

# A Little Bit Against Discrimination?

Reflection on the opportunities and challenges  
presented by the Equality Bill 2009-2010

DR DANIEL BOUCHER

Foreword by  
Lord Mackay of Clashfern





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‘Our public debate about the requirements of ‘equality’ has to become far more subtle if recent and proposed legal changes are to fulfil their promise. This excellent paper points the way forward.’

**Julian Rivers, Professor of Jurisprudence, University of Bristol**

‘In a mainly secular society the clash of religious and sexual orientation equalities cannot be resolved by wishing the conflict away or the blunt expedient of subordinating one view to the other. This paper is a careful and thoughtful contribution to the debate. It is written in a spirit of respect and toleration that is the hallmark of a genuinely liberal society and deserves to read in the same way.’

**Ian Leigh, Professor of Law, University of Durham**

‘This is the most trenchant and illuminating analysis I have yet come across of the deeply troubling consequences for individual and corporate religious freedom of Labour’s recent - and in many ways commendable - equality legislation. It shows how, in spite of some government initiatives which affirm the contribution of religion to society, others seem to be motivated by the desire to bring religion to heel, neutering its distinctive voice. I hope all politicians of faith - including secular humanists - will read it with great care and take prompt action to ensure that parliament promotes equality without demoting religion.’

**Dr Jonathan Chaplin, Director,  
Kirby Laing Institute for Christian Ethics, Cambridge**

# Introducing the CARE Equalities Series

At CARE we are very committed to seeking to add value to policy debates through the production of high-quality research. During this year, in the context of the scrutiny and development of the new Equality Bill and Equal Treatment Directive (ETD), there is a real need to generate a better understanding of the place of religion in the context of equality provisions and the hugely positive contribution it has made and can make. To this end we are delighted to be releasing the CARE Equalities Series which consists of two papers:

The first paper *Public Christianity and the Abolition of Slavery: Reflections on the Dangers of Privatising Faith, Mindful of Contemporary Challenges Facing Britain Today*<sup>1</sup> looked at the proposed legislation in the light of the huge benefits to society resulting from 'public Christianity,' mindful of the fact that this year marks a very significant anniversary in its history. In August 09 we celebrated the 175<sup>th</sup> anniversary of the release of all British colonial slaves, the result of a campaign led in Parliament by Christian statesmen William Wilberforce and Thomas Fowell Buxton. Indeed, it is interesting to note that when introducing the Bill to end slavery in the British Empire, the Colonial Secretary, Stanley observed that it was the result of a movement that 'had its source in religious principle.'<sup>2</sup> There is much for us to learn from the leading parliamentary abolitionists and their transformational value system, which we must consider - mindful of the many contemporary examples of the benefits of public Christianity - in developing our equalities legislation today.

This, the second paper, turns to the task of framing robust equalities legislation with respect to religion and the other equality strands, focusing particularly on the current Equality Bill. As such it confronts the key challenge of any diverse, liberal society, namely how best to maintain space for conflicting identities and views, whilst building community cohesion and upholding social justice. In so doing, moreover, it is particularly conscious of the need to never resolve conflicts by creating 'hierarchies of rights', in which the rights of some equality strands are deemed to have a 'first principle' priority over those of others, generating a strong sense of injustice on the part of strands condemned to a second class.

I very much hope that together these two papers will help facilitate debate and the development of the best possible legislation that will make Britain a country that cherishes its religious traditions, and which can consequently properly benefit from the manifestation of religious belief.

**Nola Leach**

Chief Executive, CARE

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# foreword

The Equality Bill presently before Parliament deals, in one Bill, with various types of equality previously dealt with in a considerable number of statutes and statutory instruments. It therefore provides an opportunity to consider the relationships between different types of equality.

Some types of equality can impinge on one another. Where two equalities compete there may be a question whether one should prevail over the other, or whether they can be so fashioned that both can be accommodated in a manner which allows those whose protection is provided by each a sufficient measure of freedom to enable both groups to be part of a diverse society.

The relationship between freedom of religion and discrimination on the ground of sexual orientation is a good example of this problem. When religious freedom was dealt with in a statute and discrimination on the ground of sexual orientation in a statutory instrument, the difficulty was not easily highlighted. This Bill provides the opportunity to examine this issue properly. Can Parliament find a way to provide the latter without riding roughshod over the consciences of those whose religious beliefs regard the practice of sexual relations outside marriage as sinful? This is an important challenge, vital to the degree of freedom of conscience, hitherto considered so crucial to our nation that it operated to modify the compulsion to military service through world wars.

This paper is a thoughtful and detailed contribution to that debate.

**Lord Mackay of Clashfern**  
**Lord Chancellor 1987-1997**



# A Little Bit Against Discrimination?

## **A faith reflection on the opportunities and challenges presented by the Equality Bill 2009-10**

### **Introduction**

The publication of the Government's Equality Bill that both consolidates all existing equalities legislation into a single Act of Parliament and updates it, provides a unique opportunity for reflection on the direction of UK equality provisions. What has been achieved in the last 45 years since the passing of the first modern equalities statute? What do we want to achieve in the next 45 years? To what extent does the law have a role to play? It is the purpose of this paper to respond to these questions by examining the foundational principles that underpin liberal democracy's commitment to equalities and their impact on the development of UK equalities legislation to date, highlighting some missed opportunities and asking how best to take things forward in the context of consideration of the new Equality Bill and beyond.

### **Structure**

Chapter One sets out the key principles that are central to the success of equalities legislation and considers how they have fared, and to what direct effect - both legally and politically - especially in the last ten years.

Chapter Two then moves on to look at some of the less direct consequences of their fate, with bearing specifically on the integrity of the equalities project and representation.

Finally, Chapter Three examines the Equality Bill and, drawing on Chapters One and Two, suggests changes that should be embraced by way of amendment.



# chapter one

# Equalities Principles and Practice

At its foundation, the modern democratic concern for minorities emerged out of a critique of crude democracy where one simply listens to and follows the majority will. It was key liberal writers like John Stuart Mill and Alexis de Tocqueville who spoke of the dangers of democracy creating a ‘tyranny of the majority’ where governments merely have regard for those with the most votes and ride roughshod over the rights of minorities.<sup>3</sup> This critique resulted in the crudely majoritarian model of democracy being replaced by what we now know as ‘liberal democracy,’ an arrangement whereby government listens to and follows the will of the majority but in so doing has regard for the rights of minorities, taking special care to ensure that laws designed for the majority do not have unfortunate and negative effects on minorities.<sup>4</sup> In the context of the maturing of this liberal democratic form, the rights of minorities have been upheld on the basis of two key principles: ‘different (appropriate) treatment under the law’ and the ‘even-handed’ treatment of different equality interests.

## 1. ‘Different Treatment Under the Law’

In order to gain a sense of the impact of different treatment under the law, this chapter will first look at the historical pedigree of the principle before turning to examine its expression in more recent years.

### a. The 19th Century and Before

As the 19<sup>th</sup> century unfolded, it was increasingly appreciated that many laws in Britain had been developed without regard for their impact on minorities and were in need of amendment. Their chief failings related to non-Anglicans: Roman Catholics, Protestant Dissenters, Jews and atheists. The law required that all marriage services were Anglican, with an Anglican priest officiating, that all burials were in Anglican graveyards,

again with an Anglican priest in charge, that the registration of all births and deaths had to be made with the Anglican church, that holders of land or property had to pay the Church Rate, regardless of whether they were Anglicans, that only Anglicans could go to Oxford or Cambridge and that only Anglicans and (from 1726)<sup>5</sup> Dissenters could become sitting MPs. During the course of the century discrimination against non-Anglicans was removed. In some cases this resulted in minorities being respected through the provision of different treatment under the law, e.g. by being allowed to use different marriage ceremonies, presided over by people from different denominations or of no denomination. In other cases, it resulted in people being treated 'in the same way' so that Catholics and Jews could stand for Parliament and 'in different ways' - with respect to oaths - so that anyone could take their seat if elected.

From the 1689 Act of Toleration onwards, it was recognised that in some contexts it was important to respect the Quakers' conscientious objection to the use of oaths, providing them with different treatment under the law. During the 18<sup>th</sup> century, this different treatment was extended and made available to the Moravians. Finally, the Oaths Act 1888, introduced to help atheist MP Charles Bradlaugh, who refused to take his oath of allegiance, allowed anyone to use an 'affirmation' whenever an oath was required should they conscientiously object to taking an oath. Thus, Anglicans, Catholics and some Dissenters could take the Oath, whilst atheists, Quakers and anyone else with a conscientious objection could affirm. Other examples of the provision of different treatment under the law from the past include conscientious objection vis-à-vis military service (which goes back to the 18<sup>th</sup> century)<sup>6</sup> and vaccination (which goes back to the 19<sup>th</sup> century).<sup>7</sup>

## **b. The Last Forty Years**

Moving forward in time, a relatively recent example of different treatment under the law is provided in relation to the wearing of crash helmets. Section 32 of the Road Traffic Act 1972 made it an offence for anyone to ride a motor bike without a crash helmet. The Sikh community, however, was most unhappy (since the law had the effect of requiring Sikh men to cease using motorbikes), given that there was no question of their being able to take off their turbans to put on crash helmets. In the event the Government addressed this wrong through the Motor-Cycle Crash Helmets (Religious Exemption) Act 1976 which provided different treatment so that Sikhs could ride motor bikes without wearing crash helmets. Similar provisions were made in relation to the wearing of protective head covering on building sites, courtesy of the Employment Act 1989, s 11.<sup>8</sup> Other examples of more recent provisions of different treatment under the law include the right of those in the medical profession, with a conscientious objection, not to engage in abortion procedures (see the Abortion Act 1967, s 4) and the right of religious bodies to practice a difference of treatment with respect to ministerial applicants of one sex if their doctrine states that ministers of the religion should be of the other sex. (Sex Discrimination Act 1975 s 19.)

## 2. 'Even-handedness:' No Hierarchy of Rights

Over time (as seen in the Sex Discrimination Act example above), regard for the place of minorities in society has resulted in government moving beyond merely protecting them from any unfortunate, negative consequences arising from 'laws designed for the majority,' to the positive development of 'laws designed for the minorities themselves,' governing the interaction of others with them. The emergence of equality strand-specific legislation with respect to race, gender, disability, religion and belief, sexual orientation, age and gender reassignment (and now, subject to Parliament passing the Equality Bill, maternity), in relation to which there can at times be conflicts of interest, has made the principle of 'even-handedness' very important. Respecting even-handedness means that government must not only take care to reject the formalisation of the priority of one strand over another, it must also ensure that its treatment of the strands bears out equal regard in practice. Failure to maintain this approach would make government vulnerable to the accusation of generating a **hierarchy of rights** - that is of favouring the rights of one community/some communities over another/others - which, manifestly contrary to the basic principle of 'fair-play,' risks jeopardising public confidence in the equalities project.

### The Principles' Fate

Having defined the two principles (different treatment under the law and even-handedness), it is now important to ask to what extent they have been respected, especially in the last ten years. Part 1 will address the fate of different treatment under the law before Part 2 considers the fate of even-handedness.

## Part 1: The Fate of Different Treatment Under the Law

Examination of the relevant legal developments, especially in the last ten years, sadly demonstrates that the framers of legislation for minorities with bearing on religion have lost sight of the majoritarian critique of democracy and law-making on which the equalities project is based (or was originally based), at least in so far as it impacts religion. In the same way that legislation designed for the majority can have unfortunate and unintended consequences for a minority, so too can legislation designed for one minority strand have very damaging implications for other equality strands. Whilst minority legislation was initially developed with proper respect for its impact on other strands, (see the different treatment provided by the 1975 Sex Discrimination Act with respect to ministerial appointments<sup>9</sup>), over time the framers of laws for specific equality strands have increasingly - in what is in many ways the ultimate equalities irony and perhaps even hypocrisy - started developing this legislation in a majoritarian manner. In this context there has been growing hostility to the provision of proper different treatment under the law, especially where religion is concerned. A number of critiques have been advanced:

- It is increasingly common to hear people objecting to the provision of different treatment because it undermines the efficacy of the law by making it too complex. We would suggest that quite the reverse is true. Everyone knows that the law can at times be 'an ass' and this is principally because its bluntness does not have regard for the complexities and nuances of life. Different treatment under the law helps make legislation less blunt so that measures introduced in response to the needs of one grouping (be it a majority or minority) do not negatively impinge upon those of others (especially if they represent a minority) and thereby undermine the ability of the law to command general respect.
- Some people have engaged in rhetoric that calls the morality of different treatment into question, always referring to it as the provision of: an 'exception' or 'exceptions,' and suggesting that those pursuing it are seeking 'special favours' so they can be 'excepted from the law,' i.e. allowed to operate beyond the law, thereby making a mockery of the notion that everyone is subject to the rule of law. In response to this, two points should be made. First, the sometimes emotive language of 'exceptions' is not always used when different treatment is provided in other contexts. For instance, whilst it is illegal to segregate toilets on racial grounds, it is legal to segregate them on grounds of sex. No one talks of this provision, however, by using the language of 'exceptions.' It is simply a matter of having legal clarity and legislation that is fit for purpose.<sup>10</sup> Second, as any study of the history of minorities readily demonstrates (as per pp. 11-12), rather than giving special favours and placing some people *beyond* the law, 'exceptions' provide different treatment *under* the law often for the purpose of protecting minorities.<sup>11</sup>
- Implicit in the rejection of the provision of proper different treatment in relation to religion, (on the basis of concerns such as the above bullet points), is the idea that 'exceptions' are very unusual and that faith groups really have a nerve to ask for this 'special treatment.' This, however, is completely untrue. British law is filled with 'exceptions.' If it was not, the law would be far too blunt and have many unhelpful side effects.<sup>12</sup> Of great interest the presence of exceptions is particularly pronounced in the current Equality Bill, which grants very extensive different treatment, even in relation to agents that do not have protected characteristics like Parliament, the insurance industry, sport etc.<sup>13</sup>
- Opponents of exceptions who have some faith literacy have criticised Christians requesting different treatment under the law for having an outdated 'Christendom' mentality. The reasoning informing this position is that whilst Christians may have been able to seek 'special favours' when they were ascendant during the centuries of Christendom, we now live in a post-Christian society and committed, church-attending Christians are just a minority and must adjust accordingly, i.e. no longer request different treatment under the law. This argument, however, completely

misunderstands Christendom, post-Christendom and the role of different treatment under the law. If Christians now requesting different treatment under the law were actually operating with a Christendom mentality they would not be requesting different treatment but rather that the law should be defined for *everyone* in line with their Christian teaching. The act of asking for different treatment under the law is not informed by the expectation of being granted a ‘special favour’ because of having a particularly influential position. It is rather informed by the hope of protection because committed, church-attending Evangelicals, Catholics etc are in the minority. Providing a church-going Christian with different treatment under the law would not have the effect of recreating Christendom any more than granting Sikhs different treatment under the law with respect to crash helmets had the effect of creating Sikhendom!

Despite strong opposition to the provision of proper ‘exceptions’ from some quarters, however, it is important to be clear that laws nonetheless continue to be framed with some regard for different treatment under the law.<sup>14</sup> Given that the last ten years have witnessed the rapid expansion of equality strand specific legislation with implications for other strands, it is not surprising that some different treatment has been made available. When one examines the legislation in question, though, it quickly becomes apparent that this different treatment has been far too limited in relation to religious liberty. In what follows, this chapter will look at two recent (pre Equality Bill) examples of the Government seeking to develop equalities legislation in a majoritarian manner that have had a particularly negative impact on religious organisations and individual people of faith. In the case of the first piece of legislation, which pertained to employment (1), the Government happily modified its position somewhat. In the case of the latter goods and services legislation (2), however, the Government stuck to its initial proposals.

## 1. Employment

To understand the impact of equalities legislation on employment, it is first necessary to examine: a) what religious bodies need if they are to be respected in relation to their religious freedom as it impacts their approach to employment, and b) to what extent their needs have been respected by government equality provisions in practice:

### a. What Religious Bodies Need

If a society is to have proper regard for freedom of religion (and actually benefit from the manifestation of belief)<sup>15</sup> it is imperative that it allows people of faith to exercise another basic liberal democratic freedom: the freedom to associate/come together for the purpose of forming organisations to facilitate the manifestation of their belief.

As these organisations grow they will need to employ people in order to effectively fulfil their manifestation of belief objectives and, in order for them to select employees who are genuinely able to serve these objectives, they must obviously be free to make the appointment in line with their relevant doctrine. Given that in Christian teaching, exacting demands are made of regular members of the faith community in relation to belief and practice, it is not surprising that even greater demands are made of those who are actually appointed to serve the religious organisation in an official capacity. This is best appreciated by a brief consideration of the relevant Bible texts on the subject and the Christian theology of organisation that they sustain.

In the first instance, the Bible is very clear about the demands made of members of a Christian community both in terms of belief and practice. The key texts in this regard (certainly those of the Evangelical tradition) are Matthew 18:14-18 and 1 Corinthians 5:1-13 and 2 Corinthians 6:14- 18. In the second instance, moreover, the Bible sets out even more demanding requirements for those with official roles both in relation to teaching (1 Tim 3:1-7) and, *crucially from our point of view, serving* (as opposed to teaching) see Acts 6:1-7 and 1 Tim 3:8-13. Those employed to serve in a Christian ministry, therefore, and not just those who teach, will need to be from the faith community, living in accordance with its doctrines, if the Christian community is to be allowed to organise itself in line with its core doctrine.

## **Theology of Organisation: Evangelical® Perspective**

### **Acts 6**

1 <sup>16</sup>In those days when the number of disciples was increasing, the Grecian Jews among them complained against the Hebraic Jews because their widows were being overlooked in the daily distribution of food. 2 So the Twelve gathered all the disciples together and said, "It would not be right for us to neglect the ministry of the word of God in order to wait on tables. 3 Brothers, choose seven men from among you who are known to be full of the Spirit and wisdom. We will turn this responsibility over to them 4 and will give our attention to prayer and the ministry of the word." 5 This proposal pleased the whole group. They chose Stephen, a man full of faith and of the Holy Spirit; also Philip, Procorus, Nicanor, Timon, Parmenas, and Nicolas from Antioch, a convert to Judaism. 6 They presented these men to the apostles, who prayed and laid their hands on them.'

**Key Points:** The theology of Christian organisation is that the Christian welfare service provider role, which has nothing to do with leading religious services or expounding doctrine, is to be set apart for mature, practising Christians 'filled with the spirit.' Furthermore they are to be commissioned by the laying on of hands and prayer.

Having set out the employment freedoms that need to be afforded to faith groups if their religious liberty is to be respected, we must ask to what extent they were respected before the advent of the current Equality Bill.

## **b. What Religious Bodies Got**

The Government's application of majoritarian principle to the development of employment equality law has sadly meant a lack of sensitivity to how the provision of employment rights for aspirant employees has allowed people from within some strands to exercise their rights in ways that infringe the rights of people represented by other strands, particularly faith. Jeopardising the ancient assumption of a free society that people of faith can come together to form organisations for the purpose of facilitating the manifestation of their belief, confident they can appoint staff *in line with their doctrine of appointment*, (i.e. people whose lives are subject to the imperative of manifesting belief), the Government's application of equality in the context of employment has actually had the effect of frustrating the ability of faith groups to be what they are.

The implication of the EU Equal Treatment Directive 2000, as originally published, was that there was only room for faith bodies to practice a difference of treatment when processing applications for clergy roles from people who were not from the faith tradition in question, living in accordance with its teachings. It was a relief that the EU recognised it would be inappropriate for an atheist to take a church to court because it refused to consider him for the post of vicar! However, many Christian, and indeed other faith organisations, were horrified by the complete lack of understanding on the part of government about the workings of religious ministries and the need for staff other than priests or their equivalents to be committed Christians, Muslims, Jews etc, living in accordance with the teaching of that church, mosque, synagogue etc. In a Christian context, for instance, what about youth workers, who lead youth worship, pastors' secretaries, who, in the course of their work, pray with people over the phone, or those appointed to provide welfare services for a church or Christian charity in accordance with the key Acts 6:1-6 passage? What would happen to team prayer meetings and retreats to ask God about the future direction of the church or project etc?

Removing the right to practice a difference of treatment vis-à-vis applicants not from, or living in line with, the faith tradition in question (in order to protect ethos) was of course particularly difficult for politicians to justify given the similarities between religious and political organisations as bodies with philosophies and beliefs that they both seek to advance in society. If the initial proposal for faith was similarly applied to politics it would mean that it would only really be appropriate for a political party to practice a difference of treatment, vis-à-vis applicants from

beyond the party, when appointing candidates. How would the Labour party feel about having to appoint a committed Conservative as their director of communications because he was the best qualified job applicant? How would the Conservative party feel if, whilst on the job, the head of their research department had a 'crisis of political faith' and became a Marxist? He would still be just as well qualified as he ever was as a researcher, but would it be appropriate for him to continue in post? How would an MP feel if he/she had to employ someone as his/her case worker and researcher knowing that, although well qualified, the person in question didn't really believe in their party and what it had to offer? Interestingly, equalities law does not require political parties to appoint the best qualified candidates regardless of their political beliefs!! Quite rightly in a liberal society, it does not jeopardise the ability of political parties to be what they are.

Thankfully the Directive was amended to take some account of the concerns of faith groups and, when the law was implemented in the UK, the Government introduced the Genuine Occupational Requirement (GOR). The GOR caters for the possibility that religious bodies might wish to make a case for being allowed to practice a difference of treatment with respect to applicants who are not adherents, living in accordance with the teaching of the faith body in question, when dealing with positions in the life of a faith body other than clergy roles.<sup>17</sup> Even with the GOR, however, we have already seen bodies use the employment regulations - Stonewall in the case of the Bishop of Hereford<sup>18</sup> and the British Humanist Association in the case of Prospects<sup>19</sup> - to challenge the right of Christian organisations to appoint believers living in accordance with their tradition and its teaching. In this context, there is no doubt that the advent of the employment regulations makes life very much more complicated for faith groups, generating the unnerving feeling - more readily associated with an illiberal politics - that the freedom of churches, para-church bodies, mosques etc to be what they are is being interrogated and frustrated.

## **2. Goods and Services**

Goods and services equalities legislation is not generally problematic for Christian providers and can be warmly supported in the vast majority of contexts. The legislation becomes deeply problematic, however, to the extent that it requires people to be willing to provide a good or service when doing so has the effect of making them complicit in endorsing, promoting or facilitating something that is deemed by their faith to be sinful. There are two main areas of concern: i) people of faith providing goods and or services as part of their job in the secular workplace and ii) religious bodies that provide goods and or services. We will examine both in turn:

## I) People of Faith in the workplace

By way of beginning our critique of the majoritarian nature of goods and services legislation from a faith perspective, it is important to point out - as we turn first to the individual in the workplace - that majoritarianism actually negatively affects both the religion and belief and the sexual orientation strands:

- The sexual orientation goods and services legislation fails to protect people of faith from having to provide a service in cases where this would involve them violating their identity by becoming complicit in behaviour deemed by their religion to be sinful, e.g. an Evangelical or Catholic website designer asked to design and update a site promoting the worship of a non-Christian deity, or gay relationships. (The same point could be made in relation to other services e.g. an Evangelical or Catholic printer asked to produce a book promoting same-sex relationships.)

- The religion and belief goods and services equality legislation similarly fails to protect e.g. a gay printer from having to print an Evangelical theology of sexuality, which would make them complicit in the propagation of a view that they would feel violated their identity. (The same point could be made in relation to other services e.g. a gay web designer asked to design a religious website promoting theological critiques of same-sex relationships.)

In both situations the provision of different treatment under the law could have solved the problem. It would have meant that in a small number of instances some people would have been encouraged to consider alternative providers but a civilised society, that genuinely respects difference and has regard for rights and responsibilities (not least how those responsibilities relate to the exercising of one's rights) should be able to deal with/cater for this.

## Two Cases

Having demonstrated how majoritarian goods and service legislation can negatively impact both religion and belief and sexual orientation, let's turn to two specific cases where goods and services provisions have been used to allow the assertion of the sexual orientation rights of some in a way that damages the religion and belief rights of others, one from the public and one from the private sector.

### • Public Sector

Lillian Ladele is an Islington registrar whose explanation of the fact that her faith meant she could not perform civil partnership ceremonies led to disciplinary proceedings, her suspension and ongoing court cases.<sup>20</sup> No attempt was made to

accommodate Ladele by allowing her to continue performing marriages. This case is particularly troubling because the public sector, as part of a liberal democratic state, serving a diverse society, **should be championing the generation of space for people with different beliefs and identities across its equality strands. Of all organisations, it should be the model equalities employer.**

### • **Private Sector**

Turning to the private sector, one of the most striking cases is that of the Christian couple, Mr and Mrs Bull, running a small hotel in Cornwall, who refused to accommodate a same-sex couple in a double bed because this would make them complicit in facilitating what is, in terms of their faith, a morally wrong relationship. Interestingly, Stonewall first wrote to the Bulls objecting to their website - which made it clear they would only accommodate married couples in double beds - and then, shortly afterwards, they were visited by the gay couple wanting a double room.<sup>21</sup> Soon we will - almost certainly - be confronted with a high profile legal battle in which the same-sex couple, backed by Stonewall, take on Christian hotel owners, backed by one or more Christian organisations, in an unfortunate inter-strand conflict that would not be happening if it were not for the majoritarian nature of the goods and services legislation.

In response to the above, one must remember that if the basic guarantee of religious liberty, Article 9 of the European Convention of Human Rights (entrenched in British law since the Human Rights Act 1998), is to have any credibility, the individual must be allowed to manifest his/her beliefs outside the private setting and particularly in the workplace, given that this is where most of us spend a very large proportion of our lives. Moreover, it is important to remember that in the last six years the Government has raised expectations in this regard by making religion a protected characteristic in UK law and thus the subject of its own equality strand. Mindful of these considerations, it is interesting to look at the Canadian experience. In the case of the *Ontario Human Rights Commission v Brockie*,<sup>22</sup> a Christian printer was directed to print materials for members of the LGBT community, but not materials which would have directly conflicted with the core elements of his religious beliefs. It was not an answer to say that those who held the relevant religious belief should not be free to offer commercial services unless they were prepared to act inconsistently with the relevant religious belief. Such an approach would lead to the undesirable withdrawal of persons holding the relevant religious belief from society. Government should try to avoid putting people in a position where they are forced to choose between their faith and means of livelihood/vocation. Something has gone drastically wrong with equality when it is used in this way.

## II) Goods and Services provided by Faith-based Organisations

Having considered the impact of majoritarian equalities legislation from the perspective of people of faith in the workplace, we now turn to faith-based organisations that provide goods and or services. There are two key considerations in relation to faith-based organisations' goods and or services provision, one of which pertains to the needs of the service provider i); the other to the needs of the service user ii). We will examine both in turn:

### i. Religious Organisation Perspective

If a culture is to make room for faith and religious freedom, it must recognise that one of the main manifestations of Christian belief (and indeed that of other faiths) is expressed through the provision of welfare services. Ever since Jesus 'went about doing good,' (Acts 10:38) Christians have always been very committed to having regard for the poor, welfare service and education provision (see e.g. Acts 9:36, 10:4, Galatians 2:10 etc). For much of Britain's history, welfare services came primarily from the churches rather than the state. As recently as the late nineteenth century it is estimated that as much as 75 per cent of voluntary welfare service provision came from just one Christian tradition – the Evangelical tradition.<sup>23</sup> Today, even with the welfare state and rapid development of the secular voluntary sector since the 1970s, the manifestation of belief by faith bodies in relation to the provision of these services is considerable.<sup>24</sup> As in the context of the individual in the workplace, if goods and services legislation is not to frustrate religious freedom, and the huge benefits of the manifestation of belief by religious bodies that provide services, it must not have the effect of either requiring service provision when this makes the body complicit in violating its faith identity or withdrawal as a service provider. The Sexual Orientation Regulations 2007 (SORs), however, had precisely this effect, requiring Catholic adoption agencies to either be willing to place children with same-sex couples, contrary church teaching, or cease receiving government funding (which in the case of voluntary adoption agencies effectively meant ceasing operations), with loss of vocation and livelihood. As such, SORs provide a great example of goods and services legislation without appropriate equalities sophistication. Why did the Government introduce such legislation?

In reply to the suggestion that the regulations should not have been implemented in their current form and must be revised (so they no longer put faith-based service providers in such an invidious position), those articulating the official line tend to respond in the following manner. They declare their commitment to religious liberty, its standing as an equality strand and celebrate

the fact that the Government has introduced religion and belief legislation, but then state, quite emphatically, that they will not support the right of anyone - religious or not - to provide a state funded service that would not be made available to same sex couples. Such a practice would be wholly indefensible. End of story. Moreover, they often give the distinct impression that requests for revision constitute religious people behaving inappropriately, claiming their own strand rights and then seeking to sabotage those of the sexual orientation strand. Those adopting this position, however, betray a complete failure to understand: [a] the liberal imperative for ensuring that laws designed for one group/situation/minority do not have damaging effects on minorities/other minorities and [b] the true nature and extent of discrimination.

### **[a] Protecting Protected Characteristics: No Equality Strand is an Island**

As noted earlier, in the same way that laws designed for the majority can negatively effect minorities, so too can laws designed for one minority strand negatively impact other equality strands. For example, the Sexual Orientation Regulations do not merely impact - and are thus not merely about - the rights of people represented by the sexual orientation strand any more than the religion and belief goods and services legislation only impacts religion and belief and is thus only about religion and belief. If government introduces a new law to advance the rights of some represented by one strand (A) but this negatively affects others represented by another strand (B), it has one of three options:

#### **Option 1: A Trumps B**

In the first instance, it can give greatest weight to A and press on with the legislation irrespective of its impact on B, thus generating a hierarchy of rights in which A trumps B.

This response is deeply problematic. Whilst, no strand - including B - has a right to expect that legislation designed for another strand, A, will necessarily advance its cause (it has after all been framed for the benefit of A not B), all strands - including B - have the right to expect that the assertion of the rights of the other strands, like A, assisted by their strand specific legislation, should not damage other strands, like B's, rights. Thus government must have regard for how any measure developed for any strand impacts the rights of constituencies represented by other strands and take appropriate action, introducing different treatment

under the law. This assumption can only be disregarded if you decide that one strand is actually more important than another strand – creating a hierarchy of rights. This is a dangerous and foolish strategy politically because it involves government favouring one community over another. Moreover, rather than fostering a culture of rights *and responsibilities*, this approach licenses one strand to exercise its rights without regard for its responsibilities vis-à-vis another strand/other strands.

### **Option 2: B Trumps A**

In the second instance, it can give greatest weight to B and decide that in light of the negative impact of its proposed legislation for A on B it will actually abandon its planned legislation for A, again generating a hierarchy, this time in which B trumps A.

This response is equally problematic. Whilst B does have the right to expect that A's rights will not be asserted in such a way that they erode B's rights, this does not give B the right to prevent A from so asserting its rights in relation to the rest of the population generally. B only has a right to expect that the laws pertaining to A's rights will be framed such that they don't give expression to A's rights as they relate to B – or indeed any other equality strand - in a way that damages those of B or any other strand. Again this assumption can only be disregarded if you embrace the politically foolish strategy of hierarchy, of favouring one community over another, of fostering a culture of rights without responsibilities.

### **Option 3: All Strands Respected**

Finally, and most importantly, in the third instance, we turn to the outcome that is consistent with the majoritarian critique. This involves government introducing its planned law to help A but not permitting A to exercise its new rights in a way that will negatively effect B by providing B with different treatment under the law. The provision of the different treatment crucially means that A will benefit from the impact of the new law in relation to the bulk of the population, since only a minority will be differently treated by the law and only in relation to specific issues. The cause of A would thus advance significantly but crucially A would not be permitted to assert its rights in a way that damages B. This arrangement, with the understanding that it must be reciprocated if legislation is proposed to help B that would damage A, provides the only means whereby one can cater for different strands whose rights must at times

conflict, without having to create a damaging hierarchy of rights. It also provides a way forward in which strands are encouraged to exercise their rights in the context of sensitivity to the needs of other strands, generating a culture of rights and responsibilities.

Sadly, the Sexual Orientation Regulations provide an example of the first option, sanctioning a hierarchy of rights. They involve government making a provision in law that allows the rights of some represented by one strand - sexual orientation - to assert themselves in a way that damages the rights of others represented by another strand - religion and belief. **The Government must explain why it rejects the provision of different treatment under the law in this case and why, consequently, one equality strand is allowed to access legislation that helps it assert its rights in a way that violates a significant constituency within another strand? Does the Government actually want to create a hierarchy of rights in which religion and belief is at the bottom of the pile? Does it want to foster a climate of rights without attendant responsibilities informing - among other things - the way in which those rights are asserted?**

## **[b] How Narrow is your Vision of Discrimination?**

In terms of regard for the nature and extent of discrimination, it would seem that the only challenge the framers had in mind was the limited offence caused by 'negative discrimination' which results from having an aspect of one's identity violated/offended by being denied something, e.g. a same sex couple being asked to approach an alternative provider. There is, however, a form of discrimination more demeaning than having one's identity violated negatively, and that is having one's identity violated positively, by being actively required to do something in contradiction of one's identity/beliefs or cease service provision and lose one's vocation/livelihood. This was the plight of the Catholic adoption agencies. Thus, not only did the Government make a provision in law allowing one equality strand to assert its rights in a way that damaged the interests of another, it also saw fit to frame the law such that it replaced the discrimination to which the former objected by creating an even worse form of discrimination for the latter. The notion that replacing: a) 'discrimination by omission' with b) 'discrimination by commission or loss of livelihood/vocation' is progress, suggests that those concerned subscribe to an impoverished and truncated understanding of discrimination with which an enlightened and progressive politics cannot afford to constrain itself.

## ii. Service User Perspective: Some Choices are More Equal than Others!

In some ways more importantly, though, we must consider the impact of majoritarian goods and services legislation for service users. Given that the SORS decision was supposedly made out of regard for the needs of service users, it had some curious implications in light of government commitment to: a) reform public services to promote diversity and choice<sup>25</sup> and b) champion wellbeing.<sup>26</sup> A key component of diversity involves providing some services in the context of a faith ethos which helps make them more accessible to people of faith. Moreover, the importance of having some faith-based welfare provision in the mix is compounded by the fact that the Government recognises that ‘the spiritual’ constitutes an important component of wellbeing.<sup>27</sup> Clearly, neither of these considerations means that all state services should be provided in the context of a faith ethos since this would not be to everyone’s taste (it would not make for diversity and choice), but to the extent that government now celebrates the idea of a diversity of service provision and the promotion of wellbeing, we should really be talking about increasing not cutting investment in faith-based welfare.

Reflecting in detail on the diversity and wellbeing imperatives specifically in the context of adoption, the points must be made that Catholic agencies constituted a small proportion of providers, had unsurpassed success rates and that many people appreciated the option of being able to adopt children in the context of a Catholic ethos.<sup>28</sup> Meanwhile, same-sex parents wishing to access adoption services had a far wider selection of options. Why then refuse to accommodate Catholic agencies, given that this decision would do away with choice for a significant constituency of people when those wishing to access a version of the service that could cater for same-sex couples had a far greater choice? In the event, the need for *all* providers to cater for same-sex couples was given priority over the need to have *some* providers that would make their adoption services available in a way that had regard for the needs of people from other equality strands. This was particularly strange in that it meant a substantial group of people would lose out on the option of accessing a service in the context of their preferred ethos, even whilst the regulations (regulation 18) made special provisions for same-sex projects to discriminate against heterosexuals (see Part 2) and there was only record of one gay couple approaching a Catholic adoption agency.<sup>29</sup> So much for choice! In the Government’s view it would seem - to adapt Orwell - that some choices are more equal than others.

## Conclusion

The impact of majoritarian equalities legislation has been most unfortunate. In the first instance, in terms of employment, the freedom of churches and para church bodies to appoint people who are from the faith tradition in question, and living in accordance with its teachings, has been restricted as seen in cases like those of the Bishop of Hereford and Prospects. In the second instance, goods and services legislation has made it difficult for Christians in the workplace and has had the effect of increasing the secularisation of service provision certainly in the field of adoption, eroding diversity and choice. Two agencies have closed, whilst the majority have cut their links with the church and continue in line with the regulations.<sup>30</sup>

In closing Part 1, it is helpful to reflect on the irony of the impact of the new majoritarianism on inter-strand relationships given that the Equality Act 2006 states, on a number of occasions, its commitment to promoting good relationships between different groups. (For instance it created the Equalities and Human Rights Commission and charges it 'with a general duty to encourage and support the development of a society in which: 'there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.!)<sup>31</sup> Interestingly, it is against the backdrop of majoritarian equality provisions (fostered not least by other parts of the same 2006 Act) that we have seen a complete disregard for other strands manifest in developments like Stonewall's 2007 Bigot of the Year award which went to the Bishop of Hereford. (Other nominees included the Archbishop of Birmingham, Vincent Nicholls - who has of course since become the new Archbishop of Westminster - and the editor of the Catholic Truth web site). That government ministers apparently happily received awards at the same ceremony must have done much to reinforce the sense that this kind of conduct was/is perfectly acceptable.<sup>32</sup> The Government should develop legislation that makes relationships between minorities with conflicting interests more harmonious; not equip them with new laws that they can/could use to attack each other, generating greater tensions and conflicts than existed previously.

## Part 2: The Fate of Even-Handedness: Hierarchy of Rights

Having already established how the failure of government to cater for religion and belief through 'different treatment under the law' has (as already noted to some degree in Part 1) been informed by the fact that it has not always adopted an even-handed approach to processing conflicts between the strands - generating the perception of a 'hierarchy of rights' - we now turn to a general examination of the fate of the principle of even-handedness. Given the well-known tensions between the religion and belief strand on the one hand, and sexual orientation strand on the other, the need to observe even-handedness in this regard has and continues to be particularly important. Sadly,

though, as we will see (and again as already noted to some extent), it is in relation to government treatment of these two strands that even-handedness has been most obviously absent. Before embarking upon this general investigation of even-handedness, however, it is important to pause to make the point that the religion and belief strand starts, in any event, from the point of a distinct disadvantage vis-à-vis the other strands.

## Starting on the wrong foot

The religion and belief strand would have to cater for more diversity than any other if it just embraced 'religion' which encompasses a whole series of different religious beliefs that, whilst overlapping in some senses, also conflict very significantly with each other.<sup>33</sup> Indeed, this is such a source of potential tension that the Department for Communities and Local Government has instituted 'Face to Face: Side by Side', the first government inter-faith strategy for the purpose of promoting better relations between faith communities.<sup>34</sup> The position of the strand as an entity that can have any kind of coherence, however, is completely jeopardised by the fact that it not only embraces people making very different religious claims: it also embraces extremely vocal elements whose *raison d'être* is defined in diametric opposition to religion. Before anyone suggests that actually there is considerable division in the other strands - that, for example, different minority ethnic groups can have very divergent opinions about how money should be spent etc - it is worth asking how any other strand would survive if it embraced groupings whose *raison d'être* lay in diametric opposition to others that were deemed to be definitive of it? To root this in practice and get a sense of the problem, imagine how Black and Minority Ethnic (BME) organisations would feel about being represented in or by a stakeholder strand group that also embraced the British National Party? The truth is that, whilst it is helpful for Christian and other faith groups to spend time with the National Secular Society and British Humanist Association,<sup>35</sup> an equality strand that straddles both stakeholders defined in terms of religion, and stakeholders defined effectively in terms of its negation, will hardly ever be able to say anything because the constituent members of the strand generally aren't able to agree. It is perfectly reasonable to create a strand that embraces diversity. It is not reasonable, however, to create a strand that embraces total incoherence unless one wants to place it at a distinct disadvantage vis-à-vis other strands. This is obviously an important consideration if you want to be seen to treat different strands even-handedly. Moreover, there are huge philosophical questions about whether those representing and championing 'the secular,' which they regard as 'neutral,' should be treated as the bearers of a protected characteristic. To read these in full, please see the Appendix 1. Having made this key introductory comment, let's consider how the Government, first as executive and legislature [1], and then as judiciary [2], has managed relationships between the religion and belief and sexual orientation strands.

## 1] Government: Executive and Legislature

The Government's handling of even-handedness, certainly as the executive, leaves - as we shall see both in relation to process I) and content II) - a great deal to be desired:

### I. Process

The most high-profile failure of government as executive with respect to balanced treatment of the religion and belief and sexual orientation strands vis-à-vis process (pre the Equality Bill), actually relates to the goods and service legislation. The religion and belief goods and services provisions were set out in the 2005 Equality Bill (which became the 2006 Act), providing those with concerns a Second Reading, lengthy Committee Stage, Report Stage and Third Reading during which there was ample opportunity to present their critique and table amendments. Having done all of this in the Commons the opportunity was then repeated in the Lords! By contrast the sexual orientation provisions were dealt with by two clauses instructing the Secretary of State to introduce parallel legislation in this area by means of regulations.<sup>36</sup> This meant that those with concerns regarding the Sexual Orientation Regulations had no parallel opportunity to debate and amend the legislation. Indeed, the first set of regulations, those pertaining to Northern Ireland, were introduced by negative assent procedure which meant that the executive did not even provide the opportunity for a single, short debate. The norm in this context is that the regulations are laid before parliament for 40 days after which they automatically become law. It was only because a parliamentarian in each house tabled a motion opposing the regulations that there was one debate on the floor of the House of Lords and one debate in a Commons' Delegated Legislation committee. The only vote that could be called, however, was simply 'for' or 'against' the regulations. There could be no amendments.

The inequality of treatment, meted out by government as the executive in relation to the religion and belief and sexual orientation equality strands, was problematic not only because it invoked a hierarchy of rights (by giving those with concerns about religion and belief scope for changing these regulations, whilst denying the same opportunity to those with concerns about the sexual orientation provisions), but also because it made it very much less likely that the need for mutually reciprocating different treatment under the law would be identified at a time and place when and where it could be introduced. Had the religion and belief and sexual orientation provisions both been processed at a primary legislative level, through the Equality Bill debates during 2005, this would have provided parliamentarians with the opportunity to consider how the religion and belief provisions would have impacted those from the sexual orientation strand, and how the sexual orientation regulations

would have impacted those from the religion and belief strand *at the same time*. When the point was made that the sexual orientation provisions were problematic in their proposed form - because they would have prevented a Christian web designer from asking a gay rights organisation, seeking to create a gay rights website, to consider another designer - the point could have also been made that the religion and belief provisions were equally problematic because they would have the effect of preventing a gay printer from asking the publisher of an Evangelical 'Theology of Sexuality' to consider an alternative provider. Neither a Christian web designer nor a gay printer should be put in a position where they are required, in the name of equalities, to violate their identity or conscience.

## II. Content

The other concern regarding lack of even-handedness relates to content and also finds its most eloquent expression in the context of the Sexual Orientation Regulations. Given that Part 1 has already identified a lack of even-handedness in relation to content via its examination of the failure to provide adequate different treatment under the law, there is no need to revisit this now other than to note that the regulations allow for the assertion of some rights in ways that damage others, i.e. an effective hierarchy of rights. The key content point that does require detailed consideration at this stage, however, concerns regulation 18.

The intention of the Government, when it refused to provide different treatment under the law for Catholic adoption agencies, seemed to be that they should only continue to operate with government monies if they were prepared to make themselves complicit in an action that would involve them violating their faith (namely authenticating a same-sex union and placing a child with a same-sex couple). It was, however, subsequently pointed out by lawyers that if the agencies defined themselves as existing exclusively for the purpose of serving 'people of a particular sexual orientation' (in this case heterosexuals), in accordance with regulation 18 (a regulation evidently intended to protect organisations created to serve LGBT people), they should be able to continue to operate as before - and do so in line with the regulations.<sup>37</sup> The debate about the real implication of regulation 18 is ongoing.

On the one hand, if regulation 18 does provide means whereby faith-based adoption agencies can place children with couples in line with their ethos, then the fact that the Catholic Church was told that it could not be accommodated in January 2007 reflects very badly on the Government.

On the other hand, however, if regulation 18 does not provide a means whereby Catholic adoption agencies can discriminate against same-sex couples and receive government monies, whilst that very same regulation allows LGBT projects to discriminate against heterosexuals and receive government monies, then the failure of government to be even-handed is even more blatant.

After the Charity Tribunal ruling on June 1<sup>st</sup> 2009 regarding Catholic Care Leeds, the latter seemed more likely<sup>38</sup> but now they have been granted a right to appeal to the High Court.<sup>39</sup>

## **Analysis: Responsibility**

Although the inequality of treatment pertaining to SORs was primarily a failure of the executive in the sense that the executive proposed the legislation, the legislature also failed by acquiescing and making the proposed law. It must be noted, however, that some parliamentarians spoke out against the regulations and a significant number voted against them.

### **2] Government: The Judiciary?**

The conduct of the judiciary regarding the manner in which it handles the different equality strands, and specifically religion and belief and sexual orientation, has also contributed to the perception of a less than equal treatment. This is chiefly based upon the contrast between the actual European Convention on Human Rights (ECHR) and the manner in which it has been interpreted by judges. In order to appreciate the lack of even-handedness, it is important to first consider the ECHR rights, mindful of what the relevant articles actually say and of the nature of the rights in question (Section 1), before moving on to take account of the impact of case law (Section 2).

## **Section I: The ECHR Rights**

First, we will examine what the relevant articles state and reflect on the nature of the rights.

### **i. Religious Freedom Right**

Today, it is increasingly common to hear people talk of Article 9 of the Convention (our legal guarantee of religious freedom) as if paragraph 1 grants an absolute right to believe whatever you want, whilst paragraph 2 makes provision for the restriction of the right to manifest belief whenever this conflicts with any other fundamental right.

What, though, does Article 9 actually say?

*1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

*2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.'*

Thus, in reality, Article 9 paragraph 1 actually sets out the right to religious (or other) belief *and the right to manifest that belief*, whilst paragraph 2 *limits the basis upon which the state can restrict the right to manifest belief*. Specifically paragraph 2 does not say, whenever there is a conflict with another fundamental right, the restriction of the right to manifest belief is in order. Neither does it say, 'But you can restrict the right to manifest belief whenever you can appeal to *'limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.'* It actually says you can ONLY restrict the right to manifest belief when you can appeal to *'limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.'*

Some might wish to argue that there is no difference between saying 'but you can restrict the right to manifest belief whenever x is fulfilled' and 'you can only restrict the right to manifest belief if x is fulfilled,' since x is the same. But there is an important point of perspective here. Having clearly defined belief and the manifestation of belief as the basic right in Article 9 (1), Article 9 (2), makes it plain that the basis for restricting the right to manifest is limited.

Moreover, it is important to note that the provision of the narrow basis for restricting the right to manifest was not accidental but the result of an exacting debate and a very deliberate decision. As Carolyn Evans observes in *Freedom of Religion Under the European Convention on Human Rights*, 'the drafting of the limitations clauses for Article 9 was a controversial process and the drafting rejected the notion that all the rights in the Convention should be subject to the same limitation clause (as had been the case for the Universal Declaration). **The final draft of Article 9 (2) was the narrowest of the proposed articles ...**<sup>40</sup>

## ii. Sexual Orientation

Unlike religion and belief, there is no explicit right to sexual orientation, but it is defended via Article 8 (paragraph 1) which sets out one's right to a family life and privacy. Article 8 (paragraph 2, which is similar but not, as we shall see, identical to Article 9 paragraph 2) makes it plain that this right cannot be qualified unless certain conditions are met.

### Article 8 – Right to respect for private and family life

*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'*

## Analysis: Religion and Sexual Orientation Compared

The religion and belief and sexual orientation rights are in an important sense remarkably similar, both involving a basis for identity which can impact practice. People from within both strands argue that identity and practice cannot be separated. In the case of religion, for example, Christians say that the Bible teaches that 'faith [belief in one's head] without works [practice] is dead.' (James 2:17) In other words, the idea that your religious belief can live and move and have its being in your head is nonsense. It has to result in practice. In the case of sexuality, LGBT rights activists contend that orientation is bound up with practice and that you cannot grant rights for the one without granting rights for the other. The scope for separating religious belief from religious practice, however, is actually rather more limited than the scope for separating sexual orientation from sexual practice, both on the basis of the subject matter and the definition of the ECHR articles:

In terms of subject matter, and with respect to Christian theology, if we follow through on 'faith without works is dead,' the point should be made that it is not actually possible to be a Christian and (relying upon an absolute right to believe doctrines in one's head) not bother with manifesting belief. (This does not necessarily put Christianity at loggerheads with Article 9 (2) because hopefully some manifesting of belief can be done without risk that others will seek to justify restraint on the basis of 9 (2) and, even if they do, the limited basis for justifying such restraint means that a judge may well rule in

favour of the person seeking to manifest). By contrast, it would be perfectly possible to be hetero or homo-sexual and live a celibate life, abstaining from sexual practice. There is no sense in which one can say 'sexual orientation without sexual practice is dead' unless one wishes to offend those people who definitely have a sexual orientation, and thus a sexual identity, but choose to live a celibate life.

In terms of law, the scope for qualifying the right to a private family life in Article 8 (2) is actually more wide-ranging than the scope to qualify the right to manifest belief in Article 9 (2). Specifically, it involves all the grounds set out in 9 (2) plus an additional ground, national security. At this point it is helpful to revisit the Evans quote with a little more context: The 'drafting of the limitations clauses for Article 9 was a controversial process and the drafting rejected the notion that that all the rights in the Convention should be subject to the same limitation clause (as had been the case for the Universal Declaration). **The final draft of Article 9 (2) was the narrowest of the proposed articles so the right to manifest a religion or belief is subject to fewer limitations than any of the other rights listed above** [family life Article 8 and expression Article 10].'<sup>41</sup> This makes plain the intention of the framers that there should be greater scope for qualifying rights in the context of privacy and family life than in relation to the manifestation of religious belief.

## Section II: The Case Law Effect

Despite the similarities between the religion and belief and sexual orientation strands, and the grounds for their being treated in broadly comparable ways (albeit with the qualification that the scope for restricting practice in relation to the latter is actually more pronounced than the former), anyone reading the relevant case law could be forgiven for thinking the judges were using quite different drafts of Articles 8 and 9. Specifically, it inclines towards a much more circumscribed right to manifest belief in relation to religion, and a much less circumscribed right to manifest sexual practice in relation to sexual orientation, than one would anticipate on the basis of the actual wording of the Convention Articles.

### i] Right to Manifest Belief

In terms of the right to manifest religion and belief, one of the best overviews of the drift of case law is provided by Lord Bingham in his judgement on *R (SB) v Governors of Denbigh High School*. It is worth spending some time examining his overview.<sup>42</sup> The examples cited as justification for curtailing the right to manifest belief, on the less than circumscribed basis he suggests, fall into one of two categories.

First, they relate to employees claiming that their rights to manifest belief have not been properly accommodated by their employers. In each case cited, the court found against the claimant on the basis that in willingly taking the job they should have been ready to submit to the nature of the job. If you do not want to be restricted in the manner that the job in question requires, you should find alternative employment. (This principle is interesting because it works two ways. The fact that the law takes the view that the secular nature of organisations limits the kind of human rights claims that can be made by religious employees, objecting to aspects of the organisation's secular identity as it impinges upon them, should mean that the religious nature of other organisations limits the kind of claims that can be made by non-religious employees or employees from other faiths, objecting to aspects of the organisation's religious identity as it impinges on them.)

Second, and much more importantly, these employment cases are weaved between examples of service provision where one would assume the rights of the individuals accessing goods and services should be more developed. After all, the basic assumption informing goods and services equality legislation is that the good or service in question should be made generally available to anyone at any time. As Evan Harris (Member of Parliament for Oxford and Abingdon) told parliament, allowing Catholic adoption agencies to refer gay people on to alternative agencies would be like a bus driver for whites in 1960s America telling Rosa Parks that a bus for black people would be along shortly.<sup>43</sup> Holding this thought, consider the following examples, bearing in mind that their formal purpose is to demonstrate the limited basis upon which one can justify the manifestation of belief:

a. *'In Kjeldsen, Busk Madsen and Pedersen v Denmark (1976) 1 EHRR 711, paras 54 and 57, parents' philosophical and religious objections to sex education in state schools was rejected on the ground that they could send their children to state schools or educate them at home.'*<sup>44</sup>

The service is education. The parents are the service users and the service is not made accessible to them. Unlike the case of Rosa, however, it would be quite acceptable to tell them to wait for the equivalent of a Christian bus to come along - although, of course, you actually have to go looking for schools!

b. *'The applicant was denied a certificate of graduation because a photograph of her without a headscarf was required and she was unwilling for religious reasons to be photographed without a headscarf. The Commission found (p 109) no interference with her article 9 right because (p 108) "by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs.'*<sup>45</sup>

Again the service is education. The student is the service user and the notion that she should not expect a secular provider to make provision for her faith assumes that the secular provider has an identity that needs to be protected as if it is the minority! The vulnerable party is the service provider, not the service user. This is the complete opposite of SORs in relation to which it was the religious service providers and not the service users that had to change.

*c. 'An application by a child punished for refusing to attend a National Day parade in contravention of her beliefs as a Jehovah's Witness, to which her parents were also party, was similarly unsuccessful in Valsamis v Greece (1996) 24 EHRR 294. It was held (para 38) that article 9 did not confer a right to exemption from disciplinary rules which applied generally and in a neutral manner and that there had been no interference with the child's right to freedom to manifest her religion or belief.'*<sup>46</sup>

Again the service is education. The parents are the service users. Surely the rights of the service users should be protected in a manner that respects their fundamental religious beliefs?

At this point someone might want to suggest that the above scenarios are not comparable with e.g. adoption because, in the case of Catholic adoption agencies, staff would ask the would-be service users to consider an alternative provider from the outset. To the extent, however, that a provider does not cater for the identity of the service user - regardless of whether this failure relates to sexual orientation or religion and belief and regardless of at what stage in the proceedings this failure is manifest - one effectively makes it impossible for either to access the service. What is the difference between a secular education project that says to a would-be service user, 'We will take you on if you comply with our secular identity and ethos (i.e. we will not accommodate your faith identity and its requirements) and a faith-based adoption agency that says, 'We will work to place children with you if you comply with our religious identity and ethos' (i.e. we will not accommodate your identity to the extent that doing-so involves us having to violate our identity)?

Crucially, we don't think that organisations providing public services with a secular identity should be compelled to change to accommodate people of faith if the provider feels this fundamentally compromises his/her identity, any more than organisations that provide public services within a faith ethos should be compelled to change to accommodate people of no faith, if they feel this violates their identity.<sup>47</sup> The key point is that, in the context of modernising public services to promote diversity and choice, it is important to make space for both secular and faith-based service provision. Human rights law should not be used by either secular or faith-based consumers in an effort to manipulate or jeopardise the identity of the service provider.

## ii] Right to Sexual Practice

In terms of sexual orientation and practice, the key provision is found in the judgement of Mr Justice Richards in *R(Amicus) v Secretary of State for Trade and Industry* [2004] IRLR 430. In complete contrast to the treatment of the relationship between the basis of identity and practice with respect to religion and belief - as set out by Article 9 on the one hand - and sexual orientation - as set out by Article 8 on the other (according to which the right to manifest belief is less constrained than the right to manifest sexual orientation) - the right to manifest sexual practice is actually far less constrained than the right to manifest belief on account of the sexual practice being given an identity with orientation.

*'Paragraph 29: Part of the background to the wording of regulation 7(3), and one of the matters that will need to be considered in examining the challenge to that provision, is a distinction drawn between sexual orientation and sexual behaviour. As regards the protection conferred by the Convention, however, I do not consider there to be any material difference between them. Sexual orientation and its manifestation in sexual behaviour are both inextricably connected with a person's private life and identity.'*<sup>48</sup>

### Interpretative License: 'Expression' Perspective

In light of the above, there is not surprisingly great concern that 'interpretation' has, in a very real sense, managed to change what the framers actually stated in Article 8 (2) and 9 (2). Interestingly, this point can also be made in relation to the right to freedom of expression in Article 10, where again the grounds for constraint (10 (2)) are more extensive than in 9 (2) and yet in practice 10 (2) has given rise to less constraint than 9 (2).

The reluctance to challenge state restriction of the manifestation of belief is at least partly because of the advent of the interpretative doctrine of the 'margin of appreciation' which is set out in *Handyside v. The United Kingdom*:

*'By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [what constitutes the legitimate manifestation of belief] as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.'*<sup>49</sup>

Reflecting on this interpretative doctrine in relation to freedom of religion (Article 9) and freedom of expression (Article 10), Prof Malcom Evans observes that jurists tend to believe there is a 'pan-European consensus' on the latter but not the former.

Thus, whilst Article 10 can readily be used to check heavy-handed governments in relation to expression, there is far less scope for challenging heavy-handed governments in relation to the manifestation of belief via Article 9. This obtains despite the fact that the larger number of grounds on which to qualify 'expression' (and family life/privacy) suggests a greater willingness on the part of the Convention to qualify it than the manifestation of religious belief.<sup>50</sup>

## The Question

Is it right for judges to develop interpretative principles that turn the balance of rights - as set out by the Convention - on its head? To the extent that the conduct of judges would seem to go against the framers' intention in a manner that specifically disadvantages people of faith, **this contributes to the sense of the judiciary' working to undermine the position of faith in society.** If interpretative license is used to identify and further a right not explicitly mentioned at all in the ECHR, **why are greater efforts not made to guarantee effective enjoyment of rights explicitly stipulated and given their own, less restricted Convention Article?**<sup>51</sup> The independence of the judiciary does not change the fact there is a public perception of the manner in which it conducts itself and this has political implications in the sense that it contributes to the broader perception of government promoting a hierarchy of rights that discriminates against religious belief. In this way the conduct of the courts becomes, at least to some degree, a political issue.

## Impact on SORs

In reflecting on the impact of the above logic in legal decision making, it is very useful to examine the analysis of the Joint Committee on Human Rights on the Northern Ireland Sexual Orientation Regulations in terms of Article 9. This sought to justify the decision not to provide different treatment for Catholic adoption agencies or Christian care homes and was later cited by the Government to defend its decision.<sup>52</sup> Consider the following:

*'44. In our view, some exemption from the Regulations is necessary in order to protect the right to freedom of conscience, religion and belief in Article 9 ECHR. Regulation 16 of the Northern Ireland Regulations ensures that nobody will be required to perform same-sex marriages, or to admit homosexual people to their religious organisations, or allow them to join in their activities or use their premises if this would be contrary to their religious belief. In our view, the scope of the exemption in Regulation 16 gives adequate protection to the absolute right in Article 9(1) to freedom of conscience and religion. Nobody is required by the Regulations not to have beliefs about the morality of different sexual orientations, or its*

*compatibility with the tenets of one's religion, or punished or subjected to any other disadvantage for having such beliefs. In our view, the prohibitions on discrimination in the Regulations limit the manifestation of those religious beliefs and that limitation is justifiable in a democratic society for the protection of the right of gay people not to be discriminated against in the provision of goods, facilities and services.*

45. It also follows from the above that there would be a compatibility problem if the Regulations provided for a wider exemption which expressly exempted religious bodies from the obligation not to discriminate on grounds of sexual orientation. This would be likely to be in breach of Article 14 in conjunction with Article 8. Exemptions from the prohibition must have a reasonable and objective justification in order to be compatible with Article 14. An exemption to protect the absolute right of freedom of conscience and religion (as in Reg 16) would therefore be likely to be justifiable, but not an exemption to protect the right to manifest one's conscience or religious belief, which, as we have sought to explain above, is capable of justified limitation and in our view can be justifiably limited in order to protect gay people from discrimination.<sup>453</sup>

The Joint Committee then goes on to reflect on the outpouring of public concern regarding the impact of the regulations on faith-based bodies providing public services such as older people's home, not wishing to accommodate civil partners in double beds, or faith-based adoption services, unwilling to place children with same sex couples. They argue:

*'52. In our view there is nothing in Article 9 ECHR, or any other human rights standard, that requires an exemption to be provided to permit religious organisations to discriminate on grounds of sexual orientation when delivering services on behalf of a public authority. Such an exemption would provide a protection not for the holding of a religious belief but for the manifestation of that belief. Where such manifestation of a belief conflicts with the right of gay people not to be discriminated against in their access to services as important as adoption services, it is in our view necessary and justifiable to limit the right to manifest the belief.'*<sup>454</sup>

Mindful of our analysis of Article 9, the Joint Committee's argument is deeply problematic:

First, curiously the report seems to enlarge 'belief' so that it actually relates to some forms of practice, for example the provision of marriage services. In some ways this should please people of faith if it means that they get some absolute practice rights under 'belief' as well as qualified practice rights under 'practice.' However, reflect for a

moment on the implications of having to recognise these freedoms, which some would undoubtedly rather contest, if they were treated as practice rights. It would mean that one would have to acknowledge the presence of controversial practice rights that were legitimate, and should consequently be defended in court, and thus the need to engage properly with 'practice,' recognising that one does not have carte blanche to qualify a right to manifest whenever it conflicts with another fundamental freedom. Conversely, keeping the right to refuse to marry gay people in the realm of belief means that one can more readily keep practice as that realm that can be qualified just so long as one can demonstrate that it interferes with another right.

Second, although Article 9 (2) restricts the scope for qualifying the right to manifest belief - thus necessitating very careful deliberation regarding any limitation of the right to manifest and the presentation of a clear justification for such a limitation - the justification given by the report in no way rises to this challenge. The committee simply suggests that since: a) religion and belief has benefited from some different treatment and b) the right to manifest is qualified, the refusal of further different treatment is appropriate.

Third, rather than explaining why the amount of different treatment religion and belief was afforded is sufficient - which is of course particularly unclear given the fact that religion is the least qualified of the qualified rights - the report instead goes on to express concerns that further different treatment might lead to counter claims under Articles 8 and 14. In highlighting this possibility, however, the report completely overlooks the facts that: i) Article 8 'exercise' rights are actually more qualified than Article 9 'manifest' rights and ii) the provision of proper different treatment for people from the religion and belief strand would not result in the regulations being jeopardised. They would continue to apply to the whole population and in so doing only apply differently to people of faith on limited grounds for the purpose of protecting their religion and belief strand identity.

## Conclusion: A Little Bit Against Discrimination?

In drawing chapter 1 to a close, it is clear that in recent years, the key principles upon which equalities law depends, different treatment under the law (Part 1) and even-handedness (Part 2), have not been respected. We will conclude by providing a summary overview of the Government's failure in this regard, using the Sexual Orientation Regulations as a case study.

At the time of the SORs controversy it was suggested that the Government must back the regulations unamended because to do otherwise would only make them only, 'a little bit against discrimination,' – from where this pamphlet gains its title.\* The

\*You can either be against discrimination or you can allow for it. You can't be a little bit against discrimination."  
Harriet Harman in an interview with Martin Bright and John Kampfner, *New Statesman*, 29 January 2007.

underlying logic of this position would seem to be that if the Government provided different treatment under the law for religious adoption agencies this would erode the regulations and qualify its commitment to ending discrimination. This chapter has shown this logic to be deeply problematic for the following reasons:

First, religion is a protected characteristic too. If you suggest that support for unamended Sexual Orientation Regulations constitutes the only position someone can adopt if they are to be fully against discrimination, then your position necessarily becomes incoherent because it becomes very difficult to say that you are against discrimination on the basis of faith.

Second, if ministers really wanted to argue that there can be no different treatment under the law because that means you are only a 'little bit against discrimination,' why didn't the Government remove the exceptions from the regulations in relation to parliament?<sup>55</sup> Why - moving forward to the present - is the current Equality Bill filled with exceptions covering sport, immigration, insurance, age etc and, of course, once again, parliament?<sup>56</sup>. Indeed, given the fact that a good deal of this different treatment has been provided to protect agents who do not represent protected characteristics, it is extraordinary that this was not provided to protect agents in need of different treatment who do represent protected characteristics.

Third, the rejection of proper different treatment under the law did not put government on the side of non-discrimination but rather involved it exchanging one form of discrimination, 'discrimination by omission,' for something worse, 'discrimination by commission' or the alternative of ceasing service provision with loss of livelihood and vocation.'

Fourth, all of the above demonstrate how the Government has allowed the creation of a hierarchy of rights. This stretches back even to procedure and the fact that people with concerns about sexual orientation goods and services legislation were not given the opportunity to fully debate and amend this legislation, whilst those with concerns about the religion and belief legislation were afforded this opportunity.

Fifth, whichever way one regards regulation 18, it has not yet provided a means whereby faith-based service provision has benefited from different treatment under the law to protect its identity and interests in the same way that it has provided a means whereby LGBT projects can access different treatment under the law to protect their identity and interests. It has thus become a blatant vehicle for a hierarchy of rights.

Sixth, the rejection of adequate exceptions was entirely at variance with government commitments to: a) reform public services to promote diversity and choice and b) champion wellbeing. Some choices are more equal than others.

Seventh, in justifying its position, the Government cited the Joint Committee on Human Rights' report, which is based on an extremely controversial reading of Article 9. It does not give concerned people of faith any assurance that their rights to belief and manifest belief are being handled with equal regard vis-à-vis sexual orientation strand rights.

Finally, the refusal to provide proper different treatment under the law contributes to the fostering of an unfortunate culture of 'rights divorced from responsibilities,' wherein rights are pressed by rights bearers without proper regard for their responsibilities towards other strands that will be affected by the pressing of these rights.

## chapter two

# In the Distortion's Wake

Having demonstrated how UK equalities legislation has developed in recent years without proper regard for the two key principles: different treatment under the law and even-handedness, and how this has resulted in the advent of majoritarian equalities legislation and what is at times anything but the even-handed treatment of the strands, we now turn to examine two less immediately obvious consequences.

### **1. Subverting Equalities Legislation for Other Purposes: Free-Riders**

The first problem results from the fact that equalities legislation designed for one strand, A, but in a majoritarian way, without proper regard for the impact of that legislation on another minority, B, thus allowing for the assertion of A's rights in a way that damages those of B, is liable to be exploited by other groups that are defined in terms of the restriction of B rather than out of any primary concern for A.

A good example of majoritarian equalities legislation that has been exploited in this manner is again found in the Sexual Orientation Regulations which, as we have seen, allow for the assertion of the rights of some from the sexual orientation strand to damage the rights of others from the religion and belief strand. As such, the regulations were, it would seem, quickly identified as a great opportunity by groups like the National Secular Society, whose purpose relates not to sexual orientation, but rather to critiquing the manifestation of religious belief. During the period January to March 2007 (when the Sexual Orientation Regulations were debated in Parliament), the National Secular Society issued ten press releases championing the unamended Sexual Orientation Regulations, focusing on how they should be used to get faith groups to privatise their faith with respect to sexual ethics, or withdraw from service provision. Stonewall, meanwhile, whose *raison d'être* is defined in terms of sexual orientation, issued only three!<sup>57</sup>

Moving on to the Equality Bill, it is interesting to note that the British Humanist Association's Second Reading (Commons) Briefing on the Equality Bill is distinctive for arguing for more gay rights via the extension of harassment offences in relation to sexual orientation, whilst arguing against rights for religion and belief in relation to the proposed Public Sector Duty.<sup>58</sup> If you are supposedly part of a strand and argue against the extension of its rights, whilst making a name for yourself by arguing for the rights of other strands that will cut across those that are definitive of what is supposed to be your own strand, your actions will surely raise significant questions about your identity and in which equality strand (if any – see the Appendix 1) you should be located.<sup>59</sup>

Whilst we respect the right of the National Secular Society (NSS) and British Humanist Association (BHA) to articulate their views (although we question their claim to protected characteristic status, see the Appendix 1), we are very concerned that the crudely majoritarian manner in which recent equalities legislation has been developed (i.e. such that its rejection of different treatment under the law allows one strand to assert its rights in a way that damages another strand) lends itself to the NSS and BHA being able to exploit its bluntness for their own quite different purposes. Sophisticated legislation not only avoids failing to have regard for others (and thus it makes good use of different treatment under the law), it also takes precautions against its subversion by free riders fervently exploiting its provisions for their own quite different purposes - a less than edifying spectacle for the reputation of the equalities movement as a whole, doing nothing to build public confidence or further its image.

## 2. Equalities and Representation

The second problem relates to the politically more sensitive area of representation in the 'new politics.' In order to provide a proper definition of this difficulty, we must first consider what it means to be fully enfranchised in the 'new politics' (Section 1) before reflecting on the implications of majoritarian equalities legislation in this context (Section 2).

### Section I: Defining Enfranchisement in the New Politics

Since the 1960s, governments throughout the western world have experienced an erosion of legitimacy as their publics have increasingly lost their sense of loyalty and attachment to the state and become disconnected and apathetic. This rising sense of alienation between politicians and their constituents, especially among the young, threatens the legitimacy of politicians and the state. The prospect of an electorate consisting largely of alienated people who 'don't care' is actually a serious concern for both government and many civil society bodies who recognise that their long-term freedom depends upon the health of democratic government.<sup>60</sup>

## **- The Common Critique**

Over time, common responses from both civil society (i) and government (ii) have emerged to address this problem, which are, in a very important sense, shaping a new kind of politics:

### **i) Civil Society**

Many civic bodies are increasingly of the opinion that the introduction of the big state, and specifically the big welfare state, which swept away many of the old personable community-generated forms of welfare provision, undermined civil society. Despite warnings from Archbishop William Temple<sup>61</sup> and others, as the state became more involved in our lives, taking responsibility for the delivery of goods and services as well as the definition of law, the public sphere increasingly became the state and its policies as the role of the intermediary associations became ever more marginalised. This, however, did not make for a particularly meaningful, rooted public sphere. 'The state may be omnipresent, its tentacles may reach into every nook and cranny of social life, yet its structures, processes and policies may be far removed from the citizen's sense of identity, history and solidarity.'<sup>62</sup> In this context the renaissance of non state - especially voluntary and community sector - service provision has become central to the development of a healthier social and political situation in the thinking of leading civil society bodies. Giving local communities greater control over their lives, it is hoped that this strategy will provide a rooted, local sense of community and identity, which can both reconnect with, and inform and support, a stronger sense of national community, sustaining a less domineering state.<sup>63</sup>

### **ii) Government**

Government itself, meanwhile, also recognises that placing its faith in the big state has been corrosive of national and local community. Again - and completely in line with the civil society response above - instead of the impersonal state seeking to undertake responsibilities for a passive electorate, confident of their place within a greater state community identity, there is now an attempt to re-ignite community and community identity by giving grassroots bodies more control in addressing their own problems. Increasingly, therefore, significant funding is being made available to help local projects address local needs, subject of course to various mechanisms of scrutiny and accountability. The hope is that this empowerment will help to regenerate community locally and nationally and thereby revive a greater sense of civic connection to the state.<sup>64</sup> In the case of the state, of course, there is also the added consideration that it is usually cheaper to commission services through the voluntary sector than for the state to provide the services itself!

Blair's advisor, Professor Anthony Giddens, describes the arrangement in the following terms:

*'The fostering of an active civil society is a basic part of the politics of the third way ...Government can and must play a major part in renewing civic culture. ...State and civil society should act in partnership each to facilitate, but also to act as a control upon, the other. The theme of community is fundamental to the new politics, but not just as an abstract slogan.'*

*'Community,' Giddens continues, 'refers to practical means of furthering the social and material refurbishment of neighbourhoods, towns and larger local areas. There are no permanent boundaries between government and civil society. Depending on context, government needs sometimes to be drawn further into the civil arena, sometimes to retreat. Where government withdraws from direct involvement, its resources might still be necessary to support activities that local groups take over or introduce - above all in poorer areas.'*<sup>65</sup>

Writing in a similar vein, Barry Knight, highlights the impact of this approach on the boundary between state and civil society. Specifically, he claims that the new politics is all about public management *'collaborating with private and voluntary initiatives to create fresh blends of civil society, of wealth creation, and of governance ...The result is a blurring of the traditional boundaries between public, private and voluntary sectors, causing a strange mix of confusion and excitement.'*<sup>66</sup>

## **- The Common Solution: Generating a New Politics**

The common civil society and government responses have translated into action in the form of: the provision of government funding for voluntary projects which has, in time, given rise to, the advent of a new relationship between civil society and the state in 'governance.'

### **• Government Funding and the New Politics**

In the context of the new government commitment to investment in voluntary welfare provision, the amount of tax-payers money going to the voluntary sector has increased rapidly. In 1975/6 the proportion of charities' funding that came from the Government was 7.3 per cent.<sup>67</sup> By contrast in 2006/7 the proportion of charities' funding that came from the Government had risen to 34.6 per cent!<sup>68</sup> We have moved from a place where some hoped that voluntary welfare provision would be completely replaced by a far more efficient welfare state, to a place where it has become indispensable and a very important part of the economy - with an income of £33.2 billion (2006/7) - called the Third Sector, third that is the public and private sectors.

## • Governance and the New Politics

The increase in the size of the voluntary sector has necessarily been related to an increase in its political significance, greatly aided by the publication of the Deakin Commission in 1996 and the advent of the Compact Process which has generated new interfaces for voluntary sector leaders with government.<sup>69</sup> Moreover, these developments should be conceptualised in the context of the more fundamental governmental change described as the shift from 'government to governance.' This development was actually first observed in the context of local government by Rod Rhodes who identified a movement 'from a system of local government into a system of local governance involving complex sets of organizations drawn from the public and private sectors'. This use sees governance as a broader term than government with services provided by any permutation of government and the private *and voluntary sectors*.<sup>70</sup> (Italics added) Similar observations were subsequently made regarding central government. 'Changing boundaries for the state meant that the boundaries between public, private, *and voluntary sectors* became shifting and opaque.'<sup>71</sup> There 'is no longer a single sovereign authority. In its place there is a greater variety of actors specific to each policy area; ...blurred boundaries between public, private and *voluntary sectors*.<sup>72</sup> In the context of this 'governance,' whilst elections are ongoing, the influential bodies are actually permanently impacting government by virtue of their position within the new 'networks of governance.'

The shift to governance is quietly revolutionising the nature of the challenge facing those who wish to be heard. No longer is it just about seeking to influence the people's representatives and their work in parliaments, assemblies and county halls through argument and regular reference to the size of the Christian constituency. Increasingly, it is important for those who are service providers and who want to shape policy - especially church/para church projects that have been providers for a long time and have a lot of experience - to engage on (what is in some ways) the same level as the politicians themselves (together with civil servants, local government officers, business leaders etc), within partnerships, i.e. within governance.

## Section II: Faith Enfranchisement in the New Politics?

Having defined enfranchisement in the New Politics, we now turn to consider its implications for faith bodies which are very dependent on their ability to access its key features: funding [i] and governance [ii]:

## i] Accessing Funding

Mindful of earlier discussions about the fate of Catholic adoption agencies, the big question that arises in relation to the ability of faith groups to access the new politics with respect to funding opportunities (and thereby contribute to the reinvigoration of civic culture) is, do government monies generally come with majoritarian equality strings attached? In the event that making a successful application involves (among other things) compliance with majoritarian equalities provisions that would require certain faith groups to act in violation of their ethos, those groups would effectively be excluded from the funding opportunity. Amounting to what would constitute, in a very real sense, a form of 'constructive discrimination,' this would be particularly problematic for churches because of the imperative for their interest in welfare service provision, stretching back over the centuries, far further than that of any other existing body. Indeed, it is because of this commitment that when the growing franchise compelled the state to become intimately concerned with welfare service provision, it looked to the Church for projects and principles; and in this regard the Evangelical tradition has been singled out for its special contribution in relation to laying the foundations of the modern welfare state.<sup>73</sup> Now that the state is increasingly turning to the voluntary sector once again, it would be contrary to natural justice for it to constructively discriminate against the Christian projects whose antecedents actually gave the state many of the institutions and principles which it used to make the welfare state, favouring instead new secular initiatives. Moreover, failure to accommodate faith-based providers is also problematic because government is committed to reform public services to promote diversity and choice for service users, and to champion wellbeing, which it recognises has a spiritual component.<sup>74</sup> So, how are church and para-church third sector projects positioned in relation to the new politics and the resulting funding? Are they able to access funding and governance networks on a level playing field with other providers?

### - Affirming Faith?

On the one hand, it is vital to recognise that the current Government has done more than its predecessors to publicly encourage faith-based welfare.

In 2001, the then Prime Minister Tony Blair said with great sensitivity:

*'Faith groups are among the main sponsors and innovators of voluntary activity in all these areas. Community by community, you are engaged directly. You know the terrain. You have committed volunteers, and often an infrastructure invaluable for delivering*

*projects speedily and effectively. And you do this because of your faith, not in isolation from it, a point that government - central and local - must always appreciate.*<sup>75</sup>

On 19 February 2007, Jim Murphy, the then Minister for Employment and Welfare Reform, held a seminar on the role of faith groups in today's welfare state. He said:

*'The involvement of faith groups in welfare and public service provision is nothing new. Most of what we now call public services was once the preserve of charities, many of which were faith based. From Vestry committees providing night-watch services to internationally renowned centres of excellence, such as St Thomas' Hospital, faith-based groups have been at the heart of delivering services to those in need for centuries.*

*...That is why I believe faith groups are in a somewhat unique position. The access they have to people, the relationships they can establish, and the trust they inspire, has the potential to go far beyond what the state can do.*

*...I am pleased to announce today that I have asked my Department's Commercial Director to develop a centre of expertise within the procurement team working with the Third Sector, to specifically cover the needs of faith-based groups. From the end of this week, there will be a link on our website, dedicated to this with specific information as well as the contact details of who to speak to. In doing this, I want to make sure that access to contracts for faith groups can be on an even footing with all other private and voluntary sector organisations who wish to compete to deliver our services. And I hope that a commitment from the Government to build up knowledge around the specific needs of faith groups illustrates our desire to achieve this.*<sup>76</sup>

In July 2008, Hazel Blears, the then Secretary of State for Communities and Local Government, was very positive about faith and its role in welfare service provision in her foreword to the Government's first inter-faith strategy document 'Face to Face, Side by Side':

*'For many, faith is not passive, but active. The values of care for the vulnerable, and responsibility towards others, are lived out through practical acts of social concern. When there are problems in a neighbourhood – whether it is drugs, crime, violence or pollution – faith communities are often the first on the scene, making a difference and remaining steadfast and committed where others might despair. Their contribution should be valued and recognised. If we fail to make the most of it, we all miss out.'*<sup>77</sup>

Speaking in January 2009 at an Institute for Public Policy Research event Stephen Timms MP, Financial Secretary to the Treasury, reflected on the 'challenge to progressive politicians to show they recognise faith-based perspectives and

contributions as valid and mainstream, rather than irrelevant and marginal.' This meant, he very properly noted, *'recognising that faith cannot be relegated to the private sphere – and as the IPPR has already argued – addressing faith literacy in central and local government, so that officials can deal intelligently with input from faith communities. And it means thinking hard about identity, recognising the part faith plays, and getting beyond "We don't do God."*'<sup>78</sup>

Stephen Timms then went on to talk about how he had been a patron of Hope 08 and celebrated specific examples of the manifestation of religious belief in the public square via welfare service provision. It is hard to imagine a more succinct instance of the manifestation of religious belief in the public square than one he cited:

*'A young girl, asked why she gave up a day to pick up litter, answering that its because she loves God.'*<sup>79</sup>

In relation to Jubilee 2000 and Make Poverty History he said: *'the change of public mood and new consensus are the results of campaigning from churches – accounting for an estimated 80 per cent of those who formed human chains and turned up on huge peaceful demonstrations to press their cause.'*<sup>80</sup>

Moreover, government has not only come up with words, it has also introduced new funding streams like the Faith Community Capacity Building Fund, now replaced by Faiths in Action.<sup>81</sup>

## - Frustrating Faith

On the other hand, however, the truth is that majoritarian equalities conditions have not only impacted government funding with respect to adoption. They have actually made their presence felt generally in relation to funding streams via employment and goods and services equality provisions. Some might respond to this by arguing that government investment in faith-based voluntary sector initiatives as a whole has none the less increased in recent years. That may be true in absolute terms but the key point - as noted earlier - is that government investment in the third sector as a whole has increased very, very significantly since the '70s - up from 7.3 per cent in 1975/76 to 34.6 per cent in 2006/07. Have faith-based voluntary sector projects been able to access this money as readily as secular projects? Do faith-based voluntary sector projects receive approximately 34 per cent of their income from government? (Indeed, the point could be made that, given the historical concentration of welfare service provision via church/para church bodies, one might expect them to have accessed a disproportionately large amount of government monies invested in the voluntary sector since 1976.) The truth is that you can make all the overtures you like to faith communities, emphasising the importance of increasing faith literacy amongst local government employees etc but, if, at the same time, you introduce new laws and

conditions that have the effect of asking many faith groups to choose between either violating their faith and continuing to receive government monies or not receiving government monies, they will inevitably decline the money and consequently become a proportionately smaller and smaller part of the voluntary sector. In this context, one has to assume that logically - it is for the Government to prove otherwise - such projects are less likely to access funding than their secular alternatives unless they are prepared to sacrifice their ethos. This certainly is born out by the evidence.<sup>82</sup>

## **ii] Accessing Governance?**

Whilst - as a consequence of the impact of majoritarian equalities conditions with respect to government funding streams (see above) - there is a case to be answered in relation to the 'representation' of faith-based voluntary bodies in the broad sense of their 'presence' in the rebuilding of civil society, what about 'representation' as 'presence' in governance? Some will no doubt argue that there is nothing to prevent churches from gaining access to governance on the basis of the self-funding welfare that they provide. Indeed, they have good representation on quite a number of local strategic partnerships at a local authority level.<sup>83</sup> In response to this, however, one must appreciate that:

- the greater the amount of funding received, the greater the capacity of a voluntary body and the greater the capacity of the voluntary body, the more lives it touches and the more lives it touches, the greater its political significance and the more likely it is to be invited into governance.
- when government funds a project, a relationship has to develop between itself and the project in question - not least for auditing purposes - and this will necessarily become more involved the larger the investment.

The political implications flowing from both the amount of funding received, in terms of the resulting project size and potential impact, and the opportunity for relationship to develop as a consequence of receipt of that money, mean that a government funded body is at least logically much more likely to be welcomed into governance networks than self-funded projects that are generally small (and which thus generally impact fewer people) and don't have a funding interface with the state. One must assume, therefore - again it really is for the Government to prove otherwise - that bodies that are effectively 'constructively discriminated' against by government funding streams are, by contrast, more likely to find themselves operating at a real disadvantage in the new politics and in this sense subject to a form of disenfranchisement.

Moreover, to really appreciate the connection between receipt of government money and enfranchisement in the new politics, one must recognise that in some cases

government actually funds voluntary groups to participate in policy development. The rationale goes something like this: effective policy development requires rigorous consultation which critically depends on the engagement of service providers. Consultation, however, can be complex and time consuming for consultees. In order to get the quality time of cutting edge community leaders, therefore, government must resource some significant consultees for their time and effort. A good example of this commitment to policy development is seen in Section 64 (Health Service Act 1968) Grants. Not only have projects in receipt of these monies been asked to contribute to policy development by feeding through their views, doing so has been a condition of receiving the money.

## Eligibility Criteria

*'To be eligible for consideration for this grant, organisations must meet the following criteria, they:*

*Must be a voluntary organisation operating in the social care sector for carers;*

*Must operate on an all-Wales basis. In considering this, the main criteria will be how far an organisation:*

*Develops local networks (of branches and people) throughout Wales;*

*Is represented itself throughout Wales;*

*Represents the views of local organisations to the National Assembly and other central agencies;*

*Is a source of information, expertise, knowledge and training to local organisations located in all areas of Wales;*

***Contributes to national policy development.'*** (Emphasis added)<sup>84</sup>

This point is, of course, particularly timely given the recent publication of The Taxpayers Alliance report, *Tax payer funded lobbying and political campaigning*, which argues that the use of taxpayer's money for furthering the political objectives of groupings in civil society, including lobby groups, is extensive.<sup>85</sup>

## Analysis

The significance of all this is fairly obvious. If churches or para-church bodies find they cannot access government monies without making changes that violate their identity, they will find that they are not only compelled to become a proportionately smaller and smaller part of the voluntary sector, unable to help the number of needy people they could if given the resources made available to secular alternatives. (This by itself is more

than enough to generate a sense of injustice given the continuous role of churches in welfare service provision over time). They are also likely to find that their voice in mainstream governance and the quality of their representation politically is seriously compromised. The combined impact of the sense of exclusion, both as it relates to accessing additional welfare service providing capacity, and as it relates to accessing the franchise in the 'new politics,' and attendant opportunities to shape welfare policy, are bound to generate a serious sense of injustice. Moreover, it should be pointed out that when considering pressures for the privatisation of faith with respect to service provision and governance, the nature of governance actually compounds the pressures of privatisation. Specifically, there is a real sense in which, in the context of networked governance, part of the old private sphere has been appropriated by the new 'public' that results from the mixtures that are constitutive of the network, leaving a smaller genuinely private sphere behind. Thus there can be no doubt that having to privatise one's beliefs in the context of the new politics and governance - where others are able to take their projects (and therein values, since no projects are values free) into the process of government via governance as never before - will be, in an important sense, more limiting than was the case before the shift from government to governance.

## **Counter Arguments and Responses**

In response to the above analysis some will no doubt want to make a number of points:

First, lots of project applications are turned down. Many voluntary bodies experience similar frustrations. This is of course absolutely true and it is entirely appropriate for a bid made by a faith group, or indeed any other group, to be turned down if it doesn't make the grade. What is not acceptable is the introduction of majoritarian equalities provisions that make it effectively impossible for many faith groups to access government monies by requiring those funded to act in a way the faith groups in question cannot without violating their identity. The development of criteria along these lines: a) makes it pointless for many faith groups to apply for funding and b) actually amounts to a form of 'constructive discrimination' which crucially does not merely relate to accessing or providing services but also to enfranchisement in the new politics.

Second, critics may come back and point out that, happily, some faith voluntary sector projects do access monies. This, however, is usually because the theology of the group in question means that signing up does not involve their having to be willing to violate their faith identity (unless the relevant equalities legislation/best practice does not apply problematically in the context in question for those with traditional theologies). No difficulty need result from this state of affairs if all the faith groups concerned with welfare provision had identity commitments consistent with the implications of current equalities provisions; but this is not the case. As we have seen, the Christian faith traditions for which legislation can be problematic, e.g. Evangelicals and Catholics, are

profoundly involved in welfare service provision - for which there is significant demand - and have been for centuries.

Third, a critic might suggest that the notion that faith groups are disenfranchised from governance does not wash. The Government has created the Faith Communities Consultative Council (FCCC) specifically to engage with faith communities. The Government must be applauded for its creation of the FCCC. This is very useful for addressing faith-specific concerns and maintaining good relationships between government and faith communities, but it constitutes a very limited part of the world of governance. Faith communities that have, over the centuries, been leading welfare providers should not have the opportunity to participate in 'mainstream governance structures' seriously frustrated by the fact that the majoritarian equalities strings associated with government funding make it very much more difficult/impossible for them to have the chance of accessing that money, which in turn makes it less likely that they will be invited into mainstream governance, for the reasons set out above.

## The Way Ahead

There are two possible ways out of this disenfranchising dilemma. The first would be for government to become the aspiring sole service provider once again, for it to instigate the shift from governance back to government, and for political representation to find its expression narrowly through the ballot box as in years gone by. This would be quite a challenge and would mean returning to mid twentieth century big state economics and aspiration. The other way out would be the development of equalities legislation and equalities hoops that are consistent with the majoritarian critique of legislation that gave rise to, and nurtured, our honourable equalities tradition in the first place. This way forward has the advantage of: being economically credible, renewing civil society and promoting choice in service provision.

## Conclusion

In conclusion - taking stock of both Chapters 1 and 2 - rather than helping to address tensions between different groupings within society, recent equalities legislation has:

- not afforded the same protection to other equalities strands that champions of equalities once sought in relation to legislation designed for the majority. In so doing, rather than giving communities rights *and responsibilities* to exercise those rights with respect to other equality strands, mindful of the importance of not violating their identities, government has generated rights that can be exercised without proper thought for their impact on other strands,

- tragically given different communities tools with which to make life harder for each other, generating more, not less, tension, leaving it vulnerable to exploitation by others for their own quite different purposes,
- promoted the erosion of Christian Voluntary Sector potential vis-à-vis the wider voluntary sector, depriving people of the option to access services in the context of a faith ethos, diminishing diversity and choice in service provision and
- placed many Christian bodies at a real disadvantage in the context of the ‘new politics.’

These failings are not the fault of equalities per se but of the increasingly majoritarian nature of the legislation and initiatives championed in recent years, and to some degree consequentially, the Government’s failure to be even-handed in its treatment of the different equality strands. Finding a successful way forward will depend on developing equalities legislation in the context of both the majoritarian critique that initially underpinned the equalities project, and the absolute rejection of any hierarchy of rights.

## chapter three

# The Way Ahead: An Amended Equality Bill

Having examined the problems associated with the development of recent equalities legislation and best practice in terms of the Government's failure to respect the principles of different treatment under the law and even-handedness, we must now turn to the key provisions of the new Equality Bill and look to the future. The Bill is important, first because it proposes the consolidation of all modern equality law into a single piece of legislation, thus providing a new opportunity for its amendment; second, because it seeks to update and add to UK equalities legislation new provisions which are again, of course, also subject to potential amendment. In the first instance, this chapter will look at the Bill, suggesting amendments both to those parts that consolidate and those that innovate (Part 1). In the second instance, it will consider the imperative for these amendments specifically in the context of an appreciation of the resources at our disposal for building a tolerant Britain, and the cost of not making the most of them (Part 2).

### Part 1: The Equality Bill: An Opportunity for Change

The following proposals outline *some* priorities for change:

#### I. Employment

First, the Bill seeks to introduce some very troubling changes in the law in relation to employment. There has already been considerable debate about the implications of the proposed new employment legislation in the Equality Bill as it replaces the Employment Equality (Sexual Orientation) Regulations 2003. At the time of writing the Government does not contest the fact that the relevant wording of the Bill (Schedule 9) is different from that in the regulations, but they argue that the changes merely clarify the original

wording in the 2003 regulations. They do not break any new ground. In reality, however, and as the minister strongly hinted initially,<sup>86</sup> Schedule 9 significantly narrows the provision for Christian and other faith bodies to only employ those who are practicing Evangelicals, Catholics etc with respect to the key area of sexual ethics.<sup>87</sup> Given that the 2003 settlement is problematic, this further erosion of the rights of faith bodies to practice a difference of treatment with respect to applicants not living the faith tradition in question is very unfortunate, making a bad situation much worse. Sadly it raises huge questions about the Government's understanding of, and commitment to, religious liberty.

## Why Change

The Government does not have to give a reason for changing the law but the two that have been suggested by some are the Amicus and Bishop of Hereford cases. The notion that either case highlights the need for a change in the law, however, makes no sense. The Amicus judgment eloquently demonstrates that the 2003 regulations are entirely in order<sup>88</sup> and there is nothing from the Bishop of Hereford case - where the Judge ruled, very properly, that the senior youth worker post in question (the head of youth work for the whole Diocese) was covered by the Genuine Occupational Requirement<sup>89</sup> - to necessitate any kind of change.<sup>90</sup>

The Schedule 9 changes in question are achieved by: i) dramatically narrowing the potential meaning of 'employment for the purposes of organised religion' ii) giving the courts new scope to make decisions that will inevitably involve them assessing doctrine. We shall examine both in turn:

### **i. Narrowing Employment 'for the Purposes of Organised Religion'**

The relevant 2003 provisions for a Genuine Occupational Requirement, with respect to employment, permit an employer to discriminate: a) on the basis of religion and belief (subject to the 2003 safeguards that it is an occupational requirement and the fact they may need to defend their GOR in court etc) with respect to employment for 'organisations with an ethos based on religion or belief' (see Employment (Religion and Belief) Regulations 2003) and b) on the basis of sexual orientation (subject again to the 2003 safeguards that it is an occupational requirement and the fact they may need to defend their GOR in court etc) with respect to employment for the purpose of 'organised religion' (see Employment (Sexual Orientation) Regulations 2003). The current Equality Bill proposals, by contrast, maintain the freedom to require that a successful applicant is from a faith community, subject to the existing safeguards (Schedule 9 (3)), but very significantly narrows the freedom to make requirements about what being a practicing adherent means in relation to sexual practice (Schedule 9 (2)). Specifically, the definition of the kind of religious employment that is covered is narrowed from:

Employment ‘for the purposes of organised religion’ in the 2003 regulations, 7(3) to:

‘...employment that wholly or mainly involves:

a) leading or assisting in the observation of liturgical or ritualistic practices of the religion, or

b) promoting or explaining the doctrine of the religion (whether to follower of the religion or others)’ Schedule 9, part 2, paragraph 8 of the Equality Bill.<sup>91</sup>

This gives rise to at least five problems:

First, many church leadership posts - let alone other church ministry or para-church ministry roles - don’t fit these criteria. We suspect that the drafters only intended to restrict the freedom of Evangelical and other faith groups to practice a difference of treatment vis-à-vis applicants not living the faith in terms of sexual morality when dealing with non-pastor/vicar (or their equivalent) roles. Many pastors, however, don’t spend their time wholly or mainly leading liturgy or ritual or explaining or promoting doctrine. In the course of a week only a small proportion of time is taken up with leading liturgy and ritual (on part of a Sunday and perhaps a mid-week evening meeting). The amount of promoting or explaining doctrine will vary widely but often the combination of leading liturgy/ritual and promoting/explaining doctrine will not occupy the bulk of their time, *even though it represents what is in some senses the most important part of their time.*

Second, much of church ministry is pastoral and does not involve leading liturgy or the explanation or promotion of doctrine. No mention is made of this.

Third, many church roles are representational and play no part in leading liturgy and ritual or promoting or explaining doctrine. On the basis of Schedule 9, churches might well have to employ people to represent them whose lifestyles are entirely contrary to the teachings of the body they represent, making a mockery of it.

Fourth, there are many roles supporting the post of the vicar or his equivalent that are very much involved in the heart of the ministry: pastors secretaries, who, among other things, represent the pastor and pray with people over the phone (for whom this accounts for 20% of their role), youth leaders, who, among other things, lead youth worship (but for whom this only accounts for 30% of their role), those members of staff who attend team days away to seek God about the future of the ministry etc (but for whom engagement with liturgy/ritual and doctrine constitutes varying proportions of their role, usually well under 50%).

Fifth, in Evangelical theology, it is also a prerequisite that those involved in welfare service provision - and having nothing to do with teaching or leading worship - are 'filled with the spirit' and anointed by the 'laying on of hands', see the selection of those to care for the needy Acts 6 1-6.

Mindful of these concerns, as currently constituted it is anticipated that Schedule 9, part 2, sub paragraph 8 will have three main implications for Evangelicals and indeed some other Christian traditions and other faiths:

- **Church/Para-Church Leadership**

Those churches whose pastors would not meet the exacting 'wholly or mainly' requirements of Schedule 9, part 2, sub paragraph 8 would find it impossible to continue with an employed pastor, let alone with people employed to key ancillary posts.

- **Church/Para-Church Representation**

Churches and para-church bodies that employ people to undertake representational roles which don't involve liturgy/ritual or doctrine, will similarly have to stop doing so or risk finding themselves in the courts if they either refuse to appoint or move to dismiss someone because their lifestyle is contrary to church teaching.

- **Church/Para-Church Welfare Provision**

Given that under Schedule 9, part 2, sub paragraph 8, Evangelical Church or Para-Church welfare projects (which played such a pivotal role in laying the foundation for the welfare state, and continue to be very significant in both domestic and international welfare provision) would not be able to protect their ethos by requiring applicants for *any* positions to be practicing Evangelicals vis-à-vis sexual ethics, from the CEO down (because no role in such a welfare providing project from the CEO down would meet Schedule 9, part 2, sub paragraph 8), it is not clear that such bodies would be able to continue to exist.

Some in government have sought to reassure us, suggesting that the intention is that the promotion and explanation of doctrine should be interpreted very widely. On this point, however, what the framers intend a provision to achieve is neither here nor there. Judges do not interpret intentions. They interpret what the law actually says. As currently drafted Schedule 9 part 2, paragraph 8 could logically be interpreted (and there are certainly many out there who would like it to be so interpreted) in a way that would be exceptionally damaging for Evangelical church and para church bodies, and some other Christian and other faith traditions, in the UK.

## ii. Judges Judging Doctrine

Schedule 9 (2) also breaks new ground because it introduces entirely new provisions with respect to proportionality:

*(5) The application of a requirement engages the compliance principle if the application is a proportionate means of complying with the doctrines of the religion*

*(6) The application of a requirement engages the non-conflict principle if, because of the nature or context of the employment, the application is a proportionate means of avoiding conflict with the strongly held religious convictions of a significant number of the religion's followers.*

It is inconceivable that a judge will be able to assess what is and what is not proportionate on these bases without making judgements about the nature and extent of the doctrines/their relative importance, the degree to which they are strongly held etc. Government should be very cautious about using the law to compel faith groups to regulate their own doctrines and practices in a particular way. Impacting what a faith body can and cannot be, this will have the effect of drawing judges into a form of social engineering which is not appropriate in a liberal democracy. Indeed, it is vital to remember that when regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 was drafted, this was done with the deliberate intention of avoiding state interference in this manner as explained by the statement on behalf of the Secretary of State during *R (Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin):

*'...Regulation 7(2) simply sets out criteria of general application and leaves it to the courts and tribunals to determine in individual cases if those criteria are met. This was not done in relation to employment for purposes of an organised religion in regulation 7(3), because the Government was concerned it would lead to litigation in tribunals about the extent to which requirements dictated by doctrine or the religious convictions of followers could legitimately limit working for an organised religion, and to what extent those requirements, and by extension, the doctrine or convictions giving rise to them, could be said to be reasonable or proportionate. The Government was engaged in striking a delicate balance between the employment rights of gay and lesbian people, and the right of religious groups to freedom of religion. The Government took the view that it is not appropriate for courts or tribunals to make such judgments, and that the balance should be identified in the Regulations themselves.'*<sup>192</sup>

## II. Goods and Services

Second, Part 3 of the Bill recapitulates the failings of the goods and service legislation introduced by the Equality Act 2006 and should be amended to address the serious problems highlighted with respect to goods and services provisions in the workplace. Specifically:

- The failure of sexual orientation goods and services legislation to protect a person from a faith community from having to provide a good or a service if this involves their violating their conscience, e.g. a Christian website designer who could not design and update a site promoting other religions or gay relationships without being complicit in actions deemed by his faith to be sinful.
- The failure of religion and belief goods and services legislation to protect a gay printer from having to print a book arguing that same-sex sexual conduct is sinful, or a gay builder constructing a place of worship for a type of religious body that he knows, will, among other things, teach that same-sex sexual activity is sinful.

These failings should be addressed through the provision of mutually reciprocating different treatment amendments.

Moreover, the position of faith-based welfare providers in receipt of government monies should be clarified with respect to the same goods and services legislation. It should be made absolutely clear that a faith-based body can receive government monies for the purpose of providing services in accordance with faith imperatives (including when this means not providing services because doing so would have the effect of violating their identity), in the same way that projects for lesbian, gay and bisexual people can make their services available in a way that reflects LGB imperatives, including having services that are only available for lesbians, gays or bisexuals. So far, however, the Equality Bill has moved in quite the wrong direction. The wording of regulation 18 of the Sexual Orientation Regulations 2007 has been translated into the Bill in amended form via clause 186 which narrows the definition of the circumstances in which it is possible to only make services available to people of one sexual orientation. Whilst it does not say so explicitly, on the basis of the wording employed, 186 would seem to be an *attempt* to restrict the right to practice a difference of treatment on the basis of sexual orientation, to LGB projects, despite the fact that sexual orientation and practice are central concerns for faith communities and their doctrine of man and therein – at least in the Christian system – their doctrine of God, in whose image man is made.<sup>93</sup> This change of the sexual orientation goods and services provisions would thus seem – mindful of what Charity Tribunals have said so far in relation to the existing 2007 regulations – to suggest that the Bill aims to allow one strand, sexual orientation, to exercise its rights vis-à-vis another strand, religion and belief, in a way that has the

effect of damaging religion and belief by encouraging many of its members to be willing to violate their identity - or cease service provision with loss of livelihood and vocation. Of course, it also has the effect of restricting consumer choice.

The above provides a textbook example of a hierarchy of rights crying out for amendment. As noted in Chapter 1, some rights and some choices would seem to be more equal than others. Of equal concern, it also contributes to the growing culture of 'rights without responsibilities,' arming one community with a right without introducing provisions to ensure that this is pressed responsibly vis-à-vis other strands in those cases where it could potentially result in the violation of other strand identities.

### **III. Other Instances of Majoritarianism: the Public Sector Duty?**

Third, all new provisions introduced by the Bill must be checked for majoritarian equalities content and in this respect special regard must be had for the new Public Sector Duty. It must not be allowed to result in obligations being placed on bodies with equality strand identities in receipt of government monies that require them to do anything that would make them complicit in violating their identity. There is a particular concern that public bodies that fund/could fund faith-based welfare projects might seek to impose the Public Sector Duty in this way on the basis that indirectly the voluntary sector provision in question constitutes service provision by the public body. This would have the effect of making it impossible for many faith-based providers to access monies and have major implications, not only for providers but also for service users wishing to access services in the context of a faith ethos. It would not make for diversity and choice or help government fulfil its wellbeing commitments.

Mindful of the above, the requirement to have regard for the needs of people represented by the sexual orientation strand must not result in, for example, faith-based nursing homes being obliged to act in a manner that would involve their endorsing gay relationships or same-sex unions. Symmetrically, having regard for the needs of the religion and belief strand should not result in projects run by lesbian, gay or bisexual bodies having to do anything that would involve their being required to act in a manner that, either directly or indirectly, authenticated values regarding sexuality that they felt violated their identity. In accordance with this approach, any amendments tabled that seek to erode protections for one equality strand with respect to provisions introduced for another must be firmly resisted.<sup>94</sup> There are also very significant concerns regarding the Public Sector Duty proposals on the basis that, although they have very far reaching implications, their definition at a primary legislative level is rather vague and all the detail will be left to unamendable secondary legislation. In similar vein clauses 146-149 give ministers wide ranging powers to make changes in relation to the Public Sector Duty.

Incidentally - and in some senses more importantly - there are actually significant questions about whether any form of the Public Sector Duty should apply to charities. Government cannot have its cake and eat it. If the decision is made to provide services through voluntary bodies because of their personableness, rootedness, accessibility and flexibility etc, which are a function of the fact that they are not part of a bureaucratic government department, one cannot then expect to treat them as if they are. If the state wants services to be subject to this kind of regime, it must provide those services itself.

#### **IV. Hierarchy of Rights**

Fourth, all new provisions in the Bill must be checked to ensure they avoid making the rights of any equality strand second-class (as in adoption, see pp. 60-61). Once again any amendments - for example in relation to the Public Sector Duty - that seek to put the rights of one strand in a second class category must also be rejected. In this regard, upholding religion and belief *on the same basis* as other strands with respect to the Public Sector Duty will be of particular importance, especially given the comments of some MPs at Second Reading.<sup>95</sup>

#### **General Reflection: Lazy Law?**

Having identified four areas in need of attention, it is important to provide a general reflection on the rather blasé attitude of the Government to the potential for conflict between the different rights that it is creating. Specifically, we need to confront the increasing tendency of some to use the Human Rights Act as an excuse for poorly drafted law. Something it absolutely was not intended to encourage.

The fact that citizens can appeal to the Human Rights Act is obviously a very important constitutional protection. It means that they know that if ever government acts in a way that places their rights in jeopardy, they have recourse to the law for redress. However, in the context of equalities, there is a very real concern that some are taking the view that government need not worry too much about the effect of majoritarian equalities laws for other equality strands because if the exercise of, e.g. LGBT rights, via majoritarian sexual orientation legislation, resulted in the infringement of religious rights, those negatively affected could always go to court and claim protection under Article 9.<sup>96</sup>

Depending on the above obviously constitutes an extraordinarily lazy and irresponsible approach to the definition of the law. It actually enables politicians to dodge some difficult decisions - leaving them to judges - which would not have to be made in any event if the law in question catered, as it should, for proper mutually reciprocating different treatment under the law. There are at least three major problems.

First, it means that anyone negatively affected has to go through the trauma of having their rights infringed, plus the huge financial and emotional costs of lawyers' fees, litigation and media exposure, when better framing of the law with mutually reciprocating different treatment would have made this quite unnecessary. Second, it is very bad for community cohesion because we will be subject - as is increasingly already the case - to high profile lengthy inter-strand equality battles in court, followed by appeals, generating far more angst and tension than ever existed previously. Finally, it would mean (and increasingly already does) that the entrenching of Convention rights would effectively further the culture of 'rights without responsibilities,' encouraging people to press their rights without regard for other strands, confident that the courts will, at some later date, introduce 'responsibilities' after a number of financially and socially costly, lengthy legal cases, stretching out over the years.

In monitoring the development of the Equality Bill it is vital to ensure that the Human Rights Act, which is supposed to help citizens, does not become a means principally for 'helping government' - enabling it to propose sloppy laws, dodging the provision of legal certainty (which can be politically very useful when the provision of certainty risks alienating key interest groups) - and 'costing citizens' who subsequently have to both pay for legal certainty and to defend themselves in court.

## **Part 2: The Need for Change**

Having considered areas requiring amendment and special scrutiny, it is now important to examine the imperative for this task specifically in light of the very significant resources at our disposal for building a tolerant Britain (I) and the implications of not exploiting them (II).

### **I. The Resources for Building a Tolerant Britain**

There are two resources that must be highlighted. The British commitment to common sense and the considerable goodwill at our disposal:

#### **Common Sense - Fairness**

In British culture, one of the things that would really help the equality cause is the development of equalities provisions that resonate with common sense notions of fairness. In appreciating this imperative, it is important to understand the difference between initiatives that trade on 'common sense' and initiatives that trade on what is 'common.' If equalities law merely reflects what is common it won't present any kind of challenge and help British society become more sophisticated in managing and enjoying diversity. Equality law must challenge and hold to account, but when it is seen

as an expression of ideology rather than common-sense fairness, it gets into difficulty. The mutual reinforcement of inflexible ideological commitments, working in tandem with the black and white nature of the law, especially in its majoritarian form, is not helpful. The appeal to common sense should be made both by: a) ensuring that the law is framed in such a way that the different equality strands give each other space, even as they make their respective claims on the majority population as a whole (i.e. developing equalities law subject to the majoritarian critique), and b) not placing too much emphasis on the law as the solution (i.e. also stressing the promotion of good relationships between strands and mediation etc but *not* relying on this in the context of significantly extending conflicting rights in law – see above).

## Goodwill Resources

### - Good Relationship

In the Evangelical view,<sup>97</sup> all people are made in the image of God and loved by him to the same extravagant degree (they are infinitely precious), regardless of any conceivable distinction including their sexual orientation. Second, all people, regardless of every conceivable distinction, including sexual orientation, are - in the language of the Bible - 'sinners' but can enjoy relationship with God if they seek his forgiveness. These two great levelling imperatives in Evangelical theology mean that criticism of same-sex sexual practice certainly should not result in Evangelicals disliking gay people anymore than criticism of any other practice prohibited by the Bible should result in Evangelicals disliking people that engage in those other activities. In the first instance, of course, there is no moral problem with being gay, only in engaging in an active same-sex sexual relationship, which depends on a decision of the will.<sup>98</sup> In the second instance, even if someone does engage in an active same-sex sexual relationship, it does not result in their being radically differentiated from others in the sense that everyone is, in any event, a sinner. The truth is that rather than inciting hatred, Evangelical theology encourages people to love lesbians, gays and bisexuals. This means that Evangelicals are actually more than happy to fight for the rights of gay people to access services beyond those directly connected to same-sex sexual practice and same-sex unions or parenting. For instance they would be very opposed to someone being denied, e.g. food from a supermarket because they were gay, treatment at a hospital because they were gay, a job at a factory because they were gay etc. They are profoundly opposed to all expressions of hatred or violence towards gay people and are more than prepared to engage constructively with lesbians, gays and bisexuals. This goodwill capital should be exploited to the full.

## - Safe Different Treatment Under the Law

The presence of this goodwill is not only of great strategic importance with respect to the need to foster good inter-strand relationships. It is also key because of the fact that, far from seeking the destruction of those benefiting from the legislation in relation to which different treatment is sought; those seeking the different treatment actually want the best for gay people. This means that providing different treatment under the law for Evangelicals or Catholics, or any other traditional expression of Christianity, should not cause great concern for those from the sexual orientation strand benefiting from the laws in relation to which these Christians seek different treatment. In the first instance the different treatment will only apply to another minority. In the second instance, that minority will only benefit from the different treatment in very limited areas and, in availing itself of the different treatment, does not seek to harm the minority strand for which the legislation is designed. It only wishes to have the freedom to ensure that its different minority identity is not placed in jeopardy. – The point must, of course, be reiterated here that LGBT web designers, printers, builders, etc (as per above) should also benefit from different treatment. (Of Course, some LGBT voluntary sector welfare service providers already do, see regulation 18 of the Sexual Orientation Regulations.)

## II. The Implications of Ignoring the Obvious Way Forward

Whilst the presence of the liberal democratic tradition, with its majoritarian critique of the law, together with the commonsense and goodwill imperatives, considered above, offer a tremendous opportunity for enlightened change vis-à-vis sexual orientation and religion and belief, there is also a sense in which they have the potential to make things rather difficult if ignored. Specifically, if their presence, and the obvious, progressive way forward they suggest is snubbed, nagging questions arise that are not helpful for the integrity of the equalities project. **To be precise, when one has regard for this approach in light of the large number of Christians that are already negatively impacted by majoritarian equality law (and will be if the Equality Bill becomes law) mindful of those who genuinely do seek to oppress gay people, and should be the target of the legislation, one could be forgiven for wondering whether promoting and protecting gay rights really is the end game. Increasingly, resistance to the provision of appropriate ‘different treatment under the law’ suggests - and not just because of the conduct of the NSS and BHA - that the primary objective of LGBT equality legislation is actually the privatisation of religious belief at least in the case of those churches and Christians with traditional theologies of sexual practice.**

Moving away from the Equality Bill specifically, this same point can be made in relation to the Government’s unsuccessful efforts to delete the free speech provision from the new offence of inciting hatred on the basis of sexual orientation. It’s fairly clear to most

people, for example, that rap lyrics that advocate ‘hanging lesbians’ are not the ‘work’ of people who think that lesbians are infinitely precious people who, made in the image of God, are no less precious than heterosexuals. They are the ‘work’ of individuals who hate gay people. As introduced by the Government, however, the primary effect (in the sense of the most people impacted) of the new law on inciting hatred on the basis of sexual orientation without a free speech protection would have been likely to be felt by Christians and churches either cowed into silence for fear of lengthy police interrogation (even if the bar is set relatively high – see the requirement that the behaviour must be ‘threatening’ and ‘intended’ – and even given the Article 9 defence) or remaining true to the faith and finding themselves subject to investigation even if they were eventually vindicated.<sup>99</sup>

Government needs to affirm the importance of religion and ask whether it wants the primary effect of sexual orientation equalities legislation to be: a) the restriction of religious liberty (denying space for Evangelicals and others to be what they are, practicing their faith freely in relation to sexual ethics) or b) the curtailment of the activities of those who hate gay people and want to prevent them making a living and prospering. If the answer is the latter then this objective can be achieved without undermining religious liberties by exchanging the majoritarian nature of current equalities legislation for genuinely liberal democratic equalities legislation that has regard for the rights of other equality strands. This also has the benefit of involving the legislature presenting British equality strands with their rights in the context of an appreciation of their responsibilities when handling these rights in relation to other equality strands.

## Conclusion

In producing this paper, CARE calls on the Government and, where appropriate, the Equalities and Human Rights Commission, to:

- 1) Use the Equality Bill to revitalise equalities legislation in light of the majoritarian critique, introducing appropriate amendments (pp 55-62) so that equalities legislation does not have the effect of allowing one strand to assert its rights in a way that damages the rights of another equality strand (e.g. compelling them to act vis-à-vis employment and service provision in ways that violate their identity). Crucially this means ensuring that rights are defined by the legislature in the context of an appreciation of the responsibilities that rights bearers must embrace when handling their rights vis-à-vis other strands.
- 2) Ensure that the people whose lives are changed by equalities legislation are those whose actions, driven by hatred, prevent strands having space to be who they are and prevent them from being able to access, employment, food, housing etc, *not*:

- those who, in deference to their religious identity, want to build on welfare service provision, accessing government monies on a level playing field with other projects without any form of constructive discrimination,
- those who, in deference to government commitments to reform public services to promote diversity and choice, would like to have the option of receiving services provided in the context of a traditional faith ethos, or
- those who, in unpacking their strand identity as it relates to their theology of sexual practice, want: i) to be able to state that, whilst all people, regardless of their sexual orientation and sexual conduct, are made in God's image, only sex within heterosexual marriage is permitted in scripture, and ii) the freedom to advance these views and encourage people accordingly, even as they know that others in the market place of ideas will advance contrary views.

3) Work constructively with churches that celebrate lesbian, gay and bisexual people, affirm them as made in the image of God and loved by him no less/no more than any heterosexual, even as they critique same-sex practice and same-sex unions, just as government works with others with contrary views and practices in mainstream civil society.



# Appendix 1: Political Humanism

*'[R]eference to religion includes a reference to lack of religion'*

Clause 10, the Equality Bill

Secular humanism has been a constant philosophical component of British life since the eighteenth century, but in the last ten years it has gained new levels of political influence. Between introducing the 1998 Human Rights Act and the 2006 Equalities Act (especially section 44 – which contains the extraordinary assertion 'reference to religion includes a reference to lack of religion,' copied word for word into clause 10 of the current Equality Bill)<sup>100</sup> a new approach has emerged on the part of government in which it apparently determined that legislation pertaining to faith should be defined as relating to 'religion and belief,' where belief encompasses religious and non-religious belief. This development - justified on the basis that the relevant European Convention on Human Rights provision (recently incorporated into British law courtesy of the 1998 Human Rights Act), Article 9, has always made reference to religion and belief, not just religion – added/adds significant momentum to contemporary pressure for the privatisation of belief. In what follows we will look at some of the problems associated with this arrangement and its implications:

## Neutral and a Minority?

If the belief accommodated by 'belief,' as opposed to 'religious belief,' was concerned with helping adherents live out their secular creed, then there would be a case for accommodating humanism within the religion and belief category. The difficulty, however, is that rather than ensuring that the rights of those subscribing to this belief are not placed in jeopardy - i.e. that people can practice their secular belief - humanists have exploited the opportunity resulting from their new position for quite different political purposes. While they argue that, as bearers of 'belief,' they should benefit from equalities legislation and be treated as a 'protected characteristic,' they also argue that, although the public square should be a domain in which different views can be expressed, the public square itself should be resolutely secular which they describe as 'neutral.'<sup>101</sup> In other words, rather than being one view among others they contend that the secular should be the basis for our society. Humanists cannot claim that 'the secular' is both so basic as to be 'neutral,' on the one hand, and yet that it should benefit from equalities provisions designed to protect minorities and the vulnerable, on the other.



There are two potential counters to this argument:

## 1. Two Seculars?

First, humanists will want to come back and claim that I am confusing two uses of the word secular. On the one hand there is ‘secular’ as a belief, for those people who see it as a creed but, on the other, there is ‘secular’ as the simple absence of religion or for that matter any belief, including secular belief. This definition of ‘secular’ is simply one of neutrality. The state should aim to provide a secular foundation in this sense, upon which people can articulate their ‘beliefs’ and some of those beliefs will be religious and some will be secular. To conflate ‘the secular as neutrality’ with ‘the secular as belief’ is to fundamentally misunderstand and muddle the debate.

There is, however, a huge difficulty with this position. There is now a vast amount of philosophical literature critiquing the myth of secular neutrality,<sup>102</sup> the message of which is actually illustrated by the fact that the word ‘secular’ and ‘belief’ are used interchangeably. Any hope that talk of ‘belief’ enables one to separate the ‘secular as belief’ from the ‘secular as neutrality’ is open to huge philosophical censure. In the same way that the Christian cannot argue that it is possible to have a Christian foundation for a polity that is truly neutral, neither can a secularist. What is interesting, though, is that polities with a Christian foundation have been able to make space for difference because, in the orthodox Christian view, the state is not the vehicle for Christian mission. The limited political objectives of Christianity mean that there always has been a public, secular sphere in the Christian view of politics and never any rigorously, theologically justified basis for removing the secular from politics.<sup>103</sup> Whilst Christian values inspire the approach of Christians towards public life, and some may engage with it in terms of a church identity, in the Christian view there is an important sense in which politics *is secular*. By contrast secular polities have not had much success with upholding freedom of religion.

## 2. Still a Minority?

Second, others might want to point out that the desire that the secular should be foundational does not mean that it is. As this objective is a long way from being achieved, those seeking it could claim to be a minority and beneficiary of equalities for so long as their goal remains very distant. The difficulty with this position, however, is that their objective largely is realised since the state is overwhelmingly secular. Even if one looks at the greatest object of their complaint, the 26 bishops in the House of Lords, the Lords Spiritual constitute just 1.9 per cent of the Westminster Parliament’s legislators. In other words, 98.9 per cent of Britain’s legislators are there because of their secular identities, usually being a member of a secular political party.<sup>104</sup>

## The Result

Interestingly, obtaining their new equalities identity has probably been the most significant political development for secular humanism in Britain ever, giving it a new lease of life. First, by locating themselves in a new equality strand, humanists have ensured that whenever government seeks to develop, or unpack equalities legislation, or legislation impacting equality strands, it must have regard for secular humanists. Second, the fact that their place in UK equalities law is in the same category as religious organisations means that, as well as having to contend with clashes between religious liberties and any of the six other equalities strands, religion (which is of course, in any event, divided between very different forms of religious belief) also has to contend with an existential battle within its own equalities category against those standing in diametric opposition to it. In this context, rather than setting about championing the rights of the minority of humanist believers to live out their creed, the National Secular Society and British Humanist Association are pressing their radical political agenda of trying to make the public square completely secular for everyone.

- They are fighting for an immediate end to the manifestation of religious belief where it is sustained by any kind of state support be it by financial or legal provision. Thus they want bishops removed from the House of Lords, the end of faith schools and compulsory religious assemblies in schools and no more government funding for faith-based welfare (unless the projects are prepared to effectively secularise themselves). The public square should thus become a resolutely *secular* space.
- They seek to use equality law to change the nature of religious organisations by campaigning against provisions that have allowed them to protect their ethos. Whilst they have not objected to the law allowing churches to discriminate against non-Christians when considering people applying for the post of vicar, they have actively campaigned against them doing so in relation to any other position.
- They seek to use equality law to restrict what religious individuals and bodies can do in terms of manifesting belief in goods and service provision: see the NSS campaign against the amendment of the Sexual Orientation Regulations - to allow Catholic adoption agencies to continue.
- Undergirding all the above, they generally want to encourage religious people to see their religious freedom primarily as a freedom of belief, not a freedom to manifest belief. Sounding extraordinarily generous they argue that people of faith have an absolute right to believe. They then explain, however, that the qualified nature of the right to manifest belief is such that if ever there is a conflict between the right to manifest belief and any other kind of fundamental right it is the right to manifest belief that must be compromised. This is hugely problematic for reasons set out by Part 2 of Chapter 1.

# Appendix 2:

## The Reasoned Opinion

After the main body of this publication was completed a new justification for the changes proposed by Schedule 9 came to light courtesy of a 'reasoned opinion' from the European Commission, published on November 20th 2009. The opinion, which the Commission initially refused to publish (although copies were leaked), asserts that the UK government failed to properly implement the Equal Treatment Directive 2000 via the 2003 employment regulations, providing faith groups with too generous exceptions. It has since been used to champion the new Equality Bill as a means for addressing the 2003 regulation's shortcomings. The opinion, however, is deeply problematic:

- First, the Commission had not raised any concerns about the 2003 regulations since March 2007 but suddenly chose to return to them just one week before remaining stages of the Equality Bill in the Commons in relation to which an employment amendment had been tabled, with over 20 co-signatories, returning the Bill to the 2003 status quo on the key point in question. This is highly suggestive to say the least.
- Second, in releasing the opinion the Commission effectively lobbied for the Equality Bill which is not the function of the Commission. It stated: 'We call on the UK Government to make the necessary changes to its anti-discrimination legislation as soon as possible so as to fully comply with the EU rules. **In this context, we welcome the proposed Equality Bill and hope that it will come into force quickly...**'<sup>105</sup>
- Third, *The Observer* broke the story explaining the opinion was issued in response to a move from the National Secular Society whose objective is not the promotion of gay rights but the privatisation of religion. It stated that the issuing of the opinion '...follows a complaint from the National Secular Society, which argued that the opt-outs went further than was permitted under the directive and had created "illegal discrimination against homosexuals."<sup>106</sup> (This should be read in the context of point 1 of chapter 2 and the final pages of chapter 3 which reflect on the use of gay rights for the fulfilment of quite different secularisation purposes).
- Fourth, other countries provide far more generous exemptions, e.g. Ireland and the Netherlands, and yet - after discussions with those states - the Commission has accepted their position. In Ireland for example section 37(1) of the Employment Equality Act 1998 (as amended by the Equality Act 2004) allows religious organisations to take '*action which is reasonably necessary to prevent an employee or prospective employee from undermining the religious ethos of the institution*' and at section 37(2) states that for these organisations

discrimination on any ground except gender can be permitted where '(a) the characteristic constitutes a genuine and determining occupational requirement, and (b) the objective is legitimate and the requirements proportionate.'<sup>107</sup>

- Fifth, some, like *The Observer*, are using the reasoned opinion to suggest reasoned opinions are authoritative. *The Observer* article states: 'The government is being forced by the European Commission to rip up controversial exemptions that allow church bodies to refuse to employ homosexual staff.' This is completely untrue. The decision – which is authoritative – is made by the European Court of Justice. The following statement from Prof Siegbert Alber, who was from October 1997 until October 2003 Advocate-General at the European Court of Justice, sets out the actual legal situation:

#### **'Remarks to the Procedure of Infringement**

*If the Commission thinks that there has been a non-respect of the Acquis Communautaire the Commission it first sends a letter to the Member State. The legal basis for this is Article 258.1 of the Treaty on the Functioning of the European Union (TFEU) - this springs from the Treaty of Lisbon Article 226 - this is to show concern that there may be a kind of non-respect of the Acquis Communautaire that the Member State needs to answer. The Commission then studies the answer of the Member State and the third step is that the Commission answers again with a detailed list of arguments. If they can use Article 258.2 then the Commission can bring the Member State to the European Court of Justice. It is a 'maybe' formulation; the Commission is not obliged to accuse the Member State.*

*The point of view of the Commission is not necessarily the right interpretation of the case. If there really is a non-respect of the Acquis Communautaire it is up to the European Court of Justice in Luxembourg to rule on this. This means that the Court will make a judgement, there is no penalty, just to clarify if there really is an infringement of the Acquis Communautaire. Only if the Court states that there is an infringement (Art 260.1) then the Member State needs to follow the point of the Commission. The point of view of the Commission is not binding until the end of this procedure.'*

#### **Prof Siegbert Alber**

Lawyer Prof Siegbert Alber was from October 1997 until October 2003 Advocate-General at the European Court of Justice. He is now Honorary Professor in European Law at the University of Saarbrücken.

In 2007 6 reasoned opinions eventually culminated in the Commission taking the UK to the European Court of Justice and in 4 out of those 6 cases the Commission lost.<sup>108</sup>





# Endnotes

- <sup>1</sup> Daniel Boucher, *Public Christianity and the Abolition of Slavery: Reflections on the Dangers of Privatising Faith, Mindful of Contemporary Challenges Facing Britain Today*, London, CARE, 2009.
- <sup>2</sup> *Memoirs of Sir Thomas Fowell Buxton Bart*, Edited by his son Charles Buxton Esq BA, London, John Murray, 1860, p. 274.
- <sup>3</sup> Alexis de Tocqueville, "Tyranny of the Majority," Chapter XV, *Democracy in America*, Book 1, Echo Library, 2006 and John Stuart Mill. *On Liberty*, Longman, 2007. Although these writers first used the phrase 'tyranny of the majority' and are very much associated with the need to protect minorities, not surprisingly this concern goes back very much further than the mid 19th century. In British history, for example, the Act of Toleration 1689 was particularly important.
- <sup>4</sup> Interestingly there is a crucial sense in which Christianity has contributed more to constitutional approaches to government that provide checks and balances, protecting the rights of individuals, especially the vulnerable, than it has to promoting the democratic model of government per se. In the first instance the Christian system is predicated on the belief that everyone is made in the image of God and thus everyone has God-given inalienable rights that result from their being an 'image bearer.' In the second instance the notion of constitutionalism, of government being subject to the law rather than law being subject to government, actually finds its first great expression in Deuteronomy 17:18-20 at the level of principle, and in 1 Samuel 10:25, at the level of practice. This thinking was central to the advent of modern constitutionalism and first the publication of Samuel Rutherford's celebrated, *Lex Rex* in 1644 and then John Locke's *Two Treatise of Government* published in 1690. In this context Christianity has also crucially contributed to liberal constitutionalism through the emphasis it places on a robust private sphere which is a function of the fact that, whilst endorsed by God, it is not the purpose of government to provide meaning for life and the answer to every problem as it is in 'activist' conceptions of government, see e.g. Noel Osullivan, *Fascism*, Everyman, 1983, p. 36.
- <sup>5</sup> Non-conformists could enter Parliament from 1726 on account of a series of indemnity acts. The position of Dissenters was finally resolved by the repeal of the Test and Corporation Acts in 1828.
- <sup>6</sup> Some concessions were made in the Militia Act 1757 but full exemption from military service was provided for by the Militia Act of 1803.
- <sup>7</sup> The Vaccination Act 1898 provided parents with a conscientious objection, a certificate of exemption, see <http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=2434508&blobtype=pdf>
- <sup>8</sup> For more information see Gurharpal Singh and Darshan Singh Tatla, *Sikhs in Britain*, Zed Books, 2006.



- <sup>9</sup> At this point, of course, religion and belief actually was not an official equality strand. It only became so in response to the EU Equal Treatment Directive 2000.
- <sup>10</sup> I am grateful to Professor Julian Rivers for this point.
- <sup>11</sup> At this point it is important to distinguish between different treatment under the law and the provision of different treatment under different jurisdictions. The notion of the provision of different treatment under different jurisdictions was the subject of great debate after a speech by the Archbishop of Canterbury that examined the possibility of different treatment being provided by parallel jurisdictions, subject to some foundational UK legal safeguards. See Archbishop's Lecture – 'Civil and Religious Law in England: a Religious Perspective,' Thursday 7 February 2008. This paper celebrates the important liberal tradition of different treatment under the law rather than parallel jurisdictions.
- <sup>12</sup> Quite apart from Acts that contain exceptions, there are numerous pieces of legislation whose purpose is actually the provision of an exception/different treatment under the law. For example: The Charities (Exception from Registration) (Amendment) Regulations 2007; The Financial Services and Markets Act 2000 (Exemption) (Amendment) (No. 2) Order 2009; The Electricity Act 1989 (Exemption from the Requirement for a Generation Licence) (Burbo Bank) (England and Wales) Order 2007; The Wireless Telegraphy (Cordless Telephone Apparatus) (Exemption) Regulations 1988 etc.
- <sup>13</sup> The provision of different treatment in the Equality Bill includes e.g. 'parliament,' in Schedule 3 Part 1, 'insurance,' Schedule 3 Part 5, 'immigration,' Schedule 3 Part 4, 'transport,' Schedule 3 Part 6 etc. Also see: National Security, Clause 187, Sport, Clause 190, Ships and Hovercraft, Clause 29 (2) etc.
- <sup>14</sup> Regulation 16 of the Sexual Orientation Regulations provides a good example of some different treatment being provided with respect to religion and belief. It means, for instance, that the goods and service legislation cannot be used to compel, e.g. a Mosque to give membership to someone living contrary to the faith with respect to sexual ethics.
- <sup>15</sup> See the first paper in the CARE Equality Series. *The Abolition of Slavery and Public Christianity*, CARE, 2009.
- <sup>16</sup> Just a note about the term 'Evangelical' which is regularly confused with the different word 'evangelistic:' Evangelical refers to a tradition of the church encompassing *all* church ministries: the pastoral, welfare provision, teaching etc including evangelism, 'i.e. "preaching the gospel" with a view to encouraging people to become Christians.' Whilst Evangelical churches embrace an evangelistic function, as do other church traditions, however, the term Evangelical is much bigger than evangelism and should never be conflated with evangelism as if the terms Evangelical and evangelism were interchangeable.
- <sup>17</sup> Interestingly as soon as this provision became law it was challenged (unsuccessfully) in the courts by trade unions and others and continues to be the subject of regular criticism from secularists. See *R (on the application of Amicus and others) v Secretary of State for Trade and Industry* ([2004] IRLR 430). The action was heard by the High Court in March 2004, and judgment was handed down on 26 April.
- <sup>18</sup> 'Tribunal orders Bishop of Hereford to pay £47,000 to gay youth worker: Award includes £7,000 for 'psychiatric injury:' Bishop has to undergo equal opportunities training'

[http://www.stonewall.org.uk/cymru/english/media/current\\_releases/3389.asp](http://www.stonewall.org.uk/cymru/english/media/current_releases/3389.asp)

The point must be made that it is not the purpose of this research to suggest that the Bishop of Hereford lost his case because the judge refused to recognise that the post in question was covered by a GOR. The case was lost for procedural reasons, namely the offering of the job and then the withdrawal of the offer. This does not change the fact, though, that the existence of the Sexual Orientation Regulations made life more complicated for the Bishop and had it not existed then possibly there would have been no case.

<sup>19</sup> 'BHA: Tribunal victory for employee in landmark religious discrimination case,' Friday, 16 May 2008.

[http://www.politics.co.uk/opinion-formers/press-releases/opinion-former-index/legal-and-constitutional/bha-tribunal-victory-employee-in-landmark-religious-discrimination-case-\\$1223099\\$365873.htm](http://www.politics.co.uk/opinion-formers/press-releases/opinion-former-index/legal-and-constitutional/bha-tribunal-victory-employee-in-landmark-religious-discrimination-case-$1223099$365873.htm)

<sup>20</sup> Please note that whilst the Sexual Orientation Regulations were used to justify the council's position, the council's own internal equality policy was also of central importance.

<sup>21</sup> Jessica Green, 'Pink News', March 23, 2009 - 14:07

<http://www.pinknews.co.uk/news/articles/2005-11707.html>

<sup>22</sup> *Ontario Human Rights Commission v Brockie* [2002] 22 DLR (4<sup>th</sup>) 174.

<sup>23</sup> Kathleen Heasman, *Evangelicals in Action: an appraisal of their social work in the Victorian era*, Geoffrey Bles, 1962, p. 14.

<sup>24</sup> *Faith In Wales: Counting Communities*, Cardiff, Gweini, WCVA, 2008.

<sup>25</sup> Rt Hon Tony Blair MP, 'Public Service Reform,' October 16<sup>th</sup> 2001.

Also consider key commitments in 'Partnership in Public Services: An action plan for third sector involvement,' Cabinet Office, 2006: Writing in the foreword the PM celebrated the role of the third sector in public service provision because it extends choice. Para 7 (page 12) states: 'One of the most important transformations we are seeking to achieve through developing public services is a new relationship with users. People increasingly want services that are tailored to their needs, and we want those services that engage users to be closer to them and able genuinely to empower them.'

One of the most important documents, however, is without doubt 'The UK Government's Approach to Public Service Reform,' The Prime Minister's Strategy Unit, 2006. As well as highlighting the importance of choice generally, this explicitly engages with the choice of whether or not something is faith-based, see p. 63. Not surprisingly it roots this in the context of education but of course the range of faith-based service provision is far greater than just education.

Also see 'The future role of the third sector in social and economic regeneration: the final report,' July 2007. [www.hm-treasury.gov.uk/media/9/8/pbr06\\_3rd\\_sector\\_428.pdf](http://www.hm-treasury.gov.uk/media/9/8/pbr06_3rd_sector_428.pdf)

Specifically on the role played by faith in the provision of diversity and choice:

Tony Blair, March 22<sup>nd</sup> 2005. <http://www.pm.gov.uk/output/Page7375.asp>

Jim Murphy, 'What role for faith groups in today's welfare state?' February 19<sup>th</sup> 2007, <http://www.dwp.gov.uk/newsroom/ministers-speeches/2007/19-02-07.shtml>

<sup>26</sup> Dolan, Peasgood and White, Final report for Defra, 'Review of research on the influences on personal well-being and application to policy making,' 2006; 'Life Satisfaction: The State of

- Knowledge and Implications for Government,' Strategy Unit, December 2002, p. 3, and National Assembly for Wales, Plenary Debate 17<sup>th</sup> December 2002, 'Well Being in Wales.'
- <sup>27</sup> *Sustainable development and UK faith groups: Two sides of the same coin? A survey of UK faith communities' sustainable development activities and next steps for the future, A Report from WWF-UK and SDC*, October 2005; Dolan, Peasgood and White, 'Review of research on the influences on personal well-being and application to policy making,' 2006, pp. 53-56; 'Life Satisfaction: The State of Knowledge and Implications for Government,' p. 3, and p. 27; and National Assembly for Wales, Plenary Debate 17<sup>th</sup> December 2002, 'Well Being in Wales.'
- <sup>28</sup> 'However, it [the catholic adoption sector] has the lowest breakdown rate of any agency in the country, with an average of 3.6 per cent. in the latest year's figures. It is heavily subsidised by the Catholic Church ...' Julian Brazier MP, *Hansard*, 21 Feb 2007 : Column 110WH
- <sup>29</sup> 'Nobody is missing out on the opportunity to adopt under the current arrangements. Gay couples form only 4 per cent of the pool and, as far as the records show, only one gay couple has ever applied to the Catholic Children's Society. They were courteously and immediately referred to another agency.' Ibid.
- <sup>30</sup> Simon Caldwell, 'Bishop gives ultimatum to agency over gay adoption,' *Catholic Herald*, October 2008. 'The first to go was the St Francis Children's Society in Northampton in May, followed a fortnight later by the Catholic Children's Society of the Nottingham diocese. A month later the country's largest Catholic adoption agency, the dioceses of Southwark, Portsmouth and Arundel and Brighton's Catholic Children's Society, decided to cut links with the bishops. Last month the St David's Children Society, covering three dioceses in Wales, also followed suit. Only one agency, the Catholic Children's Rescue Society of the Salford diocese, has so far pulled out of adoption altogether. The Catholic Children's Society in Westminster archdiocese is hoping to remain within the control of the Church and to challenge the laws in court if necessary, the preferred route of Bishop O'Donoghue. The Father Hudson's Society of the Archdiocese of Birmingham and the Catholic Care agency of the Leeds diocese are considering the same course. Adoption agencies in Liverpool and Bristol are still considering how best to respond to the law.'
- <sup>31</sup> 'The Commission shall exercise its functions under this Part with a view to encouraging and supporting the development of a society in which—  
...there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.'  
Equality Bill 2006, Part 1, Section 3.  
The EHRC's legal framework document similarly states that:  
'The Commission is an independent body, with a general duty to encourage and support the development of a society in which:  
There is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.'  
[http://www.equalityhumanrights.com/uploaded\\_files/ehrc\\_framework\\_agreement.pdf](http://www.equalityhumanrights.com/uploaded_files/ehrc_framework_agreement.pdf)  
The 'What We Do' section of the EHRC website states:  
'Good relations between all people are something which we must work at constantly, ensuring

that the conditions for social division and rupture are not allowed to ferment. The Equality and Human Rights Commission uses a well developed network of local sources to monitor social tensions between groups, and work to minimise these.'

<http://www.equalityhumanrights.com/our-job/what-we-do/#5>

<sup>32</sup> 'Newspapers triumph at Stonewall Awards,' Pink News, November 2, 2007.

<http://www.pinknews.co.uk/news/articles/2005-5936.html>

<sup>33</sup> If we take Christian bodies only, *The UK Christian Resources Handbook* lists over 5000 addresses but this is NOT comprehensive in the sense that Organisations are normally only listed if they:

'- offer a definitive Christian product, service or function, that is the nature of their output or work reflects their belief and could not be adequately performed without it,

- do not operate or trade under their own individual name (musical artistes, evangelists and similar occupations apart), so that their listing represents an identifiable organisation, however small, rather than the work or interest of one or two persons,

- work in a wide geographical area, that is they are serving the wider Body of Christ and not only one local church. Individual churches are usually only included if they are also the headquarters for their denomination in the UK.' [www.eden.co.uk/directory/help.php](http://www.eden.co.uk/directory/help.php)

<sup>34</sup> In the aftermath of 7/7 the Government established the Commission on Integration and Cohesion and its report stressed the need for inter-faith co-operation and gave rise to *Face to Face and Side by Side: A framework for partnership in our multi faith society* published in July 2008. <http://www.communities.gov.uk/publications/communities/facetofaceframework>

<sup>35</sup> Please note it is not the purpose of this paper to make any comparisons between the BNP and NSS and BHA beyond the fact that they exist as a counter to faith, as the BNP counters immigration and ethnic diversity. It has been good to spend time with the NSS and BHA even though we usually don't agree!

<sup>36</sup> Clause 81 instructed the Secretary of State to produce regulations for Great Britain and Clause 82 instructed the Secretary of State to produce regulations for Northern Ireland.

<sup>37</sup> Simon Caldwell, 'Loophole offers hope to adoption agencies,' *Catholic Herald*, 21 November 2008 <http://www.catholicherald.co.uk/articles/a0000419.shtml>

Regulation 18 states:

18.—(1) Nothing in these Regulations shall make it unlawful for a person to provide benefits only to persons of a particular sexual orientation, if—

(a) he acts in pursuance of a charitable instrument, and

(b) the restriction of benefits to persons of that sexual orientation is imposed by reason of or on the grounds of the provisions of the charitable instrument.

<sup>38</sup> Charity Tribunal Decision on Catholic Care June 1<sup>st</sup> 2009: [http://www.charity.tribunals.gov.uk/documents/decisions/CatholicCareDecision\\_1609v2.pdf](http://www.charity.tribunals.gov.uk/documents/decisions/CatholicCareDecision_1609v2.pdf)

<sup>39</sup> Permission to Appeal July 6<sup>th</sup> 2009: [http://www.charity.tribunals.gov.uk/documents/decisions/CatholicCareAppeal%20\(Final\)web6.7.09.pdf](http://www.charity.tribunals.gov.uk/documents/decisions/CatholicCareAppeal%20(Final)web6.7.09.pdf)

<sup>40</sup> Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford, Oxford University Press, 2001, p. 137.

<sup>41</sup> Ibid.

<sup>42</sup> Lord Bingham in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100.

- <sup>43</sup> Dr Harris said: ‘...saying that people are allowed to discriminate as long as they are allowed to refer someone to another provider is like telling Rosa Parks when she tried to get on a whites-only bus in the deep south, “You can’t get on this bus, because it’s for whites only. But a mixed bus is coming along, and you’ll be able to get on that.” The humiliation still exists, and it is wrong. We should not turn down anyone on the basis that they are gay.’ *Hansard*, 21 Feb 2007, Column 121WH.
- <sup>44</sup> Lord Bingham in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100.
- <sup>45</sup> *Ibid.*
- <sup>46</sup> *Ibid.*
- <sup>47</sup> The only context in which there may be a case for qualifying this is where the *only publicly funded service* available is secular, such that it is not accessible to people of faith, or where the *only publicly funded service* available is faith based, such that it is not accessible to people with no faith.
- <sup>48</sup> *R(Amicus) v Secretary of State for Trade and Industry* [2004] IRLR 430.
- <sup>49</sup> *Handyside v. the United Kingdom*, judgement of 7 December 1976, Series A, No 24, para 4.
- <sup>50</sup> Prof Malcom Evans, ‘The Freedom of Religion or Belief and the Freedom of Expression,’ p. 21.
- <sup>51</sup> Some might respond by asserting that religious liberty rights, when in conflict with sexual orientation rights, do not count because the religious views in question are not “consistent with human dignity.” Even if there was a requirement (which there isn’t) that a religious belief must not be a “crack-pot” idea before it receives the law’s protection, it is clear that the Christian belief that homosexual practice is sinful satisfies this requirement. It was accepted by Richards J in the *Amicus* case that “monogamous heterosexual marriage is the form of partnership uniquely intended for full sexual relations between persons.” (*R (Amicus – MSF section) v Secretary of State for Trade and Industry with Christian Action Research Education and others intervening* [2004] EWHC 860 (Admin), para 7) In addition, Weatherup J noted that the view that same-sex sexual activity is sinful, is an orthodox religious belief which is worthy of recognition in a modern democratic society (*Application for Judicial Review by The Christian Institute and Others*, Ref: WEAC5888, 11 September 2007 para 50).
- <sup>52</sup> *Getting Equal: Proposals to outlaw sexual orientation discrimination in the provision of goods and services - Government response to consultation*, p.10  
<http://www.communities.gov.uk/documents/corporate/pdf/565856.pdf>
- <sup>53</sup> *Legislative Scrutiny: Sexual Orientation Regulations*, HL 58/HC 350, Sixth Report, 2006-7.
- <sup>54</sup> *Ibid.*
- <sup>55</sup> See Regulation 12 (3)The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.
- <sup>56</sup> See for example ‘parliament’ in Schedule 3 Part 1, ‘insurance,’ Schedule 3 Part 5, ‘immigration,’ Schedule 3 Part 4, ‘transport,’ Schedule 3 Part 6 etc. Also see: National Security, Clause 187, Sport, Clause 190, Ships and Hovercraft, Clause 29 (2) etc.
- <sup>57</sup> National Secular Society Press Releases on SORS: Jan 2007-March 2007  
Jan 2 2007 Petition Queen to Block Anti-Gay Discrimination Regulations Is “An Affront to Democracy” <http://www.secularism.org.uk/petitionqueentoblockanti-gaydisc.html>  
Jan 9 The Sexual Orientations Uphold Human Rights. They Should Not Be Subject To Religious Bigotry.

<http://www.secularism.org.uk/thesequalorientationsupholdhuman.html>

Jan 9 The Government Must See the Sexual Orientation Regulations Through With No Further Exemptions.

<http://www.secularism.org.uk/thegovernmentmustseethesequalori.html>

Jan 16 Sexual Orientation Regulations (N.I.): Commons Should Vote For Equality and Human Rights, Not Religious Bigotry

<http://www.secularism.org.uk/sexualorientationregulationsn.i..html>

Jan 21 Catholic Dogma Must Not Be Written Into British Equality Regulations

<http://www.secularism.org.uk/catholicdogmamustnotbewrittenint.html>

Jan 23 Equality Regulations: Catholic Blackmail Must Not Be Allowed To Succeed

<http://www.secularism.org.uk/equalityregulationscatholicblack.html>

Jan 24 Granting Exemptions Will Spur Bishops On To Make New Demands, Say Secularists

<http://www.secularism.org.uk/grantingexemptionswillspurbishop.html>

Jan 30 Roman Catholic Church Demonstrates Its Unsuitability for Faith Based Welfare

<http://www.secularism.org.uk/romancatholicchurchdemonstratesi.html>

March 7 Government Stands Up For Equality, Forcing Religious to Back Down

<http://www.secularism.org.uk/governmentstandsuptforequalityfor.html>

March 22 Equality Regulations – Are The Churches Now Going To Carry Out Their Threats?

<http://www.secularism.org.uk/equalityregulationsarethechurche.html>

Stonewall Press Releases on SORS: Jan 2007-March 2007

Jan 10 Stonewall celebrates 'overwhelming' House of Lords vote for gay equality

[http://www.stonewall.org.uk/media/current\\_releases/1566.asp](http://www.stonewall.org.uk/media/current_releases/1566.asp)

Jan 25 Stonewall welcomes adoption decision: 'triumph for tolerance over prejudice'

[http://www.stonewall.org.uk/media/current\\_releases/1598.asp](http://www.stonewall.org.uk/media/current_releases/1598.asp)

March 22 Stonewall celebrates House of Lords vote for gay equality

[http://www.stonewall.org.uk/media/current\\_releases/1650.asp](http://www.stonewall.org.uk/media/current_releases/1650.asp)

<sup>58</sup> *BHA Briefing 2009/1: Equality Bill 2nd Reading*, page 2 argues that harassment should apply to sexual orientation but not religion and belief. Pages 2 and 3 argue that limb (b) of clause 143 (advancing equality of opportunity) should not apply to religion and belief. Page 6 welcomes the narrowing of the freedom to practice a difference of treatment in employment for religion and belief.

<sup>59</sup> At this point it is important to note that some will probably want to argue that because secularist organisations now claim protection under the religion and belief strand that the bodies fighting for sexual orientation rights in order to privatise religious belief cannot be said to constitute another equality strand from that of religion. Whilst this may be so in a technical sense, however, it does not change the fact that they have championed the rights of an entirely different strand for the purpose of advancing the privatisation of faith - thus frustrating religious freedom - in a key area. Moreover, there are huge questions about whether such bodies should be treated as a protected characteristic, see the Appendix.

<sup>60</sup> Geoff Mulgan, 'Democracy as Self-Government,' *What Needs to Change: New Visions for Britain*, ed Giles Radice, London, Harper Collins, 1996 and Andrew Adonis and Geoff Mulgan, 'Back to Greece.' *Life After Politics*, Ed Geoff Mulgan, London, Harper Collins, 1997.

- <sup>61</sup> William Temple, *Christianity and Social Order*, London, SCM Press, 1955, pp. 65-66.
- <sup>62</sup> Camilleri and Falk, *The End of Sovereignty*, Aldershot, Edward Elgar, 1992, p. 204.
- <sup>63</sup> To appreciate the key role played by the voluntary sector in relation to the renaissance of civil society see, Bronilsaw Szerszynski, 'Voluntary Associations an the Sustainable Society,' *Greening the Millennium: The New Politics of the Environment*, Ed Michael Jacobs, Oxford, Political Quarterly Publishing, 1997, pp. 150-151, especially: 'As Paul Hirst as written, not only does "bureaucratic monoculture" threaten to stifle human autonomy and creativity, it also threatens to produce a no less dangerous response of refusal, as more and more people may react to it by disengaging from any sense of a public world and retreating into purely private concerns. ...Voluntary associations can, of course, manifest many of the positive features of bureaucracies, but their impressive power to evince from a very different kind of social authority, one based on their status as authentic and spontaneous expressions of public will.' Former Labour MP Prof David Marquand highlights the importance of generating and upholding bases of being that can connect with the state in his article 'Community and the Left.' The key area is the 'public domain' which is not the same as the state but rather the place where intermediate civic institutions flourish. He writes of it 'The public domain nourishes and, in turn, draws nourishment from the little platoons of civil society; almost by definition, community ties will wither if the public domain is undermined.' However, he claims that this withering is precisely what has happened, thanks to over reliance on the state and the state imposed market. David Marquand, 'Community and the Left,' *What Needs to Change*, p. 77.
- Also see *Civil society: a framework for action*, NCVO, February 2009. [http://www.ncvo-vol.org.uk/uploadedFiles/NCVO/\\_Homepage/Civil\\_society\\_a\\_framework\\_for\\_action\\_NCVO.pdf](http://www.ncvo-vol.org.uk/uploadedFiles/NCVO/_Homepage/Civil_society_a_framework_for_action_NCVO.pdf)
- <sup>64</sup> In the case of the state, of course, there is also the added consideration that it is usually cheaper to commission services through the voluntary sector than for the state to provide the services itself!
- <sup>65</sup> Anthony Giddens, *The Third Way: The Renewal of Social Democracy*, Cambridge, Polity Press, 1998, pp. 78-80. Please note: whilst the notion of celebrating private-voluntary-state partnerships is still relatively new in the history of political economy, in the much faster moving world of political ideas and buzzwords, the term 'third-way' (used by both Knight and Giddens) is now particularly associated with the late '90s and in that sense may seem a little dated.
- <sup>66</sup> Barry Knight, 'The shifting sands of voluntary action and civil society,' *Building Civil Society*, Ed by Knight, Smerdon and Pharaoh, Charities Aid Foundation, 1998, p. 8. This focus on civil society still remains central see, Stuart White, 'Thinking The Future,' *The New Statesman*, September 7, 2009, p. 22.
- <sup>67</sup> Knapp, Martin, Robertson, Eileen and Thomason, Corinne (1990), 'Public Money, Voluntary Action', in Helmut K. Anheier and Wolfgang Seibel, *The Third Sector: Comparative Studies of Non-Profit Organisations*. Berlin: Walter de Gruyter, p. 190.
- <sup>68</sup> NCVO (2009) *UK Civil Society Almanac*, op cit, p. 6.
- <sup>69</sup> Nicholas Deakin, *The Future of the Voluntary Sector*, November 1996.
- <sup>70</sup> RAW Rhodes, 'Governance and Public Administration,' *Debating Governance: Authority,*

Steering and Democracy, Ed Jon Pierre, Oxford, Oxford University Press 1999, p. 60.

RAW Rhodes, 'The Hollowing out of the State,' *Political Quarterly*, 56.

<sup>71</sup> RAW Rhodes, 'Governance and Public Administration,' p. 61.

<sup>72</sup> *Ibid.*, p. 58. The theory of governance has since developed such that scholars from a wide diversity of theoretical positions now talk in terms of the effective deconstruction of 'modern politics.' Consider the following which include international relations perspectives: Jean Marie Guehenno, *The End of the Nation-State*, Minneapolis, University of Minneapolis, 1993, p. 23, p. 113, pp. 116-7, p. 139; Kenichi Ohmae, *The End of the Nation State: The Rise of Regional Economies: How New Engines of Prosperity are Reshaping Global Markets*, London, Harper Collins, 1996, chapter 4, especially pp.46-57 and Kenichi Ohmae, 'Putting Global Logic First,' *The Evolving Global Economy: Making Sense of the New World Order*, ed. K. Ohmae, Harvard, Harvard Business Review, 1995, pp. 130-134; Michael Hardt and Antonio Negri, *Empire*, London, Harvard University Press, 2000, p. 344, p. 353, p. 340; Joseph Camilleri and Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World*, Edward Elgar, Aldershot, 1992, p. 203, 205, 206; V. Spike Petersen, 'Shifting Ground(s): Epistemological and Territorial Remapping in the context of globalization,' *Globalization: Theory and Practices*, Elenore Kofman and Gillian Youngs, London, Pinter, 1996, p. 12; R. B. J. Walker, 'State Sovereignty and the Articulation of Political Space/Time,' *International Studies Quarterly*, 1990, p. 454; Bauman, *Globalization*, pp. 61-62 and p. 64.

<sup>73</sup> 'Evangelicals were largely instrumental in the evolution of many of the principles and concrete forms of social work which are followed today. Much of the present-day youth work closely follows Evangelical lines; they suggested many of the modern improvements in the practice of nursing...it was certain groups of Evangelicals who first recognised social work as a distinctive professional occupation, rather than a voluntary part-time one, offering training and payment to workers and making provisions for their recuperation from sickness and for their old age. The mission visitor and the mission nurse performed many of the tasks which now fall to the school care committee representative and the health visitor. The probation officer can trace his direct descent from the police court missionary, and the modern moral welfare worker owes much of her techniques and methods to evangelical predecessors.' Kathleen Heasman, *Evangelicals in Action: an appraisal of their social work in the Victorian era*, Geoffrey Bles, 1962, pp. 292-293.

On the basis of her examination of the Charities Register and Digest of the Charity Organisation Society Heasman concludes 'that as many as three-quarters of the total number of voluntary charitable organisations in the second half of the nineteenth century can be regarded as Evangelical in character and control. The greater proportion of these were formed in the decades immediately after the mid-century, many as a result of the revival of that time. ...In many instances the voluntary services set the pattern for those taken over by the State, ...In the process the Evangelicals played an important part, both beginning and developing many of these voluntary services, and suggesting lines of action which were later followed by the State.' *Ibid.*, pp. 13-14. This book was the result of doctoral research 'The Influence of the Evangelicals upon the Origins and Development of Voluntary Charitable Institutions in the second half of the Nineteenth Century,' The University of London, 1960.

<sup>74</sup> See again endnotes 26 and 27.

<sup>75</sup> From the Prime Minister's address to the Christian Socialist Movement conference 'Faith in Politics,' 29 March 2001.

<sup>76</sup> Jim Murphy MP, 'Minister for Employment and Welfare Reform,' Seminar in partnership with Employment Focus – What role for faith groups in today's welfare state? City of Manchester Stadium, Monday, 19th February 2007. <http://www.dwp.gov.uk/newsroom/ministers-speeches/2007/19-02-07.shtml>

More recently, Jim Murphy, now Secretary of State for Scotland, made some similar very helpful comments in the Catholic Observer, see Faith groups can help government deliver says Murphy, 7 July 2009 <http://www.scotlandoffice.gov.uk/scotlandoffice/12344.html>

<sup>77</sup> *Face to Face, Side by Side*, July 2008

[www.communities.gov.uk/documents/communities/doc/916951.doc](http://www.communities.gov.uk/documents/communities/doc/916951.doc)

Other very positive comments are made by *Face to Face, Side by Side*, e.g. pp. 17-18.

<sup>78</sup> Rt Hon Stephen Timms, 'Faith: helping build a politics based on hope', IPPR, 29 January 2009, p. 3.

<sup>79</sup> *Ibid.*, p. 8.

<sup>80</sup> *Ibid.*, p.16.

<sup>81</sup> The Faith Communities Capacity Building Fund ran for two years closing in 2008. The fund had a particular focus on building good relationships between faiths which meant that one had the sense that the need to promote good inter-faith relations was the overriding consideration rather than investment in faith based welfare per se. This has continued with the Government's first inter-faith strategy *Face to Face – Side by Side* and a new funding stream called Faiths in Action. Rather than seeking to facilitate the provision of good faith based welfare its objectives focus very much on the problem of the divisions between the faiths and need to get them working together. Its objectives are:

'A. Developing the confidence and skills to 'bridge' and 'link'

B. Supporting shared spaces for interaction and social action

C. Developing structures and processes which support dialogue and social action

D. Improving opportunities for learning which build understanding.'

Interestingly this approach rather suggests that Government sees faith as a problem rather than a solution.

<http://press.homeoffice.gov.uk/press-releases/boost-faith-communities-society>

<sup>82</sup> Bodies dealing regularly with Christian Voluntary Sector projects like the Council for the Christian Voluntary Sector in Wales report that constructive discrimination, especially via employment hoops, are a significant challenge. In surveys the same perception has become apparent, see Church Urban Fund, *Xchange Report*, 2007; *Breakthrough Britain*, Centre for Social Justice, 2007, pp. 647-648; *Faith in the Public Realm: controversies, policies and practices*, ed. Dinham, Furbey and Lowndes, Bristol, Policy Press, 2009, pp. 213-4.

Interestingly, *Faith in Wales: Counting Communities* reveals that only 27% of faith congregations received *any* public money for the provision of their welfare services. This is concerning on two bases. First, 27% is considerably less than 34.6%. Second the fact that only 27% received *any* funding suggests that the total amount of public funding received by

faith based welfare is considerably less than 27%. *Faith in Wales: Counting Communities, Gweini, WCVA, 2008*, p. 40.

The fact that discrimination against faith based welfare is a concern has been noted by government, see: *Working Together: Co-operation between government and faith communities, Progress report*, p. 6. It was also reflected in the Commission for Integration and Cohesion report *Our Shared Future*, 2007. para 6.24.

Concerns about the inaccessibility of public funds for faith based welfare have been around for some time. Consider the following from the Local Government Association's 2002 Guidance *Faith and Communities: A Guide to Best Practice*':

5.1 A frequent source of misunderstanding between local authorities and faith communities has been uncertainty about whether public funding can appropriately be made available for faith group activities. On the one hand there is general agreement that public funding should not be used to support the worship activities of faith groups or the propagation of a particular faith. On the other hand, both central government and many local authorities now accept the validity and value of funding services and activities run by faith groups. Some will argue that this is justified only if the services and activities are open to all, regardless of their faith. Others will argue that a service or activity, even if targeted at these within a faith community can nevertheless be assessed in terms of its public or community benefit and a case for public funding therefore be made.

5.2 There is an aspect of funding for faith communities on which there is no clear consensus - that is the public funding of capacity building or the development of structures within individual faith communities. In this situation, authorities need to judge the potential benefit against the possible risks. Support for the strengthening of structures within a faith community could have significant benefits in terms of community participation, the coordination of community services, civic renewal, and the improvement of public services. At the same time there may be a risk of involving central and/or local government in sectarian politics within faith communities or an unacceptable alignment to a particular faith group.

5.3 It is not uncommon for funders, including local authorities, to insist on faith groups establishing separate legal entities or semi-independent structures in order to be eligible for funding for services delivery or project activity. Although some faith based organizations may find this helpful, it should not be rigidly imposed, when it may artificially disrupt the integrity of the organization. Decisions on whether to fund a potential organization should be made in terms of the nature of the cause the organization is making, rather than on whether it has a religious or secular ethos.

5.4 Many faith communities also report that local authority officers seem unwilling to engage with them due to misunderstanding of their motivation and purposes. This might arise from unclear application documents and processes, or from a perception that faith communities are well resourced and do not need public funding. In Lewisham (see case study) the authority helps faith groups to see how they fit the criteria for grants or how they can adapt to qualify.'

5.5 A number of faiths prohibit their members groups from applying for funding from the National Lottery Board because the money is derived from gambling. Since the Community

Fund in part is seen as a major alternative source of funding for voluntary and community sector groups by both central and local government, a case can be made for funding applications from such groups being treated more sympathetically by other public bodies.’ <http://www.communities.gov.uk/documents/communities/pdf/151996.pdf>

<sup>83</sup> *Faith in the Public Realm: controversies, policies and practices*, ed. Dinham, Furbey and Lowndes, p. 6.

<sup>84</sup> National Assembly for Wales Library Enquiry, 27<sup>th</sup> September 2001. This can also be seen in more recent examples, see Department of Health, *Third Sector Investment Programme: Innovation, Excellence and Service Development Fund 2009-10: Information Package for third sector organisations*, states on page 8 that one of the rationales for funding is to enable bodies to ‘advise and inform the Department about key issues in health and social care field affecting the third sector.’

[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_086328](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_086328)

<sup>85</sup> The Taxpayers Alliance report, Tax payer funded lobbying and political campaigning, published August 2009 <http://www.taxpayersalliance.com/tflpc.pdf>

<sup>86</sup> Mathew Moore, ‘Law ‘will force churches to employ gay staff,’ *The Telegraph*, 21 May 2009 <http://www.telegraph.co.uk/news/newstoppers/religion/5357247/Law-will-force-churches-to-employ-gay-staff.html> and Jessica Green ‘Churches to be banned from turning down gay staff’ *Pink News*, 21 May 2009. <http://www.pinknews.co.uk/news/articles/2005-12537.html> That changing the impact of the law was the clear intention is illustrated by explanatory note 747 (in the original explanatory notes) which stated that the new definition would mean that it would not be appropriate for the Catholic Church to require youth workers to be heterosexual. Given the refusal of the Government to make any distinction between orientation and practice, one has to assume that this means the Church could not refuse a youth worker position to someone on the grounds that they were living, contrary to church teaching, in an active gay relationship. That this constitutes a significant change is evidenced by the fact that in the Bishop of Hereford case the Judge made it clear that the 2003 Genuine Occupational Requirement - the current law - is such that it certainly is proper for churches to decline senior youth worker positions to people not living in line with church teaching regarding sexuality. Interestingly, in committee the minister questioned whether this explanatory note was accurate and the explanatory notes now concede that it might be in order to insist that a youth worker position is filled by someone living the faith vis-à-vis sexual ethics if the job in question is ‘mainly teaching bible classes.’ This is deeply problematic on two bases. First, many church youth workers play key roles in leading bible classes but it is seldom the only thing they do. Often it will take up to about 25% of their time. Second, the explanatory note only says the exception ‘may apply if the youth worker mainly teaches Bible classes.’ ‘May apply’ generates huge uncertainty and the legal advice we have received is that youth workers won’t be covered unless they are wholly or mainly involved in leading bible classes which very few, if any, are. In many jobs the most important part of one’s role does not take more than 50% of one’s time. The notion that that which occupies most of one’s time is the most important (the most likely legal interpretation of wholly or mainly) and that it is only in relation to this that one can determine whether or not applicants are appropriate is very strange.

<sup>87</sup> Specifically ‘a requirement to be of a particular sex, a requirement not to be a transsexual person, a requirement not to be married or a civil partner, a requirement not to be married to, or the civil partner of, a person who has a living former spouse or civil partner, a requirement relating to circumstances in which a marriage or civil partnership came to an end; a requirement related to sexual orientation.’ See Schedule 9, part 2, paragraph 4.

<sup>88</sup> R(Amicus) v Secretary of State for Trade and Industry [2004] IRLR 430.

<sup>89</sup> John Reaney v the Hereford Diocesan Board of Finance at the Employment Tribunal, Cardiff, 2007, para 102. The Bishop, however, went on to lose his case on procedural grounds relating to the fact that the job in question was offered but then withdrawn.

<sup>90</sup> Since going to the type settings another argument has emerged which is addressed by an additional Appendix 2.

<sup>91</sup> The Religious requirements relating to sex, marriage, sexual orientation etc.

(1) A person (A) does not contravene a provision mentioned in sub-paragraph

(2) by applying in relation to employment a requirement to which sub-paragraph (4) applies if A shows that—

the employment is for the purposes of an organised religion,

the application of the requirement engages the compliance or non-conflict principle, and

the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it)

(2) The provisions are-

(a) Sections 37 (1) or (c) or (2) (b) or (c)

(b) section (3)(a) or (c) or (6)(b) or (c);

(c) section (3)(a) or (c) or (6)(b) or (c);

(d) section (1).

(3) A person does not contravene section (1) or (2)(a) or (b) by applying in relation to a relevant qualification (within the meaning of that section) a requirement to which sub-paragraph (4) applies if the person shows that—

(a) the qualification is for the purposes of employment mentioned in sub-paragraph (1)(a), and

(b) the application of the requirement engages the compliance or non-conflict principle.

(4) This sub-paragraph applies to –

(a) a requirement to be of a particular sex

(b) a requirement not to be a transsexual person,

(c) a requirement not to be married or a civil partner

(d) a requirement not to be married to, or the civil partner of, a person who has a living former spouse or civil partner

(e) a requirement relating to circumstances in which marriage or civil partnership came to an end

(f) a requirement related to sexual orientation

(5) The application of a requirement engages the compliance principle if the application is a proportionate means of complying with the doctrines of the religion

(6) The application of a requirement engages the non-conflict principle if, because of the nature or context of the employment, the application is a proportionate means of avoiding

conflict with the strongly held religious convictions of a significant number of the religion's followers.

(7) A reference to employment includes a reference to an appointment to a personal or public office.

(8) Employment is for the purposes of an organised religion only if the employment wholly or mainly involves—

(9) In the case of a requirement within sub-paragraph (4)(a), sub-paragraph (1) has effect as if in paragraph (c) the words from “(or” to the end were omitted.’

Schedule 9, Parts 1 and 2, the Equality Bill.

<sup>92</sup> R (Amicus) v Secretary of State for Trade and Industry [2004] EWHC 860 (Admin), para 90.’

<sup>93</sup> See Endnote 37.

<sup>94</sup> There are also very significant concerns regarding the public duty proposals on the basis that, although they have very far reaching implications, their definition at a primary legislative level is rather vague and all the detail will be left to unamendable secondary legislation. In similar vein, clauses 146-149 give ministers wide ranging powers to make changes in relation to public duties.

<sup>95</sup> At Second Reading one parliamentarian argued that the religion and belief strand should not benefit from the public duty provisions at all, (Lynne Featherstone, *Hansard* 11 May 2009, Column 583) whilst another seemed to argue that religion and belief public duty obligations should be of a lower order (Evan Harris, *Hansard*, 11 May 2009, Column 629). Both outcomes would have the effect of formally creating a hierarchy of rights and making religious rights second class vis-à-vis those pertaining to the other protected characteristics.

<sup>96</sup> This must be a particular concern for the Conservative Party in the sense that they might find it harder to justify repealing the Human Rights Act if the Equality Bill becomes the Equality Act.

<sup>97</sup> While some Christians have, in recent years, sought to re-interpret the key passages in the Bible regarding same-sex sexual relationships, the traditional approach, subscribed to by mainstream Catholics, Evangelicals and Anglo-Catholics (only mainstream Liberals take a different view), remains that same-sex sexual activity is contrary to Christianity and wrong. For a good overview see: Prof Robert AJ Gagnon, *The Bible and Homosexual Practice: Texts and Hermeneutics*, Nashville, Abingdon Press, 2001.

<sup>98</sup> In Christian theology sexual intercourse is a choice. Intercourse within marriage is holy, whilst intercourse outside marriage is sinful. The fact that unmarried Christians live a celibate lifestyle does not make them any less sexual beings with clear sexual orientations.

<sup>99</sup> The government was overruled on free speech by the House of Lords on four separate occasions between April 2008 and November 2009.

<sup>100</sup> Clause 44 of the Equality Act 2006 introduced the notion that religion included lack of religion and belief included a reference to lack of belief.

‘Religion and belief

In this Part—

(a) “religion” means any religion,

- (b) “belief” means any religious or philosophical belief,
- (c) a reference to religion includes a reference to lack of religion, and
- (d) a reference to belief includes a reference to lack of belief.’ Clause 10 of the new Equality Bill covers this ground.

<sup>101</sup> British Humanist Association, *The Case for Secularism: a neutral state in an open society*, London, BHA, 2007.

<sup>102</sup> See e.g. Jonathan Chaplain, *Talking God: The Legitimacy of Religious Public Reasoning*, Theos, 2008 and John Coffey, ‘The myth of secular tolerance,’ *Cambridge Papers*, Vol 12 No 3, September 2003.

<sup>103</sup> Roger Scruton, *The West and the Rest: Globalization and the Terrorist Threat*, London, Continuum, 2002, chapter 1.

<sup>104</sup> There are no confessional parties in British politics with MPs or Peers. As well as the bishops the Chief Rabbi has just been given a peerage presumably primarily because of his religious role.

<sup>105</sup> Commission Press Release, IP/09/1778, 20 November 2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1778&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>106</sup> Jamie Doward, ‘Brussels says churches must lift ban on employing homosexuals,’ *The Observer*, November 22nd 2009. [www.guardian.co.uk/world/2009/nov/22/churches-lift-ban-homosexual-staff](http://www.guardian.co.uk/world/2009/nov/22/churches-lift-ban-homosexual-staff)

<sup>107</sup> Full text available on <http://www.equality.ie/index.asp?locID=60&docID=205>  
The relevant Dutch law is the General Law on Equal Treatment (AWGB) of 1994 as amended in 2000 to bring it into line with the Directive. This states at Article 3 that ‘*This Law does not apply to: a. legal relationships within churches and their independent components and entities in which they are united, as well as in other faith-based associations b. spiritual work;*’ and at Article 5(1) that the general prohibition of discrimination does not affect ‘*a. the freedom of religious or philosophical institutions to set requirements which, for the purposes of the institution, are necessary for the performance of a function, where these requirements may not lead to discrimination based merely on political affiliation, race, nationality, heterosexual or homosexual orientation or marital status.*’

What this means is that, whilst it would be illegal to refuse a position to someone on the grounds of e.g. sexual orientation, it would be legal to refuse a position to someone if their lifestyle and practice was not compatible with the ethos of the organisation seeking to make the appointment.

<sup>108</sup> This statistic is from Table 11 on page 91 of the 2007 annual report of the European Court of Justice on [http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/07\\_cour\\_stat\\_2008-09-29\\_13-39-23\\_731.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/07_cour_stat_2008-09-29_13-39-23_731.pdf)





# Notes



“...a thoughtful and detailed contribution to the Equality debate.”  
*Lord Mackay of Clashfern, Lord Chancellor 1987-1997*

“Our public debate about the requirements of 'equality' has to become far more subtle if recent and proposed legal changes are to fulfil their promise. This excellent paper points the way forward.”  
*Julian Rivers, Professor of Jurisprudence, University of Bristol*

“In a mainly secular society the clash of religious and sexual orientation equalities cannot be resolved by wishing the conflict away or the blunt expedient of subordinating one view to the other. This paper is a careful and thoughtful contribution to the debate. It is written in a spirit of respect and toleration that is the hallmark of a genuinely liberal society and deserves to read in the same way.”  
*Ian Leigh, Professor of Law, University of Durham*

“This is the most trenchant and illuminating analysis I have yet come across of the deeply troubling consequences for individual and corporate religious freedom of Labour's recent - and in many ways commendable - equality legislation. It shows how, in spite of some government initiatives which affirm the contribution of religion to society, others seem to be motivated by the desire to bring religion to heel, neutering its distinctive voice. I hope all politicians of faith - including secular humanists - will read it with great care and take prompt action to ensure that parliament promotes equality without demoting religion.”  
*Dr Jonathan Chaplin, Director, Kirby Laing Institute for Christian Ethics, Cambridge.*

# A Little Bit Against Discrimination?

Reflection on the opportunities and challenges  
presented by the Equality Bill 2009-2010

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