

# TO EQUALITY AND BEYOND: RELIGIOUS DISCRIMINATION AND THE EQUALITY ACT 2006

RUSSELL SANDBERG

*Doctoral Student, Cardiff Law School  
Associate, Centre for Law and Religion, Cardiff University<sup>1</sup>*

Recent years have witnessed a piecemeal development of discrimination law that affects religious organisations: the collection includes statutes such as the Sex Discrimination Act 1975 and the Race Relations Act 1976,<sup>2</sup> statutory instruments such as the Employment Equality Regulations 2003 and 2005,<sup>3</sup> and international human rights instruments such as Article 14 of the European Convention on Human Rights (ECHR).<sup>4</sup> The newest addition to the collection is the Equality Act 2006 (c 3), which received Royal Assent on 16 February 2006.

Despite its generic name, the Act boasts a miscellaneous collection of provisions grouped under four main parts: Part 1 (ss 1–43) dissolves the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission and replaces them with a single body: the Commission for Equality and Human Rights; Part 2 (ss 44–80) makes discrimination on grounds of religion and belief unlawful in the provision of goods, facilities and services, thus extending the protection already enjoyed by Jews and Sikhs under the race relations legislation to other faith communities;<sup>5</sup> Part 3 (ss 81, 82) enables the Secretary of State to make provision to prohibit discrimination on grounds of sexual orientation; and Part 4 (ss 83–90) imposes a duty on public authorities to promote equality of opportunity on grounds of sex and to prohibit sex discrimination and harassment in the exercise of public functions.<sup>6</sup>

This short piece focuses upon the provisions in Part 2 of the Act which

<sup>1</sup> I would like to thank Professor Norman Doe and Frank Cranmer of the Centre for Law and Religion for their invaluable guidance.

<sup>2</sup> These often include sections that apply specifically to religious organisations: see eg the Sex Discrimination Act 1975, s 19.

<sup>3</sup> Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660; Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661; Employment Equality (Sex Discrimination) Regulations 2005, SI 2005/2467.

<sup>4</sup> However, this only extends to 'the rights and freedoms set forth in [the] Convention'. Protocol 12, Art 1 includes a freestanding discrimination provision but this has not been ratified by the United Kingdom: see R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) p 109.

<sup>5</sup> *Seide v Gillette Industries Ltd* [1980] IRLR 427, EAT; *Mandla v Dowell Lee* [1983] 2 AC 548, [1983] 1 All ER 1062, HL. Cf *Dawkins v Department of the Environment* [1993] IRLR 284, CA (Rastafarians excluded from the Race Relations Act 1976).

<sup>6</sup> See the Equality Act 2006: Explanatory Notes, available from <http://www.opsi.gov.uk/acts/expa2006.htm>

protects religions and beliefs in two ways: not only does it contain a number of provisions that outlaw discrimination on grounds of religion or belief but it also largely excludes religious organisations and believers from these measures. Religious organisations<sup>7</sup> and ministers of religion can discriminate on grounds of religion or belief ‘by reason of or on grounds of the purposes of the organisation’ or to avoid causing offence on grounds of the religion or belief to which the organisation belongs.<sup>8</sup> Benefits to persons of a religion or belief imposed by a charitable instrument are also exempt as are the Charity Commissioners.<sup>9</sup> In addition to this, religious believers are exempt to the extent that one cannot discriminate under the Act if one’s actions occur as a result of one’s own religion or belief, as the sections on definitions elucidate.

### DEFINITIONS AND CONCEPTS

Part 2 of the Equality Act 2006 provides a wide definition of ‘religion or belief’ and a narrow definition of ‘discrimination’. Section 44 defines ‘religion or belief’ for the purposes of the Act by providing ‘a broad definition in line with the freedom of religion guaranteed by Article 9 of the ECHR’:<sup>10</sup> to include ‘any religion’, ‘any religious or philosophical belief’, ‘a reference to lack of religion’ and ‘a reference to lack of belief’. However, it has been contended by the British Humanist Association that this concept of belief found in the Act is wider than that employed in ECHR jurisprudence: whereas Strasbourg defines ‘belief’ under the ECHR as involving a deeply held conviction or a ‘worldview’,<sup>11</sup> the Humanists argue that the statutory reference to a ‘philosophical belief’ could be interpreted liberally to include philosophical views such as ‘I think therefore I am’.<sup>12</sup> This is especially important given that the definition of religion and belief provided in section 44 is substituted for regulation 2(1) of the Employment Equality (Religion or Belief) Regulations 2003.<sup>13</sup>

Section 45 defines ‘discrimination’ for the purposes of Part 2.

<sup>7</sup> The Equality Act 2006, s 57, provides a rare statutory definition, restricting an ‘organisation relating to religion or belief’ to organisations whose purpose is ‘(a) to practice [sic] a religion or belief, (b) to advance a religion or belief, (c) to teach the practice or principles of a religion or belief, (d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief, or (e) to improve relations, or maintain good relations, between persons of different religions or beliefs’.

<sup>8</sup> *Ibid*, s 57.

<sup>9</sup> *Ibid*, s 58.

<sup>10</sup> Equality Act 2006: Explanatory Notes, p 19.

<sup>11</sup> See, eg, *McFeeley v United Kingdom* (1980) 3 EHRR 16, E Com HR; *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, E Ct HR; and *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, [2005] 2 All ER 1, HL.

<sup>12</sup> British Humanist Association Briefing 2005/7b, available from: <http://www.humanism.org.uk>.

<sup>13</sup> Equality Act 2006, s 77.

‘Discrimination’ includes direct discrimination, indirect discrimination and victimisation:<sup>14</sup>

- i. Direct discrimination occurs where a person (A) treats another person (B) less favourably than they would treat others in circumstances that are materially the same. The discrimination must be on grounds of religion or belief but this need not be B’s religion or belief: discrimination may also occur if A is mistaken as to B’s religion or belief. It is immaterial whether A subscribes to the same religion or belief as B. However, there are limits to the definition. Direct discrimination does not occur where the treatment occurs on grounds of A’s religion or belief: so A cannot discriminate if he is motivated by his own religion or belief to act in a certain way.
- ii. Indirect discrimination occurs where A treats B equally with others. However, that equal treatment places people who share B’s religion or belief at a disadvantage where the circumstances are materially the same. Indirect discrimination occurs where B is actually put at a disadvantage, provided that A cannot reasonably justify the discrimination by reference to matters other than B’s religion or belief, such as security or health and safety concerns.
- iii. Victimisation occurs where A treats B less favourably than others because A knows or suspects that B has brought proceedings, given evidence, provided information, made allegations or done any other thing under Part 2 of the Act or intends or intended to do so in relation to the religion or belief of B. However, discrimination does not occur where A’s treatment relates to B making or intending to make a false allegation, unless that allegation was in good faith.

For analytical purposes, the provisions in Part 2 can be divided into two areas: discrimination by private bodies and public bodies.

#### DISCRIMINATION BY PRIVATE BODIES: THE PROVISION OF GOODS, FACILITIES, SERVICES AND THE MANAGEMENT OF PREMISES

Section 46 of the Equality Act 2006 outlaws discrimination on grounds of religion or belief in the provision of goods, facilities and services: this includes refusal to provide such goods, facilities and services, the provision of goods, facilities and services of a lower quality, the provision of goods, facilities and services in a different manner (such as hostile service) and the provision of goods, facilities and services on different terms.<sup>15</sup> It should be noted that differential treatment arising from the manifestation of one’s own religion or belief does not constitute discrimination: if A exercises a skill (such as preparing food) in a particular way for the purposes of a religion or belief, he is permitted to insist on exercising that skill in relation to, or for the purposes of, that religion or belief and can refuse to exercise

<sup>14</sup> The following is adapted from Equality Act 2006: Explanatory Notes, p 20.

<sup>15</sup> Equality Act 2006: Explanatory Notes, p 20.

the skill in relation to or for the purposes of *another* religion or belief if 'he reasonably considers it impracticable' to do so.<sup>16</sup>

Section 47 prohibits discrimination on grounds of religion or belief in relation to the disposal and management of premises: this includes refusing to dispose of property, the disposal of property on less generous terms, discrimination in relation to a list of people requiring premises and refusing permission for the disposal of premises. Under section 47(2), a manager of premises such as a landlord cannot discriminate against tenants on grounds of the religion or belief of the tenant or other occupier. However, under section 48, there is no discrimination in relation to the disposal or management of premises by a landlord if that landlord or a 'near relative'<sup>17</sup> resides and intends to continue to reside in another part of those premises.

#### DISCRIMINATION BY PUBLIC BODIES: THE PROVISION OF EDUCATION AND THE EXERCISE OF PUBLIC FUNCTIONS

Section 49 of the Equality Act 2006 prohibits discrimination on grounds of religion or belief in relation to certain schools,<sup>18</sup> bringing them in line with further and higher education institutions which are covered by the 2003 Employment Regulations. Schools may not discriminate in relation to the terms of admission or by refusing admission;<sup>19</sup> schools may not discriminate against pupils by refusing them access to a benefit, facility or service or by discriminating in the way in which it provides access to any such benefit, facility or service.<sup>20</sup>

However, schools with a religious character are exempt from these stipulations.<sup>21</sup> Schools with a religious character are not exempt from the requirement that schools may not discriminate by excluding a pupil or subjecting them to any other detriment.<sup>22</sup> Nevertheless, there is no discrimination against pupils<sup>23</sup> 'in relation to anything done in connection with' the content of the curriculum<sup>24</sup> or to acts of worship of religious observance organised by or on behalf of an educational establishment. Under section 61, it is lawful to do anything to meet the 'special needs

<sup>16</sup> Equality Act 2006, s 46(3)(b).

<sup>17</sup> *Ie* as defined by *ibid*, s 48(2).

<sup>18</sup> In England and Wales: schools maintained by the local education authority, independent schools and special schools; in Scotland, public schools, grant-aided schools and independent schools: *ibid*, s 49(3).

<sup>19</sup> *Ibid*, s 49(1)(a)-(b).

<sup>20</sup> *Ibid*, s 49(1)(c)(i)-(ii).

<sup>21</sup> *Ibid*, s 50(1), outlines the schools that are exempt from these provisions.

<sup>22</sup> *Ibid*, s 49(1)(c)(iii)-(iv).

<sup>23</sup> *Ie* in relation to any detriment save exclusion from the establishment.

<sup>24</sup> Including the National Curriculum and other elements required by legislation such as religious education. This preserves the existing legislative framework, including, for example, laws governing how parents can withdraw their children from sex education and religious education: Equality Act 2006: Explanatory Notes, p 23.

for education, training or welfare of persons of a religion or belief'.<sup>25</sup> Under section 51 it is unlawful for a local education authority (LEA)<sup>26</sup> to discriminate against a person in the exercise of their functions. However, a LEA is permitted to discriminate on grounds of religion or belief in relation to a very wide range of matters, namely: the exercise of its functions in relation to the provision of schools,<sup>27</sup> transport and its general responsibility for education.<sup>28</sup>

## CONCLUSION

Part 2 of the Equality Act 2006 meets a real need in extending race relations legislation.<sup>29</sup> In doing so, it grants generous exemptions for religious believers and organisations: believers do not discriminate where their actions constitute a manifestation of the person's own religion or belief; schools with a religious character, religious organisations and ministers of religion also benefit from generous exceptions. A question must be raised: given the number of exceptions, does the Act actually result in equality?

<sup>25</sup> The Secretary of State has the power *inter alia* to amend or repeal these exceptions: *ibid*, s 64.

<sup>26</sup> For Scotland, read 'education authority'.

<sup>27</sup> *Ie* under the Education Act 1996, s 14.

<sup>28</sup> *Ie* under *ibid*, s 13.

<sup>29</sup> For evidence of the need, see J G Oliva, 'Sociology, Law and Religion in the United Kingdom' (2004) 152 *Law and Justice* 8 at 10.