 2 of Protocol 1 of the Convention, which refers to ‘the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions’, the Court took ‘philosophical’ to include rejection of corporal punishment - clearly a very wide definition and probably wider than the Directive intends. Admittedly there the context for ‘philosophical’ is different: the preceding reference to religion there is not such as to limit the interpretation of ‘philosophy’; whereas in the draft Regulations ‘philosophy’ has to be ‘similar’ to religious belief, which clearly limits its scope in the manner to which we have already raised objection.

20. Our concern about the narrowness of the definition is aggravated by the Explanatory Notes, which say:

3 They continued, in part:
5) . . . Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief. . . . Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature.
6) The Committee is of the view that article 18.4 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18.4, is related to the guarantees of the freedom to teach a religion or belief stated in article 18.1. The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians. - UN Human Rights Committee: General Comment 22: The right to freedom of thought, conscience and religion (Article 18) (Forty-eighth session 1993).


‘religion or belief’ is defined as being any religion, religious belief or similar philosophical belief. This does not include any philosophical or political belief unless that belief is similar to a religious belief. The courts and tribunals may consider a number of factors when deciding what is a ‘religion or belief’ (e.g. collective worship, clear belief system, profound belief affecting way of life or view of the world).

21. We accept that the Government probably intends to cover non-theistic attitudes: the phrase ‘similar philosophical belief’ and the wording of the Explanatory Notes: ‘profound belief affecting way of life or view of the world’ seem to point towards a functional definition: a belief which has the same function in an individual’s life as a religion, in providing a view of ‘ultimate reality’ and/or a basis for morality - a ‘lifestance’. If that word ‘lifestance’ (or ‘worldview’ - Weltanshauung) were better established, it would serve well in the Regulations.

22. However, we do not believe that these words will adequately secure this supposed intent⁴:

(a) the courts have consistently taken a narrow view of the nature of a religion⁵ and will be likely to see the definition and notes as an invitation to take a narrow view of the meaning of ‘religion or belief’ in this context also;

(b) the phrase quoted does not cover ‘the unconcerned’ (as referred to in Kokkinakis v Greece (1994) 17 EHRR 397 - quoted above), whose right not to be discriminated against on grounds of their lack of commitment to any religious or similar belief is therefore unprotected. The conscious adoption of a lifestance is not a pre-requisite to being moral or serious or reliable - many people just live their lives without philosophising about them until challenged. They may be thought to have a lifestance implied by their behaviour. This problem would be mitigated if the Regulations were drafted in terms of ‘religion or belief, whether professed or not’.

(c) The draft makes no reference to the ‘lack of religious belief’ (such as is included in the definition of a ‘religious group’ in relation to religiously

⁴ Even in ‘The Way Ahead’ (para. 123) the Government proposes written guidance on ‘What is a religion?’ - not ‘What is a religion or belief?’ - and later refers to ‘information about particular faiths’, where ‘faiths’ is a word unlikely to refer to non-religious beliefs.

⁵ Lord Denning in considering what was a ‘place of meeting for religious worship’ saw the essence of a religion as reverence to God: ‘It need not be the God which the Christians worship. It may be another God, or an unknown God, but it must be reverence to a deity.’ - though he added: ‘There may be exceptions. For instance, Buddhist temples are properly described as places of meeting for religious worship…’ [R v Registrar General ex p Segerdal [1970] 3 AER 886 at 889]. Similarly in 1980 Dillon J defined religion as ‘concerned with man’s relations with God and ethics are concerned with man’s relations with man’ [Re South Place Ethical Society: Barralet v Attorney General [1980] 3AER 924]. Similarly in 1999, Lord Ahmed, introducing a debate on religious discrimination, suggested the following definition for religion: ‘that system of beliefs and activities centred round the worship of God which is derived in whole or in part from a book revealed by God to one of his messengers’ [Hansard, HL, 28.10.99, column 457]
aggravated offences\(^6\) and in the current draft of legislation on incitement to religious hatred\(^7\), so that discrimination on grounds of the absence of belief or of any particular belief remains arguably a legitimate ground for discrimination.

23. In a paper to a conference organised by Justice in July 2001, Robin Allen QC and Gay Moon wrote:

‘Whatever legislation the Government introduces to give effect to the framework directive it will have to be certified as compliant with Article 9. It follows that, likewise, it would be unwise for this legislation to define precisely what constitutes a religion or belief. This will have to be worked out on a case-by-case basis applying the jurisprudence to which we have referred. The domestic Courts and tribunals will always be able to refer a difficult case to the European Court of Justice and an unsatisfied party is likely to be able to seek a final review from the European Court of Human Rights.’\(^8\)

24. The Government’s wish seems to be that protection from discrimination shall not extend to political beliefs (see Towards Equality & Diversity, para 13.5). We remarked in our comments on that consultation paper that the Fair Employment (Northern Ireland) Acts embrace political opinion as well as religious belief. We accept that it is arguable how far the Human Rights Act (and hence indirectly the EU Directive) extend to political beliefs: there seems some ground for arguing that political philosophies may be covered, and if they are, then of course public bodies are bound not to discriminate on such grounds under the Human Rights Act itself. However, if the Government is unwilling to leave the matter to the courts, the simple solution in the present draft Regulations is surely to add a rider to ‘religion or belief’ to the effect that it does not include political opinions or beliefs.

**Harassment**

25. Article 2.3 of the EU directive reads:

‘Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.’


\(^7\) Namely, the Religious Offences Bill currently under consideration by the House of Lords Religious Offences Select Committee, which follows the Government’s draft legislation dropped from the Anti-Terrorism, Crime and Security Bill in the Lords.

\(^8\) ‘Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and their Implications’ - Gay Moon and Robin Allen QC, paper to Justice conference, 9/7/01
26. Regulation 5 follows this wording closely. The Explanatory Notes say:

‘Regulation 5 defines harassment for the purposes of the Regulations as an unlawful act distinct from direct and indirect discrimination. Harassment is defined in broad terms using the wording of the Directive. It takes place if A’s conduct is intended either to violate B’s dignity or to create an offensive environment for him. Harassment also takes place if, taking into account all the circumstances, A’s conduct ‘should reasonably be considered’ as having violated B’s dignity or created such an environment for him. This reflects the judgment of the Employment Appeal Tribunal in the case of Driskel v Peninsula Business Services Ltd [2000] IRLR 151 (which concerned the approach to be followed by tribunals when considering whether alleged harassment amounted to sex discrimination)\(^9\). Therefore, an over-sensitive complainant who takes offence unreasonably at a perfectly innocent comment would probably not be considered as having been harassed.

27. This regulation might have the effect of protecting non-believers in a heavily Christian workplace where there was pressure to take part in prayers, for example - one or two US-based companies seem to have such practices. However, it is also likely to act as an inhibition on ordinary discussion of religious matters. Discussion of the (lack of) merits of the protests against Salman Rushdie’s Satanic Verses, or of the oppressive behaviour of Saudi Arabia towards non-Muslims (e.g., the apparently rigged accusations of planting bombs brought against some British expatriates), or of the recent riots in India when Hindus and Muslims slaughtered each other, or of the highly restrictive life imposed on their children by some religious communities (e.g., Hasidic Jews, Jehovah’s Witnesses etc), or of the extraordinary science fiction origins of Scientology - the list could be extended endlessly - would all seem to be legitimate and ordinary topics of conversation (and would certainly not be considered exceptional on talk radio), but would be potentially actionable in a workplace where a roomful of people on a coffee break might include an oversensitive - or publicity-seeking - member of the religion concerned.

28. We would agree that no-one should be forced to work in an environment of intimidation, or where their dignity is violated, and where such discussion is undertaken with the deliberate intent of violating someone’s dignity or creating an intimidating or offensive atmosphere for them, we would agree that the proposed regulation is acceptable. But where that is not the intent, it is left to the courts to decide whether the conversations concerned ‘should reasonably be considered’ to have infringed the law, and the Government clearly envisages that ‘perfectly innocent comment’ may in some

\(^9\) Driskel v Peninsula Business Services & others (2000, IRLR 151, EAT): Ms Driskell, an advice line consultant, alleged that her departmental manager who had a history of making sexually explicit comments and banter, advised her to wear a short skirt and a see-through blouse when arranging to interview her for a more senior post. Her complaints about him to the company were investigated but rejected. When the company did not move him elsewhere, she refused to work and was consequently dismissed. The Employment Appeal Tribunal ruled that when there is a series of alleged incidents, a tribunal should not consider the discriminatory affect of each incident in isolation but should delay making a judgement until it has considered all the relevant facts. In addition, when deciding whether sexual banter does amount to sex discrimination, the sex of the parties involved should be taken into account as sexual comments by a male manager may be more intimidating when directed towards a woman than towards a man. Ms Driskell's appeal was successful - http://www.eoc.org.uk/cseng/advice/sexual_harassment_cases.asp
cases be ruled unlawful.

29. This is a totally unacceptable proposal. As drafted, and without clear guidance, the Regulations would severely inhibit the right to freedom of speech even if no cases were ever brought, both by inducing unnecessary caution on the part of employees and by encouraging informal complaints by believers and warnings by employers about conduct that might never be condemned by the courts.

30. The solution lies in the wording of the EU Directive itself. The quotation cited above from Article 2.3 of the Directive is immediately followed by the words:

‘In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.’

We would consider it essential that the Regulations include guidance to the courts to the effect that in any case of harassment based on the effect rather than the purpose of the ‘unwanted conduct’, where the rights of a complainant under these regulations and the rights of the alleged offenders under Article 10 (Freedom of Expression) of Schedule 1 of the Human Rights Act are in conflict, greater weight should normally be given to the right to freedom of expression. Without such a proviso, the courts are likely to behave in exactly the opposite way, relying on the more specific provisions of these Regulations.

**Genuine Occupational Requirement**

31. Discrimination by an employer on grounds of religion or belief will be lawful under Regulation 7(2) where holding a particular religion or belief is a ‘genuine and determining occupational requirement’ for the post in question. This is a necessary and justified provision: the BHA itself would apply it in appointing its Director and some policy or campaigns staff.

32. However, Regulation 7(3), which applies ‘where an employer has an ethos based on religion or belief’, goes much further. Such employers are to be permitted to discriminate, ‘having regard to that ethos and to the nature of the employment or the context in which it is carried out’, even where holding that religion or belief is not a determining occupational requirement but merely ‘genuine’ and ‘it is proportionate to apply that requirement in the particular case’.

33. The Explanatory Notes say optimistically that this exemption is ‘slightly broader’ than the general one and point out that it follows the wording of the Directive - which was amended at a late stage as a result of heavy lobbying by religious, mainly evangelical, organisations. The Regulations do not, however, follow the Directive in restricting the concession to arrangements covered by ‘national legislation in force at the date of [its] adoption’ or ‘national practices existing’ at that date, provisions which we suggest should be added to the draft.\(^\text{10}\)

\(^{10}\) Article 4(2) reads: Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's
34. Moreover, the provisions of the Directive in relation to concessions for organisations with an ethos based on religion or belief are permissive, not mandatory. It is open to the Government to limit the concessions (or even to refuse to implement them at all). In our view there is a strong case for at least limiting their application in the interest of minimising the growth of a sectarian, confessional approach to public life and services (see paragraphs 3-4 above).

35. Under the draft Regulations, the conditions for an employing organisation being permitted to restrict employment to those of a given religion or belief are:

(a) that it has an ethos based on religion or belief - this will be obvious in the case of churches etc., but may also be claimed by (for example) charitable organisations, such as church-based welfare organisations, or even commercial companies such as those owned by some American religious sects, or the evangelical religious broadcasting organisations which the Government is licensing in increasing numbers, or – a realistic, but hypothetical example – the Stagecoach group of companies, whose chief executive is the strongly evangelising Brian Souter.

(b) that having the particular religion or belief is a genuine occupational requirement for the post. The word ‘genuine’ seems to lack any meaning in the context - as is indicated by the fact that the additional, equally meaningless words ‘legitimate and justified’ found in the Directive have been dropped from the draft Regulations.

(c) that it is proportionate to apply the requirement in the particular case – a provision that we welcome as a valuable addition to the Directive.

36. In relation to (a), we suggest that there is no case for applying this concession wholesale to any commercial organisation, whatever its ownership. As a minimum, we suggest that there should be guidance indicating that in such organisations only a minimal number of posts concerned with policy and direction should be covered.

37. Both (b) and (c) have to be assessed ‘having regard to that ethos and to the nature of the employment or the context in which it is carried out’. Neither test sets any substantial obstacle. First, whereas an organisation with an ethos based on a caring and tolerant religion or belief will not mind appointing persons who do not share the particular religion or belief to many of its posts, the more exclusive or intolerant an organisation’s religious ethos, the more it will wish for and justify religious discrimination in its appointments procedures and employment practices. Second, although the ‘nature of the employment’ and ‘the context in which it is carried out’ might be seen as debarring discrimination in relation (say) to backroom posts invisible to the public or junior positions (cleaners, stockroom assistants), the organisation has only to claim that its ethos would be harmed by the knowledge that some colleagues did not share the predominant religion or belief. There is a serious risk that the courts might find in favour of such an extended interpretation of ‘genuine occupational requirement’ unless
strong guidance is issued or, even better, some provision is included in the Regulations to the contrary effect.

38. This is not merely a theoretical problem. While maintained schools of a religious character are intended to fall outside the scope of these Regulations, there are increasing numbers of technically independent schools – so called Academies and the earlier City Technology Colleges, which are wholly publicly funded (after an initial small capital contribution) and are taking over existing maintained schools and their employees and operating as neighbourhood schools. Some of these have a pronounced, even extreme religious ethos - Emanuel College in Gateshead is the first of half a dozen such schools planned by the Vardy Foundation which is committed to a fundamentalist, bible-based and creationist Christian ethos. These schools will be free to discriminate in their employment not only of teachers but also of office and laboratory staff, cooks and caretakers. The Government is strongly encouraging the formation of such schools.

39. Local authorities and health trusts are increasingly contracting out what used to be public sector functions and developing partnerships with or funding non-statutory organisations (such as hospices), and the Government is actively supporting the involvement of religious organisations in the delivery of public services. Examples of existing public funding for religious charities providing services that might otherwise be provided by public authorities include Adullam Homes, an evangelical charity that runs centres offering support and accommodation for drug addicts, ex-offenders and others in 33 local authority areas across the Midlands and north of England, and receives £6.5m in public funding; the night centre for London’s street homeless at the church of St Martin-in-the-Fields, which gets all its funding - £400,000 a year - from the government's rough sleepers' unit; and Pecan Ltd, which provides training and other services related to helping people into employment, drawing on substantial NHS and government funding, but is run with heavy religious emphasis by a consortium of evangelical churches in Peckham. The development of such initiatives is given Government backing through the Inner Cities Religious Council, which operates from within the Office of the Deputy Prime Minister.

40. This is being encouraged by the umbrella group Faithworks, which has had many meetings with Government ministers and has had encouragement from Messrs Blair, Blunkett and Brown (among others). Yet this relatively moderate group, which is intent on encouraging engagement by churches and other Christian-based organisations in community action and community services, is actively campaigning for freedom for such bodies to discriminate on religious grounds in their employment of people to deliver services to the general public:

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11 Schools provide a good example of the effects of sectarian provision of services. A substantial proportion of the total of teaching posts (those in aided schools and reserved posts in controlled schools) is limited to teachers with particular religious beliefs, who may nevertheless compete on equal terms for all unrestricted posts, putting the majority of teachers – those without the required religious belief – at a serious disadvantage.

12 In a speech to the Christian Socialist Movement in March 2001, Tony Blair promised faith-based voluntary organisations a bigger role in the delivery of public services, and praised the ‘unique contribution’ of churches and faith groups in helping deliver ‘speedily and effectively’ a range of services from health to regeneration. He told the conference that the role of faith groups working in partnership with central and local government was ‘legitimate and important’, and that ministers were keen to take forward such partnerships ‘wherever we can’.
In its consultation document the Government states that it will ensure that churches and other organisations with a faith-based ethos ‘can continue to recruit staff of the same religion or belief where that is necessary to enable the preservation of that ethos.’ But the question is who decides what is ‘necessary’? The Government’s current answer is clear. It will be ‘up to each organisation to consider…which of their posts need to be held by believers in order to preserve their ethos, particularly where ancillary or support staff are involved.’ Such organisations will then have to ‘satisfy Employment Tribunals that…their particular recruitment or staffing policies could be justified.’

‘While committed, by virtue of their faith, to serve all unconditionally and without discrimination, the Faithworks Movement believes that churches and Christian charities must be reassured that their freedom to pursue employment policies which allow them to effectively deliver the services needed in their communities will be retained.’

41. The BHA of course has no objection to Christian and other religious voluntary organisations working in the community, but we are strongly opposed to such bodies being given contracts to deliver public - especially statutory - services. This would represent a reversion to the time - not so long distant - when it was almost impossible for a non-Christian couple to adopt a child because the adoption agencies were overwhelmingly run by Christian organisations, and when it was difficult for elderly non-Christians to find sheltered housing, for the same reason. At that time, the BHA established the Agnostics (later Independent) Adoption Society and the Humanist Housing Association specifically to meet the needs of non-religious people who were being discriminated against by the religious providers. Later, when the need for these organisations was past, the humanist organisations were merged with larger players in their fields, since we are, as a matter of principle, opposed to the organisation of public services on confessional lines.

42. To the extent that - with dire potential consequences for community cohesion - a new confessionalism in the organisation of public services comes about, with quasi-independent faith and sectarian schools funded by public money and with social services delivered in part through religious organisations, it is essential that these bodies be required not to discriminate not only in the delivery of their services, but also in their employment policies and practices. Such religious organisations would be acting as public authorities and must, like public authorities, be bound by section 6 of the Human Rights Act not to act incompatibly with any right under the European Convention on Human Rights, including Article 14 on non-discrimination. This obligation, it must be made clear in the legislation, must have priority over any presumptive rights relating to ‘genuine occupational requirements’.

Summary of Recommendations

43. We summarise our recommendations as follows:

(a) Legislation against discrimination should be extended from employment and occupation to services and other areas as soon as possible (paras. 9-10).

13 http://www.faithworks.info/Standard.asp?ID=609
(b) ‘Religion or belief’ should be left undefined; if it is considered essential to exclude political opinions (which we would consider legally challengeable), this should be done by a specific exclusion (paras. 12-24).

(c) The Regulations should be drafted in terms of ‘religion or belief, whether professed or not’ (para. 22(b)).

(d) It should be made clear that discrimination on grounds of religion or belief includes discrimination on grounds of the absence of religion or belief including any particular belief (para. 22(c)).

(e) In any case of harassment based on the effect rather than the purpose of the ‘unwanted conduct’, where the rights of a complainant under these regulations and the rights of the alleged offenders under Article 10 (Freedom of Expression) of Schedule 1 of the Human Rights Act are in conflict, greater weight should normally be given to the right to freedom of expression (para. 30).

(f) The provisions related to ‘genuine occupational requirement’ should be limited (in accordance with the Directive) to arrangements covered by ‘national legislation in force at the date of [its] adoption’ or ‘national practices existing’ at that date (para. 33).

(g) The words ‘occupational activities’ in the Directive should be used in preference to the draft’s phrase ‘the nature of the employment’ (footnote 10).

(h) In commercial organisations claiming an ethos based on religion or belief only a minimal number of posts concerned with policy and direction should be covered by the concession relating to genuine occupation requirement (para. 36).

(i) The Regulations – or, less satisfactorily, strong guidance - should make clear that presumptive interpretation of ‘genuine occupational requirement’ should in all cases be a narrow one (para. 37).

(j) It must be made explicit that insofar as organisations claiming an ethos based on religion or belief are engaged in the provision of public services (e.g., ‘academies’, hospices funded by the NHS, etc.) they will be acting as public authorities and must, under section 6 of the Human Rights Act, be bound not to act incompatibly with the European Convention on Human Rights, including Article 14 on non-discrimination. This obligation, it must be made clear in the legislation, must have priority over any presumptive rights relating to ‘genuine occupational requirements’ (para. 41).

British Humanist Association  
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