

1) About the British Humanist Association (BHA)

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

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

Our expertise lies in the ‘religion or belief’ equality strand, which includes non-religious beliefs such as Humanism, and how that strand relates to and intersects with other protected characteristics. We also work closely with others on wider equalities issues in a range of forums.

We continue to undertake in depth and unique work in the area of public service reform. In 2007 we published a report ‘Quality and Equality: Human Rights, Public Services and Religious Organisations’¹, and we have subsequently built on and developed that policy in line with external developments, including substantial analyses, briefings and recommendations during the passage of the Equality Act 2010².

2) Introduction

We are pleased to respond to this Green Paper, and look forward to contributing further and in more detail to the forthcoming White Paper to which this Green Paper will feed.

We wish to comment on aspects of the Green Paper and the consequences of its proposals that fall within our expertise and therefore this response does not directly address the paper’s questions. Rather, it will address the following areas:

- Public services and commissioning
- Commissioning and communities
- Free schools
- Public services and the Equality Act 2010
- Single equality duty
- Meeting and assessing needs
- TUPE

¹ Available in hardcopy from the BHA or online at http://www.humanism.org.uk/campaigns/public-service-reform/quality_and_equality_report

² More information, including all detailed briefings, available at <http://www.humanism.org.uk/campaigns/equalities/equality-act-2010>

We believe that there are a number of difficulties for commissioning because of the different treatment in law of religious organisations in law compared to other civil society organisations. We also have concerns about the data on religion or belief used by commissioning authorities which is often inaccurate and unsuitable for use in commissioning. We make a number of recommendations relating to the issues discussed in this response.

3) Public services and commissioning

Fairly provided and fairly distributed public services of a good quality are an essential foundation of a healthy, happy, and good society. We believe that public services can promote the well-being of individual citizens and enhance their social capital, that their full availability is essential for full citizenship and equality for all and equally essential for greater social cohesion.

The BHA makes no judgment on the desirability or otherwise of a mixed economy policy in the provision of public services. However, the recent Labour governments' and the present coalition government's enthusiasm for placing contracts with religious organisations, for commissioning public services including 'free schools' to faith groups, gives rise to significant issues of principle and to substantial practical problems.

The Green Paper notes that the government's aspiration is 'to award 25 per cent of government contracts to SMEs, which will also benefit small and medium civil society organisations' (p7). If the government's aspirations to include contracting out to faith-based organisations is also realised, then this ambitious target might include a significant number of such groups.

In this response we focus specifically on the current and potential problems for equalities, rights and inclusion that increasing the role of religious groups in future commissioning creates, with suggestions for ways to mitigate those negative and sometimes unintended consequences.

It is our view that future commissioning and public service reform should be grounded in principles of equalities and human rights, and be inclusive of people regardless of background or belief.

4) Commissioning and communities

In general, we want government to recognise the value of communities as a whole, not focus on communities of identity such as self-described 'faith communities', and to recognise the contributions that individuals, whether humanist or religious, to the wider community.

We want communities where people of all different backgrounds and beliefs engage and work with each other for the benefit of the whole community and work together on issues of shared concern, starting from a truly level playing field and being equal before the law.

As stated above, the BHA does not take a position on the desirability or otherwise of creating a market in public services. However, commissioning has, as the Green Paper indicates, the potential to be inclusive and support citizen and community involvement. On the other hand, a policy of commissioning to religious organisations without first assessing the potential for, and then preventing, discrimination will cause divisions and inequalities for employees, service users, citizens and those within communities.

Commissioners must not assume that religious groups and organisations will be better able to serve the local community than a secular organisation. Rather, those groups which wish to take on the delivery of public services may be particularly conservative, or evangelical, or unrepresentative, or internally discriminatory, and therefore there are particular problems with contracting to religious

organisations that do not exist when contracting to secular organisations. There is no evidence that religious organisations are better able to reach vulnerable people in communities than others. If they are discriminatory however, perhaps having a men-only board or are homophobic³, then they may be less accessible to the wider community than an inclusive secular organisation would be.

In order to meet its aim of creating accessible, inclusive and accountable public services through commissioning as set out in the Green Paper, we recommend that the government only contracts services to groups and organisations that do not discriminate on religious grounds in their employment or in the way they provide services.

5) Free schools

In seeking to engage a diverse range of people and organisations in local public services, the Green Paper makes special mention of the 'Free Schools Programme' and asks, 'What can civil society organisations contribute to the development of Free Schools. What should Government consider in order to realise this contribution?' (p23). For the BHA, the free schools model demonstrates a number of our concerns relating to equality, rights and diversity that arise from the modernising commissioning process.

Free schools can be established by anyone approved by the Education Secretary. Since their proposed introduction with the Academies Act 2010, the BHA has continually pointed out that the free schools programme would be particularly attractive to religious groups. We suggest that this is because free schools are largely unregulated, and are given complete power over what they teach with no safeguards to ensure that myth and misinformation do not dominate the curriculum. Free schools do not have to follow the National Curriculum and are outside of local authority control. Moreover, very few parents have the time, resources or local influence to set up a new school, but religious groups often have all of these.

Given that the government has only made token gestures to limit religious discrimination in the admissions criteria of religious 'free schools', and has permitted wide discrimination in employment on religious grounds, the evidence suggests that these schools will create segregation and divisions within communities⁴.

There are concerns about inclusion wider than those relating to discrimination in admissions and employment. Our own polling shows that the majority of the public are concerned that the new academy schools will lead to public money being spent on promoting religious beliefs⁵. There are no robust safeguards to prevent religious extremism and discrimination in state-funded schools.

There are similar concerns about what equalities measures would or would not be in place to ensure the new 'community right to challenge' proposed in the Localism Bill and the drive to commission services as set out in the Green Paper. It is not clear that there are sufficient measures in place to ensure that religious groups taking on public services would be fully committed to equality and diversity, and to ensure that they may not use the service as a vehicle through which to promote their own religious perspective or practice.

³ The Salvation Army for example, an evangelical organisation which provides a range of public services, has a positional statement on homosexuality which describes it as 'unnatural' and homosexual conduct to be 'renounced' http://www1.salvationarmy.org.uk/uki/www_uki.nsf/vw-search/F2B09D2DFA617925802576EB00428FB6?opendocument

⁴ See, for example, the Accord Coalition's 'dossier of evidence' on faith schools

<http://www.humanism.org.uk/uploads/documents/DossierofIndependentEvidenceonFaithSchools2.pdf>

⁵ <http://www.humanism.org.uk/uploads/documents/BHAICMpollonreligiousAcademies.pdf>

Without strict safeguards in place to mitigate the negative effects on social cohesion and the potential for exclusion rather than inclusion of pupils, teachers and parents on religious grounds, we believe that the free schools programme is an unsuitable model on which to base a wider community and civil society focused programme of commissioning. Religious people, groups and organisations wishing to take on the provision of public services must not be allowed to discriminate in the provision of services, nor in employment, and in order to be inclusive the services should be provided in a neutral, secular way.

6) Public services and the Equality Act 2010

The Equality Act 2010 contains wide and significant exceptions that exempt religious organisations from significant parts of the law, permitting potentially wide discrimination by those organisations in employment and service provision.

In employment, the Equality Act fails to protect the rights of employees working for religious organisations, even those organisations working under public contract.

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

In the context of the government's commitment to modernising commissioning with a focus on the voluntary and community sector and civil society, including a focus on handing the provision of public services to religious organisations, it is more urgent than ever before to ensure that staff and service users are treated equally regardless of religion or belief. We recommend that measures are taken to ensure that these exceptions do not apply when religious organisations are working under public contract to provide services.

7) Single equality duty

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

The Act imposes the public sector equality duty on public authorities to have due regard to three specified matters:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

During the passage of the Equality Bill, the BHA briefed in detail about our concerns regarding extending 'limb b', advancing equality of opportunity, to the protected characteristic of religion or belief⁶, and on the permission in the Act for religious organisations to discriminate on grounds of religion or belief in the provision of services⁷.

⁶ See BHA Briefing on public sector duty for Equality Bill, Lords Committee Stage, for more details <http://www.humanism.org.uk/documents/4583>

⁷ Discrimination on grounds of sexual orientation by religious organisations when working under contract was made unlawful with the 2007 Equality Act (Sexual Orientation) Regulations but a similar provision was not made for preventing discrimination on grounds of religion or belief.

Provisions in the Equality Act allow religious organisations to discriminate widely on religious grounds in service provision, even when working under contract (which we strongly oppose). This together with a requirement on public authorities to advance equality of opportunity through meeting the needs of persons who share a religion or belief, risks a balkanisation of public services.

Furthermore, for most services – health, for example – it would be hugely inefficient to have overlapping and duplicated services. It would lead to unavoidable discrepancies in provision: different groups of people, demarcated irrelevantly by religion or belief would be expected to rely on separate services.

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

We believe that the existence of these exemptions from equality law, and many religious organisations' desire to use them, even when working under contract, will make it more difficult for public bodies wishing to work to the highest equalities standards from doing so. Short of legislative change to prevent discrimination in the delivery of public services by religious organisations working under contract (our preferred option) we believe that measures to assist commissioning public authorities should be put in place. This would include monitoring whether organisations bidding for contracts have a religious ethos and if so, whether they currently or intend to discriminate in their employment on religious grounds or in the delivery of the service.

The new public sector duty may actually make promoting equality through commissioning even more difficult.

8) Meeting and assessing needs

The Green Paper discusses various ways to assess and meet needs of local areas and communities. In relation specifically to meeting needs based on demography, public authorities must take great caution when looking at religion or belief. As detailed above in 'Commissioning and communities', commissioning authorities should not assume that contracting services to a religious organisation will meet the 'needs' of people stemming from their religion or belief.

In reference specifically to assessing needs, the data that public authorities use especially for religion or belief will often be unreliable and unsuitable for purpose. Measuring, in any kind of meaningful way, religion and belief is notoriously difficult. Public authorities will often rely on data from the Census to make decisions, including those deciding service provision and resource allocation, which may be met increasingly through commissioning. The Census data on religion or belief is completely unsuited to those purposes. The 2001 Census grossly undercounted the number of non-religious people and gave a hugely inflated religious figure, especially for the number of Christians⁸. The Census actually encourages people to claim a religious affiliation without recording whether they practise or believe in a religion. It is quite clear that 72 per cent of the population are not practising and believing Christians as the Census data might suggest, and that there are many more than 15 per cent of the population who are not religious – those figures are not replicated in any other significant social survey⁹.

⁸ The BHA has undertaken some considerable work in developing our policy and knowledge on census data. We would be happy to provide more information and evidence on request.

⁹ The latest British Social Attitudes survey, just published but conducted in 2009, shows only 43.7% of people claiming to be Christian while 50.7% say they are non-religious
<http://www.natcen.ac.uk/media/606622/bsa%202009%20annotated%20questionnaires.pdf>

Apart from the inaccuracy of the data collected on religious affiliation, there are real, practical problems with the use of such data. The Census data on religion says nothing about the actual religious practice, involvement, belief or belonging of the population; the sorts of features which *might* translate into 'needs' for some people, such as a service not being delivered on a Saturday for Orthodox Jews. In any case, it does not translate at all that only religious organisations are able to be flexible in terms of meeting diverse needs of communities.

Given the threat to equality, to the balkanisation of services, and the problems with data, we urge that commissioning authorities exercise great caution when seeking to assess and meet needs of communities and local people on grounds of religion or belief.

9) TUPE

The Green Paper asks, 'What are the key issues civil society organisations face when dealing with TUPE regulations and what could government do, within existing legislation, to resolve these problems' (p15). In relation particularly to the transfer of workers from the public sector to a contracted religious organisation, specific issues are raised.

During the passage of the Equality Act 2010, Lord Warner of Brockley raised a number of concerns about the rights of workers transferred to a new, religious employer. The previous government's detailed, written response¹⁰ suggests that the law is not intended to be read widely and so discrimination against transferred workers should not be commonplace. However, there is little to prevent discrimination by religious organisations working under contract that place religious occupational requirements on positions and work outside of the TUPE Regulations in some circumstances. Without legislative change or strict contractual stipulations, the main recourse to justice for transferred workers who face religious discrimination by a new religious employer working under contract is through expensive, retrospective and individual court action because the area of law is not well defined or tested through case law.

Our concerns are as follows.

- i. When working under contract with, or on behalf of, a public authority, organisations with a religious ethos are permitted in some circumstances to put a religious occupational requirement on a previously secular position. Moreover, they can require that employees have to have 'respect for the faith in question'¹¹ in taking up what would previously have been a secular position if not provided by religious contractor. The TUPE Regulations do not protect workers against these actions which, at best, constitute an infringement of the right to freedom of belief for transferred workers
- ii. TUPE Regulations have a limited range of protection in employment, dealing with dismissal or loss of job as result of transfer. Public sector workers transferred from a public authority to a contracted religious organisation remain at risk of being made redundant or of dismissal if their new posts have religious requirements attached to them, as the TUPE protections would not apply if the duties of the employee had changed for an organisational reason¹².

For example, a religious employer could try to defend such action by making the case that it was vital for the organisation that all care workers sign a statement of faith and pray with

¹⁰ Response from Baroness Thornton on behalf of the Labour government, available in House of Lords library, February 2010.

¹¹ Ibid.

¹² Ibid.

patients and so dismiss any transferred staff who didn't fit. This would be different to dismissing someone directly on grounds of their religion, which would likely be unlawful.

- iii. The exception in the Equality Act allows religious employers, even when working under public contract, to impose a requirement that the person be of a particular religion or belief in relation to access to training and other benefits. In these circumstances, transferred workers are not protected by the TUPE Regulations and may find their opportunities at work restricted because of their lack of required beliefs.
- iv. TUPE protections would similarly not apply if employees had to reapply for their position with a new, religious employer and found that their lack of required beliefs rendered them ineligible for the very post they have previously held, if the religious employer made the case that the changes in the role were for organisational reasons and also had placed an occupational requirement on the role – another barrier to employment for people of no religion or of the wrong religion.

Public sector workers who are transferred to a contracted religious organisation from a public authority are at risk of having their career prospects restricted when more senior positions have religious requirements attached to them. In its response to a question on this subject¹³, the previous government said that, in practice, a religion or belief occupational requirement applies only in a small number of cases. However, there is not much evidence for this. The fact is, we do not know how many positions religious occupational requirements are applied to because there is pretty much no monitoring or recording of it, including for religious organisations that are working under public contract.

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

In 2008 an employment tribunal found that an employer's religious ethos was not necessarily determined by the religious beliefs of its staff¹⁴. Although the Tribunal ruled comprehensively against the employer, a Christian charity called Prospects, this was the first (and so far only) time an employment tribunal has been called on to decide the extent to which an organisation with a religious ethos is allowed to discriminate on grounds of religion or belief.

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

We believe that in relation to religion or belief there are a number of important considerations both for commissioning authorities and for religious organisations seeking to take on public contracts to provide services. We recommend that, at a minimum, the government produces clear guidance on

¹³ Ibid.

¹⁴ Judgment in the Employment Tribunal of Mr Mark Sheridan and Prospects for People with Learning Disabilities, May 2008 – a case involving religious discrimination by a religious employer working under contract with the local authority to provide health and social care services. See in particular, 'Stage 3 – proportionality'.

this area and works with authorities and civil society organisations to raise awareness of the issues and to prevent discrimination wherever possible. For public services to be truly inclusive, accessible and representative, we do not believe that organisations which place religious occupational requirements on positions involved in service delivery or which seek to restrict the career prospects of transferred workers if they do not profess the 'right' religion should not be considered for the public service contract.

10) Summary

In sum, we have a number of concerns regarding modernising commissioning as it relates to religious organisations. We believe that for the playing field to be truly level, and for contracted public services to be inclusive and accessible, some measures are necessary to prevent against discrimination in employment and the provision of services.

It is our view that future commissioning and public service reform should be grounded in principles of equalities and human rights, and be inclusive of people regardless of background or belief.

We recommend that the government only contracts services to groups and organisations that do not discriminate on religious grounds in their employment or in the way they provide services.

We believe that the free schools programme is an unsuitable model on which to base a wider community and civil society focused programme of commissioning.

We recommend that measures are taken to ensure that these exceptions do not apply when religious organisations are working under public contract to provide services.

Short of legislative change to prevent discrimination in the delivery of public services by religious organisations working under contract (our preferred option) we believe that measures to assist commissioning public authorities should be put in place.

We urge that commissioning authorities exercise great caution when seeking to assess and meet needs of communities and local people on grounds of religion or belief.

We recommend that, at a minimum, the government produces clear guidance on this area and works with authorities and civil society organisations to raise awareness of the issues and to prevent discrimination wherever possible.

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