

EQUALITIES LEGISLATION AND HUMAN RIGHTS: THE REQUIREMENTS FOR 'RELIGION AND BELIEF' ORGANISATIONS

A. Introduction

1. This note describes the provisions of recent equality legislation and in particular the Equality Act 2010 and, much more briefly, the European Convention on Human Rights, incorporated into UK law through the Human Rights Act 1998, which are of particular relevance to religion and belief organisations.

B. The Equality Act 2010

(i) General

2. The Equality Act 2010, which comprises 218 Sections and 28 Schedules, received Royal Assent in April 2010, shortly before the dissolution of Parliament. The Act consolidates a range of existing discrimination legislation and also includes additional measures. In line with the intentions of the previous Government, the new Government implemented its main provisions with effect from 1 October 2010; and intends that the provisions relating to the new general public sector Equality Duty and the secondary legislation setting out specific public sector equality duties should come into force in April 2011.
3. The Government announced on 17 November that it will not bring into force Part 1 of the Act (Sections 1-3), placing on Government departments and certain other public bodies a duty to consider how their strategic decisions might help to reduce inequalities associated with socio-economic disadvantages. In its Equality Strategy, published on 2 December (and to be found on the Government Equalities Office (GEO) website at: http://www.equalities.gov.uk/news/equality_strategy.aspx), the Government said that it would be seeking greater transparency in relation to the gender pay gap in private and voluntary sector organisations through voluntary action and would therefore not implement the gender pay reporting measures in Section 78 of the Act at least until the effectiveness of this voluntary approach can be assessed. The Strategy also announced that the Act's provisions on positive action in recruitment and promotion in Section 159 will be brought into force in April 2011 and it has published guidance on the operation of this (to be found on the GEO website). The Government is still considering a number of other provisions in the Act (of which full details are also available on the GEO's website) including the provision in Section 202 relating to civil partnerships on religious premises. The Strategy Review also announced that the GEO is to become part of the Home Office.
4. The 2010 Act repeats in terms of their effect the provisions providing special treatment for religion and belief organisations contained in the Employment Equality (Religion or Belief) Regulations 2003; the

Employment Equality (Sexual Orientation) Regulations 2003; Part 2 of the Equality Act 2006; and the Equality Act (Sexual Orientation Regulations) 2007. While Part 1 of the Equality Act 2006 relating to the constitution and operation of the Equality and Human Rights Commission (EHRC) remains in force, the remainder has been (or will be in April 2011) replaced by the 2010 Act. It should be noted, by way of background, that the Act includes exceptions of various kinds not only for 'religion and belief' organisations, described below, but also for other kinds of institutions and organisations.

5. The term 'strand' has been used in the past (but not in legislation) to identify the various 'grounds' on which protection against discrimination has been enacted. The new Act lists what are now described as 'protected characteristics'. They are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex [i.e. gender]; and sexual orientation.
6. Section 9(5) confers powers on 'a Minister of the Crown' to amend, by order, the description of the protected characteristic of 'race' "so as to provide for caste to be an aspect of race". The previous Government commissioned the National Institute of Economic and Social Research (NIESR) to explore 'the nature, extent and severity of caste prejudice and discrimination in Britain, and its associated implications for future Government policy'. The Government has now received the NIESR report and will be considering whether or not to exercise the power in Section 9(5). The report is available at www.equalities.gov.uk/docs/101213%20niesr%20report%20into%20caste%20discrimination%20in%20great%20britain.doc.
7. In line with earlier legislation in terms of 'religion or belief', the Act defines a person who has this 'protected characteristic' as a person of a particular religion or belief; with 'religion' meaning any religion (or lack of religion) and 'belief' meaning any religious or philosophical belief (or lack of belief). The term 'belief' is generally taken to refer to non-religious belief – for example, Humanism. The combination of the terms 'religion' and 'belief' reduces the need for clarity on what constitutes a 'religion' because in any borderline case the probability is that it would constitute a 'belief' even if not a 'religion'.
8. The new Act makes provision to deal with cases of 'dual discrimination'. This allows people to make a claim that they have been directly discriminated against because of a combination of two relevant protected characteristics, e.g. race and gender; or disability and sexual orientation.
9. The Equality and Human Rights Commission (EHRC) has prepared statutory codes of practice and non-statutory guidance on the implementation of the Act. Non-statutory guidance material has been published following earlier consultation on initial drafts of these. The statutory codes of practice are subject to Parliamentary procedure. Those on employment; on equal pay; and on services, public functions and associations have been laid before Parliament. No objection having been raised to them by either House, they will be brought into force

shortly by Ministerial Order. Consultation has been taking place on a draft code of practice on further and higher education, which has yet to be laid before Parliament.

(ii) Discrimination in employment

10. The 2010 Act includes provisions relating to discrimination (both direct and indirect) and harassment in relation to employment and vocational training, and there are provisions specifically permitting discrimination on the part of 'religion or belief' organisations in this regard in Schedule 9 to the Act. These are:

(a) In paragraph 1, general provisions which permit employers to discriminate in relation to any 'protected characteristic' where there is an 'occupational requirement' for an employee to be, for example, of a particular 'religion or belief' and the application of the requirement is 'a proportionate means of achieving a legitimate aim';

(b) In paragraph 2, specific provisions which permit discrimination in relation to the 'protected characteristics' of gender; gender reassignment; marriage; and civil partnership where the employment is 'for the purposes of an organised religion' in order to meet a particular requirement, (for example, a requirement that a Catholic priest be a man and unmarried). This exception is intended to cover a very narrow range of employment: ministers of religion and a small number of lay posts, including those that exist to promote and represent religion. It can only be used because of the nature and context of the employment so as to 'comply with the doctrines of the religion'; or to 'avoid conflict with a significant number of the religion's followers' strongly held religious convictions'.

(c) In paragraph 3, in relation to employment where the employer has 'an ethos based on religion or belief' and 'having regard to that ethos and to the nature or context of the work' there is an 'occupational requirement' for an employee to be of a particular religion or belief and the application of the requirement is a proportionate means of achieving a legitimate aim.

11. There have been some recent high profile court cases involving claims on behalf of Christian employees that they have suffered religious discrimination in their employment. It is important to note that these cases were settled in favour of their employers on the basis that the employer was entitled to require any of their staff to fulfil the contractual requirements of their job (eg to provide the relevant service to people regardless of their sexual orientation). The courts therefore decided that the issue of religious discrimination in relation to their religious beliefs, did not arise. These cases do point, however, to the desirability of encouraging employers to make such accommodations to take account of the religious sensitivities of their employees as they can, without harm to their clients.

(iii) Discrimination in the supply of goods, facilities and services

12. The Equality Act 2006 included, in Part 2, provisions relating to discrimination in the supply of goods, facilities and services, on the grounds of religion and belief. These provisions also included exceptions relating to religion and belief organisations, as did the regulations subsequently made under the Act relating to discrimination in the supply of goods, facilities and services on the grounds of sexual orientation. These provisions are now to be found in Schedule 23 of the new Act.
13. Paragraph 2 of Schedule 23 provides an exception for religious or belief-based organisations with regard to the provisions in the Act relating to services and public functions, premises and associations. The types of organisation that can use this exception are those that exist to: practice, advance or teach a religion or belief; allow people of a religion or belief to participate in any activity or receive any benefit related to that religion or belief; or to promote good relations between people of different religions or beliefs. Organisations whose main purpose is commercial cannot use this exception. The exception allows an organisation (or a person acting on its behalf) to impose restrictions 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. However, any restriction can only be imposed under this provision by reference to a person's religion or belief or their sexual orientation and not other 'protected characteristics' e.g. race or disability.
14. In relation to religion or belief, the exception can only apply where: (i) a restriction is necessary to comply with the purpose of the organisation; or (ii) to avoid causing offence to members of the religion or belief that the organisation represents. In relation to sexual orientation, the exception can only apply where: (i) it is necessary to comply with the doctrine of the organisation; or (ii) in order to avoid conflict with the strongly held convictions of members of the religion or belief that the organisation represents. However, if an organisation contracts with a public body to carry out an activity on that body's behalf, it cannot discriminate because of sexual orientation in relation to that activity. Furthermore, if a religion or belief-based organisation discriminates by only offering services to people of its religion or belief, the public body which has contracted with it must make arrangements for equivalent services to be provided to those who are not offered the service by the religion or belief-based organisation. The exception also enables ministers of religion to restrict participation in the activities that they carry out in the performance of their functions as a minister and access to any goods, facilities or services they provide in the course of performing those functions.

(iv) Equality Duty on public authorities

15. Earlier equality legislation placed duties (with variations between them) on public authorities relating to disability, gender and race. Section 149 of the 2010 Act creates a new and broader general Equality Duty on public authorities when carrying out their functions to have due regard to:

the need to eliminate conduct which the Act prohibits, [i.e. discrimination, harassment and victimisation]; the need to advance equality of opportunity between persons who share a relevant 'protected characteristic' and those who do not; and the need to foster good relations between people who share a relevant 'protected characteristic' and people who do not (which will therefore cover good relations between people of different faiths and between people who have a religious faith and those who do not). The list of public authorities to which the General Duty applies is contained in Schedule 19 to the Act, which may be amended by Ministerial order.

16. The practical effect of these provisions is to require public authorities listed in Schedule 19 to the Act to consider how their policies, programmes and service delivery affect people with all the 'protected characteristics' listed in the Act. This general 'public sector Equality Duty' also covers bodies which are not listed in Schedule 19 but which exercise public functions, with the Duty in such cases applying to the exercise of those functions rather than to the organisation as a whole.
17. There are two distinctions which it is important to bear in mind in this context. The first is between the provisions in the Act itself which relate to the provision of goods, facilities and services by religious organisations; and any additional legal requirements which are relevant to their contracting to provide public services. The second is between the delivery of a public service by an organisation under contract from central or local government; and work undertaken with grant funding in pursuit of a public policy objective, such as community cohesion, but in accordance with the organisation's own programme of work.
18. The Act enables more specific equality duties to be prescribed through regulations in secondary legislation and draft regulations will shortly be laid before Parliament following a public consultation on them. These specific duties, which will apply to most of the public bodies listed in Schedule 19, are intended to underpin the general Equality Duty and to help public authorities in their better performance of it by improving the focus and transparency of their activities to meet the Duty. They will cover the publication of prescribed information on compliance with the general Equality Duty; and the preparation and publication of specific and measurable equality objectives.
19. The intention is that both the general and specific Equality Duties should come into force on 6 April 2011. The EHRC has published guidance on the general and specific public duties, which can be found at www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/new-public-sector-equality-duty-guidance; and will be drafting a statutory code of practice to accompany both Equality Duty and the underlying specific duties. It will be consulting publicly on the draft of this.

(v) Education

20. With regard employment, schools with a religious character are governed by the School Standards and Framework Act 1998 (SSFA). The relevant parts of the SSFA are exempted from the Equality Act.

There are various provisions in the Equality Act which have bearing on all schools, in relation to discrimination in the admission and treatment of pupils and prospective pupils (again, schools with a religious character have certain exceptions here) and the victimisation and harassment of pupils. The prohibition on harassment, as distinct from discrimination, of school pupils or prospective pupils does not cover gender reassignment, sexual orientation or religion or belief. The provisions bear on the way in which a school delivers the curriculum but not on the content of it. There are also provisions relating to parents and to past pupils. For the most part, the Act does not make any changes to the present law but repeats previous legislation. However, it makes it unlawful to discriminate against a transsexual pupil or a pupil who is pregnant or who has had a baby. The Act also includes provisions relating to institutions of further and higher educational institutions which relate to discrimination, victimisation and harassment.

(vi) Civil partnerships

21. The 2010 Act makes it possible to remove the prohibition on civil partnerships taking place in religious buildings, while placing no obligations on religious organisations to host civil partnerships if they do not wish to do so. This would enable Liberal Judaism, the Quakers and Unitarians to do so, which is what they wish. The Approved Premises (Marriages and Civil Partnerships) Regulations 2005 would need to be amended to bring this provision into force. The Government has held a listening exercise with different interested parties on the next steps for civil partnerships including how some religious organisations can allow same-sex couples the opportunity to register their relationship in a religious setting if they wish to do so. There would need to be a public consultation prior to any changes been made. There are issues involved here about the relationship between arrangements for the celebration and registration of religious marriage, civil marriage and civil partnerships.

(vii) Charities

22. Sections 193 and 194 of the Equality Act 2010, which apply to all charities, covering both religious and non-religious, replace and harmonise separate exceptions in previous legislation allowing charities to benefit only people of the same gender, racial group, religion or belief or sexual orientation, and create new exceptions along these lines for charities benefiting only people of the same age group or with the same disability.
23. Section 193 of the Act allows charities to provide benefits only to people who share the same protected characteristic (for example, gender, sexual orientation or a religion or belief), but only if this is not only in line with their charitable instrument but also a “proportionate means of achieving a legitimate aim”; or the restriction is for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic. Under Section 194 it remains unlawful for charities to limit

their beneficiaries by reference to their colour (eg “black” or “white”) – and if they do so their charitable instrument will apply if that limitation did not exist.

24. Charities must not restrict benefits consisting of employment, contract work or vocational training to people who share a protected characteristic. However, Section 193, in general, allows people to provide, and the Government to agree, arrangements for supported employment limited to people with the same disability, or disabilities of a description to be set out in regulations.
25. Section 193 also provides that it is not a contravention of this Act for a charity to require members, or persons wishing to become members, to make a statement which asserts or implies membership or acceptance of a religion or belief, (and for this purpose restricting the access by members to a benefit, facility or service to those who make such a statement is to be treated as imposing such a requirement), providing they have done so continuously since before 18 May 2005. The Act also allows single-sex activities for the purpose of promoting or supporting a charity (such as women-only fun-runs), and allows the charity regulators to exercise their functions in a charity’s interests, taking account of what is said in its charitable instrument.
26. These provisions in the Equality Act have to be taken in tandem with the requirement that a charity must be, demonstrably, for the public benefit. Guidance issued on this by the Charity Commission identifies two principles. The first is that there must be an identifiable benefit or benefits; and the second is that the benefit must be to the public or a section of the public. Who constitutes ‘the public or a section of the public’ for any organisation is based on those whom the organisation’s aims are primarily intended to benefit. The ‘class’ of people who can benefit must be a ‘public class’.
27. The guidance says that where benefit is to a section of the public, the ‘opportunity to benefit’ must not be ‘unreasonably restricted’. There are a number of different ways in which the class of people who can have the opportunity to benefit from a charity’s operations might be restricted. The restrictions must be legitimate, proportionate, rational and justifiable, given the nature of the organisation’s charitable aims. Where the benefits are delivered through membership, then restrictions may be based on eligibility for membership.
28. Where an organisation is set up ‘for the advancement of religion’, in order to be charitable it has to demonstrate that its aims are for the public benefit and that it has not been established solely for the benefit of the followers or adherents of the religion in question. However, the public benefit might flow, for example, from the fact that the teaching of the religion in question encourages its followers or adherents to conduct themselves in a socially responsible way in the wider community; or that the values held and expressed by it are put into practise in a way that leads to the moral or spiritual welfare or improvement of society. It is legitimate for a charitable organisation of this kind to restrict its membership to followers or adherents of a particular religion.

29. An agency of the Roman Catholic Diocese of Leeds, Catholic Care, sought approval from the Charity Commission for an amended Memorandum of Association to limit its provision of its adoption services to heterosexuals, on the basis that such services would only be provided in accordance with the tenets of the Roman Catholic Church. The adoption agency could not make use of the exceptions mentioned in paragraph 12 because, as explained in paragraph 14, the exception in relation to sexual orientation does not apply where a faith based organisation has contracted with a public body to carry out an activity on that body's behalf; and Catholic Care's adoption service was provided under contract with the local authority.
30. The court considered that respect for the religious belief motivating a faith based adoption agency would not be likely to constitute a justification of differential treatment in favour of heterosexual couples under Article 14 of the European Convention on Human Rights because of the essentially public nature of their activities. The court therefore concluded that the point at issue was whether the exception would be to the public benefit, as the charity had argued that it would be, and on this basis required the Charity Commission to reconsider its refusal of consent to the new Memorandum of Association. After doing so, the Commission has confirmed its refusal. The court's decision was reached on the grounds that while "particularly convincing and weighty reasons" would be needed to justify the change, there might be a case in terms of public benefit if there were a significant number of children for whom adoptive parents would not be found if the Catholic Care adoption service no longer provided its service in making adoption arrangements for "hard to place" children. However, on the basis of further evidence which the Commission collected from local authorities and churches the Commission concluded that this would not be the case. [It is not yet known whether Catholic Care will appeal against the Commission's latest ruling.] *[To check]*

(viii) Good relations

31. So far the present note has focused on 'equality' issues. Under Part I of the Equality Act 2006 (which, unlike the rest of that Act, is not repealed / replaced by the Equality Act 2010) the Equality and Human Rights Commission (EHRC) is not only given statutory responsibilities relating to equality and diversity and human rights, but also, under Section 10 of the Act, required to "promote understanding of the importance of good relations" and "encourage good practice" in terms of relations "between members of different groups and between members of groups and others". However, the new Government is currently reviewing the range of EHRC's statutory responsibilities and plans to issue a consultation document on this shortly.
32. At present, the EHRC is required by the Act, as part of these 'good relations' responsibilities to "work towards the elimination of prejudice against, hatred of and hostility towards members of groups" and to "work towards enabling members of groups to participate in society." While its

functions in this regard apply to groups sharing a common attribute in respect of age, disability, gender, gender reassignment, race, religion or belief and sexual orientation (the 'protected characteristics' in terms of equality and discrimination), the EHRC is required by the Act to have particular regard to the importance of exercising its role in relation to groups defined by reference to race and to religion or belief.

33. As noted in paragraphs 15 to 19 above, the 2010 Act provides for a new general duty on listed public authorities, when carrying out their functions, to have due regard not only to the need to eliminate conduct which the Act prohibits, but also the need to foster good relations between people who share a relevant 'protected characteristic' and people who do not (which therefore covers good relations between people of different faiths and between people who have a religious faith and those who do not). As noted in paragraph 19, the EHRC will be providing a statutory code of practice on the new public sector equality duties and will consult publicly on the draft of this, which will cover the good relations dimension of them.

(ix) Inter faith organisations

34. Schedule 23 of the Equality Act 2010 includes 'provisions relating to discrimination on the grounds of religion or belief' in the provision of goods, facilities and services, previously to be found in Section 57 of the 2006 Act. The Schedule provides for certain exceptions for religion or belief organisations including those whose purpose is 'to improve relations, or maintain good relations, between persons of different religions or beliefs'. The provisions allow such organisations, in relation to religion or belief, 'to restrict membership of the organisation' or 'to restrict participation in activities undertaken by the organisation or on its behalf or under its auspices'. These restrictions may only be imposed: '(a) by reason of, or on the grounds of, the purpose of the organisation'; or '(b) in order to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief'. [Since the Act only protects individuals, so there is no need for an exception for the treatment of organisations in this regard.]
35. It is never possible to say with certainty how the courts might interpret statutory provisions whether in general or in specific cases, but reliable advice suggests that inter faith organisations (including the Inter Faith Network itself) may legitimately determine their pattern of membership, (whether in terms of either religious or non-religious organisations), if the reason is to 'fulfil the purpose of the organisation' and they can demonstrate that any restrictions on membership or participation are necessary if the organisation's purpose is to be fulfilled.

C. Human Rights

36. The European Convention for the Protection of Human Rights (incorporated in UK law through the Human Rights Act 1998) provides protection in Article 9 for 'freedom of thought, conscience and religion'. It also provides protection of 'freedom to manifest one's religion or beliefs'

but this is 'subject [only] to such limitations as are prescribed by law and are necessary within a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.' It is worth noting that the provisions in equality legislation which place restrictions on the freedom of action to engage in certain practices or behaviour by way of manifesting one's religion or belief are therefore not inconsistent with the human rights enshrined in UK law; and that, at the same time, the affirmation of rights relating to religion and belief, subject to certain limitations, in the Human Rights Act supports the case for appropriate exceptions for religion and belief organisations embodied in equality legislation.

37. Broadly speaking, the Convention sets out fundamental civic and political rights which can be exercised in the face of action, or inaction, by public authorities¹ against whom cases can be brought under the Act, although courts must consider the Convention rights in all cases even if they do not involve a public authority.
38. Where there is a 'conflict of rights' between those claimed by one or more individuals or groups then it is for the courts to balance the different considerations involved, including those claimed on grounds of religious or non-religious identity and belief.

December 2010
Revised 9 February 2011

¹ The definition of 'public authority' for this purpose remains disputed territory.