

Equality and Human Rights Commission
Report

Religion or belief:
is the law working?

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Equality and Human Rights Commission

For further information about the Commission's work on religion or belief, please contact:

Post: David Perfect
Research Team
Equality and Human Rights Commission
Arndale House
The Arndale Centre
Manchester M4 3AQ

Email: david.perfect@equalityhumanrights.com

Website: www.equalityhumanrights.com

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Executive summary

This report explores whether Great Britain's (GB's) equality and human rights legal framework sufficiently protects individuals with a religion or belief and the distinctiveness of religion or belief organisations, while balancing the rights of others protected under the Equality Act 2010 (the Equality Act). The assessment reflects our statutory duty to monitor the effectiveness of equality and human rights legislation and make recommendations to the government about any changes that might be necessary.

Our evaluation focuses on four questions:

- Is the legal approach to defining a religion or a belief effective?
- Are the Equality Act exceptions allowing religion or belief requirements to influence employment decisions sufficient and appropriate?
- Does the law sufficiently protect employees wishing to manifest a religion or belief at work?
- Does the law sufficiently protect service users and service providers in relation to religion or belief?

The report draws on our call for evidence on religion or belief in employment and service delivery (Mitchell and Beninger, with Donald and Howard, 2015), our review of the legal framework (Edge and Vickers, 2015), and extensive engagement with stakeholders.

When assessing whether the legal framework is effective, our starting point has been that the law needs to protect competing rights fairly, for example between the right to manifest religious belief and the rights of others not to be discriminated against. We conclude that the Equality Act and the Human Rights Act 1998 generally strike the right balance between protecting the rights of individuals with a religion or belief, of religion or belief organisations and of others protected by the Equality Act.

Is the legal approach to defining a religion or a belief effective?

We found that the definition of religion or belief in the Equality Act is sufficiently broad to ensure wide protection to many religions or beliefs. Although the decided

cases on what constitutes a protected belief are not always easy to follow, we do not consider that using a list of recognised religions and beliefs to increase clarity on which are protected under the law is an option that should be pursued. Such a list might be viewed as arbitrary and would be likely to exclude minority, emerging and less well known religions and beliefs. It would also need to be reviewed regularly. We consider that the possible negative impact of introducing a finite list outweighs the increased certainty it might bring. We consider that any lack of clarity around what beliefs are protected is best tackled through the development of case law. To this end, the Commission will proactively seek out appropriate test cases to assist or in which to intervene as a third party.

We recommend:

- **No change is made to the broad definition of the protected characteristic of religion or belief in the Equality Act.**
- **No change is made to the current approach whereby the courts decide whether any particular religion or belief is protected under the Equality Act.**
- **The definition of the protected characteristic of belief should be clarified through case law.**

Are the Equality Act exceptions allowing religion or belief requirements to influence employment decisions sufficient and appropriate?

Our call for evidence showed that some participants believed that commercial business owners should be able to make decisions about whom they employ to reflect their own religious belief. We consider that the current Equality Act employment exceptions for employers with an ethos based on religion or belief, and for the purposes of an organised religion, provide sufficient protection to such organisations to allow them to operate in a way that recognises the distinctiveness of their religion or belief. The exceptions allowing for occupational requirements permit organisations to balance non-discrimination and requirements of a religion or belief ethos or purpose in a way that ensures any restrictions to employment of people with particular characteristics are necessary and proportionate and should not be widened.

We looked at sections 60 (4) and (5) of the School Standards Framework Act (SSFA) in England and Wales and section 21 (2A) of the Education (Scotland) Act 1980 in Scotland. We consider the SSFA provisions are too broad and do not comply with the requirements in the EU Employment Equality Directive Article 4 (2) that the exceptions be legitimate and proportionate. The SSFA provisions allowing voluntary

aided schools to consider the conduct of teachers appear to permit discrimination because of other protected characteristics, such as sex or sexual orientation discrimination. This is not permitted by the EU Employment Equality Directive Article 4 (2) which requires that 'difference of treatment' 'should not justify discrimination on another ground'.

Under the Education (Scotland) Act 1980, a teacher wishing to be appointed to a post in a denominational school managed by an education authority has to be approved by representatives of the relevant church or denominational body as to their religious belief and character. The need for approval does not require a consideration of proportionality.

In the interest of clarity and consistency of equality law, and given the breadth of the relevant provisions and significant proportion of schools involved, the UK and Scottish Governments should review the extent to which the provisions are compatible with the EU Employment Equality Directive. It is important that we ensure teachers are able to pursue their careers without unjustifiable limitations being placed upon them.

We consider that exceptions permitting a religious requirement which has a legitimate aim and is proportionate are an effective way of making appointments which protect the religious ethos of schools. The provisions regulating the appointment of teachers to schools with a religious character and denominational schools could be modelled on the current occupational requirement exception set out in the Equality Act. To this end, if cases are raised in relation to this issue, the Commission will consider providing assistance or intervening as a third party.

We recommend that:

- **There should be no change to the current occupational exceptions allowed under the Equality Act in employment for employers with an ethos based on religion or belief, or for employment for the purposes of an organised religion.**
- **The Department for Education (DfE) should review sections 60 (4) and (5) of the SSFA and the Scottish Government should review section 21 (2A) of the Education (Scotland) Act to ensure their compatibility with the EU Employment Equality Directive.**

Does the law sufficiently protect employees wishing to manifest a religion or belief at work?

We conclude that the existing indirect discrimination model and the concept of balancing competing rights in human rights law where there is an apparent conflict

between individuals or between an individual and the public interest, provide sufficient protection for people manifesting a religion or belief, and that no additional duty of reasonable accommodation is required. Those who favour introducing such a duty into GB law feel that it would better protect the right of individuals to manifest their religion or belief, and so lead to a more appropriate balance between their rights and the rights and needs of their colleagues, service users and customers. However, our assessment is that a duty of reasonable accommodation would not lead to substantial additional protection. The Equality Act does not prevent an employer from making an accommodation, unless doing so would breach discrimination law or other legal requirements such as health and safety legislation. Employers should already consider seriously every request made for reasons relating to religion or belief, both for good practice reasons and to avoid the risk of indirect discrimination. They should only turn these down if they have objective reasons for their decision that can be justified, for example, the impact of the request on the business or on customers, and have taken into account both the rights of other individuals and the impact on the individual making the request.

Even if there were a duty of reasonable accommodation in GB, we are clear that it could never be used to permit discriminatory service provision or to allow employment arrangements which could have a discriminatory impact on colleagues. As a separate duty would not lead to a substantial change in the level of protection for religion or belief, we have therefore concluded that the current legal approach is the correct way to protect the right to manifest a religion or belief while also upholding the right to non-discrimination.

For the same reason, we also conclude that the law should not be changed to permit individuals to opt out of work duties, to accord with their religious or non-religious beliefs, where this has an actual or potential detrimental or discriminatory impact on others.

We consider the legal judgments on freedom of expression in the workplace and dress codes, the wearing of religious symbols and time off work are consistent and appropriate given the facts. What the cases show is that each situation is different, and the outcomes in individual cases are sensitive to the particular facts in each instance.

We recommend that:

- **The legal framework should remain unchanged because the existing model of indirect discrimination and the concept of balancing rights in human rights law provide sufficient protection for people manifesting their religion or belief.**

- **A duty of reasonable accommodation should not be introduced into law.**
- **Individual employees should not be permitted to opt out of performing part of their contractual work duties due to religion or belief where this would have a potential detrimental or discriminatory impact on others.**

Does the law sufficiently protect service users and service providers in relation to religion or belief?

The Equality Act does not permit an individual or organisation to discriminate when providing services to the public by treating someone worse because of a protected characteristic. However, it provides an exception allowing a non-commercial religion or belief organisation to restrict services on the basis of sexual orientation because doing so is necessary to comply with its doctrine, or to avoid conflict with the strongly held convictions of a significant number of its members. Some have argued that this exception is too narrow and that any service provider where the owner has a religion or belief should be able to rely on the exception and restrict services on the basis of sexual orientation. The Commission's research also suggests that some service providers believe they should be able to refuse a service to particular groups where providing the service would not accord with their religious views.

In our view, the law does not and should not permit discriminatory service provision by public or commercial service providers. A service provider is permitted to provide a service that caters for specific religious needs but it may not treat customers on a discriminatory basis. Where a service is provided to the public, it must be provided to all on equal terms.

In November 2015, Digital Cinema Media (DCM), a company that supplies advertising to the majority of British cinemas, refused to distribute a Church of England advertisement reciting the Lord's Prayer on the grounds that it infringed its advertising policy which prohibits all religious or political advertising. It is lawful for a commercial company to adopt such a policy. However, we are concerned that a single supplier is effectively able to control a very large proportion of the market and effectively impose a blanket ban on advertising of a religious nature. We consider that all businesses should have regard to the UN Guiding Principles on Business and Human Rights. These make clear the responsibility of all businesses to respect human rights, including the right to freedom of expression and the right to manifest one's religion or belief, and to take appropriate action to prevent and mitigate adverse human rights impacts. In fulfilling these responsibilities, businesses should avoid taking decisions based on an overly broad view of what might cause offence, which could limit freedom of expression for religion or belief organisations. We are

not recommending any change in the law, but will seek test cases to clarify issues around freedom of expression and freedom of thought, conscience and religion in relation to religious organisations.

Harassment related to religion or belief and sexual orientation is prohibited only in relation to employment. It does not apply in the provision of goods and services or the exercise of public functions, or in education. Although concerns have been raised that the protection available to different religious groups continues to differ because racial harassment protection applies to Sikhs and Jewish people but not to those of other religions, we have concluded that harassment protection should not be extended to cover religion or belief in non-employment settings. The extension of protection from harassment related to religion or belief in service delivery was carefully considered during the passage of the Equality Act and it was rejected because of the risk that the broad definition of harassment, which allows for an element of subjectivity in what is considered offensive, could lead to an unwanted chilling effect on freedom of expression. ‘Harassing’ conduct related to religion or belief which causes a detriment is covered by direct discrimination protection.

We recommend that:

- **The Equality Act should not be amended to permit religion or belief or sexual orientation discrimination by organisations whose sole or main purpose is commercial.**
- **There should be clarification of the extent of freedom of expression and freedom of thought, conscience and religion in relation to religious organisations which is required, through case law.**
- **There should be no extension of harassment protections covering religion or belief to non-employment settings.**

Guidance and training

Our call for evidence and meetings with a wide range of civil society, business and trade union stakeholders suggest that employers and employees, service providers and service users are often unclear what the law requires and permits. They are unsure how to request or respond to a request related to an individual’s religion or belief, or how to manage diverse workplaces or diverse service user groups.

To build knowledge and understanding of the law in this area, and confidence in applying it correctly in practical day to day situations, we are providing a range of new information and making this available where people are most likely to seek it. So we are simultaneously publishing guidance on our website to explain to employers and service providers the questions they should consider when dealing with a

request related to an individual's religion or belief. In addition, we have worked with ACAS who are launching an online training module for line managers and the TUC who are providing online training for union representatives. Several organisations with a religious focus have also independently published their own guidance recently. We believe that easier access to consistent information will help employers and employees and service providers and service users identify practical and lawful ways of responding to requests related to an individual's religion or belief, and help reduce litigation.

1 | Introduction

1.1 Background

Everyone has the right to be treated with fairness, dignity and respect; this includes respect for a person's religion or belief or lack of religion or belief, and respect for the rights of others.¹ Achieving the appropriate level of protection of rights that can sometimes compete or even conflict is the source of extensive debate about the place of religion in public life. As demonstrated in the Commission's previous research and policy work, some have argued that religious belief is so distinctive that it requires greater protection than that currently provided by our legal framework; and that a failure to recognise this is evidence that there is a hierarchy of rights in which other protected characteristics, in particular sex and sexual orientation, receive greater protection than religion or belief. Others suggest that religion or belief is given too much protection, and that the Equality Act 2010 (Equality Act) exceptions that recognise the distinctiveness of religion or belief disadvantage other protected characteristics. Yet others argue that the current legal framework provides similar protection for all groups and that the legal principles of reasonableness, justification and proportionality ensure fairness and balance for all (Donald, with Bennett and Leach, 2012: 77-83, 111-12).²

This report explores whether Great Britain's (GB) equality and human rights legal framework sufficiently protects individuals with a religion or belief and the distinctiveness of religion or belief organisations,³ while appropriately protecting the rights of other groups protected under the Equality Act. Our assessment reflects our duty under section 11 of the Equality Act 2006 to monitor the effectiveness of

¹ When we refer to 'religion or belief' in this report, we mean any religion or belief or lack of religion or belief protected under the Equality Act 2010.

² These issues were also discussed at a series of 'dialogues events' with stakeholders in 2013 which were organised on behalf of the Commission by the Religious Literacy Leadership Programme at Goldsmiths, University of London, working with Coexist Foundation. A report of all the events and many of the presentations can be found at: <https://sites.google.com/site/religiousliteracy2/ehrc-dialogues/>.

³ The Equality Act 2010 includes limited exceptions from the duty not to discriminate. These are for: non-commercial organisations with a religion or belief purpose, in the provision of goods and services; employers with a religion or belief ethos; and employment for the purposes of organised religion.

equality and human rights legislation and make recommendations to the government about any changes that might be necessary.

1.2 The legal framework

Religion or belief is protected in GB under the Human Rights Act 1998 (HRA) and the Equality Act.

The HRA, which incorporates the rights and freedoms in the European Convention on Human Rights (ECHR) into domestic UK law, protects the right to freedom of thought, conscience and religion. Under Article 9(1) of the ECHR:

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.

The right to manifest the religion or belief in worship, teaching, practice and observance is *qualified* under Article 9(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.

In addition, Article 14 of the ECHR requires that people enjoy all the rights under the ECHR without discrimination. Article 14 is not a freestanding right and it can only operate when another Convention right is engaged.

In order to assess whether an interference with someone's rights is justified, the courts apply a three stage test: asking first, is there a legal basis for the interference? Second, does it pursue a legitimate aim? Third, is the interference 'necessary in a democratic society'? This involves consideration of whether the interference is proportionate to the aim pursued: whether there is an alternative less intrusive means of protecting the public interest and whether a proper balance has been struck with any competing rights. In assessing proportionality, the state is

allowed a discretion or 'margin of appreciation' – the principle that in theory the state is best placed to judge the necessity of a restriction.⁴

The Equality Act protects individuals from direct and indirect discrimination and harassment because of nine 'protected characteristics', including religion or belief,⁵ and from victimisation. Protection applies in the workplace, the provision of services and other contexts, and is subject to defined exceptions. The Equality Act defines 'religion or belief' very broadly to include any religion; any religious or philosophical belief; a lack of religion; and a lack of belief.

Indirect discrimination occurs where an employer or a service provider applies an apparently neutral provision, criterion or practice which puts persons sharing a protected characteristic at a particular disadvantage. It will not amount to indirect discrimination if the person applying the provision, criterion or practice can show that it is 'objectively justified', that is '... a proportionate means of achieving a legitimate aim'. The test for justifying indirect discrimination is similar to the test for justifying an interference under Article 9(2) of the ECHR.

Section 13 of the HRA states that a court 'must have particular regard to the importance' of the right to freedom, thought, conscience and religion by a religious organisation (itself or its members). This is reflected in the Equality Act. The basic presumption under the Equality Act is that discrimination because of a protected characteristic is unlawful; however, it recognises that some religion or belief organisations may hold convictions that affect their role as employers and service providers. It therefore provides for limited exceptions to the duty not to discriminate. These include permitting organisations with a religious ethos to employ people of a particular religion where it is an occupational requirement, and non-commercial organisations with a religious purpose to restrict the provision of goods and services to certain people.

⁴ In some instances this might lead to different interpretations in different countries. For example, in *SAS v France* the court held that a ban on wearing a niqab in public places in France was proportionate, applying the margin of appreciation in the context of France's legal state secularism. It is not known whether a similar outcome would arise in a different state party. See *SAS v France* [2014] Application number: 43835/11 (1 July).

⁵ These 'protected characteristics' are: age; disability; gender reassignment; race; religion or belief; sex; sexual orientation; marriage and civil partnership; and pregnancy and maternity.

1.3 Call for evidence and review of legal framework

Debates about the effectiveness of this legal framework are taking place in a changing landscape of religious affiliation and identity. Britain today is simultaneously a Christian, religiously plural and secular society, although arguably becoming more secular, more religiously plural and less Christian (Nye and Weller, 2012: 50; Weller et al, 2013: 38). Census data show that between 2001 and 2011 the proportion of the British population identifying as Christian declined from 72 per cent to 59 per cent; while that identifying as 'no religion' increased from 15 per cent to 26 per cent. Over the same period, the proportion of Muslims rose from 3 to 5 per cent and the Hindu, Sikh, and Buddhist proportions rose slightly, whereas the Jewish proportion remained broadly similar (see Appendix 1). There has also been a marked increase in the membership of evangelical Pentecostal Churches and New Churches and a decline among longer established Christian denominations, especially Catholics, Methodists and Presbyterians (Brierley, 2014: Table 0.2.1).

In some religions, adherents display their observance publicly through means such as dress, wearing religious symbols or religious attendance at religious ceremonies. Religious tenets may inform an individual's views about social issues, such as marriage and sexual relations, the role of women, transgender identity, and disability. This may sometimes have an impact on their behaviour at work, when providing or using services and in other public environments. This may result in tensions between people with and without a religion, between people of different religions, or between people with a religion and those with other protected characteristics. To develop our evidence base, we wanted to understand the issues people faced in their daily lives due to religion or belief, and whether the legal framework provides sufficient protection to everyone. Our activities are explained in more detail in Appendix 2.

In 2014, the Commission issued a call for evidence asking individuals how their religion or belief, or that of others, had affected their experience at work or when providing or using services. The report described the experience of participants who were Christian, of other religions, or agnostics, atheists, humanists or of no religion (Mitchell and Beninger, with Donald and Howard, 2015).⁶ Some respondents said that they worked in positive, inclusive environments where their religion or belief reflected wider diversity in the workplace. Others reported negative experiences, for example: perceptions that their religion or belief was a barrier to recruitment and

⁶ The call for evidence was a qualitative, not a quantitative, exercise. While it aimed to gather as wide a range of experiences and views as possible, the methodology adopted means that it is not possible to state how prevalent these are in the wider population.

progression; being refused time off work for religious holidays or feeling overburdened with work due to colleagues taking religious holidays; being refused permission to wear religious clothing or symbols at work; being mocked for holding religious or other beliefs; being subject to unwelcome proselytism; or being refused permission to pray with service users.

We also asked participants in the study their views about the effectiveness of the current legal framework on religion or belief. Some viewed it positively, saying that it provided a single robust framework to deal with discrimination and equality. Others were broadly positive about the legal framework, but had reservations about how well it was applied and the resulting perception of discrimination and unfair treatment. A third group viewed the law negatively saying that it did not protect people with a religion because, whether at work interacting with colleagues or when delivering services, people should be able to behave in a way that accorded with their religious views, regardless of the possible discriminatory impact on others.

We also commissioned a review of the interpretation and effectiveness of the current legal framework (Edge and Vickers, 2015). This report examined the protection offered by definitions of religion or belief, the way the legal framework and the courts balance rights, debates about the feasibility of a proposed duty of reasonable accommodation, and the public sector equality duty in relation to religion or belief. It found that the legal framework was generally clear and consistent, but identified five areas for further consideration, the majority of which we have considered in this report.

We have drawn on these two reports, and information from a series of meetings with religion or belief stakeholders, academics, legal practitioners, businesses, trade unions and lesbian, gay, bisexual, transgender and women's groups held in London and Glasgow between 2014 and 2016, as well as on published secondary literature on religion or belief law (see Appendix 2).

1.4 Our approach

We decided to explore four questions in this report to assess whether levels of protection for individuals and religion or belief organisations are sufficient in respect to all rights under equality and human rights law. These are:

- **Is the legal approach to defining a religion or a belief effective?** (Chapter 2)

- **Are the Equality Act exceptions allowing religion or belief requirements to influence employment decisions sufficient and appropriate?** (Chapter 3)
- **Does the law sufficiently protect employees wishing to manifest a religion or belief at work?** (Chapter 4)
- **Does the law sufficiently protect service users and service providers in relation to religion or belief?** (Chapter 5)

When assessing whether the legal framework is effective, our starting point has been that the law needs to protect competing rights fairly, for example the right to manifest religious belief and the rights of others not to be discriminated against. It is also important to note that everyone has characteristics that are protected in law, and that many people have several different ones. So this is not just about groups whose interests are sometimes perceived as conflicting, but also ensures that people are protected from discrimination in all the complicated factual scenarios that exist in real life.

We excluded some topics from this report which do not fall directly within the Commission's remit or because the Commission, the government or other organisations are undertaking work on the issue.⁷

1.5 Our findings

We conclude that the Equality Act and the HRA provide sufficient protection for individuals with and without a religion or belief, religion or belief organisations and other groups protected by the Equality Act. We found that the definition of religion or belief in the Equality Act is sufficiently broad to ensure protection to many religions or beliefs. We found that the existing indirect discrimination model and the concept of balancing rights in human rights law where there is an apparent conflict between

⁷ The excluded topics include: admission of pupils; chaplaincy; collective worship; the existence and operation of schools of a religious character; gender segregation on university campuses; hate crime; religious courts; religious education; and Article 10 freedom of expression issues. The Commission recently published research on hate crime (Abrams et al, 2016) and guidance on gender segregation on campus and freedom of expression (Equality and Human Rights Commission, 2014, 2015). The Home Office appointed an independent ongoing inquiry on religious courts by Professor Mona Siddiqui, to which the Commission has made a submission, and the House of Commons' Home Affairs Committee (Bowcott, 2016; Cranmer, 2016; Equality and Human Rights Commission, 2016); while there have been a number of recent analyses of collective worship and religious education (Clarke and Woodhead, 2015; Commission for Religion and Belief in British Public Life, 2015; Cumper and Mawhinney, 2015).

individuals or between an individual and the public interest already provide sufficient protection for people manifesting a religion or belief, and that no additional duty of reasonable accommodation is required. We are strongly of the view that the law should not permit individuals to opt out of work duties, to accord with their religion or belief views, where this has an actual or potential detrimental or discriminatory impact on others. We also consider that the current exceptions allowed under the Equality Act in employment for employers with an ethos based on religion or belief, or for the purposes of an organised religion, provide sufficient protection to allow them to operate in a way that recognises the distinctiveness of their religion or belief. We do not consider that the exception relating to religion or belief and the provision of goods and services should be widened to enable commercial bodies to restrict services on the basis of religion or belief or sexual orientation. Finally, although concerns have been raised that the protection available to different religious groups continues to differ, we do not think that harassment protection should be extended to cover religion or belief in non-employment settings. We do not consider that the absence of protection leaves individuals with no remedy, as where they have been subjected to a detriment they have access to redress through the current legislative framework. If protection from harassment was extended to religion or belief in non-employment settings, the subjective element of the definition of harassment could lead to an unwanted chilling effect on the freedom to express religious or philosophical beliefs.

However, we consider that change is needed in some areas. We consider that the exceptions permitted to voluntary controlled and voluntary aided schools by the School Standards and Framework Act (SSFA) in England and Wales are too broad. Under the Education (Scotland) Act 1980, section 21 (2A), a teacher wishing to be appointed to a post in a denominational school managed by an education authority has to be approved by representatives of the relevant church or denominational body as to their religious belief and character. The need for approval does not require a consideration of proportionality. In the interest of clarity and consistency of equality law, we recommend that the Department for Education (DfE) should review sections 60 (4) and (5) of the SSFA and the Scottish Government should review section 21 (2A) of the Education (Scotland) Act to ensure their compatibility with the EU Employment Equality Directive.

In addition, we also consider that clarification of the law is required through case law in several respects, including the definition of belief and the extent of freedom of expression and freedom of thought, conscience and religion in relation to religious organisations.

1.6 Next steps

Our call for evidence and meetings with a wide range of civil society, business and trade union stakeholders suggest that employers and employees, service providers and service users are often unclear about their rights and obligations. They are unsure how to request or respond to a request related to an individual's religion or belief, or how to manage diverse workplaces or diverse service user groups.

To build knowledge and understanding of the law in this area, and confidence in applying it correctly in practical day to day situations, we are providing a range of new information and making this available where people are most likely to seek it. So we are simultaneously publishing guidance on our website to explain to employers and service providers the questions they should consider when dealing with a request related to an individual's religion or belief. In addition, we have worked with ACAS who are launching an online training module for line managers and the TUC who are launching online training for its union representatives. Several organisations with a religious focus have also independently published their own guidance recently.⁸ We believe that easier access to consistent information will help employers and employees and service providers and service users find practical solutions to requests related to individuals' religion or belief, and help reduce litigation.

Case law related to religion or belief discrimination is still relatively new⁹ and legal judgments play a significant role in clarifying our understanding of the interaction between equality and human rights law, and balancing competing rights. We welcome the announcement in 2016 by HM Courts and Tribunals Service that it intends to publish new Employment Tribunal judgments online.¹⁰ This will make judgments more accessible to everyone and help build understanding of the way in which equality and human rights law protects the rights of people with a religion or belief and other rights and individuals protected in law.

The Commission itself will proactively seek out appropriate test cases to assist or in which to intervene as a third party. Based on our findings in this report, key areas we are interested in pursuing include cases that will help clarify the definition of belief,

⁸ See Board of Deputies of British Jews (2015); Catholic Bishops' Conference of England and Wales (2014); Evangelical Alliance (2016).

⁹ Protection from discrimination on the grounds of religion or belief in employment was initially provided by the Employment Equality (Religion or Belief) Regulations 2003, which implemented the EU Directive 2000/78/EC into law. This was extended to protection from discrimination in the areas of goods, services and facilities by the Equality Act 2006. Both are now contained in the Equality Act 2010.

¹⁰ <https://ids.thomsonreuters.com/download/file/fid/55657>.

freedom of expression and freedom of thought, conscience and religion in relation to religious organisations, and the compatibility of the SSFA sections 60 (4) and (5) with the EU Employment Equality Directive section 4 (2).

2 | Is the legal approach to defining a religion or a belief effective?

2.1 Introduction

The Equality Act 2010 provides protection for individuals from discrimination because they have a religion or a belief or no religion or no belief; but it does not define either religion or belief in any further detail, an approach in line with Article 9 of the European Convention on Human Rights. As a result, it has been left to the courts to decide whether a particular religion or belief is protected under the Act. This chapter examines whether there should be a narrower definition of religion or belief and whether the courts are applying the existing broad definition in a way which provides effective protection.

2.2 Definition of religion

The courts have not generally had any difficulty deciding what is or is not a religion. The key case to date is unrelated to equality law, but concerned the question of whether or not Scientology is a religion, in relation to the registration of places of worship for the solemnisation of marriages.¹¹ An earlier case had found that a chapel of the Church of Scientology was not a place of meeting for religious worship.¹² In December 2013, the Supreme Court ruled that Scientology could be classified as a religion. It found that religions should not be restricted to faiths involving ‘... a supreme deity’ since this would exclude Buddhism and other religions and would also mean that the courts would be entering ‘difficult theological territory’. Lord Toulson described religion, for the purposes of the Places of Worship Registration Act 1855, as ‘... a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship

¹¹ *Regina (Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77.

¹² *R v Registrar General, Ex p Segerdal* [1970] 2 QB 697.

with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system'.¹³ This decision is very likely to be influential if the question of what a 'religion' for the purposes of the Equality Act ever needs to be decided. In our view, the definition is sufficiently broad to ensure protection to many religions.

Some European countries have adopted official lists of recognised religions. In our view, such an approach could be seen as arbitrary and would be likely to exclude smaller, more recently established and less well known religions. It would also risk creating a two-tier system in which 'recognised' religions receive protection and 'unrecognised' ones do not, which could be in breach of the Convention. Where organisations use a defined list of religions for administrative purposes,¹⁴ we suggest that they should regularly review their lists to ensure that they reflect the actual and potential religious requirements of service users.

Therefore our view is that GB's current broad approach is preferable to one where there is an official list of recognised religions.

2.3 Definition of belief

The definition of 'belief' has proven more challenging for legislators and the courts. The Employment Equality (Religion or Belief) Regulations 2003 covered 'any religion, religious belief, or similar philosophical belief', but the word 'similar' was omitted in the Equality Act 2006 and not restored in the Equality Act 2010. Some academics have suggested that this widened the scope of the legislation, leading to definitional challenges, particularly around philosophical beliefs.¹⁵

One possible approach to limiting the range of beliefs recognised for the purposes of equality and human rights law would be a recognised list. This, like a list of religions, might be viewed as arbitrary and would be likely to exclude minority, more recently established and less well known beliefs. We consider that the possible negative

¹³ See note 12.

¹⁴ The prison service uses this approach, In 2016, the National Offender and Management Service (NOMS) recognised 18 religions in prisons in England and Wales; there is no equivalent list for the Scottish Prison Service (SPS). In addition, the religious festivals of 11 religions are listed by NOMS and 12 by SPS (the latter includes Orthodox Christianity as well as Christianity). See Prison Service Instructions 05/2016 and 34/205: <https://www.justice.gov.uk/offenders/psis>; Scottish Prison Rules (Religious Observance) Direction 2016: <http://www.sps.gov.uk/Corporate/Information/PrisonRulesandDirections.aspx>.

¹⁵ The possible implications of this change are discussed in Sandberg (2015): 181-82; Hambler (2015): 106; Vickers (2016): 23.

impact of the introduction of a defined list outweighs the increased certainty it might bring, and therefore we do not recommend it.

In the absence of a definition, the meaning of 'belief' has to be developed through case law. Mr Justice Burton laid down five criteria to decide which beliefs should be entitled to protection under equality and human rights law.¹⁶ These are that:

- The belief must be genuinely held.
- It must be a belief, and not an opinion or viewpoint based on the present state of information available.
- It must be a belief as to a weighty and substantial aspect of human life and behaviour.
- It must attain a certain level of cogency, seriousness, cohesion and importance.
- It must be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others.

Mr Justice Burton's definition has been wide enough to include political beliefs and beliefs based on science as philosophical beliefs. However, it has been suggested that the criteria are open to different interpretation by the courts, and some are difficult to apply. For example, it may be difficult for a court to evaluate cogency and coherence when a belief system may not regard this as important (Edge and Vickers, 2015: 16-19). It has also been argued that some judgments in 'belief' Employment Tribunal cases have been inconsistent (Sandberg: 2014: 44-45; Edge and Vickers, 2015: 16-19) and as the cases generally did not reach the higher courts, the inconsistency was not resolved.

We consider that the case law on the interpretation of 'belief' in the Equality Act could be usefully developed through new test cases. To this end, the Commission will proactively seek out appropriate test cases to assist or in which to intervene as a third party.

2.4 Recommendations

- **No change is made to the broad definition of the protected characteristic of religion or belief in the Equality Act.**

¹⁶ *Grainger plc v Nicholson* [2009] UKEAT 0219/09/ZT.

- **No change is made to the current approach whereby the courts decide whether any particular religion or belief is protected under the Equality Act.**
- **The definition of the protected characteristic of belief should be clarified through case law.**

3 | Are the Equality Act exceptions allowing religion or belief requirements to influence employment decisions sufficient and appropriate?

3.1 Introduction

The Equality Act allows all employers to impose occupational requirements relating to protected characteristics where necessary and proportionate. The Act also allows religion or belief organisations to impose additional religion or belief requirements in specific circumstances in employment decisions as a means of reflecting the doctrine or ethos of the organisation and beliefs of its followers. It permits organised religions to impose requirements related to other protected characteristics in narrowly defined circumstances; an employer that is an organised religion can require office holders to be of a specific religion, sex, or sexual orientation, while an organisation with a religion or belief ethos can require an employee to hold that particular religion or belief where role and context require it.¹⁷ Thus a synagogue can require a rabbi to be male. Organisations with an ethos based on religion or belief can rely on an occupational requirement if they can show that having a religion or belief is an occupational requirement relevant to the nature or context of the work and a proportionate way of achieving a legitimate aim. Thus a humanist organisation promoting humanist philosophy can require its chief executive to be a humanist. In all cases, the occupational requirement cannot be applied as a blanket policy, but must follow the specific requirements set out in legislation and must be a proportionate way of meeting a legitimate aim.

Some have argued that these exceptions are too wide and provide an opportunity for employers to discriminate in employment. Others argue that the exceptions are not wide enough, and constrain the ability of religion or belief organisations to ensure all

¹⁷ Equality Act 2010, Schedule 9, (2) and (3).

their employees reflect their religion or belief ethos. This debate has been reflected in case law about occupational requirement exceptions.¹⁸

3.2 Exceptions and employment

The Commission's call for evidence found that some respondents who stated their organisation had a Christian ethos considered that they should be able to advertise for and recruit staff who are Christians for any role (Mitchell and Beninger, with Donald and Howard, 2015: 56-58).¹⁹ This blanket approach would go wider than the exception allowing employers with a religion or belief ethos to employ individuals with a specific religion or belief as long as this is necessary, bearing in mind the ethos of the organisation and the nature and context of the role, and proportionate.²⁰

Several Employment Tribunal cases have clarified when organisations can justifiably use an occupational requirement. An employer must identify a legitimate aim for any requirement, and the means for achieving that aim must be proportionate. So, for example, in *Muhammed v The Leprosy Mission International*, the Leprosy Mission (a Christian charity) was allowed to refuse applications for a finance administrator role from non-Christians, because Christianity permeated the organisation, with prayers starting each day. The tribunal found the requirement for a finance administrator to be a Christian was a genuine occupational requirement due to the context in which the job was carried out; that is, the belief in the power of Christian prayer to achieve the respondent's goals was at the core of its work and activities.²¹ In another case, the tribunal found that a charity which had a policy of recruiting only Christians to posts of particular seniority had unlawfully failed to consider each appointment separately to assess whether it could be reasonably subject to a religious requirement: a 'fundamentally flawed' approach.²² These judgments reflect that non-discrimination is core to employment and any exception must be justified by 'particularly weighty reasons' and necessarily be limited to the fulfilment of the aim

¹⁸ On Schedule 9, paragraph 2 (or similar previous regulations) see *Reaney v Hereford Board of Finance* [2006] ET 1602844; *Pemberton v Inwood, Acting Bishop of Southwell and Nottingham* [2015] ET 2600962/2014 (the latter case has been appealed). On Schedule 9, paragraph 3 (or similar previous regulations) see *Muhammad v Leprosy Mission International* [2009] ET 2303459; *Hender (Louise) v Prospects* [2008] ET 2902090/2006; *Sheridan (Mark) v Prospects* [2008] ET 2901366/2006.

¹⁹ This was stated by 132 out of 186 organisations; 46 out of 108 service providers; and 14 out of 67 employers.

²⁰ Equality Act 2010, Schedule 9 (3)

²¹ *Muhammad v The Leprosy Mission International* [2009] ET 2303459.

²² *Hender (Louise) v Prospects* [2008] ET 2902090/2006; *Sheridan (Mark) v Prospects* [2008] ET 2901366/2006.

pursued. Employers must consider each role separately in order to determine whether an occupational requirement can apply.

We consider that the exceptions allowing for occupational requirements permit organisations to balance non-discrimination and requirements of a religion or belief ethos or purpose in a way that ensures any restrictions to employment are necessary and proportionate.

3.3 Employment of teachers

England and Wales

Employment of teachers and non-teaching staff in England and Wales is governed by the School Standards and Framework Act 1998 (SSFA). Under the SSFA, only schools which have a religious character are permitted to impose requirements related to religion or belief, or other protected characteristics, when assessing applicants for teaching and non-teaching positions.

The Equality Act 2010 permits schools of a religious character in England and Wales to take religious considerations into account in relation to the employment of head teachers and teachers, in accordance with the SSFA.²³ The SSFA requirements vary according to the constitution and governance structure for schools, rather than the degree of commitment to a religious ethos.²⁴

The SSFA allows voluntary controlled or foundation schools with a religious character to consider a 'person's ability and fitness to preserve and develop the religious character of the school' when appointing a head teacher²⁵ and to select up to one fifth of 'reserved' teachers on the basis of their fitness and competence to teach religious education.²⁶ Non-reserved and support staff are protected by the SSFA from discrimination on grounds of religious opinion, failure to attend religious worship or refusal to give religious education.

The SSFA allows a voluntary aided school to give preference to people who hold religious opinions, attend religious worship and who give, or are willing to give,

²³ Equality Act 2010, Schedule 22, para 4. The SSFA does not apply in Scotland.

²⁴ In voluntary controlled schools, the church owns the land and buildings, and the local education authority funds the school, employs staff and controls admissions. In voluntary aided schools, the church owns the land and buildings, a governing body employs staff and controls admissions, and the local authority largely funds the schools. Foundation schools can be seen as a hybrid, containing both voluntary controlled and voluntary aided elements.

²⁵ SSFA 1998 section 60 (4).

²⁶ SSFA 1998 section 58.

religious education in accordance with the tenets of the religious character of the school. The preferential treatment applies to decisions about the appointment, promotion and remuneration of teachers. A voluntary aided school may also consider 'conduct ... incompatible with the precepts or with the upholding of the tenets' of the religious character of the school when deciding to employ or terminate employment of any teacher.²⁷ In Wales, the regulations for non-teaching staff are different from those in England (Edge and Vickers, 2015: 39).²⁸

We considered submissions from religion or belief stakeholders about the impact and lawfulness of these exceptions. The SSFA provision affects a quarter of primary and secondary schools in England and Wales.²⁹ The evidence we received from stakeholder organisations about the impact of the SSFA and the ways in which individual teachers may have been adversely affected differed considerably. On the current evidence, it is not possible to state with any degree of certainty how many teachers have been affected, although evidence collected by the Accord Coalition (2016) suggests that a number have been.³⁰

Our greater concern is with the consistency and clarity of equality law. In our view, the exceptions for voluntary controlled and voluntary aided schools are too broad and do not comply with the requirement in Article 4 (2) of the EU Employment Equality Directive that exceptions to the prohibition on discrimination be legitimate and proportionate.

We consider that it is legitimate to exercise an occupational exception for teachers providing religious education in order to preserve the religious ethos of a school of religious character. Reserving one fifth of posts on the basis of fitness to teach religious education in voluntary controlled schools is arbitrary, may not reflect the needs of the school and is not a proportionate exercise of occupational requirements. The faith requirements applied to all teachers in voluntary aided schools, regardless of whether they are teaching religion, also seem to go beyond what is lawful in the EU Employment Equality Directive. Under the approach in the

²⁷ SSFA 1998 section 60 (5) (a), section 60 (5) (b).

²⁸ SSFA 1998 section 60 (6).

²⁹ In England, there were 16,778 primary and 3,401 secondary schools in January 2016 of which 5,215 primary and 290 secondary schools had a religious character (Department for Education, 2016). In Wales, there were 1,574 schools in 2015-16 of which 86 were voluntary controlled and 153 were voluntary aided (the proportion of these which were of a religious character is unclear). Data from StatsWales, available at: <https://statswales.gov.wales/Catalogue/Education-and-Skills/Schools-and-Teachers/Schools-Census/Pupil-Level-Annual-School-Census/Schools/Schools-by-LocalAuthorityRegion-Governance>.

³⁰ The submissions of the National Secular Society, on the one hand, and the Catholic Bishops' Conference of England and Wales/Catholic Education Service, on the other, differed completely on this point.

Equality Act, an exception would apply only if being of a particular religion or belief is an occupational requirement for a role and it is proportionate to apply the requirement to the role.

Thus Vickers suggests that the inclusion of a proportionality test in the SSFA, would give greater protection to teaching staff in schools of a religious character and would allow these schools the same freedom to protect their religious character as other religious organisations. It would also bring the SSFA into line with the Directive and require religious employers to balance their needs and the needs of employees in a consistent way as already required in the Equality Act occupational requirement exceptions (Vickers, 2016: 219-22).

The SSFA conduct requirements that allow voluntary controlled schools to consider the 'fitness to preserve and develop the religious character'³¹ in head teacher appointments, and allow voluntary aided schools to consider 'conduct incompatible with the precepts or with the upholding of tenets'³² of all teachers, also seem too broad. These provisions appear to permit discrimination because of other protected characteristics. For example, they would seem to permit a Catholic school to dismiss a gay or lesbian teacher, a divorced teacher or a married teacher conducting a relationship outside of marriage. This also appears to be too broad to comply with the requirement in Article 4 (2) of the EU Employment Equality Directive that 'difference of treatment' 'should not justify discrimination on another ground'.

In our view, although the evidence is limited about the extent to which these provisions are unjustifiably restricting access to employment in schools and influencing promotion and remuneration decisions both in England and Wales, the exemptions allowed by the SSFA are broad and have no requirement for proportionality. In the interest of clarity and consistency of equality law, and given the breadth of the relevant SSFA provisions and large proportion of schools involved, the Department for Education (DfE) should review the extent to which the SSFA sections 60 (4) and (5) are compatible with the EU Employment Equality Directive. It is important that we ensure teachers are able to pursue their careers without unjustifiable limitations being placed upon them.

We consider that exceptions permitting a religious requirement which has a legitimate aim and is proportionate are an effective way of making appointments which protect the religious ethos of schools. The provisions regulating the appointment of teachers to schools with a religious character could be modelled on

³¹ SSFA 1998 section 60 (4).

³² SSFA 1998 section 12 (4A).

the current occupational requirement exception set out in the Equality Act. To this end, if cases are raised in relation to this issue the Commission will consider providing assistance or intervening as a third party.

Scotland

Under section 21 (2A) of the Education (Scotland) Act 1980, a teacher wishing to be appointed to a post in a denominational school managed by an education authority has to be approved by representatives of the relevant church or denominational body in regard to the teacher's 'religious belief and character'.³³ The need for approval does not require a consideration of proportionality as required by the EU Employment Equality Directive.

We did not receive strong, consistent, evidence about the impact of this legislation on the way in which individual teachers may have been adversely affected. Vickers (2016: 215) argues that the Employment Appeal Tribunal judgment in *Glasgow City Council v McNab* 'shows that it will usually be difficult to convince a tribunal that being of a particular religion or belief is an occupational requirement even in faith schools, as it is rare (apart from where religious instruction is given) for religion to be a defining element of such a role'.

The case was brought under the Employment and Equality (Religion or Belief) Regulations 2003 rather than the Equality Act. David McNab, an atheist mathematics teacher, was successful in his discrimination claim after he had not been considered for an interview for the post of Acting Principal Teacher of Pastoral Care at his Roman Catholic school (which would have represented a promotion). The tribunal found that it was not essential for the position to be filled by a Roman Catholic, since only a few responsibilities of the job required knowledge of Catholic doctrine.³⁴

Although there is little evidence about impact, in the interest of clarity and consistency of equality law, we recommend that the Scottish Government should review the impact of section 21 (2A) of the Education (Scotland) Act to ensure its compatibility with the EU Employment Equality Directive.

³³ There were 369 denominational publicly funded schools in Scotland in 2015, of which 365 were Roman Catholic schools, and 2,175 non-denominational schools (Scottish Government, 2016).

³⁴ *Glasgow City Council v McNab* [2006] UKEATS 0037/06/MT.

3.4 Recommendations

- **There should be no change to the current occupational exceptions allowed under the Equality Act in employment for employers with an ethos based on religion or belief, or for employment for the purposes of an organised religion.**
- **The Department for Education should review sections 60 (4) and (5) of the SSFA and the Scottish Government should review section 21 (2A) of the Education (Scotland) Act to ensure their compatibility with the EU Employment Equality Directive.**

4 | Does the law sufficiently protect employees wishing to manifest a religion or belief at work?

4.1 Introduction

Some of the recent high profile religion or belief legal cases have concerned limitations on the exercise of people's right to manifest their religion or belief at work. Manifestation can occur through worship, teaching and proselytism, observation by wearing symbols or special clothes, by eating or avoiding certain foods, or by expressing beliefs inside and outside the workplace.

The courts have considered: employees' rights to time off work for religious observance;³⁵ the right of individuals to wear religious dress;³⁶ the right to wear religious symbols at work;³⁷ opting out of work duties;³⁸ and freedom of expression in the workplace.³⁹ Many, but not all, of the claimants have been Christians.⁴⁰ The key issue in all of these cases was whether the claimants had been indirectly discriminated against by restrictions placed on the manifestation of their religion or belief. Some claimants won their cases but most did not.

As a result, some academics and other commentators (e.g. Christians in Parliament, 2012; Gibson, 2013; Griffiths, 2016) have questioned whether the law prohibiting

³⁵ *Mba v London Borough of Merton* [2013] EWCA Civ 1562; *Cherfi v G4S Security Services* [2011] UKEAT 0379/10/DM; *Fugler v MacMillan - London Hair Studios* [2005] ET 2205090/04.

³⁶ *Begum v Pedagogy Auras UK Ltd (t/a Barley Lane Montessori Day Nursery)* [2015] UKEAT 0309/13/RN; *Azmi v Kirklees Metropolitan Borough Council* [2007] UKEAT 0009/07/MAA.

³⁷ *Eweida v British Airways* [2010] EWCA Civ 80; *Chaplin v Royal Devon and Exeter NHS Foundation Trust* [2010] ET 1702886/2009.

³⁸ *Ladele v London Borough of Islington* [2009] EWCA Civ 1357; *McFarlane v Relate Avon* [2009] UKEAT 0106/09/DA.

³⁹ *Haye v London Borough of Lewisham* [2010] ET 2301852/09; *Wastenev v East London NHS Foundation Trust* [2016] UKEAT 0157/15/LA; *Grace v Places for Children* [2013] UKEAT 0217/13/GE; *Amachree v Wandsworth Borough Council* [2010] ET 2328606/09; *Chondol v Liverpool City Council* [2009] UKEAT 0298/08/JOJ; *Mbuyi v Newpark Childcare (Shepherds Bush) Ltd* [2015] ET 3300656/2014; *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch).

⁴⁰ For example, Begum and Azmi cited in note 36 were Muslims.

indirect discrimination because of religion or belief provides sufficient protection to employees who wish to manifest their beliefs. They argue that a duty of reasonable accommodation could offer a preferable alternative approach. A similar view was taken by the RELIGARE project, funded by the European Commission, which called for a duty of reasonable accommodation in Europe (Fobleys et al, 2014: 6-7; Vickers, 2016: 266).⁴¹ Others strongly disagree with this view (e.g. Pitt, 2013) or are not persuaded of the advantages of a duty of reasonable accommodation and therefore prefer to retain the existing indirect discrimination concept (e.g. Commission on Religion and Belief in British Public Life, 2015; Hambler, 2015; Vickers, 2016).

This chapter examines whether the legal framework provides sufficient protection for people to manifest a religion or belief at work, and whether any limitations on this permitted by law are justified.

4.2 Dress codes, wearing of religious symbols and time off work

Some of the employees who responded to our call for evidence reported that they were refused time off work for religious holidays and holy days, which they perceived as discriminatory. Respondents from the legal and advice sector reported similar issues were raised with them, as well as problems associated with the wearing of religious dress or religious symbols (Mitchell and Beninger, with Donald and Howard, 2015: 9, 146-47). Many of the religion or belief cases have also considered whether employers' decisions about dress codes, wearing religious symbols or time off work have put people who share a religion or belief at a particular disadvantage.

When assessing claims of indirect discrimination, the courts consider whether limitations on the rights of individuals to manifest their religion or belief are justified (see section 1.2). This involves consideration of whether the purpose or aim of the restriction is legitimate and whether the limitation is proportionate to that aim. For example, the European Court of Human Rights (ECtHR) placed a great deal of weight on health and safety considerations when considering the case of a Christian nurse, Shirley Chaplin, who wore a crucifix on a chain over her uniform. It accepted that there was a risk that a disturbed patient might seize and pull the chain, thereby injuring herself or the applicant, or that the cross might swing forward and could, for example, come into contact with an open wound. Therefore the decision not to allow Chaplin to wear the cross in the manner she preferred was justified, particularly as

⁴¹ Religious Diversity and Secular Models in Europe (RELIGARE) was conducted between 2010 and 2013.

she could have worn it under her clothing and was offered an alternative of wearing a brooch instead of the necklace. An Employment Tribunal similarly found that a nursery's request that a Muslim prospective nursery assistant, Tamanna Begum, wear a jilbab that was not so long as to present a tripping hazard was justified due to legitimate health and safety considerations.

The Employment Appeal Tribunal upheld another tribunal's decision that a school's instruction to a Muslim bilingual support worker, Aishah Azmi, to remove her full veil while teaching was a proportionate measure to ensure effective communication that supported teaching and learning. The tribunal accepted evidence that the veil was detrimental to her teaching because it limited her diction and prevented the children from observing her facial expressions. The Court of Appeal found that an employer was justified in requiring Celestina Mba, a Christian care worker in a children's home, to work on the occasional Sunday, in accordance with her contract, as this was a proportionate means of achieving the council's duty to ensure children had continuous care at weekends.

In contrast, the ECtHR found in favour of Nadia Eweida, a Christian member of the check-in staff at British Airways who wished to wear a cross on a chain. The ECtHR ruled that her right to manifest her religion had been breached. It stated that although the employer's aim of projecting a corporate image was legitimate, the domestic courts had not given enough weight to the employee's desire to manifest her religious belief. The court noted that this is a fundamental right because '... a healthy democratic society needs to tolerate and sustain pluralism and diversity'; and that a person who has made religion a central tenet of his or her life should be able to communicate that belief to others in circumstances which did not adversely affect her employer (and in the absence of other countervailing factors).⁴²

In our assessment, these judgments are consistent with one another and appropriate given the facts. In relation to dress codes, the wearing of religious symbols and time off work, courts have balanced appropriately the right to manifest a religion or belief with other factors, including health and safety, and business requirements such as effectiveness of a service, or a duty of care for vulnerable service users. What the cases show is that each situation is different, and the outcomes in individual cases are sensitive to the particular facts in each instance.

⁴² See notes 35-37 for details of the cases.

4.3 Opting out of work duties

The Commission's call for evidence found that some organisations are concerned about the issue of individuals wishing to opt out of work duties due to religion or belief and some employees felt that they had the right not to perform work duties or serve particular clients where it did not accord with their religious views (Mitchell and Beninger, with Donald and Howard, 2015: 133-34).

Both the claimants who had sought to opt out of part of their work duties in the cases listed in note 38 were unsuccessful. The leading case on opting out of work duties is *Ladele*, which by the time it reached the ECtHR was joined with *McFarlane* and with *Eweida* and *Chaplin* (above). Lillian Ladele, who was a registrar, refused to officiate at civil partnership registrations on the grounds that same-sex relationships conflicted with her Christian beliefs, while Gary McFarlane, a counsellor, was reluctant to provide psycho-sexual therapy to same-sex couples for similar reasons. Both Ladele and McFarlane were eventually dismissed by their respective employers: Islington Borough Council (a public sector organisation) and Relate Avon (a charity providing a private service). The ECtHR ruled that the proper balance between an employer's duty to secure the rights of others and the right of an individual to manifest his or her beliefs had been achieved. In the first case, the court accepted that Islington Borough Council had a legitimate aim in requiring all its employees to 'act in a way which does not discriminate against others' in accordance with its Dignity for All policy. In the second case, the court accepted that Relate Avon had a legitimate aim of 'providing a service without discrimination'.⁴³

Our assessment is that the decisions in these two cases struck the right balance in protecting the religious freedom of the individuals and preventing discrimination against service users.

The *Ladele* case also clarified whether public sector employers are required by law to ensure that all their employees carry out their contractual work duties without discrimination. The Court of Appeal decision accepted the argument that 'once Ms Ladele was designated a civil partnership registrar, Islington was not merely entitled, but obliged, to require her to [perform civil partnerships]' on the basis that this accords with the natural meaning of the Equality Act (Sexual Orientation) Regulations 2007.⁴⁴

⁴³ *Eweida and Others v United Kingdom* [2013] Application numbers: 48420/10, 59842/10, 51671/10, 36516/10 (15 January).

⁴⁴ *Islington London Borough Council v Ladele (Liberty intervening)* [2009] EWCA Civ 1357.

The implication of this is that public sector employers must take corrective action where employees are delivering a public service in ways that are discriminatory, or potentially detrimental, to others. Ladele herself had made informal arrangements with her colleagues so that she would not have to perform civil partnerships and at the time some local authorities did not list all their registrars as officiating at civil partnerships (Donald, with Bennett and Leach, 2012: 85-86; Hambler, 2012). In our view, and the view of the Court of Appeal, informal arrangements between staff should not be permitted where there is the potential for a discriminatory or detrimental impact on other staff or on service users.

Our view is that in the public and private sectors, employees are legally required to provide goods, facilities or services in the same way to all members of the public, regardless of the member of the public's sexual orientation, age, sex, gender identity, race, disability or religion or belief. If an employee refuses to do so, they would be directly discriminating against the member of the public because of a protected characteristic. The employer would be entitled to take disciplinary action against an employee if they refused to carry out their duties in this way. An employer is liable for the discriminatory acts of its employee, unless the employer can show it has taken all reasonable steps to prevent the discrimination. This requirement is enhanced by the public sector equality duty which requires a public body, or an organisation exercising a public function, to have due regard to the need to: eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act; advance equality of opportunity between people who share a protected characteristic and those who do not; and, foster good relations between people who share a protected characteristic and those who do not.⁴⁵

Opting out of work duties may be permissible where there is no actual or potential detrimental impact to other staff or to service users. In some instances this will not only be good practice, but essential to ensure that the employer is not indirectly discriminating against the person requesting the arrangement. One example of this might be where an employee requests that they should be permitted not to handle alcohol or meat products as part of their work duties and this is not a key element of these duties.⁴⁶ Thus, where an employee wishes to opt out of their working arrangements, and this will not give rise to perceived or actual discrimination against others, the employer should consider the request seriously and should allow it unless there are objective reasons not to do so, such as the impact on other staff or service

⁴⁵ Equality Act 2010 section 149.

⁴⁶ The appropriate response of the employer to such a request is likely to differ according to the nature and size of the organisation. For example, it may be more likely to be proportionate for a large supermarket to permit an employee not to handle alcohol than a small off-licence.

users. This does not require any change in the law since an employer is already required to make a decision that is proportionate and justified in order to avoid the risk of indirect discrimination.

4.4 Freedom of expression at work

Some of the employees who responded to our call for evidence reported that they felt harassed by colleagues who mocked their religious or other beliefs. Others said they had experienced unwelcome ‘preaching’ or proselytising. Other respondents believed they had the right to express their religious views to peers or junior colleagues or to service users as part of their religious identity, even if the recipient found the views hurtful or derogatory or unwanted (Mitchell and Beninger, with Donald and Howard, 2015: 41-45; 114-18; 140-41).

These issues are reflected in recent court cases. Tribunals have had to consider whether or not employers were justified in taking disciplinary action against their employees who expressed their beliefs at work or outside it. The cases have covered an employee sending an offensive and homophobic e-mail;⁴⁷ an employee telling another employee that homosexuality was a sin;⁴⁸ an employee posting messages on his personal Facebook page expressing opposition to the idea of religious solemnisation of marriages of same-sex couples;⁴⁹ a senior employee imposing her religious views on a junior colleague;⁵⁰ a homelessness prevention officer telling a client with an incurable illness to put her faith in God; and a social worker breaking his employer’s prohibition of the overt promotion of religious beliefs.⁵¹

Freedom of expression is a fundamental right protected under the Human Rights Act 1998 by Article 10 of the European Convention on Human Rights. It is also protected under the common law. Protection under Article 10 extends to the expression of views that may shock, disturb or offend the deeply-held beliefs of others. Any restrictions on freedom of expression must always be clearly set out in law, necessary in a democratic society for a legitimate aim, and proportionate. Subject to these conditions, freedom of expression may be limited in some circumstances and

⁴⁷ *Haye v London Borough of Lewisham* [2010] ET 2301852/09.

⁴⁸ *Mbuyi v Newpark Childcare (Shepherds Bush) Ltd* [2015] ET 3300656/2014.

⁴⁹ *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch).

⁵⁰ *Wastenev v East London NHS Foundation Trust* [2016] UKEAT 0157/15/LA; *Grace v Places for Children* [2013] UKEAT 0217/13/GE.

⁵¹ *Amachree v Wandsworth Borough Council* [2010] ET 2328606/09; *Chondol v Liverpool City Council* [2009] UKEAT 0298/08/JOJ.

in particular does not protect statements that unlawfully discriminate against or harass, or incite violence or hatred against, other persons and groups, particularly by reference to their race, religious belief, gender or sexual orientation. Harassment refers to unwanted conduct that has the purpose or effect of violating a worker's dignity, or creating an intimidating, hostile, or humiliating environment for the worker.⁵²

Expression of religious views can also be considered a manifestation of religion or belief protected under Article 9 ECHR. Similarly an interference with that freedom is permitted so long as it is justified.⁵³ The balance between freedom of expression and lawful restrictions has been considered relevant in several cases. For example, Denise Hays, an evangelical Christian who felt it was part of her faith to proselytise about Christian teachings, including about sexual relationships and marriage, sent a homophobic and offensive email to the then head of the Lesbian and Gay Christian Movement using her work account. The tribunal found that it was not her religious views, but the manner in which she had expressed them, that led to her dismissal. It found that her employer, the London Borough of Lewisham, had a legitimate aim in wanting to exercise control over the views transmitted by employees in the course of employment. The policy was a proportionate means of achieving that aim, as it did not interfere with the claimant's right to proselytise outside work in her own time. In contrast, the High Court found against Trafford Housing Trust when it demoted one of its employees, Adrian Smith, for posting comments critical of religious solemnisation of marriages of same-sex couples on his personal Facebook page. The tribunal found that no reasonable reader would conclude his posting was made on the Trust's behalf, or that this would damage the reputation of the Trust. It found that Smith had the right to promote his religious views in his own time and an employer's code of conduct did not extend so far into an employee's private life.⁵⁴

The line between freedom of expression and harassment has also been relevant in several cases. Not all behaviour which an employee finds offensive will be harassment; the context of a discussion, how it is initiated, the roles of the participants and the employer's policies are all relevant to determining whether behaviour is unwanted, and qualifies as harassment.

Victoria Wasteneay, a member of an evangelical church, was disciplined by an NHS Foundation Trust following complaints from a new female Muslim employee that

⁵² The Equality Act prohibits harassment related to a relevant protected characteristic, including religion or belief, sexual orientation, age, disability, gender reassignment, race and sex. Equality Act 2010 sections 26 (1), (5).

⁵³ See section 1.2 above.

⁵⁴ See notes 47 and 49 on these cases.

Wastenev had tried to impose her religious views by inviting her to church services, giving her church literature and asking her to pray with her. The tribunal found in favour of the Trust, finding that Wastenev had been disciplined because of her own inappropriate actions, and not because she was manifesting her Christian beliefs. It found that Article 9 did not give her ‘... a complete and unfettered right to discuss or act on her religious beliefs at work’ and that ‘any senior manager who fails to maintain an appropriate boundary between their personal beliefs and their role in the workplace, such that junior employees feel under pressure to behave or think in certain ways, is likely to be the subject of disciplinary proceedings.’⁵⁵

The Employment Tribunal made a similar finding in *Amachree v Wandsworth Borough Council*, although without explicitly referring to Article 9. The tribunal held that Duke Amachree was dismissed partly for having an inappropriate conversation about his religious beliefs with a service user, and that the employer would have treated any other employee who inappropriately promoted any religious belief or any other strong personal view with a service user in the same way.⁵⁶

In contrast, the tribunal found in favour of Sarah Mbuyi, an evangelical Christian, who was dismissed by her employer, Newpark Childcare, for harassment following a discussion with a lesbian colleague in which Mbuyi said that homosexuality was a sin. The tribunal said that Mbuyi had not harassed her colleague as there was no evidence of unwanted conduct, because Mbuyi had given her views after being asked for them. The tribunal found that Mbuyi’s belief that homosexuality is a sin was protected by the Equality Act and that Newpark Childcare had made stereotypical assumptions about Mbuyi and her beliefs and could not provide a non-discriminatory explanation for its treatment of her.

In each of these cases, the judge considered the facts of the case carefully and conducted a balancing exercise of the basis of the facts to determine whether the employer had properly considered the employee’s right to manifest their religion. In those cases where the employer’s decision was upheld, it was generally because of the discriminatory impact of the employee’s actions on other people. Our analysis of these cases is that the judgments appear to be appropriate given the facts and generally consistent. These cases also demonstrate that similar issues can be dealt

⁵⁵ See note 50.

⁵⁶ See notes 48 and 51 on these cases. Amachree also gave an interview to the *Daily Mail* in which he revealed information which made it possible for a relative of Ms X (the service user) to identify her. In fact, the Employment Tribunal added that if the misconduct had been limited to the inappropriate interview comments, those allegations alone might not have been sufficient to justify dismissal, but noted that the decision was taken against the background of a serious breach of confidentiality.

with through good employer practice and clear information so that employers understand their obligations and employees understand what is expected of them. An employer can have a policy which places limits on discussions about religion or belief at work, but any restrictions on freedom of speech or manifesting religion or belief must be proportionate to achieving aims like protecting the rights of others or the reputation of the employer.

4.5 Reasonable accommodation

The cases discussed in this chapter generated considerable public debate as some felt the law did not provide sufficient protection for individuals who wished to manifest their religion or belief. As discussed above, some academics and religious organisations have proposed introducing a duty of reasonable accommodation for religion or belief in employment, drawing on the Canadian and US models of the duty of reasonable accommodation for religion or belief.⁵⁷

In both countries, a legal requirement is placed on an employer to accommodate the religious practices of employees as long as this does not cause undue hardship to the employer. The US has taken a minimal approach to the issue of hardship. In effect, once a competing interest is identified, the duty on the employer is not very onerous, although not meaningless (Howard, 2012: 129-30; Vickers, 2016: 237-44). In Canada, a higher standard of review is used. The Canadian courts have required employers to accommodate where possible. To assess whether employers have met the duty the courts have listed examples of criteria employers should consider which include financial cost, the size of the employer, and the nature of the employee's job. In considering whether it would be reasonable for the employer to accommodate a religious employee's request, courts balance the competing interests and use the principle of proportionality to reach their conclusions (Gibson, 2013; Edge and Vickers, 2015: 50-56; Vickers, 2016: 251-55).

Those who favour introducing a duty of reasonable accommodation into GB law feel that it would better protect the right of individuals to manifest their religion or belief, and so lead to a more appropriate balance between the rights of the individual and the rights and needs of their colleagues, service users and customers. They argue that a duty of reasonable adjustment already exists in relation to disability and so a

⁵⁷ In Canada, reasonable accommodation operates only with regard to anti-discrimination law, not human rights law. One other important difference between Canada and the UK is that there is no distinction between direct and indirect discrimination; a single unified test exists (Gibson, 2013: 594).

model already exists. They suggest that a duty would apply to individuals as well as groups;⁵⁸ and that it would make clear that employees have a right to ask for an accommodation; and it may make it easier for them to do so as it avoids them having to state or imply that their employers have discriminated against them.

Those who oppose the introduction of a duty argue that it would privilege religion or belief over other protected characteristics. They argue that the duty of reasonable adjustment is not a suitable model: the reasonable adjustment duty requires an employer to remove barriers to ensure disabled people have the same opportunities to participate in society; and does not result in less favourable treatment of people with another protected characteristic. A duty of reasonable accommodation could cause employers uncertainty; for example, it is unclear how far employers would be expected to go to accommodate beliefs when the definition of belief is so broad and it might lead to employees expecting that a request would usually be granted. Moreover, it is questionable whether it would result in substantial additional protection beyond that already provided by indirect discrimination.⁵⁹

In our view, the most persuasive argument in favour of a duty of reasonable accommodation is the presentational one, i.e. that it would provide a clearer framework within which requests could be made. However, we do not consider that this alone is sufficient to justify legislative change. Our assessment is that a duty of reasonable accommodation would not lead to substantial additional protection. There is nothing in the existing law which prevents an employer making an accommodation, unless doing so would breach discrimination law or other legal requirement such as health and safety legislation. Employers should already seriously consider every request made for reasons relating to religion or belief, both as a matter of good practice and to avoid the risk of indirect discrimination. They should only turn these down if they have objective reasons for their decision that can be justified. Their considerations should include the impact of the request on the business and customers, and the impact on the rights of other individuals (including impacts relating to other protected characteristics) and on the individual making the request.

⁵⁸ Some commentators have argued that a problem with the current law is whether a claimant needs to show they are part of a disadvantaged group. The lack of a suitable comparator was a primary reason for the EAT finding against the applicant in *Eweida*, and some commentators consider that this may still cause difficulties. However, the case law has moved on since *Eweida*, and following *Eweida* (ECtHR) and *Mba* in the Court of Appeal (above) we do not consider that the 'group comparator' point creates a difficulty any longer.

⁵⁹ The most detailed assessment of the advantages and disadvantages of introducing a duty is in Vickers (2016: 265-74). See also Edge and Vickers (2015: 50-56).

Even if there were a duty of reasonable accommodation in GB, we are strongly of the view that it could never be used to permit discriminatory service provision or to allow employment arrangements which would have a discriminatory impact on colleagues. A separate duty would not lead to substantial change in the level of protection for religion or belief, as the impact of the duty would depend on the courts' interpretation of 'reasonable'. It is highly unlikely in our view that this would lead to a higher level of protection than that currently provided by the assessment of what is 'proportionate'. We therefore conclude that the current legal approach adopts the correct balance of protecting the right to manifest a religion or belief while also ensuring that the principle of non-discrimination is upheld.

4.6 Recommendations

- **The legal framework should remain unchanged because the existing model of indirect discrimination and the concept of balancing rights in human rights law provide sufficient protection for people manifesting their religion or belief.**
- **A duty of reasonable accommodation should not be introduced into law.**
- **Individual employees should not be permitted to opt out of performing part of their contractual work duties due to religion or belief where this would have a potential detrimental or discriminatory impact on others.**

5 | Does the law sufficiently protect service providers and service users in relation to religion or belief?

5.1 Introduction

The Equality Act makes it unlawful for an individual or organisation to discriminate when providing services to the public by treating someone worse because of a protected characteristic, except in very limited circumstances. In particular, it provides an exception allowing a non-commercial religion or belief organisation to impose restrictions in relation to sexual orientation where this is necessary to comply with its doctrine, or to avoid conflict with the strongly held convictions of a significant number of members of the religion or belief. If a religion or belief organisation contracts with a public body to carry out an activity on its behalf then it cannot impose a sexual orientation restriction in relation to that activity. Some have argued that this exception is too narrow and any service provider where the owner has a religion or belief should be able to apply the exception and restrict service on the basis of sexual orientation.

This chapter examines whether the legal framework provides sufficient protection for people or organisations providing and using services, and whether any limitations on manifestation of a religion or belief are justified.

5.2 Restricting a service for reasons related to religion or belief

The Commission's research suggests that some service providers believe they should be able to refuse a service to particular groups where to do so would not accord with their religious views (Mitchell and Beninger, with Donald and Howard, 2015: 105-08).

The Equality Act provides non-commercial religion or belief organisations with a general exception which permits restrictions relating to religion or belief and sexual

orientation in membership, in the provision of goods and services, and in other activities, provided certain statutory conditions are met.⁶⁰ The exception is narrowly drawn. Restrictions relating to religion or belief are only permitted where it reflects the purpose of the organisation, or to avoid causing offence, on the grounds of the religion or belief to which the organisation relates, to persons of that religion or belief. Restrictions relating to sexual orientation are only permitted where it is necessary to comply with the doctrine of the organisation, or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers. The exception does not apply to an organisation whose sole or main purpose is commercial. It also does not extend to permitting a restriction relating to sexual orientation in the provision of services on behalf of and under the terms of a contract with a public authority.⁶¹ The duty not to discriminate applies to all employers and service providers, regardless of the size of business. This means that all employees and service users have a right to fair treatment.

In a series of cases, organisations who sought to restrict the services they offered only to particular groups were unsuccessful, with the Supreme Court in *Hall and Preddy* and the Court of Appeal in *Black and Morgan* ruling that hotel/bed and breakfast owners must not discriminate against same-sex couples. Similarly, in *Catholic Care*, the Upper Tribunal rejected an attempt by Catholic Care to amend its charitable objects so that it could restrict its adoption services to opposite-sex couples only.⁶² The Commission was involved in all three cases.⁶³ In *Hall and Preddy*, the Commission argued that the hotel owners' restriction of service was not a manifestation of their religious belief that should be protected under Article 9, as the law required civil partners be treated in the same way as married couples. In *Black and Morgan*, the Commission disagreed that a distinction was drawn in protection provided to same-sex couples who are in a civil partnership and those who are not. In *Catholic Care*, the Commission argued at the High Court that, as the Charity Commission was a public authority, it was subject to the Human Rights Act. This meant that it could not permit Catholic Care to make the proposed amendments to its charitable instrument as these were motivated by a desire to discriminate. This view was ultimately supported by the courts.

⁶⁰ Equality Act 2010 Schedule 23, para 2.

⁶¹ Equality Act 2010 Schedule 23 para 2 (10).

⁶² *Hall and Preddy v Bull and Bull* [2013] UKSC 73; *Black and Morgan v Wilkinson* [2013] EWCA Civ 820; *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] EWHC 520 (Ch).

⁶³ The Commission directly supported *Hall and Preddy* and *Black and Morgan* and provided a third party intervention in *Catholic Care*.

In our view, the judgments in these cases were consistent and appropriate: the law does not and should not permit discriminatory service provision by public sector or commercial service providers.

In the Northern Ireland case of *Lee v Ashers Baking Co Ltd*,⁶⁴ Ashers refused to provide a cake with a political slogan about marriage of same-sex couples, on the grounds that the bakery was Christian. The County Court and the Northern Ireland Court of Appeal found that Ashers had directly discriminated against Lee on grounds of his sexual orientation. An application to appeal has been made to the Supreme Court.⁶⁵

These cases raise the question of whether the exceptions should be widened so that commercial organisations that claim a religious ethos due to the owners' religious beliefs can restrict employment or goods, services and facilities to reflect religious tenets. We consider that such an approach would be deeply flawed. Such an exception would mean that individuals with particular protected characteristics – for example, sexual orientation – would receive less protection against discrimination than other people in the UK. If commercial service providers were permitted to restrict services in this way, individuals with certain protected characteristics could face greater costs in seeking a service, and experience distress if the service was denied.

We strongly oppose the idea of extending the exception for religion or belief organisations to commercial organisations as to do so would breach the important principle that services available to the public should be provided without discrimination. Commercial service providers may provide a service that caters for specific religious needs (for example, a bookshop providing only Christian literature, or a travel agent specialising in the Hajj) but may not treat customers on a discriminatory basis. Where a service is provided to the public, it must be provided to all on equal terms.

5.3 Advertisements

The right to freedom of thought, conscience and religion applies to religious organisations. As discussed in Chapter 4, freedom of expression may be limited in some circumstances and in particular does not protect statements that unlawfully

⁶⁴ *Gareth Lee v Colin McArthur, Karen McArthur and Ashers Baking Company Ltd* [2016] NICA 39.

⁶⁵ One important difference between the law in Northern Ireland and Great Britain is that in the former case only, political beliefs are protected. The impact on domestic law in Britain remains to be seen.

discriminate against or harass, or incite violence or hatred against, other persons and groups, particularly by reference to their race, religious belief, gender or sexual orientation. This applies in commercial contexts, for example, in advertising, where broadcasters who air advertisements on behalf of other organisations have to comply with regulatory codes that govern the content of advertisements. For example, the High Court found that it was justified and proportionate for Transport for London (TfL) to refuse to allow a Christian charity, Core Issues Trust (CIT), to run an advertisement on buses promoting a 'gay cure', on the grounds that the advertisement was offensive and in order to protect the rights and dignity of gay people. TfL's advertising policy did not permit adverts which were controversial or likely to cause widespread or serious offence or which were inconsistent with its obligations under the Equality Act. The court also found that the refusal did not breach CIT's human rights.⁶⁶

In November 2015, Digital Cinema Media (DCM), a company that supplies advertising to the majority of British cinemas, refused to distribute a Church of England advertisement reciting the Lord's Prayer on the grounds that it infringed its advertising policy which prohibits all religious or political advertising. We expressed our concern about this approach in December 2015 and in January 2016 sought the views of interested parties on whether the DCM's approach allows sufficient freedom of expression. We received 13 responses. However, there was little consensus on the correct approach to freedom of expression, religious advertising and regulation. DCM initially suggested that the advertisement should not be shown as it risked offending people attending the cinema, although it clarified later that its advertising policy was not based on the view that political or religious advertisements are inherently likely to be offensive. There is no right in Britain not to be offended and in our view respect for people's right to express beliefs with which others might disagree is the mark of a democratic society. In our view, reciting the Lord's Prayer cannot reasonably be considered to be offensive. It is lawful for a commercial company to consider acceptable any advertisement which has been pre-approved both under the Committee of Advertising Practice's (CAP) UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing and by the British Board of Film Classification. However, if an advertisement has been approved, but a commercial company considers it unacceptable (for instance, because it believes there is a risk of incitement to religious hatred, or another criminal offence), then it is legally entitled to refuse to show it.

⁶⁶ *R (on the application of Core Issues Trust Ltd) v Transport for London* [2014] EWHC 2628 (Admin). The CIT adverts had been placed in direct opposition to adverts relating to sexual orientation placed by Stonewall on buses.

However, we are concerned that a single supplier is effectively able to control a very large proportion of the market and effectively impose a blanket ban on advertising of a religious nature. We consider that all businesses should have regard to the UN Guiding Principles on Business and Human Rights. These make clear the responsibility of all businesses to respect human rights, including the right to freedom of expression and the right to manifest one's religion or belief, and to take appropriate action to prevent and mitigate adverse human rights impacts. In fulfilling these responsibilities, businesses should avoid taking decisions based on an overly broad view of what might cause offence, which could limit freedom of expression for religion or belief organisations.

Organisations, including religion or belief organisations, have access to redress under human rights legislation.⁶⁷ In limited circumstances, organisations can also bring discrimination claims under the Equality Act.⁶⁸ We are not recommending any change in the law, but will seek test cases to clarify issues around freedom of expression and freedom of thought, conscience and religion in relation to religious organisations.

5.4 Harassment in service provision

In our call for evidence, some participants reported examples of service providers expressing their religious views to service users whether or not this was requested. Some people felt that they should have the freedom to talk about their religious beliefs to service users; others found this inappropriate, especially when the service user was in a vulnerable position, or did not welcome religious messages, in which case, it might be seen as harassment. Some service users, on the basis of their religious views, refused the offer of a service from people with particular protected characteristics, usually if the service provider was female, or lesbian, gay, bisexual or transgender (Mitchell and Beninger, with Donald and Howard, 2015: 68-69; 76; 84-85; 97-103). We also received evidence of students in schools being ridiculed and potentially harassed because of their religion or belief.

⁶⁷ The European Court of Human Rights allows applications from 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation', and the Human Rights Act 1998, section 13 states: 'If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right'.

⁶⁸ *EAD Solicitors & Ors v Abrams* [2015] UKEAT 0054/15/DM.

Harassment related to religion or belief and sexual orientation is prohibited only in relation to employment. It does not apply in the provision of goods and services, the exercise of public functions, the management or disposal of premises or in education, although 'harassing' conduct which causes a detriment would be covered by direct discrimination protection.

When the Equality Act 2006 and the Equality Act (Sexual Orientation) Regulations 2007 were made, the government decided not to provide explicit protection from harassment in the provision of goods and services for religion or belief or sexual orientation. The issue was raised again in debates during the passage of the Equality Act 2010 and attempts were made to extend the harassment provisions to cover religion or belief in services, public functions and schools, but there was considerable resistance to this on the grounds that this would limit freedom of religious expression and academic debate. The law therefore remained unchanged (Sandberg, 2011: 104; Vanderbeck and Johnson, 2014: 122-23).

The Commission's predecessor, the Equal Opportunities Commission (EOC), in its response to the government's 2007 Discrimination Law Review (DLR) (Department for Communities and Local Government, 2007), argued that 'the protection against harassment should be extended to all grounds in respect of all the activities covered by any new Single Equality Act (i.e. within the employment sphere and outside the employment sphere).' The EOC considered that there would be 'significant problems... in treating certain strands differently. This would create a hierarchy, with some grounds afforded more respect than others.... It would also create practical problems, particularly if religion were treated differently, given that Jews and Sikhs (at least) have been held to constitute racial groups for the purposes of the RRA and so would be entitled to the enhanced protection afforded to race.' Similarly, as outlined in its response to the Discrimination Law Review, the Commission argued (in less detail) that the harassment protection should apply to goods and services. It stated that '...the new equality act should contain consistent express statutory protection against harassment on all grounds and in relation to all activities within the scope of the act. We do not agree that there should be any statutory exceptions for particular grounds or in particular circumstances' (Equality and Human Rights Commission, 2007).

We do not now, however, feel that it is necessary for protection from harassment related to religion or belief to be extended beyond the employment sphere. The extension of harassment protection for religion or belief was carefully considered during the passage of the Equality Act 2010. When applying harassment provisions relating to all protected characteristics, the British courts have applied a subjective

standard in determining whether potentially harassing conduct is unwanted and a partly subjective and partly objective standard in determining whether or not it has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment or violates an individual's dignity. If protection from harassment was extended to religion or belief in non-employment settings, the subjective element of the definition of harassment could lead to an unwanted chilling effect on the freedom to express religious or philosophical beliefs others might find offensive.

Some submissions to our call for evidence included examples of potential harassment in service provision and education. One example of this was a Christian pupil whose teacher described those who believe that God created the universe as 'religious nutters'. When the pupil responded that as a Christian she held this belief, the teacher ridiculed her in front of the class, causing her to feel upset and humiliated (Mitchell and Beninger, with Donald and Howard, 2015: 81). Individuals such as this are currently protected through the protection from direct discrimination, without the need for change to the current legislative framework. We have therefore concluded that harassment protection should not be extended to cover religion or belief and sexual orientation in non-employment settings.

5.5 Recommendations

- **The Equality Act should not be amended to permit religion or belief or sexual orientation discrimination by organisations whose sole or main purpose is commercial.**
- **There should be clarification of the extent of freedom of expression and freedom of thought, conscience and religion in relation to religious organisations which is required, through case law.**
- **There should be no extension of harassment protections covering religion or belief in non-employment settings.**

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Appendix 1: Religion or belief statistics

Table 1 Population of Great Britain by religion, 2001-11

	Numbers		Percentages	
	2001	2011	2001	2011
Christian	41,014,811	36,093,374	71.8	58.8
Muslim	1,588,890	2,782,803	2.8	4.5
Hindu	558,342	833,012	1.0	1.4
Sikh	336,179	432,213	0.6	0.7
Jewish	267,373	269,233	0.5	0.4
Buddhist	149,157	260,538	0.3	0.4
Any other religion	159,167	255,726	0.3	0.4
No religion	8,596,488	16,038,345	15.1	26.1
Religion not stated	4,433,520	4,406,071	7.8	7.2
All population	57,103,927	61,371,315	100.0	100.0

Sources: 2001 and 2011 Census as analysed by Office for National Statistics (2004) and Catto et al (2015): 85. Census data are Crown copyright material and reproduced with the permission of the Controller of HMSO.

Appendix 2: Call for evidence, legal review and stakeholder consultations

Introduction

In 2013 the Commission published a strategy, *Shared understandings*, to take forward its work on religion or belief, following widespread discussion with religion or belief, lesbian, gay, bisexual and transgender (LGBT), employer and trade union stakeholders on key issues they faced. The strategy committed the Commission to improve employers' understanding and practice in managing religious diversity; create a more balanced and reasonable public dialogue on religion or belief issues; and assess whether the existing equality and human rights legal framework on religion or belief, offers sufficient protection for people with a religious or other belief.

To deliver the strategy, the Commission launched a call for evidence, commissioned a technical assessment of the law, and drafted guidance, and engaged with diverse stakeholders throughout each element. This report is the final product that brings delivery of the strategy to a close. Further details about each element are provided below.

Call for evidence

In August 2014, the Commission launched a major call for evidence on religion or belief in the workplace and in service delivery, which was carried out by NatCen Social Research. The aim was to provide new evidence about the recent personal and direct experiences of individuals in the workplace or in accessing a service with regard to religion or belief. Different questionnaires were compiled for employees, employers, service users and service providers. Separate questionnaires were also drawn up for organisations and for the legal and advice community. The call for evidence remained open until the end of October 2014 by which time just under 2,500 responses had been received.

The resulting report published in March 2015 (Mitchell and Beninger, with Donald and Howard, 2015), presented a wide range of both positive and negative experiences of religion or belief in the workplace and service delivery. Key findings included that:

- Positive experiences included respondents describing workplaces with an inclusive environment in which employees and employers were able to discuss openly the impact of religion or belief on employees or customers.
- Some employees or service users stated that they had experienced no or few negative issues in their workplace or in receiving a service which they attributed to the view of employers or service providers that religion or belief was a private matter and should not be discussed in the workplace or the service.
- Some employees and students stated that they had encountered hostile and unwelcoming environments in relation to the holding, or not holding, of a religion or belief. The issues raised concerned the recruitment process, working conditions, including the wearing of religious clothing or symbols, promotion and progression, and time off work for religious holidays and holy days. Some reported that particular beliefs were mocked or dismissed in the workplace or classroom, or criticised as unwelcome 'preaching' or proselytising, or the expression of hurtful or derogatory remarks aimed at particular groups.
- Employees and employers reported that requests relating to religion or belief issues were not always fairly dealt with in the workplace and some called for better guidance on how to achieve this.
- Many participants were concerned about the right balance between the freedom to express religious views and the right of others to be free from discrimination or harassment. Specific issues raised included conscientious objection in relation to marriage of same-sex couples and how to protect employees from harassment and discrimination by staff, customers or service users with a religion. There was a marked divergence of opinion about when it was desirable and appropriate to discuss religious beliefs with service users during the delivery of a service.
- A group of service providers with a religious ethos expressed concerns about reductions in funding opportunities from the public and private sectors.
- Some participants viewed the current equality and human rights legal framework relating to religion or belief favourably, arguing that it provided a single robust framework to deal with discrimination and equality. Others were broadly favourable, but felt a pluralistic approach had not yet gone far enough. A third group viewed the law negatively, with some Christian employers,

service users and providers considering that Christianity had lost status as a result of the legal framework.

Legal review

In 2014, Peter Edge and Lucy Vickers of Oxford Brookes University were commissioned to undertake a review of equality and human rights law relating to religion or belief. Their subsequent report (Edge and Vickers, 2015) found that:

- The current domestic law on religion or belief addresses complex issues in a context where there is considerable difference of opinion as to how the law should be framed and applied. In particular, the manifestation of religion or belief carries with it the possibility of impacting on the rights and interests of others. For such a recent body of law, operating in such a complex field, it is generally clear and consistent.
- In particular, the legislation and decided cases make it clear that the law extends to a wide variety of religions and beliefs, including not only religions with a significant number of adherents in Great Britain, but also those with much fewer members and belief systems which do not identify as religions.

The report also found that there are a number of areas which may require further consideration. These included that:

- The definition of belief, particularly in equality legislation, merits further assessment. The broad definition currently being applied by the courts is unclear, particularly for belief systems which are based upon scientific evidence. This results in apparent inconsistencies between judgments, particularly at Employment Tribunal level. Additionally, the relationship between 'religion' and 'belief' is also unclear.
- The impact on domestic law of some specific issues which have been tested at European level remains unclear. Despite the *Eweida* judgment, it remains unclear whether an individual bringing a claim will need to find a group of individuals who share his or her beliefs and, if so, what the size of this group should be.
- The primary focus of the case law to date has been on the relationship of the religious employee and their employer. The position of the religious employer, and the religious service provider, has been relatively unexplored in the case law, but has the potential to be a significant area. Important underlying issues are whether the existing Equality Act exceptions on the basis of religion or

belief may be too narrow, or too wide, and how these exceptions have been interpreted by the courts.

- The role of the public sector equality duty in this area may be worth exploring further as a way to mainstream religion or belief equality, by integrating religion or belief equality into the day to day practice of public sector organisations.
- It would be helpful to assess the extent to which a duty to accommodate religion or belief might be beneficial to employees and employers.

Stakeholder consultations

This report draws on discussions at nine ‘Friends of the Chair’ meetings held in London and Cambridge between March 2014 and November 2015. The group, which had a small core membership of academics and religion or belief stakeholders and brought in other specialist expertise as required, aimed to provide a forum for open discussion of issues relevant to the Commission’s equality and human rights role on religion or belief, and allow us to hear and learn from the diverse views of stakeholders.

Six meetings covered religious literacy in different contexts: the law; school education; higher education; the media; the City; and health. One meeting focused on the Commission's call for evidence on religion or belief in the workplace and service delivery and the work of the Commission for Religion or Belief in British Public Life. The final two meetings examined issues discussed in this report.

In addition, three events were held in London and Glasgow in March-April 2016, with academics and a wider group of stakeholders, drawn from religion or belief, LGBT, employer and trade union groups. These meeting explored the issues that the Commission proposed to cover in this report.

The Commission has also discussed the call for evidence, the technical assessment of the law and its guidance with a wide group of stakeholders in numerous meetings held through 2014 to 2016 to learn from stakeholders, hone our ideas and promote open and considered discussion of complex issues related to the protection of religion or belief rights.

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