



Equality Bill 2008-09: sexual orientation and religious employment

Standard Note: SN/BT/ 5132

Last updated: 9 February 2010

Authors: Vincent Keter, Business & Transport Section

Manjit Gheera, Social Policy Section

Lucinda Maer, Parliament and Constitution Centre

Existing law contains a limited permission for religious organisations to discriminate on grounds of sexual orientation when employing people. It is argued by some that the *Equality Bill* will make changes to current law on this issue which will narrow the range of exceptions that religious organisations may rely on in employment. These changes do not amount to making the employment of lesbian or gay people mandatory in religious organisations. If such an organisation wishes to lawfully refuse employment on the grounds of the sexual orientation of the applicant they will face a more defined range of legislative requirements proposed in the Bill than exist in current regulations. Case law, which refers to comments made by the Government during the passage of the current legislation, has given a narrow interpretation to the scope of the exception.

This note covers these issues and also gives other related information: concerning religious discrimination; and discrimination on grounds of sexual orientation on goods and services provision; as well as on the wider relationship between religious law and UK law.

This information is provided to Members of Parliament in support of their parliamentary duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as being up to date; the law or policies may have changed since it was last updated; and it should not be relied upon as legal or professional advice or as a substitute for it. A suitably qualified professional should be consulted if specific advice or information is required.

This information is provided subject to [our general terms and conditions](#) which are available online or may be provided on request in hard copy. Authors are available to discuss the content of this briefing with Members and their staff, but not with the general public.

Contents

- 1 Existing legislation 2**
 - 1.1 Employment equality regulations 2
 - 1.2 Lawful discrimination by employers 3
 - 1.3 Case law: scope of the exception 7
 - 1.4 Genuine occupational requirement 8
- 2 The *Equality Bill* 8**
 - 2.1 Lawful discrimination in the Bill 8
 - 2.2 Commons Committee Stage: written evidence 9
 - 2.3 Commons Committee Stage: debates 10
 - 2.4 Commons Report Stage 11
 - 2.5 Lords amendments 12
 - 2.6 The Pope 13
- 3 Religious discrimination 15**
 - 3.1 Religious discrimination against employees 15
- 4 Religious hatred 16**
- 5 Background: Government guidance on existing law 16**
 - 5.1 Employment for purposes of an organised religion 16
 - 5.2 Genuine occupational requirement 18
 - 5.3 Religious ethos 19
- 6 *Equality Act 2006*: services provisions 20**
 - 6.1 Sexual orientation discrimination 20
 - 6.2 Debates 21
 - 6.3 Adoption issues 21
 - Further links 23
- 7 The wider interaction between religious law and UK law 23**

1 Existing legislation

1.1 Employment equality regulations

In terms of current law, these issues engage provisions in two complementary pieces of legislation:

[*Employment Equality \(Sexual Orientation\) Regulations 2003*](#)

Employment Equality (Religion or Belief) Regulations 2003

The Government has produced guidance on these.¹ Further guidance on practical issues in the workplace arising under each set of regulations is available from Acas.² Relevant excerpts from the departmental guidance are reproduced below.

The regulations arise from the EC *Equal Treatment Framework Directive 2000/78/EC* (*Directive establishing a general framework for equal treatment in employment and occupation* also known as the *Employment Directive*) which outlaws discrimination on grounds of religion or belief, disability, age, or sexual orientation. The *Employment Directive* was adopted on 27 November 2000 by the EC Employment and Social Affairs Council.³

1.2 Lawful discrimination by employers

Under current law a religious organisation could lawfully refuse to employ a person due to their sexual orientation.

Article 4(1) of the Directive allows for limited circumstances where a difference of treatment may be justified when a characteristic related to sexual orientation constitutes a:

genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate.

Under regulation 7(3) of the *Employment Equality (Sexual Orientation) Regulations 2003*, where employment is for purposes of an organised religion, it allows the employer to apply a requirement related to sexual orientation so as to comply with the doctrines of the religion or avoid conflicting with followers' religious convictions. The provision currently reads as follows:

- (3) This paragraph applies where -
 - (a) the employment is for purposes of an organised religion;
 - (b) the employer applies a requirement related to sexual orientation -
 - (i) so as to comply with the doctrines of the religion, or
 - (ii) because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers; and
 - (c) either -
 - (i) the person to whom that requirement is applied does not meet it, or
 - (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

This provision has been the focus of significant debate. When the regulations were placed before Parliament the Joint Select Committee on Statutory Instruments voiced concerns over the compatibility of regulation 7(3) with the Directive. Lord Lester tabled a motion in the Lords which was debated on 17 June 2003 seeking to annul the regulations on the grounds that

¹ DTI (now BIS) , *Explanation of the provisions of the: Employment Equality (Sexual Orientation) Regulations 2003 and Employment Equality (Religion or Belief) Regulations 2003*

² Acas, *Religion or Belief* and *Sexual orientation*

³ Council Directive 2000/78/EC of 27 November 2000

regulation 7(3) did not comply with the Directive.⁴ He quoted the comments of the Committee in support of the motion:

At paragraph 1.17 of its report, the committee concluded that there is doubt about the compatibility of Regulation 7(3) with the directive. The committee reported that there is therefore a doubt as to whether Regulation 7(3) is *intra vires*, in other words, that there is any power in Parliament to enact it. In paragraph 1.15 it explains its reasoning in this way. The committee stated:

"Against this background, the committee is not persuaded that the only acts permitted by Regulation 7(3) are those permitted by Article 4.1 of the Directive. Organised religions vary considerably in their structure; the identity of the employer will vary according to the structure of the religion. It seems to the committee wholly within the bounds of possibility that, for example, an employer considering employing a custodian who would, as part of his or her duties, have care of religious artefacts might determine not to employ a worker solely on a ground related to his or her sexual orientation in order to avoid conflicting with the strongly held religious beliefs of a significant number of the religion's followers. Even if those beliefs were held only by a minority of the religion's followers, and by those located at only one of the several places where the post holder might be required to work, the discrimination would seem to the committee apparently to be allowed by Regulation 7(3)".

The committee went on:

"Yet it is open to question whether either the intention or effect of Article 4.1 [of the Directive] is to allow the personal beliefs, (even of a majority within an organisation) to determine the position, on the basis that they are part of the context in which the work is to be carried out and, in the view of the employer the factor is decisive. Even if a characteristic of the worker could be said to be a 'genuine and determining occupational requirement' in these circumstances there seems to the committee to be a doubt as to whether the requirement is proportionate as the Directive requires".

That is expressed in the diplomatic language customary to our committees, which means they think that as it stands the regulation exception is legally dubious.

The Select Committee explained that Regulation 7(3)—I now refer to paragraph 1.11 of its report—may,

"permit difference of treatment based on characteristics relating to sexual orientation where the characteristic could not be said to be a 'genuine and determining occupational requirement' which was proportionate".

The committee further explained that Regulation 7(3),

"might allow the employer to impose a discriminatory requirement on an employee or prospective employee whose functions or proposed functions did not promote the core activities of the organised religion concerned".

It is, as the Joint Committee explains, important that Article 4 of the directive be construed strictly, and that the regulations do not provide for exceptions which only a very broad interpretation would permit. It is surely wrong as a matter of principle and, as the Joint Committee explains, of dubious legality, that a person in an administrative or ancillary role within a religious organisation should be excluded from employment

⁴ [HL Deb 17 June 2003, c751](#)

because they do, or do not, have a particular sexual orientation. To require a person applying for the position of a church cleaner to be heterosexual when that has absolutely nothing to do with whether he or she can wield a mop and bucket not only flies in the face of reason, but is contrary to the express terms of the directive. It is not just cleaners but librarians and a wide variety of others who will be affected—in both paid and unpaid, voluntary work.

In response to these arguments the Minister said that the Government viewed the exception as being applicable in a very limited range of employed positions and expected that if the issue came to be tested the courts would also take this view:

Lord Sainsbury of Turville: My Lords, I welcome this opportunity to explain the rationale behind Regulation 7(3) of the sexual orientation regulations and to clarify its scope. We have a duty to think very carefully indeed before making any exception for equality legislation. A provision that concerns the sexual orientation of people employed for the purpose of organised religion is clearly a particularly sensitive matter, and it is right that we should consider the evidence set out by the Joint Committee on Statutory Instruments in its 21st report of 2002-03 before going on to consider the merits of the regulations as a whole.

[...]

Before I go any further, I must mention the report of the Joint Committee on Statutory Instruments. Again, it is a measured and genuinely constructive contribution to the debate. The committee concluded that the doubt about the vires of Regulation 7(3) was sufficient to draw it to the attention of both Houses but the committee has not, contrary to some rumours, said that the regulations are ultra vires. Indeed, it notes that the Government's arguments about the compatibility of Regulation 7(3) with the directive might succeed if tested in the courts. We are firmly of the view that it would.

[...]

It became clear that with the regulations as drafted the Churches would have some difficulty upholding the doctrine and teaching of their faith in relation to particular posts. I suspect that quite a variety of faiths represented on the Benches this evening may disagree quite strongly with other religious beliefs, but we recognise and respect the fact that they are genuinely held.

In the same way we do not believe that these regulations should interfere with religious teachings or doctrine, nor do we believe it appropriate that doctrine should be the subject of litigation in the civil courts.

The right reverend Prelate the Bishop of Worcester made a very interesting and fine speech, but I say to him that the logic of his comments about taking out the words "strongly held religious convictions" means that we would have to go back to a situation where religious doctrine and the reasonableness of it, would have to be debated in tribunals.

The employment directive is explicit in recognising the status of Churches and religious associations. As Lord Russell said once in this House,

"The difficulty comes not when evil is pitched against good, but when two goods are pitched against each other".

In this case, they are religious traditions and the sexual orientation regulations. We have to draw a careful line between the two within the terms of the employment directive. I believe that we have succeeded in doing that.

[...]

This is not a question of extreme positions. Article 4(1) of the European directive is quite clear that religious considerations can be taken into account. What we are debating this evening is exactly where that line is drawn.

Under these circumstances I believe that the Government need to take a lead—and we did that in preparing Regulation 7(3). It resolves the problem of interfering with doctrine and teachings while remaining consistent with the directive. We believe that Regulation 7(3) is lawful because it pursues a legitimate aim of preventing interference with a religion's doctrine and teaching and it does so proportionately because of its narrow application to a small number of jobs and the strict criteria which it lays down.

There is no need to copy out the words "genuine", "determining", "legitimate", "proportionate", because the provisions embody the obligations which are set out in the directive.

Having explained why Article 7(3) is necessary, I wish to focus on the scope of the provision. I agree entirely with the noble Lord, Lord Lester, that this is a crucial issue. As well as dealing with the points that he and the Joint Committee on Statutory Instruments have raised, I hope that it will assist the House if I pick up on others which have been reflected in press reports over the last week.

When drafting Regulation 7(3), we had in mind a very narrow range of employment: ministers of religion, plus a small number of posts outside the clergy, including those who exist to promote and represent religion. The words on the page reflect our intentions. The first clause reads:

"This paragraph applies where—(a) the employment is for the purposes of an organised religion".

First, this is no "blanket exception". It is quite clear that Regulation 7(3) does not apply to all jobs in a particular type of organisation. On the contrary, employers must be prepared to justify any requirement related to sexual orientation on a case by case basis. The rule only applies to employment which is for the purposes of "organised religion", not religious organisations. There is a clear distinction in meaning between the two. A religious organisation could be any organisation with an ethos based on religion or belief. However, employment for the purposes of an organised religion clearly means a job, such as a minister of religion, involving work for a church, synagogue or mosque.

A care home run by a religious foundation may qualify as a religious organisation, for example. I do not wish to make light of differences which the involvement of a church, mosque or synagogue can make to the culture of an organisation, but I believe that it would be very difficult under these regulations to show that the job of a nurse in a care home exists,

"for the purposes of an organised religion".

I would say exactly the same in relation to a teacher at a faith school. Such jobs exist for the purposes of health care and education.

[...]

Regulation 7(3) does not stop there. Even if an employer can show that the job exists for the purposes of organised religion, and that is a significant hurdle, he may only apply a requirement related to sexual orientation if one of two further tests are met. In

the first test the requirement must be applied to comply with the doctrines of the religion. We do not believe that that test would be met in relation to many posts. It would be very difficult for a church to argue that a requirement related to sexual orientation applied to a post of cleaner, gardener or secretary. Religious doctrine rarely has much to say about posts such as those.

If the first test is not met, what about the second? There the church will have to show that the requirement related to sexual orientation is necessary,

"because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers . . .".

I shall dispel one or two myths. It is neither sufficient for the requirement to be imposed simply because of the nature of the work and the context in which it is carried out, nor may the requirement be imposed simply because of the religious convictions of the followers of the faith. Both elements have to be satisfied before the second test can be met. They are strict tests and will be met in very few cases.⁵

1.3 Case law: scope of the exception

This interpretation was subsequently followed in the courts, in particular *Amicus v Secretary of State for Trade and Industry*.⁶ The above speeches by Lord Sainsbury were quoted in the judgement of Mr Justice Richards which found the scope of the exception to be narrow:

115. [...] I think it clear from the Parliamentary material that the exception was intended to be very narrow; and in my view it is, on its proper construction, very narrow. It has to be construed strictly since it is a derogation from the principle of equal treatment; and it has to be construed purposively so as to ensure, so far as possible, compatibility with the Directive. When its terms are considered in the light of those interpretative principles, they can be seen to afford an exception only in very limited circumstances.

116. The fact that the exception applies, by regulation 7(3)(a), only to employment "for purposes of an organised religion" is an important initial limitation. I accept Miss Carss-Frisk's submission that that is a narrower expression than "for purposes of a religious organisation", or the expression "where an employer has an ethos based on religion or belief", as used in the corresponding regulations relating to discrimination on grounds of religion or belief. I also accept the example she gave, that employment as a teacher in a faith school is likely to be "for purposes of a religious organisation" but not "for purposes of an organised religion".

117. The conditions in regulation 7(3)(b) impose very real additional limitations. In my view the condition in regulation 7(3)(b)(i), that the employer must apply the requirement "so as to comply with the doctrines of the religion", is to be read not as a subjective test concerning the motivation of the employer, but as an objective test whereby it must be shown that employment of a person not meeting the requirement would be incompatible with the doctrines of the religion. That is very narrow in scope. Admittedly the alternative in regulation 7(3)(b)(ii) is wider; but even that is hemmed about by restrictive language. The condition must be applied "because of the nature of the employment and the context in which it is carried out" - which requires careful examination of the precise nature of the employment - "so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers". Again this is in my view an objective, not subjective, test. Further, the

⁵ HL Deb 17 June 2003 cc777-780

⁶ [R. \(on the application of Amicus\) v Secretary of State for Trade and Industry \[2004\] EWHC 860 \(Admin\)](#), 26 April 2004

conflict to be avoided is with religious convictions, which must be strongly held; and they must be the convictions of a significant number of the religion's followers. This is going to be a very far from easy test to satisfy in practice.

118. The fact that reference is made to "a significant number" rather than to all or the majority of a religion's followers not only reflects the desirability of avoiding detailed statistical analysis, to which Lord Sainsbury referred in the Parliamentary debate, but also ensures that proper account is taken of the existence of differing bodies of opinion even within an organised religion. Sexual orientation is a matter on which some followers of a religion may hold stronger religious convictions than others. In my view it is legitimate to allow for the possibility of applying a relevant requirement even if the convictions in question are held only by a significant minority of followers.

1.4 Genuine occupational requirement

Independently of the provisions in the Sexual orientation regulations there are exceptions in the *Employment Equality (Religion or Belief) Regulations 2003* which allow a religious organisation to discriminate in favour of a person who shares that religion if this is a "genuine occupational requirement" for the given employment.

2 The Equality Bill

2.1 Lawful discrimination in the Bill

The *Equality Bill* is mostly intended to harmonise existing law and much of it replicates existing provisions which are being repealed, although there are a number of changes proposed. The exception in regulation 7(3) of the *Employment Equality (Sexual Orientation) Regulations 2003* is tightened in various ways by Schedule 9(2) of the Bill, in particular by the addition of a new test of proportionality.⁷ The Explanatory Notes describe the exception as it appears in the Bill as follows:

743. Where employment is for purposes of an organised religion, this paragraph allows the employer to apply a requirement to be of a particular sex, not to be a transsexual person or make a requirement related to the employee's marriage, civil partnership or sexual orientation, but only if –

- appointing a person who meets the requirement in question is a proportionate way of complying with the doctrines of the religion; or,
- because of the nature or context of the employment, employing a person who does not meet the requirement would conflict with a significant number of the religion's followers' strongly held religious convictions.

744. The requirement must be crucial to the post, and not merely one of several important factors. It also must not be a sham or pretext. The application of the requirement must be a proportionate way of complying with the doctrines of the religion or of avoiding such a conflict.

745. Employment can only be classified as for purposes of an organised religion if the employment wholly or mainly involves promoting or explaining the doctrines of the religion or leading or assisting in the observation of religious practices or ceremonies.

746. The requirement can also be applied by a qualifications body in relation to a relevant qualification (within the meaning of clause 50), if employment is for the

⁷ [Bill 85 of 2008-09, Volume II](#)

purposes of an organised religion and either of the above criteria are met and the employment is for the purposes of organised religion as defined above.

Background

747. This specific exception applies to a very narrow range of circumstances. It replaces and harmonises exceptions contained in current discrimination law but makes it clear that the employment in question must be closely related to the religious purposes of the organisation. Applying the requirement must be a proportionate way of meeting either of the criteria described in paragraph 742 above.

2.2 Commons Committee Stage: written evidence

A memorandum submitted to the Public Bill Committee on the *Equality Bill* by the Catholic Bishops' Conference of England and Wales sets out the following concerns about how the exceptions will be replicated in the Bill:

Employment exceptions for the purposes of religion

4. Under existing law, there is an exception relating to sex, marriage, sexual orientation etc where the employment is for the purposes of organised religion. The Bill proposes to restrict this very substantially by limiting the exception to employment where it principally concerns formal worship activities (liturgy) or the promotion or explanation of doctrine (Schedule 9, 2(8)).

5. It is gravely disappointing that this marked restriction in what the law permits has been introduced with no prior notice or consultation. Not least because it fails to understand the nature of religious life. The ethos of the Catholic Church should permeate every aspect of its activities: religion is about the whole of life and the whole person; it is not limited to formal worship and instruction.

6. The importance of this varies with the nature of the employment concerned. At the bottom end of the scale are technical services such as accountancy. Higher up the scale would be a residential caretaker post if it involves routine contact with the local Catholic community. But there is a whole range of posts, paid or voluntary, where it is essential that the Church has the right to prefer a candidate whose life is in accordance with its ethos; these might include, for example, youth workers, members of marriage preparation teams, and parish secretaries. What all these have in common is a pastoral, representative, or functional role where their effectiveness in the post for which they are being paid would be severely limited if their life were openly at variance with the teachings of the Church.

7. Without amendment to the schedule, the Church would face the absurd position that it would be unable to exclude from a Parish position dealing with young people a candidate who had divorced their spouse, civilly re-married and created two broken families within the same Parish community.

8. It is important to note that while a person is free to seek employment or not from a religious charity, the charity is not free to vary its charitable objects and must be true to the purposes for which money has been given. A fair balance needs to be struck, given that the individual is free to seek alternative employment but there is no comparable option for a religious organisation.⁸

⁸ Equality Bill, Public Bill Committee, [Memorandum In Chief submitted by Catholic Bishops' Conference of England and Wales \(E14\)](#)

2.3 Commons Committee Stage: debates

The issue was debated in the Public Bill Committee during the 12th sitting on 23 June 2009.⁹ John Mason proposed amendments seeking to remove the proportionality requirement which were not supported by the Government and were accordingly withdrawn:

John Mason: I beg to move amendment 44, in schedule 9, page 181, line 33, leave out 'proportionate'.

The addition of a new proportionality test narrows the scope of existing exceptions for religious employment. This amendment, in conjunction with the amendment to leave out sub-paragraph (8), retains the status quo.

The Chairman: With this it will be convenient to discuss the following: amendment 45, in schedule 9, page 181, line 37, leave out 'proportionate'.

The addition of a new proportionality test narrows the scope of existing exceptions for religious employment. This amendment, in conjunction with the Amendment to leave out sub-paragraph (8), retains the status quo.

Amendment 42, in schedule 9, page 181, line 41, leave out sub-paragraph (8) and insert—

'(8) Employment is for the purposes of an organised religion if—

(a) A has an ethos based on religion or belief, or

(b) the employment wholly or mainly involves—

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

(ii) promoting or explaining the doctrine of the religion (whether to followers of the religion or to others).'

Sub-paragraph (8) narrows the scope of existing exceptions for religious employment. This amendment would instead broaden the scope of the exceptions to benefit all religious organisations.

Amendment 43, in schedule 9, page 181, line 41, leave out sub-paragraph (8).

Sub-paragraph (8) narrows the scope of existing exceptions for religious employment. This amendment, in conjunction with the amendments to lines 33 and 37, retains the status quo.

Amendment 189, in schedule 9, page 181, line 42, leave out 'wholly or'.

Amendment 46, in schedule 9, page 182, line 6, leave out from 'requirement' to 'if' and insert 'to which sub-paragraph (2) applies'.

Place the exceptions from paragraph 2 of Schedule 9 into paragraph 3, which has a broader framework. This would provide wider protection for the freedom of association of religious bodies.

Amendment 47, in schedule 9, page 182, line 13, at end insert—

'(2) This paragraph applies to—

⁹ In particular: PBC Deb, 23 June 2009, [cc441-465](#)

- (a) a requirement to be of a particular religion or belief;
- (b) a requirement to be of a particular sex;
- (c) a requirement not to be a transsexual person;
- (d) a requirement not be married or a civil partner;
- (e) a requirement not to be married to, or the civil partner of, a person who has a living former spouse or civil partner;
- (f) a requirement relating to circumstances in which a marriage or civil partnership came to an end;
- (g) a requirement related to sexual orientation.’.

Place the exceptions from paragraph 2 of Schedule 9 into paragraph 3, which has a broader framework. This would provide wider protection for the freedom of association of religious bodies.

Amendment 250, in schedule 9, page 182, line 14, at end insert—

‘4 Paragraph 3 does not apply when A is operating—

- (a) on behalf of a public authority, and
- (b) under the terms of contract between the organisation and the public authority.’.

An amendment to ensure that users of public service provided by an organisation with a religious ethos are not subject to conditions or requirements of that ethos.

2.4 Commons Report Stage

David Drew tabled [amendment 37](#) to the Bill at Report Stage:

Mr David Drew
Andrew Selous

37

Page 162, line 13 [Schedule 9], leave out subparagraph (8).

This related to case law, described in the standard note cited above, which set out a narrow definition of employment for the purposes of an organised religion, and which is reflected in the subparagraph which the amendment sought to remove. Mr Drew explained the amendment as follows:

Mr. Drew: This will be a short speech, as we have already covered much of the ground. I intend to press amendment 37 to the vote. The amendment is straightforward in the sense that it simply removes paragraph 2(8) from schedule 9. What those who feel strongly about this want to see is effectively a return to the status quo. We have just had an argument about whether and why the Government’s interpretation is narrow. The simple answer is that even if we argued crucially that ministers as part of organised religion have certain protections-in some cases those protections have been found wanting by the courts under existing legislation-others involved in religion do not. It is absolutely right to protect people when they are going about doing something that in any other walk of life they would feel entirely free to do.

Several examples have been given. The hon. Member for South-West Bedfordshire (Andrew Selous) mentioned political parties. We saw a real live example involving them when a peer who had taken the Labour Whip until the last election had it removed from him because he had happened to make a voluntary donation to a friend who was a member of another party.

Some of us may have misgivings about that, but it happened, and that individual had no recourse because he was seen to have been disloyal to the political party that he served as a parliamentarian.

I believe, as do the other Members who signed amendment 37, that that safeguard would not apply to religion, and we feel strongly that there is a need for protection. We are not asking for a change in the law; we are merely asking for the status quo to be reinforced. It is irrelevant to us whether the narrowing of the definition is a result of the Government's own inclination or of pressure from the European Union. The simple fact is that if sub-paragraph (8) is removed, we shall feel that the position has been clarified.

This issue has been a source of debate not only here but in the Public Bill Committee, on which I, like others, was pleased to serve. To be fair to the Solicitor-General, I should say that we were given some clarification, and some of us felt that it would go a long way towards making clear that people in organised religions would be given rights and protections. However, the Government seem to have moved in the other direction and weakened those protections, which is why I tabled amendment 37.

The strength of public opinion was demonstrated in a letter sent to the Minister for Women and Equality saying that members of many Churches and other religions-for this concerns not just the Christian community, but a number of religions-felt that if the provision were passed in its current form, it would bring about a deleterious change that would threaten to prevent those involved in organised religion from going about their everyday business.

I hope that the Government will think again and will agree to take us back to where we thought we were-or, at least, the position to which we thought they were moving in Committee-rather than taking an even harder line and restricting even further the freedom of operation of people who, in good faith, pursue their religious convictions. I tabled the amendment because I believe in freedom of conscience. I do not believe that there should be a right to discriminate against people who are, for instance, gay or disabled, but I do believe that people have a right to work with fellow members of their faith. I believe that that right should be recognised, and should not be undermined by people who come in and say-as happens too often nowadays-that they want exactly the same rights as members of organised religions whose faith they may not share and whose goals they may not wish to pursue.

I hope that the Solicitor-General will consider amendment 37 carefully. It seems to have attracted support from both sides of the House. I hope that, even at this late stage-I am sure that those in the other place will give the amendment careful attention if it is not accepted here-we can obtain clarification and stop the narrowing of the rights of members of organised religions. I should be delighted, in due course, to press the amendment to a vote.¹⁰

There was a division on the amendment which was not made (Ayes 170, Noes 314).¹¹

2.5 Lords amendments

Amendments in the House of Lords overturned the Government's proposed wording. The first set of amendments were similar to those proposed by John Mason in Commons Committee Stage, albeit simpler, and removed the test of proportionality. The other amendment was identical to David Drew's amendment. The effect of these amendments was to widen the allowance for religious organisations to discriminate. Given that similar amendments were rejected in the Commons Stages, these changes appear unlikely to be accepted when the Bill returns to the Commons for consideration of Lords amendments.

The Government was defeated on the following opposition amendments which were made on the 4th day of Committee Stage in the Lords, after divisions:

¹⁰ [HC Deb 2 December 2009 cc1191-1192](#)

¹¹ [HC Deb 2 December 2009 c1221](#)

Amendment 98

Moved by Baroness O'Cathain

98: Schedule 9, page 165, line 5, leave out "application is a proportionate means of complying" and insert "requirement is applied so as to comply"¹²

Division on Amendment 98: Contents 216; Not-Contents 178.¹³

Amendment 99, linked to amendment 98 was agreed without division:

Amendment 99

Moved by Baroness O'Cathain

99: Schedule 9, page 165, line 8, leave out "application is a proportionate means of avoiding conflict" and insert "requirement is applied so as to avoid conflicting"

Amendment 99 agreed.

A further amendment made was identical to David Drew's amendment in the Commons:

Amendment 100

Moved by Baroness O'Cathain

100: Schedule 9, page 165, line 13, leave out sub-paragraph (8)

Baroness O'Cathain: I wish to test the opinion of the House.

6.32 pm

Division on Amendment 100

Contents 177; Not-Contents 172.

Amendment 100 agreed.¹⁴

2.6 The Pope

The Pope made an intervention in a speech, apparently attacking aspects of the *Equality Bill* which was reported as follows in the Daily Telegraph:¹⁵

THE Pope has made an unprecedented attack on the Government, accusing it of pursuing "unjust" equality laws.

Benedict XVI claimed that legislation introduced by Labour to end discrimination "actually violates natural law" because it stopped worshippers remaining true to their beliefs.

Rather than making society more equal, the Government's new rules limited religious freedom, he said.

His strongly worded intervention in British politics comes after leaders of both the Roman Catholic Church and the Church of England clashed with Labour over its

¹² [HL Deb 25 January 2010 c1211](#)

¹³ [HL Deb 25 January 2010 c1240](#)

¹⁴ [HL Deb 25 January 2010 c1246](#)

¹⁵ Martin Beckford "The Pope attacks Labour laws on equality" *The Daily Telegraph*, 2 February 2010

Equality Bill, which they fear will make them admit homosexuals to the priesthood or face prosecution for discriminating against them.

In an address delivered yesterday to 35 Catholic bishops from England and Wales, the Pope attacked Labour's equality proposals.

He said: "Your country is well known for its firm commitment to equality of opportunity for all members of society. Yet . . . the effect of some of the legislation designed to achieve this goal has been to impose unjust limitations on the freedom of religious communities to act in accordance with their beliefs.

"In some respects it actually violates the natural law upon which the equality of all human beings is grounded and by which it is guaranteed." Harriet Harman's Equality Bill, currently going through Parliament, contains a new, narrow definition of religious workers. It means clergy will not be allowed to opt out of the rules and so will either have to go against their teachings by employing homosexuals, or face prosecution.

It is also believed the law, intended to outlaw discrimination against any group in the "provision of services" from health care to shopping, would restrict the right of a church school to employ a head teacher who shared their faith, and would open the job up to members of any religion or atheists.

Since coming to power, Labour's drive for equality has led to a series of high-profile disputes with the 4.1 million Catholics in England and Wales.

Ministers wanted to force popular and successful faith schools to take a quarter of their pupils from other religious backgrounds but backed down following a Catholic campaign.

Many Catholic adoption agencies have either closed down or cut their links with the Church over the past year after they were refused exemptions from anti-discrimination rules that forced them to consider homosexual couples as potential parents.

As he confirmed that he would make a historic state visit to the country later this year, the Pontiff also urged Catholics in Britain to speak "with a united voice" in a secular and multi-cultural society.

He said staying true to the Gospel

"in no way restricts the freedom of others" but rather "serves their freedom by offering them the truth".

He told the bishops that they must continue to assert the Catholic point of view in national debates.

The Pope is seen as more conservative than his predecessor, Pope John Paul II, and has been unafraid to assert the Church's traditional teachings on subjects such as contraception and sexuality, despite criticism in the liberal West.

At a press conference in Rome, the Most Rev Peter Smith, Archbishop of Cardiff, said: "The Church of course upholds absolutely the equal dignity of every person, irrespective of their faith, age and ability. But I think there is a misunderstanding, because sometimes in government legislation equality seems to be that we are all absolutely equal, which we are not. We are equal in dignity, beyond that each one of us is unique."

The Pope's comments come at a critical time, just months ahead of the general election. English and Welsh bishops are expected to publish their own guide to issues that voters should consider when choosing a party, such as family life, abortion and assisted suicide.

The remarks may increase opposition to his visit to Britain, expected to take place during September.

Peter Tatchell, the homosexual rights activist, said: "He seems to be defending discrimination by religious institutions and demanding they should be above the law. Benedict is likely to make highly partisan political criticisms during his visit. Most British people will not welcome a meddling pontiff who opposes our equality laws."

3 Religious discrimination

3.1 Religious discrimination against employees

The [Equality and Human Rights Commission](#) website gives general information about anti-discrimination legislation, in particular on [grounds of religion or belief](#). The following are the relevant provisions in chronological order:

The *Race Relations Act 1976* (RRA) prohibits discrimination on racial grounds and this has been used to protect certain religious groups that also constitute a distinct ethnic group. The RRA applies in employment as well as in other fields. The Act was amended from 19 July 2003 to implement the provisions of the *EC Race Directive*.¹⁶

The *Fair Employment and Treatment (Northern Ireland) Order 1998* SI No.3162 (N.I. 21) outlaws both direct and indirect discrimination "on the ground of religious belief or political opinion" in employment in Northern Ireland. The *Fair Employment and Treatment (Northern Ireland) Order 1998* was amended by the *Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003* which came into operation on 10 December 2003 implementing the requirements of the European *Employment Framework Directive 2000/78/EC*.

The *Human Rights Act 1998* (HRA) incorporated the *European Convention on Human Rights* (ECHR) into UK law and came into force on 2 October 2000 in England. Article 9 of the ECHR covers freedom of thought, conscience and religion:

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

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

The HRA gave effect to Convention Rights beyond the existing European framework in two principal ways:

- UK courts should interpret the law in a way that is compatible with Convention rights.

¹⁶ *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*. The *Race Relations Act 1976 (Amendment) Regulations 2003* implemented the directive by amending the RRA.

- Public authorities as defined are obliged to act compatibly with Convention rights.

Under the Act people have the right to take court proceedings against public authorities if they think that their Convention rights have been breached or are in danger of being breached.

The EC *Equal Treatment Framework Directive 2000/78/EC (Directive establishing a general framework for equal treatment in employment and occupation* also known as the Employment Directive) outlaws discrimination on grounds of religion or belief. The Employment Directive was adopted on 27 November 2000 by the EC Employment and Social Affairs Council.¹⁷ The purpose of the directive is to prohibit discrimination in employment on the grounds of religion or belief; disability; age; or sexual orientation.

The *Employment Equality (Religion or Belief) Regulations 2003* SI No. 1660 came into force on 2 December 2003 and prohibit discrimination in employment and vocational training on the grounds of religion, religious belief or similar philosophical belief. The *Employment Equality (Religion or Belief) (Amendment) Regulations 2003* extended the protection to pension schemes.

4 Religious hatred

The *Racial and Religious Hatred Act 2006* came into force on 1 October 2007 and makes "provision about offences involving stirring up hatred against persons on racial or religious grounds". The *Anti-terrorism Crime and Security Bill 2001-02* included new provisions to make incitement to *religious* hatred a criminal offence, but these did not become law.

The following Library standard note covers this topic in detail:

[SN/PC/03768 The Racial and Religious Hatred Act 2006](#)

5 Background: Government guidance on existing law¹⁸

The following are excerpts from government guidance on existing law.

5.1 Employment for purposes of an organised religion

Sexual orientation Regulations: employment for purposes of an organised religion

89. Regulation 7(3) of the sexual orientation Regulations provides a further exception in relation to employment for purposes of an organised religion, which is similar to section 19 of the SDA. In brief, where employment is for purposes of an organised religion, it allows the employer to apply a requirement related to sexual orientation so as to comply with the doctrines of the religion or avoid conflicting with followers' religious convictions.

Meaning of "employment for purposes of an organised religion"

90. Whilst the exception in regulation 7(2) is in principle available to any employer, regulation (3) of the sexual orientation Regulations may only be relied upon in relation to employment for purposes of an organised religion. This means, in other words, that

¹⁷ Council Directive 2000/78/EC of 27 November 2000

¹⁸ DTI (now BIS) , [Explanation of the provisions of the: Employment Equality \(Sexual Orientation\) Regulations 2003 and Employment Equality \(Religion or Belief\) Regulations 2003](#)

the employee is working for an organised religion: the effect of the words “for purposes of” is similar to stating that the person is employed “by” an organised religion.

91. Regulation 7(3) thus applies to a limited range of employment. Its scope includes members of the clergy or other ministers of religion, but also other staff working for an organised religion. They may work in a local body or place of worship such as a church, temple, or mosque, or in a body which coordinates the work of such bodies or places of worship throughout the country. For example, this may include: a General Secretary, official spokesperson, typists, support staff, cleaners (though only if the other criteria in regulation 7(3) described below are also met).

92. The scope of regulation 7(3) does not include employment where the employer simply has some form of religious ethos. In this respect, it is narrower than regulation 7(3) of the religion or belief Regulations (see above). So it would not generally apply in relation to a care home or a school with a religious ethos because the employment is for purposes of a home providing healthcare, or a school providing education; the employees do not work for an organised religion. Only in exceptional circumstances might it be the case that an organised religion runs such an organisation (rather than simply having a representative on a board of management, or contributing to funding), such that employment there was for purposes of the religion.

Requirement related to sexual orientation

93. In contrast to regulation 7(2), regulation 7(3) refers to the employer applying “a requirement related to sexual orientation”, rather than to the situation where “being of a particular sexual orientation” is a requirement. In this respect, regulation 7(3) is slightly broader. For example, a requirement not to engage in sex with a same-sex partner would be a requirement related to sexual orientation, which would be covered by regulation 7(3) but not regulation 7(2).

Doctrines of religion

94. Regulations 7(3)(b)(i) permits an employer to rely on the exception if he applies a requirement related to sexual orientation “so as to comply with the doctrines of the religion”. In other words, the employer may apply a requirement related to sexual orientation if the religion’s doctrine requires him to do so. The doctrines of a religion are the core concepts and articles of faith laid down by a religion in its teachings as true. As such, doctrine must represent the established teachings of a religion which is authoritative, commanding a wide, if not universal, acceptance within the religion.

95. It is unlikely that this element of regulation 7(3) will be applicable in most cases of employment for purposes of an organised religion. Few religious doctrines have anything to say about heterosexuals, bisexuals, gay men or lesbians which necessitates the application of a requirement related to sexual orientation to those working for the religion. Where there are such doctrines, they are likely to apply to ministers of religion, rather than to other employees whose work is not of a spiritual nature (e.g. cleaners).

Religious convictions of followers

96. Regulation 7(3)(b)(ii) is an alternative which permits an employer to rely on the exception if he applies a requirement related to sexual orientation “because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers”. It does not cover any work for an organised religion that a requirement is applied to; it only covers work for an organised religion if the requirement is applied to it because of the nature and context of the work. What are

“strongly held convictions of a significant number” of the followers will need to be assessed in the context of each case, but it may be a significant number of followers in a local context, or a regional, national or international context. It does not mean a majority of followers, but it does mean a substantial number – more than a few. In practice, there will be very few cases under regulation 7(3)(b)(ii) where a requirement for a job related to sexual orientation will be required by both the convictions of followers and the nature and context of the work.

5.2 Genuine occupational requirement

Regulation 7

Exception for genuine occupational requirement

Scope of application of regulation 7

66. Regulation 7 is an exception which allows an employer, when recruiting for a post, to treat job applicants differently on grounds of sexual orientation / religion or belief if being of a particular sexual orientation / religion or belief is a genuine occupational requirement (“GOR”) for that post. An employer may also rely on this exception when promoting, transferring or training persons for a post, and when dismissing persons from a post, where a GOR applies in respect of that post. A GOR may only apply in relation to discrimination under regulation 3, so it cannot be used to justify victimisation or harassment.

67. Regulation 7 may apply where an employer is dismissing a person from a post. That is because, after taking up a post to which a GOR applies, an employee's sexual orientation / religion or belief might change in some cases.

68. An employer could not use this provision to justify dismissing an employee if there were no change in circumstances and no change in the employee's sexual orientation / religion or belief. That is because if the person was taken on by the employer to perform the job in the first place, and performed the job, that would be clear evidence that there was no GOR which applied to the job and which the employee was unable to meet. However, if the employee had deliberately given the employer false information to suggest that he complied with the GOR, the employer would be entitled to dismiss the employee, once it became clear that the employee did not comply with the GOR. In any event that would not be discrimination if the provision of false information were the reason for the dismissal, rather than the employee's sexual orientation / religion or belief.

69. Regulation 7 is referred to as an exception in cases of discrimination under regulations:

- 6 (employment),
- 8 (contract workers),
- 10 (office-holders),
- 11 (police – indirectly via regulation 6)
- 14 (partnerships),
- 17 (providers of vocational training),

- 18 (employment agencies, careers guidance etc) and
- 20 (institutions of further and higher education).

70. Regulation 7(1) and (2) take the same approach in both the sexual orientation Regulations and religion or belief Regulations, as does the RRA (as amended). Both sets of Regulations have further exceptions in regulation 7(3), which differ in their scope and effects. In regulation 7(3) of the sexual orientation Regulations there is an exception for requirements related to sexual orientation which are applied to employment for purposes of an organised religion. In regulation 7(3) of the religion or belief Regulations, there is an exception where the employer has an ethos based on religion or belief, and being of a particular religion or belief is a GOR for the job.

[..]

5.3 Religious ethos

Religion or belief Regulations: employers with a religious ethos

82. There is a further exception in regulation 7(3) of the religion or belief Regulations which may be relied upon by an employer who has an ethos based on religion or belief. (Regulation 7(2), in contrast, is in principle available to any employer.) This exception is very similar to that in regulation 7(2) and, in most respects, operates in the same way. However, there are three differences:

- the employer has to show that he has an ethos based on religion or belief;
- the GOR has to be applied having regard to that ethos; and
- the GOR does not have to be a determining requirement.

Apart from these differences, the same considerations apply as under regulation 7(2) (see above) for an employer to establish that, having regard to the nature or context of the work, being of a particular religion or belief is a genuine occupational requirement for the job. It will be for the employer to show that he has an ethos based on religion or belief; and that, having regard to that ethos, being of a particular religion or belief is a GOR for the job. There are also special provisions in the School Standards and Framework Act 1998 and the Education (Scotland) Act 1980 (see regulation 39 below), which regulate the circumstances in which it may be a requirement for a teacher in a faith school or denominational school to be of a particular religion or belief.

Ethos based on religion or belief

83. It is for the employer to show that his organisation has “an ethos based on religion or belief”. To do so, he may seek to rely on evidence such as the organisation’s founding constitution or similar documents, provisions in contracts of employment used by the employer, or other evidence about the practices of the employer’s organisation and the way it is run. When considering if an employer’s organisation has an ethos based on religion or belief, it is necessary to consider the meaning of “religion or belief” set out in regulation 2 (see above) – a religion, religious belief, or similar philosophical belief.

84. In some cases there may be questions as to the identity of the employer for the purposes of establishing if its organisation has a religious ethos. To state the answer in its simplest terms, the employer is the person or body which has engaged, together with the employee, in the mutual obligations set out in the contract of employment.

For example, if a children's play group with a Jewish ethos hires a member of staff, the employer is the person or body running the group who hires the person in question. Accordingly, it is for the employer to show that its organisation running the group has an ethos based on religion or belief. It is not for the employer to show that the local synagogue, or Judaism in general, has a religious ethos. Nor, if the employer is an individual, is it for the employer simply to show that he or she attends the local synagogue. However, if the employer's organisation is affiliated to a local synagogue, it might refer to that fact to demonstrate its religious ethos.

85. The employer must also establish that the GOR applies, having regard to its ethos. This means that the ethos should be taken into account when considering what the functions of the job and its context are, and the skills and attributes required to perform them, so as to assess whether it is a GOR for the person doing the job to be of the particular religion or belief. It also means that the GOR should not be inconsistent with that ethos.

6 Equality Act 2006: services provisions¹⁹

6.1 Sexual orientation discrimination

Section 81 of the [Equality Act 2006](#), allowed the Secretary of State to make regulations prohibiting discrimination on the grounds of sexual orientation in, amongst other things, the provision of goods facilities or services.²⁰ It provides:

81 Regulations

- (1) The Secretary of State may by regulations make provision about discrimination or harassment on grounds of sexual orientation.
- (2) In subsection (1) "sexual orientation" has the meaning given by section 35.
- (3) The regulations may, in particular-
 - (a) make provision of a kind similar to Part 2 of this Act;
 - (b) define discrimination;
 - (c) define harassment;
 - (d) make provision for enforcement (which may, in particular, include provision-
 - (i) creating a criminal offence of a kind similar to, and with the same maximum penalties as, an offence created by an enactment relating to discrimination or equality;
 - (ii) about validity and revision of contracts;
 - (iii) about discriminatory advertisements;
 - (iv) about instructing or causing discrimination or harassment);
 - (e) provide for exceptions (whether or not of a kind similar to those provided for by Part 2 of this Act or any other enactment relating to discrimination or equality);
 - (f) make provision which applies generally or only in specified cases or circumstances;
 - (g) make different provision for different cases or circumstances;
 - (h) include incidental or consequential provision (which may include provision amending an enactment);
 - (i) include transitional provision.
- (4) The regulations-
 - (a) shall be made by statutory instrument, and

¹⁹ By Manjit Gheera, Social Policy Section

²⁰ For information about the other provisions in the Act see the [Explanatory notes](#) to the Act

(b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.

(5) In subsection (3)(h) "enactment" includes an enactment in or under an Act of the Scottish Parliament.

The following Library standard note covers in detail the regulations that were subsequently made under this power:

[SN/HA/4032 Sexual orientation discrimination in the provision of goods and services](#)

6.2 Debates

The exception (now s 81(3)(e) of the 2006 Act) was introduced as an amendment by Lord Alli during the third reading debate of the Bill in the House of Lords.²¹

The exception provision (in Part 3 of the Bill) was discussed during the second reading debate in the Commons.²²

There were no amendments tabled to the exception clause.

6.3 Adoption issues

The issue of adoption as a service was not raised during the debates on the Bill in either House. Adoption services are defined under the *Adoption and Children Act 2002*²³ as services designed to meet the needs, in relation to adoption of children, who may be, or who have been adopted, adults who have been adopted, and their parents or guardians. The 2002 Act places a duty on local authorities to establish and maintain adoption services.

In terms of the proposals to exempt Catholic adoption agencies from the scope of the regulations it is clear that the Secretary of State was given an unrestricted power by the Act to make or not make such a provision. Subsection 3(e) states that he may "provide for exceptions (whether or not of a kind similar to those provided for by Part 2 of this Act or any other enactment relating to discrimination or equality)".

The issues engage Article 9 of the *European Convention on Human Rights* (ECHR) which reads as follows:

ARTICLE 9

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

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

A judicial review of the *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 SI No. 439* was lodged in the High Court by the Christian Institute.

²¹ [HL Deb 9 November 2005 cc628-36](#)

²² [HC Deb 21 November 2005, 1272--74](#)

²³ Section 3(1) of the *Adoption and Children Act 2002*

The grounds were outlined by the Evangelical Alliance as follows:

2.0 The Judicial Review

2.1 In pursuance of the Judicial Review on behalf of the Christian Institute, the legal advice prepared by James Dingemans QC falls under three claims. Firstly, that the Regulations were made “without proper consultation of interested parties”. Secondly, that there are “material parts of the Regulations which infringe rights guaranteed by article 9 of the European Convention of Human Rights which has statutory force in Northern Ireland, namely, that everyone has ” the right to freedom of thought, conscience and religion; this right includes ...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.” (Article 9 ECHR). Thirdly, that the Regulations do not create equality in respect of discrimination on the grounds of religious belief, which was stated as an intended aim in the consultation paper.

2.2 On Thursday 21 December the High Court (as anticipated) declined to suspend the Regulations, pending the outcome of the Judicial Review. The substantive hearing is scheduled for 1 and 2 March 2007.²⁴

The other provision in the Act which may affect religious adoption agencies is section 46. It concerns discrimination on grounds of religion or belief in the provision of goods, facilities and services. It provides:

(1) It is unlawful for a person (“A”) concerned with the provision to the public or a section of the public of goods, facilities or services to discriminate against a person (“B”) who seeks to obtain or use those goods, facilities or services—

(a) by refusing to provide B with goods, facilities or services,
(b) by refusing to provide B with goods, facilities or services of a quality which is the same as or similar to the quality of goods, facilities or services that A normally provides to—

- (i) the public, or
- (ii) a section of the public to which B belongs,

(c) by refusing to provide B with goods, facilities or services in a manner which is the same as or similar to that in which A normally provides goods, facilities or services to—

- (i) the public, or
- (ii) a section of the public to which B belongs, or

(d) by refusing to provide B with goods, facilities or services on terms which are the same as or similar to the terms on which A normally provides goods, facilities or services to—

- (i) the public, or
- (ii) a section of the public to which B belongs.

(2) Subsection (1) applies, in particular, to—

- (a) access to and use of a place which the public are permitted to enter,
- (b) accommodation in a hotel, boarding house or similar establishment,
- (c) facilities by way of banking or insurance or for grants, loans, credit or finance,
- (d) facilities for entertainment, recreation or refreshment,
- (e) facilities for transport or travel, and
- (f) the services of a profession or trade.

(3) Where a skill is commonly exercised in different ways in relation to or for the purposes of different religions or beliefs, a person who normally exercises it in relation to or for the purpose of a religion or belief does not contravene subsection (1) by—

²⁴ Extracts from *Sexual Orientation Regulations (Northern Ireland) Update for EA Board & Council, December 2006*: http://www.eauk.org/upload/D_Muir_SOR_briefing_to_council_December_2006.pdf

(a) insisting on exercising the skill in the way in which he exercises it in relation to or for the purposes of that religion or belief, or (b) if he reasonably considers it impracticable to exercise the skill in that way in relation to or for the purposes of another religion or belief, refusing to exercise it in relation to or for the purposes of that other religion or belief.

(4) Subsection (1)—

(a) does not apply in relation to the provision of goods, facilities or services by a person exercising a public function, and

(b) does not apply to discrimination in relation to the provision of goods, facilities or services if discrimination in relation to that provision—

(i) is unlawful by virtue of another provision of this Part or by virtue of a provision of the Employment Equality (Religion or Belief) Regulations 2003 (S.I. 2003/1660), or

(ii) would be unlawful by virtue of another provision of this Part or of those regulations but for an express exception.

(5) For the purposes of subsection (1) it is immaterial whether or not a person charges for the provision of goods, facilities or services.

The provision of adoption services by a private or voluntary agency could fall within the ambit of this section.

Further links

<http://www.baaf.org.uk/media/releases/070126.shtml>

<http://www.pinknews.co.uk/news/articles/2005-7991.html>

http://blogs.telegraph.co.uk/news/damianthompson/5889868/Catholic_adoption_agencies_have_caved_in_to_the_Government_says_legal_expert/

<http://www.catholicherald.co.uk/articles/a0000558.shtml>

7 The wider interaction between religious law and UK law²⁵

The issue of the interaction between religious law and UK law is, however, wider than the recognition or otherwise of the findings of religious courts by civil courts.

In her book, *Freedom of Religion, Minorities and the Law* Samantha Knights considered the ways in which legal systems might adopt different approaches in terms of jurisdiction and substantive rules for religious groups:

Within a liberal framework there are a number of possible responses as to how a system might accord respect to individuals or groups. One solution is to allow groups the right to govern themselves through their own set of rules and courts. But there are many variables on this option as regards the areas of law that are parcelled out to the group and the extent to which separate jurisdiction is granted. Some systems have made a division between substantive areas of the law so that, for example, family and criminal laws may be governed by religious law while other areas such as commercial law, tax and torts are governed by general secular laws. Some systems allow groups jurisdiction over their own personal laws at the lowest level and then may incorporate a right of appeal to a state court from the decision of the group. This was advocated by the province of Ontario in Canada by a proposal to set up a Shar'ia court that would adjudicate on matters relating to Muslims but with a possibility of appeal to the federal court system, but now appears to have been rejected.

²⁵ By Lucinda Maer, Parliament and Constitution Centre

Another approach and one used to some degree in many legal systems is the rule and exemption model. On this basis generally applicable laws are passed according to the needs of the majority but it is recognised that certain categories of people will have considerable difficulty in conforming the general rule and a special exemption is enacted for them. The English legal system has used this approach in a number of areas and has granted exemptions to turbaned Sikhs from wearing motorcycle helmets, and Jews and Muslims from being subject to rules requiring the stunning of animals before slaughter for food. But it raises a number of issues including who in the community decides what rules they need exemption from, and which groups get exemptions, and it ultimately reifies religious practice, belief, and group identity.²⁶

Sebastian Poulter has explored the variety of methods available to legal systems for the implementation of both assimilationist and pluralist policies. These range from suppression through the application of criminal penalties at one end of the spectrum through to the allocation of state-funding at the other.²⁷

Some examples of the law allowing for special arrangements for those with particular religious beliefs include: the exemption for turban-wearing Sikhs from motor-cycle crash helmet legislation; exemptions from animal and bird slaughter legislation for the purposes of providing *halal* and *kosher* meat; and provisions contained in the *Finance Act 2006* which related to Sharia compliant financial products. Details of these are given below.

In 1976 the *Motor-Cycle Crash Helmets (Religious Exemption) Act* was passed in order to relieve turbaned Sikhs from the duty being imposed on all motor cyclists to wear helmets complying with high safety standards. In his book, *Ethnicity, Law and Human Rights*, Poulter writes that:

More recently, the Sikh community has built upon the precedents established by the 1976 Acts and persuaded Parliament to pay further attention to its needs. One of the five distinctive symbols of Sikhism ('the five Ks') is the *kirpan* (a small sword or dagger), which should be carried as a matter of religious obligation by all orthodox Sikhs. The Criminal Justice Act 1988, which contains provisions designed to penalise those who carry knives and other sharply-pointed instruments in public places, deals with the *kirpan* by means of a specific exemption for those carrying sharply-pointed articles for 'religious reasons'. Similarly, section 11 of the Employment Act 1989 contains an exemption for turbaned Sikhs from the duty recently imposed upon all those working on construction sites to wear safety helmets. Furthermore, any employer who refuses to employ a Sikh on a construction site simply because he is unwilling to wear a safety helmet in place of his turban will be barred from even being able to argue that such a policy is 'justifiable' on grounds of safety under the indirect discrimination provisions of the Race Relations Act.²⁸

The Slaughterhouses Act 1974 and the *Slaughter of Poultry Act 1967* both have the objective of trying to ensure a humane method of slaughter, and any person who slaughters an animal or bird in contravention of these provisions commits a criminal offence.²⁹ Such pre-stunning of animals is unacceptable to religious Jews who require that an animal or bird must be completely sound and must not have suffered any injury before slaughter if it is to be capable of providing *kosher* meat. Poulter explains that:

²⁶ Samantha Knights, *Freedom of religion, minorities and the law*, 2007, paras 1.33-1.34

²⁷ Sebastian Poulter, *Ethnicity, Law and Human Rights*, 1998, pp59-65

²⁸ Sebastian Poulter, *Ethnicity, Law and Human Rights*, 1998, p50

²⁹ See Library Standard Note SN/SC/1314, *Religious Slaughter*, for more information

In order to accommodate *shechita* and obviate any need for pre-stunning both Acts furnish specific exemptions for the slaughter, without the infliction of unnecessary suffering, of a bird or animal 'by the Jewish method for the food of Jews and by a Jew duly licensed for the purpose', by a special Rabinical Commission. Similar exemptions are given to Muslims so that they can maintain their religious tradition of *dhabh* and produce *halal* meat.³⁰

The *Finance Act 2006* included some provisions that would allow Sharia mortgages to fall within the ambit of UK tax law. In March 2006, the *Sunday Times* reported that:

... the chancellor has given Muslim leaders private assurances that he wants to create a "level playing field" in the economy, so that more and more "sharia compliant" financial products can be offered to British Muslims ... "Making the UK and London a centre for Islamic finance means putting in place the tax and legislative framework that is supportive of Islamic products," said a senior Treasury official.³¹

The Government announced this strategy in December 2004 in the *Pre-Budget Report*, which stated that it would consult on "how to encourage further innovation [in the supply of financial products compliant with Sharia law] and ensure that tax does not create an impediment to the development of new products in this area".³² In *Budget 2005* the Government confirmed it would bring forward legislation to clarify the tax treatment of these products, which – in broad terms – are economically equivalent to conventional banking products but do not involve interest or speculative returns:

The Government is committed to fair tax treatment for Shari'a compliant financial products. Following consultation announced in the 2004 Pre-Budget Report, legislation will be included in the Finance Bill to amend the tax rules so that the mark-up on a Murabaha transaction and the profit-share on a Mudaraba arrangement are taxed on a level playing field with equivalent banking products. Stamp duty land tax reliefs for Islamic house purchase schemes will be extended to include a new Shari'a compliant product.³³

Provisions were included in the *Finance (No.2) Bill 2005-06* (specifically, clauses 95-98, and 169) [these became sections 95-98 and section 168 of the *Finance Act 2006*].

³⁰ *Ibid*, p132

³¹ "Brown to boost Islamic banking, 12 March 2006", *Sunday Times*.

³² Cm 6408 December 2004 para 5.106

³³ Budget 2005 HC 372 March 2005 para 5.117