

**CHRISTIAN CONCERN FOR OUR NATION &  
THE CHRISTIAN LEGAL CENTRE RESPONSE  
TO THE GOVERNMENT EQUALITIES OFFICE  
UK CONSULTATION ON THE EUROPEAN  
COMMISSION'S PROPOSAL FOR AN EQUAL  
TREATMENT DIRECTIVE  
JULY 2009**



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The Consultation can be found here: <http://www.equalities.gov.uk/default.aspx?page=1091>.

## **GEO International—EU Directive**

### ***UK Consultation on the European Commission Proposal for an Equal Treatment Directive***

Published: 5 May 2009

Closing date: 28 July 2009

#### ***Summary***

This consultation document seeks your views to inform the UK Government's further consideration of a proposed European Commission (EC) Directive to prohibit discrimination on the grounds of religion or belief, disability, age and sexual orientation outside the areas of employment and vocational training.

The UK Government wishes to consult in particular on the impact of the draft Directive in those areas where its proposals are, or might be, at variance with the current and proposed law, and on the impact of the proposals on individuals, business and others.

#### ***Responding to this consultation***

Responses can be emailed to: [EUDirective@geo.gsi.gov.uk](mailto:EUDirective@geo.gsi.gov.uk)

Please make clear in the email if you are responding from Northern Ireland

Hard copies can be sent to:

EU Directive Consultation Responses

EU and International section

Government Equalities Office

9th Floor, Zone G9, Eland House

Bressendon Place

London

SW1E 5DU

If you are responding from Northern Ireland hard copies can be sent to:

Equality legislation 2

Room e 307

Castle buildings

Stormont

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BT4 3SR

When responding, please indicate whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

## **About Us**

Christian Concern for Our Nation (CCFON) is a policy and legal resource centre that identifies changes in policy and law that may affect the Judeo-Christian heritage of this nation. The team of lawyers and advisers at CCFON conduct research into, and campaign on, legislation and policy changes that may affect Christian Freedoms or the moral values of the UK. CCFON reaches a mailing list of 25,000 supporters. <http://www.ccfon.org>

CCFON is linked to a sister and separate organisation, the Christian Legal Centre, which takes up cases affecting Christian freedoms. <http://www.christianlegalcentre.com>

## **Executive Summary**

1. CCFON & CLC welcome the opportunity to respond to this consultation by the Government Equalities Office (GEO). This consultation covers the draft Equal Treatment Directive outside the field of employment on the grounds of age, disability, sexual orientation and religion or belief. The draft Directive requires unanimity. Thus, to adopt the proposal, consensus must exist amongst all 27 Member States. We encourage all nations to veto this proposed Directive because it improperly infringes upon freedom of expression and the free exercise of the conscience of religious people.
2. In the UK, implementation of Equality Laws and policies has already imposed a devastating impact on Christians. An undercurrent of growing intolerance and failure to respect the diversity of beliefs has sought to evict expression of religious beliefs from the workplace and the public square. In our opinion, this is contrary to the freedom of thought, conscience and belief in Article 9(2) of the European Convention on Human Rights, where the qualified right to manifest belief is based upon *minimal* interference with religious belief “subject only to such limitations as...are necessary in a democratic society..”<sup>i</sup>
3. Britain is already known as a cold place for Christians due to the type of equality laws and policies the EU Directive seeks to promote.<sup>ii</sup> Many examples exist showing how individuals use Britain’s equality laws and policies to suspend or sack Christians unfairly.
4. In the field of the provision of goods and services, a Christian Bed and Breakfast currently faces legal action as a result of adhering to a “married couples only” policy for sharing rooms.<sup>iii</sup> A care home with a Christian ethos faced funding withdrawal as a result of its elderly residents not wishing to complete a questionnaire on their sexual orientation, four times a year, as they found it intrusive.<sup>iv</sup> Roman Catholic Adoption agencies closed as a result of the Sexual Orientation Regulations.<sup>v</sup>
5. In the provision of goods and services, if actions taken against Christians occur not due to malfeasance by the Christians, but rather because the Christians express sincerely-held religious beliefs and values, this creates a chilling impact on the freedom of speech of religious people. Christians already self-censure their words at work, fearing others with different views will characterise the Christians’ views as offensive or harassment. The transient and fleeting nature of many goods and services transactions will make it doubly difficult to avoid inadvertently offending someone. Such selective exclusion of religious speech both inside and outside employment simply should not happen in a democratic society that supposedly respects fundamental human rights including the freedom of expression and diversity of belief.

6. The provisions in the draft Directive are even harsher than the current oppressive equality laws and policies in Britain. In this regard, we specifically object to the harassment provisions in the draft Directive and strongly recommend they be removed. Harassment, as vaguely defined in the Directive, severely limits and curtails basic human rights in the provision of goods and services. If implemented, the provision inexcusably restricts freedom of speech and the free exercise of conscience of religious people delivering goods and services to the public.
7. Whilst the Directive may be well-intentioned in prohibiting religious discrimination, without proper balancing mechanisms, protections and exceptions to ensure the rights of those professing different religions and beliefs in relation to each other, the Directive may well lead to indirect religious discrimination and oppression. Likewise, without proper balancing, protections and exceptions between religious people and those practising homosexuality, the Directive will likewise lead to Member State-authorized persecution of Christians. The draft Directive fails to even consider the implications of conflicts between those professing religions or beliefs and between those groups and those practising homosexuality.
8. Christian beliefs in marriage and the traditional family will be subject to legal action.
9. Similarly, the Directive fails to protect or respect the status of churches, religious organisations, religious associations or communities. This failure alone provides sufficient grounds for the Directive not to proceed. Member States must not interfere with the legitimate religious beliefs, tenets and doctrines of churches, religious organisations, religious associations or communities, whether run on a commercial or a non-commercial basis.
10. The Directive should exclude education, media and advertising, healthcare, housing and transport from the Directive. The Directive should simply refer to “goods and services”, as does the Gender Directive, without mentioning specific areas which are not even regarded as “services” by European law, such as education. It should not apply to unpaid professional work.
11. The draft Directive should exclude **both** “religion or belief” and “sexual orientation”. It is no use excluding one only, as concern already exists over an unfair hierarchy of rights that is developing, whereby the rights of those professing a religion are given the lowest priority. The draft Directive also fails to consider the indirect impact on employment law, where many Christians across Europe will lose their jobs because they are not prepared to violate their consciences. For fear of being sued with no fixed upper limit on the amount of compensation that they may have to pay, employers may well ignore the consciences of Christian staff.
12. In issues of conflict, the Directive must provide for a “religious conscience” exemption. In a free and democratic society, those with religious beliefs should not be subject to unlimited compensation awards or unfair legal processes that shift the burden of proof to the accused.
13. Europe needs to respect diversity, not just of Member States, but within Member States, otherwise democracy itself is threatened. Equality in a democratic society needs to respect the diversity of staff and service providers not just that of service users, otherwise it is no equality at all.
14. Equality law should not be used as a tool to create inequality and oppression of those holding Christian values and beliefs. We hope that the GEO will take measures to ensure that this does not happen and to re-address the current situation. More protection is desperately needed for freedom of religion and freedom to manifest religion, both in the domestic Equality Bill and in this proposed Directive. Article 9 is not about suppressing religion, but about ensuring it is allowed to continue. Article 10

on freedom of expression is protected where States allow for opposing views, not where they impose one view on everyone.

## **Responses to Consultation Questions**

1) **What recent evidence do you have of harassment that would be prohibited by virtue of the Directive that would not currently be prohibited by UK discrimination law on the grounds of a) religion or belief and b) sexual orientation?**

No legitimate evidence of the need for a harassment provision to be included in the Directive on “goods and services” exists.<sup>vi</sup> The Government’s response to the recent consultation on the Discrimination Law Review received responses from a wide range of over 4,000 stakeholders. The Government’s response concluded that no need existed to extend protection against harassment outside the context of work on the grounds of religion or belief and sexual orientation. The Government reached this conclusion based on the lack of any evidence of a problem. Even if evidence exists, however, the Commission should not entertain such an extension because of the wide-ranging and detrimental impact such an extension has on fundamental human rights in a democratic society.<sup>vii</sup>

2) **Do you support the proposal in the Directive to extend protection against harassment on the grounds of a) religion or belief and b) sexual orientation? Please explain why.**

No, the Directive should not extend harassment provisions on the grounds of religion or belief and sexual orientation. The question erroneously assumes that adding harassment provisions extends protection. Harassment provisions like the one in the Directive actually *remove* protection for those whose views are informed by a religious worldview. Such harassment provisions infringe on fundamental rights of individuals of different religions expressing their various beliefs. Such provisions likewise infringe on fundamental rights of religious people expressing different beliefs on sexual ethics. Indeed, promulgation of the instant harassment provision will result in individuals exploiting the law by claiming that those with opposing views have created an “offensive environment”. Any bystander can complain they felt offended by the expression of a view they oppose. Thus, rather than protecting people against harassment, the harassment provisions become nothing less than a licence to harass those who disagree with one’s views.

Moreover, the inclusion of harassment provisions chills free speech. For example, a mere explanation of the relevant religious belief relating to homosexual conduct could be charged as harassment in the provision of goods and services. Similarly, explanation of one’s religious tenets to a person of another faith could also be interpreted as harassment.

The hallmark and measure of a democratic society is its commitment to protecting free speech and the freedom of thought, conscience and religion. A government that truly supports free speech allows diverse and opposing ideas and values to be shared in public debate.<sup>viii</sup>

### 3) **Do you have concerns about the proposal? Please explain why.**

Yes, we have grave concerns. The centre of our concern about the effect of the Directive focuses on its infringement on freedom of speech and freedom of religion. The Directive subjects churches and individual Christians to frivolous allegations of harassment, merely for: 1) preaching the Gospel; 2) proselytising; or 3) expressing Biblical views on faith or sexual ethics. (Please see our further explanation under the title “Why the Harassment Provision in Article 2(3) of the Directive Should be Removed”).

The peril of the harassment provision lies in its inherent vagueness. The language proscribing an "intimidating, hostile, degrading or offensive environment" invites abuse similar to that experienced under the Religious Vilification legislation of Victoria, Australia. In the case of *Islamic Council of Victoria v Catch the Fire Ministries* [2004] VCAT 2510, one of the allegations made was that an audience "laughed" at recitations from the *Qur'an*.<sup>ix</sup> Under Article 2(3), the potential exists for someone to make a similar allegation under the Directive alleging "harassment" on the basis that such laughter would be "humiliating or offensive" to a Muslim. Likewise, the same allegation could be brought against those who mock the Bible.

#### **Why the Harassment Provision in Article 2(3) Should be Removed**

The Equal Treatment Directive's provisions create a mechanism of law that infringes human rights, the principles of natural justice, legal certainty and other general principles of law that are recognised as part of the corpus of EU Law<sup>x</sup>:

- It includes harassment within the definition of discrimination, including indirect discrimination. Merely being offended, as perceived by the recipient, is categorised as the unacceptable act of infringing his or her human right to equality.
- Since there is no knowing what might or might not offend someone, no legal certainty exists. Since no fair notice of what is prohibited by the law exists, the right to a fair hearing is necessarily also infringed.
- The offensive behaviour need not be physical or material; it only need be words that the recipient finds offensive. This is a very significant restriction on freedom of speech and freedom of expression that is wholly unjustified.
- A person can be found to have discriminated even when no intent to discriminate existed.
- Once the victim presents a charge of discrimination to a court, the burden of proof shifts to the respondent, who must then prove a negative—a doubly difficult case for him or her to prove. This is similar to infringing the human right that one is presumed innocent until proven guilty. The fact that other legal provisions, including Directives, already follow this unfair model does not mean that such unjust practices should continue. Article 8 should be changed so that the normal civil rules apply, whereby plaintiffs making allegations have to prove their case.

Recital I commences the Directive by referring to the founding principles in Article 6 of the Treaty on European Union which include the “rule of law” and to the “principles of liberty, democracy, respect for human rights and fundamental freedoms”—yet these founding

principles are undermined by the way the Directive: 1) proscribes harassment; 2) changes the burden of proof contrary to the principles of natural justice, (which is part of the rule of law)<sup>xi</sup>; 3) lacks a balancing mechanism between rights; 4) lacks exceptions; and 5) uses vague wording. These are fundamental rights issues.

The right to freedom of expression and freedom of speech are vital to the preservation of our democracy. If promulgated, the Directive undermines such values while creating intolerance. Since the Directive allows individuals to easily allege offence, the ominous threat of legal action chills expression of legitimate viewpoints related to, but different than, another's lifestyle or belief. This fear goes beyond that which we have ever experienced in this country, but which we are unfortunately moving toward. The EHRC has a vital role in protecting religious rights. Being able to express views with which other people disagree is part of being a free society. This Directive could easily create fear of false allegations of "homophobia" and could be used to harass those who hold orthodox religious beliefs regarding homosexual practice.

A summary of extracts from the legal opinion by James Dingemans QC, of 20<sup>th</sup> October 2008<sup>xii</sup> on this EU Directive states:

*...the definition of harassment, in the context of the provisions or goods and services, has the potential to have a chilling effect on freedom of speech. The mere explanation of the relevant religious belief to a homosexual could be interpreted as amounting to harassment.*

The mere explanation of the belief in a religion's exclusivity and rightness by a Muslim to a Christian or by a Christian to a Muslim, namely that their faith is the only true one, could be interpreted as being offensive. Such explanations could easily arise in a discussion about faith between an employee and a customer during the provision of a public or commercial service.<sup>xiii</sup>

The display of images alone may be enough to constitute harassment, see *Moonsar v Fiveways Express Transport Ltd* [2005] IRLR 9. This is relevant to the example of a Christian bookshop or publicly-funded Community Centre which has posters about the importance of marriage, or posters with Biblical passages condemning sexual immorality on them. These could all be held to constitute harassment of homosexuals. A comment by a respondent can constitute harassment, even if it is not made to the claimant: *Hereford and Worcester CC v Clayton* (1996) *The Times*, 8<sup>th</sup> October. This could mean that if two Christians were talking about homosexuality in a Christian bookshop, and unbeknown to them a homosexual person overheard the comment whilst being served a cup of coffee, their comments could constitute harassment.

Moreover, the harassment offence has a low threshold. There is no need to have any intent to offend someone, so preaching in good faith would not be protected. Instead, it would lower the level of protection for legitimate debate. Indeed, the requirements for making out harassment can be extremely low. A single act can constitute harassment: in *Bracebridge Engineering v Darby* [1990] IRLR 3 and in *Insitu Cleaning v Heads* [1995] IRLR 4, a single comment of three words constituted harassment. It is no defence to such an action if the harassment was not intended. However, the genuine and loving intention of a Christian who was explaining why they believe homosexual practice to be wrong could lead to their being sued for unlawful harassment if the court finds that the conduct in question has the requisite effect.

It is clear, therefore, that people can use this law to bring ridiculous actions. For example, a witch in prison used the religious vilification laws in Australia to take a claim against the Salvation Army for teaching Alpha Courses in prison. Dismissing the claim, which he described as “preposterous”, the Australian judge in question was still heavily critical of the failure of the legislature to draft a law that could have prevented the Salvation Army's name being dragged through the dirt, as well as wasting their time and resources.<sup>xiv</sup>

The examples below show that the category of activities that can be considered “hostile”, “humiliating” or “offensive” is already very wide. In addition, most of the examples given could take place in the context of providing goods, facilities or services under the proposed Directive:

- Churches in areas with large Islamic populations have been asked to take down posters and not to hand out tracts because they are considered offensive. The posters had Bible verses on them such as “Jesus is the way, the truth and the life”.
- The Mysticism and Occult Federation maintained 24-hour surveillance of Premier Christian Radio so that they could complain about the Christian content of the programmes. They made 48 complaints to the Radio Authority.
- Christian Unions at Birmingham, Edinburgh, Heriot-Watt, Hull and Exeter Universities have had funds frozen, been refused affiliation with the Student Union and been prevented from putting up posters or booking rooms because they refused to have non-Christians on their executive committees or because of their teaching on sexual morality.
- A Christian doctor was treating a Muslim lady and introduced the Gospel into their conversation. As a result, a *fatwa* was put out against him.
- The Gideons have been told that they may not distribute Bibles at Plymouth University, as it is discriminatory and offensive to people of other religions.
- The police approached a street preacher in High Wycombe after a woman complained that she was offended that the preacher was saying that those who do not turn to Christ would go to Hell. The police officer said that this was unacceptable in a multi-faith society and was a criminal offence.
- The General Secretary of the Christian Medical Fellowship has been banned from certain London Universities because of his stance on Islam and his evangelism of Muslims.
- Jay Smith, a Christian church worker who often goes to Speakers Corner in Hyde Park, was banned from the British Museum after a Muslim security-guard complained that he was offended by Jay Smith’s Christian stance in what he was saying as he took a tour around the museum.
- Police officers told an open-air preacher in Gainsborough, Lincolnshire, that it is a criminal offence to identify homosexuality as a “sin”<sup>xv</sup>.
- A five-strong team of police officers investigated a church's literature because someone said a leaflet inviting the public to an Easter service was “offensive”. Two mounted policemen were later joined by three armour-clad officers who jumped out of a police van to examine the Easter invitation leaflet. After the police found no evidence that the leaflet was offensive, the individual making the complaint changed his claim. He told police he found it offensive that an Evangelical church was allowed to advertise itself on the high street in a region



that had a sizeable homosexual community. The incident took place as the church displayed a table of literature on a street in Chorlton, near Manchester. Police took away examples of the church's literature for further investigation. Although the leaflet inviting people to an Easter service made no mention of homosexuality, it appears the complainant believed the mere advertising of an Evangelical church was "homophobic".<sup>xvi</sup>

Adding to the chill, the Directive allows no upper limit to the amount of compensation that can be awarded to the victim. This means that businesses face the possibility of paying huge compensation awards to someone merely alleging offence due to a negative comment about one of their characteristics. This could bankrupt many Christian businesses that benefit society.

To reiterate, adopting a provision covering harassment on the grounds of religion or belief or sexual orientation in the provision of goods, facilities and services would create a massive chilling effect on freedom of speech, freedom of the press and media, academic freedom, the rights of religious believers to preach and to proselytise and would virtually make it impossible for religious individuals or groups to deliver services to the public without fear of causing offence.

It is also noteworthy that the Directive also covers harassment in the context of education. We strongly disagree that any harassment provision should cover religion or belief or sexual orientation in relation to schools. These equality strands, together with gender reassignment, are currently correctly exempted from harassment in the Equality Bill 2009 in relation to schools. Any religious belief or ethos could be used as grounds to argue that someone had been offended. The Government in debates on the Equality Bill in 2005 made this point. We consider that school bullying is absolutely no excuse for bringing in harassment provisions in education or in schools. The levels of "homophobic" bullying are in fact similar to levels of bullying amongst all children. For example, the Stonewall study of 1,145 LGB pupils in the UK in 2007, found that 65% of LBG pupils<sup>xvii</sup> had experienced bullying compared to a national survey of bullying of 4,772 pupils in 2006, which found that an even higher 69%<sup>xviii</sup> of all children complained of being bullied. In the Public Bill Committee the Government has made it clear that this is considered a pupil-to-pupil issue and not something that merits harassment provisions.<sup>xix</sup> School policies and laws should be formed at national or even local level (rather than European level).

If the existing exclusion of harassment from the areas of religion or belief and sexual orientation are removed it would not only threaten our country as a liberal democratic and free society, but such injustice and unfair treatment would also bring equality legislation into disrepute.

We support the views of Jim Allister, QC, MEP (Northern Ireland) who said in April 2009:

*Mr President, I will be voting against this report and this proposed directive for three reasons. First of all, I dissent from the belief that the EU, rather than national governments, should be legislating on these issues, believing every Member State is best placed to decide if it needs to strengthen such legislation. If ever there was a subsidiarity issue, this should be it.*

*My second reason is that the new offence of harassment has the alarming prospect of, in fact, curbing the rights in respect of freedom of speech and freedom of religion, particularly for those*

who proclaim a Christian message. Christians preaching the gospel, particularly in a public place to people of other faiths who take offence and who claim it is an assault on their dignity, could be breaching this law. Likewise, defending and promoting a biblical approach to heterosexual marriage could allow litigious gay rights activists to claim harassment.

The third reason is that the measures within the directive are disproportionate and inadequately balanced. It compels the Christian printer, for example, to accept an order to print material which offends his religious beliefs, whereas he should be free to conduct his business according to his conscience.

Without essential balancing mechanisms, this directive will become an instrument which in fact creates discrimination. Thus, to me, it is an unnecessary directive infringing basic rights, particularly of people of faith and conscience, and illustrates all that is over-reaching, meddling and wrong-headed within the EU.<sup>xx</sup>

- 6) **Given the limits of Community competence, and subject to the proposals being clarified in relation to housing, as described above, can you provide examples of the practical effects of the Directive in the areas of health care, education, housing.**

### **Limits of Community Competence, National Competence and Subsidiarity**

There are many areas in the EU Directive that usurp Member-State competence to determine our own laws without EU interference.

In a Communication from the Commission in July 2008 it was stated that:

*The diversity of European societies is one of Europe's strengths, and is to be respected in line with the principle of subsidiarity. Issues such as the organisation and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions are best decided at national level. The draft Directive does not therefore require any Member State to amend its present laws and practices in relation to these issues. Nor does it affect national rules governing churches and other religious organisations and their relationship with the state. So, for example, it will remain for Member States alone to take decisions on questions such as whether to allow selective admission to schools, whether to recognise same-sex marriages, and the nature of any relationship between organised religion and the state.... The proposal therefore draws on practice in several Member States and includes provisions limiting its application to the commercial provision of goods and services. Private individuals are covered only in so far as they are performing their commercial activity.<sup>xxi</sup>*

### **Education, Media & Advertising, Housing and Healthcare Should be Excluded from the Scope of the Directive**

#### **Education, Media and Advertising**

In our opinion, education should be removed from the Directive and replaced by provisions similar to those in the Gender Directive.

Article 3(3) of the Gender Directive clearly states that: “This Directive shall not apply to the content of media and advertising nor to education.”

We believe that the content of media and advertising should also be omitted because of the importance of the freedom of the press. The Directive exposes both TV and the press to censorship and to allegations of harassment by journalists when interviewing or when reporting on issues of homosexuality or religion or belief. The defence of freedom of expression will not prevent allegations of discrimination being made or being used to intimidate the media, including Christian journalists. The abolition of discrimination in the media and in advertising may result in the promotion of same-sex relationships to young children and the advertising of consumer products using homosexual couples. Such advertisements may become commonplace across Europe as a result of this Directive, contrary to many parental sensibilities and religious beliefs.

The European Parliament did advise that the advertising and media sectors should be excluded from the scope of this proposed Directive in its new Article 3(5a).<sup>xxii</sup>

Education should be explicitly excluded from the scope of the Directive, as the Directive is focussed on the provision of goods and services. Recital 13 of the Gender Directive as well as Article 3(3) makes it clear that the exclusion of education from that Directive applies to both public and private education. The case of *Humbel (263/86)*<sup>xxiii</sup> found that education is not a service and that “Courses taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services for the purposes of Article 59 of the EEC Treaty” and that “The first paragraph of Article 60 of the EEC Treaty provides that only services ‘normally provided for remuneration’ are to be considered to be ‘services’ within the meaning of the Treaty”. (Article 60 EEC is now known as Article 50 EC). This case is relevant because the present Directive covers goods and services; if education is not a service, it should be excluded and the Directive should state explicitly that it does not apply to any kind of education.

This is true not only because of case law, the precedent in the Gender Directive and our legislation, but also because Article 149<sup>xxiv</sup> of the EC Treaty makes it clear that Community Competence is limited to contributing to the “development of quality education... and, if necessary, ...supporting and supplementing” co-operation between Member States with their own responsibility for “the content of teaching and the organisation of educational systems” including the provision of special needs education. Education needs to be excluded as recognised in the Equality Act 2006, where the curriculum is excluded from the scope of discrimination law. Part 6 of the Equality Bill also has similar provisions. It is vitally important that education is excluded to protect academic freedom.

Article 3(3) asserts that the Directive is “without prejudice to the responsibilities of Member States for the content of teaching, activities and the organisation of their education systems...” and that “Member States may provide for differences in treatment in access to educational institutions based on religion or belief”, whilst Article 3(1)(c) states that the Directive applies to education. This is at best confusing, as it is not clear to which aspect(s) of education the Directive can apply.

## **Health Care**

Article 152(5) of the EC Treaty makes it clear that the organisation and delivery of health “services” and medical care is a matter for Member States. The delivery of a health “service” must include the “provision” of that health service whether or not such provision is discriminatory. The Directive therefore incorrectly states it has competence in this area by including it within Article 3(1)(a) of the Directive.

## **Housing**

Similarly, provisions on housing should not be included. We are not aware of any provision of EU Law in any Treaty that brings housing within European competence. The Government Equalities Office’s consultation queries the limits of Community competence in this area on page 18, which we think is correct. The regulation of housing is a national issue and is not suitable for European determination. Recitals 10 and 24 and Article 1 of the Gender Directive simply extends its application to combating discrimination based on sex in access to and the supply of goods and services. In our opinion, Article 3 of this proposed Directive should do likewise. Article 50 EC on its own is not sufficient to argue for a provision such as housing to be included.

## **National Competence and Subsidiarity**

In our opinion, the fact that Recital 30 of the Directive claims that it complies with the principle of subsidiarity is not a sufficient reassurance that Community competence will not stray into areas of national competence. Whilst it may be argued that the Articles have to be interpreted in accordance with the recitals, this may well not happen in practice. The case of *Maruko*<sup>xxv</sup> has illustrated how recitals can be overruled and national competence to decide issues can be ignored. The *Maruko* ruling on the principle of equality overruled Recital 22 of the Employment Directive and this may create a precedent for the overruling of Recitals in future. The best way to ensure national competence is respected is to follow the precedent of the Gender Directive and to exclude areas of national competence explicitly from the Articles.

## **Article 15**

The Directive as currently drafted gives Member States two years to transpose the Directive into national law, and four years in the case of effective access for disabled persons.

### **16) Do you think the proposed timetable is realistic?**

No, we do not think that Article 15 allows sufficient time for implementation because of the need properly to consult stakeholders, and because of the need for firms to prepare for compliance. However, we do not support the implementation of the Directive in the first place because of its adverse impact upon Christian beliefs and values as detailed in our own impact assessment.

## **17) What difficulties would it cause?**

The provisions in Article 15 would not allow sufficient time properly to consult stakeholders and to legislate in this area. The time limit in the Gender Directive was approximately 3 years from the date of publication. 4 years would appear to be a more reasonable time period to allow time to consult and for implementing legislation to progress through Parliament. However, we do not support many of the proposals in the Directive in the first place.

### **Comments on the draft Directive as a whole**

#### **Lack of Balancing and Exceptions— Article 3 and Recital 17: Changes to Effect Balancing.**

#### **Lack of Balancing and Exceptions**

The Directive purports to support the need for the prohibition of discrimination to go hand in hand with other fundamental rights such as the freedom of religion. However, this claim is placed in a Recital and not in an Article. The *Maruko* case on the principle of equality has already effected the overruling of a Recital in relation to the Employment Directive and could create a precedent that allows for Recitals to be easily overruled in future. This shows how fundamental rights are not properly protected even in this Directive. There is a lack of balance between fundamental rights that needs to be addressed by changes to Article 3 and recital 17.

Extracts of the legal opinion by James Dingemans QC of 20<sup>th</sup> October 2008<sup>xxvi</sup> on this EU Directive state:

*“[I]t is essential that those respective views, beliefs and rights are balanced, otherwise well-meaning Directives such as the Proposed Directive can themselves become instruments of discrimination or oppression”.*

*“It seems to me that the legal answer when there are rights which are engaged which are not immediately compatible with the rights of others is that the rights of one section of the community should not be permitted to override and exclude the rights of the other section of the community”.*

*“The Directive makes no attempt to balance the rights of differing communities...”.*

*“It does seem to me that, without mechanisms permitting the balancing of rights, the Directive becomes internally inconsistent by creating (at least indirect) discrimination against religious believers. This may, of itself, give rise to questions about the compatibility of the Proposed Directive with the ECHR and the Charter [of Fundamental Human Rights of the European Union]”.*

The drafting of the Directive is inspired by the misunderstanding that all the equality strands are harmonious and that there is no need to provide protections between those of different religions or between those professing a religion or belief and those practising homosexuality. UK equality legislation contains a number of such protections by providing balances and exceptions. The description in the Equality Impact Assessment on the Equality Act (Sexual Orientation) Regulations 2007 recognised the need for mitigating measures to balance the rights of people in these two equality categories with each other.<sup>xxvii</sup>

By failing to consider the need for such protections and exceptions, the passing of the Directive is likely to result in unnecessary disharmony with allegations and legal actions between those of different faiths or beliefs, as well as destructive and unnecessary legal actions between those with traditional orthodox Christian beliefs and those practising homosexuality.

The prohibition of discrimination is meant to go hand in hand with other fundamental rights such as freedom of religion, but in order to do so appropriately, such freedoms need to be protected by the articles of the Directive's main text, rather than tucked away in the interpretative recitals. This lack of forethought, together with the lack of the necessary exceptions, may well result in indirect religious discrimination and is likely to defeat the Directive's stated aim of prohibiting religious discrimination. It is also important to include freedom of expression, which is missing from Recital 17.

### **Suggested Changes to Article 3 and to Recital 17 to Effect Balancing**

We would suggest the following changes to the Directive in order to add the necessary balancing mechanisms:

#### Current recital 17

*(17) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context, the freedom of religion, and the freedom of association. This Directive is without prejudice to national laws or family status, including on reproductive rights. It is without prejudice to the secular nature of the State, state institutions or bodies, or education.*

### **Suggested amendments**

#### Recital 17

(17) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that, freedom of **thought, conscience and** religion, **the freedom of expression** and the freedom of association. This Directive **does not apply** to national laws or family status, including on reproductive rights. It is without prejudice to the secular nature of the State, state institutions or bodies, or education.

#### Article 3, paragraph 2a (new)

*(2a) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context, the freedom of thought, conscience and religion, the freedom of expression and the freedom of association.*

- The Directive is inconsistent, because it repeats nearly all of Recital 17 in article 3(2) and article 3(4), but fails to repeat the important balancing rights in the enabling article (detailed above).
- The *Maruko* case has resulted in the loss of credibility, both for Recitals and for the words “without prejudice” in European legislation. The words “without prejudice” in the Directive should therefore be replaced with “does not apply”.
- We suggest that a further balancing article is needed in the Directive itself, (as opposed to an interpretative or descriptive Recital) in order to provide specifically for balancing and exceptions.

### Suggested New Article

#### Article 3 paragraph 5a (new)

*(5a) The prohibition of discrimination and the principle of equal treatment do not apply to the maintenance or adoption by Member States of measures intended to achieve balance between, or to allow exceptions for, either of the grounds of religion or belief or sexual orientation in areas of conflict between them, or between the rights of those who are characterised by those grounds, even if those conflicts should arise between two individuals or two groups who are characterised by the same ground. Member States have a duty to ensure that measures are taken to ensure that the implementation of the Directive is compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union.*

### **Freedom of Thought, Conscience and Religion**

In a democratic and free society measures need to be taken to preserve our democracy and freedom of thought, conscience and religion. The EHRC has a statutory duty to protect human rights (which includes the rights of those who profess a religion or belief) and to work towards enabling members of various different groups to participate in society. A democratic society allows a marketplace of ideas and not solely whatever happens to be the current politically-correct view.

Equality must respect diversity, including the diversity of staff, the diversity of service providers and the diversity of service delivery. Equality that respects only the service users and not the staff who provide the service is not true equality at all.

The Directive will have an indirect impact on the workplace and on businesses, as employers instruct their staff to follow the Directive due to fear of potential legal costs that have no fixed upper limit. Thus employees will not be permitted to discriminate, even in circumstances demanded by their consciences and they are likely to be dismissed if they follow their consciences rather than the Directive. Businesses are therefore likely to lose valuable members of their workforces or else they face the spectre of potentially crippling legal costs.

There have been numerous examples on the Christian Legal Centre website and elsewhere of a growing intolerance of Christian values and beliefs, often in the name of “equality” legislation or policies. If this is not stopped, people will continue to be unfairly and unnecessarily forced out of employment because of this inequality. Equality laws must avoid a hierarchy of rights, whereby the right of e.g. those of a non-conventional sexual orientation to equality of treatment “trumps” the right of e.g. religious minorities to equal treatment. It is essential, therefore, that equality legislation promotes equality of opportunity and demonstrates respect for diversity across all equality “strands”.

The following examples demonstrate the need for a measure to protect the freedom of thought, conscience and religion in this context, and in particular for a “religious conscience” measure, both in the Equality Bill and in the proposed EU Directive:

### **Examples of a Lack of Equality for Christians in the UK that have Resulted from “Equality” Legislation and Policies**

A hospital suspended a Christian nurse for offering to pray for a patient.<sup>xxxviii</sup> The daughter of a Christian primary school receptionist was scolded for talking about Jesus at school. The receptionist may be dismissed for asking for support from her church friends.<sup>xxxix</sup> A Christian foster mother has been struck off the local council's register because a 16 year-old Muslim girl in her care became a Christian.<sup>xxx</sup> BA Airlines did not allow a Christian worker to wear a small cross necklace at work. The management of a radio station dismissed a Christian radio presenter as a result of a discussion of a Muslim speaker's claim that Jesus was not the only prophet considered to be the Way, the Truth and the Life; this offended Muslims, who complained.<sup>xxxi</sup> Because they did not wish to promote homosexuality to an 11 year-old child, Christian foster parents had the child temporarily removed from their care.<sup>xxxii</sup> A magistrate was forced to resign because his employers refused reasonably to accommodate his request that he not be involved in cases where he would have to place children with same-sex carers, which arose from his conscientious objection to placing children with same-sex carers.<sup>xxxiii</sup> A Christian relationships counsellor was dismissed merely for raising the fact that he might have difficulties with providing sex therapy to same-sex couples in the future.<sup>xxxiv</sup> Catholic adoption agencies have closed rather than comply with The Equality Act (Sexual Orientation) Regulations 2007, which requires them to allow same-sex adoption. A Homelessness Prevention Officer was sacked by Wandsworth Council for encouraging a homeless woman with an incurable medical condition to look to God for help.<sup>xxxv</sup> A Homelessness Charity suspended a Christian for answering questions about his faith to a work colleague.<sup>xxxvi</sup> A school suspended a Christian teacher from a senior post because he complained that a staff training day was used to promote homosexual rights.<sup>xxxvii</sup>

Several University Christian Unions have suffered discrimination because of their adherence to core Christian beliefs. For example, in running the “PURE” course on sexual ethics, which was viewed as contrary to diversity/equality standards because it taught that sexual activity outside heterosexual marriage was not God-ordained, Edinburgh University CU attracted censorship.<sup>xxxviii</sup> There was a withdrawal of funding by a local council from a Christian home because elderly residents found questions on sexual orientation intrusive and refused to answer them.<sup>xxxix</sup> Christian and Muslim parents could face court action for removing their primary-school aged children from a week of lessons designed to celebrate “Lesbian Gay Bisexual Transgender History Month.” One story covered in a lesson was *King and King*, a



fairytale about a prince who turns down three princesses before falling in love with one of their brothers.<sup>xi</sup> Such actions may spoil a pupil's attendance record, whilst parents suffer the loss of earnings or annual leave if they have to stay at home to look after the children as a result of them being absent from school.

The cases of the school receptionist and the nurse (described above) led the Archbishop of York recently to state that:

*Those who display intolerance and ignorance, and would relegate the Christian faith to just another disposable lifestyle choice, argue that they operate in pursuit of policies based on the twin aims of 'diversity and equality'.*

*Yet in the minds of those charged with implementing such policies 'diversity' apparently means every colour and creed except Christianity, the nominal religion of the white majority; and 'equality' seemingly excludes anyone, black or white, with a Christian belief in God.<sup>xii</sup>*

## **Suggested New Article to Protect the Freedom of Conscience of Religious People**

### **Article 2 paragraph 5a (new)**

*(5a) Conduct on the part of a person or an organisation that does not conform to the principles set out in the provisions of this Directive shall not be considered to be a form of discrimination within the meaning of paragraph 1 where such conduct is motivated by moral standards based on religion or belief.*

### **Article 2 paragraph 9 (new)**

*This Directive shall not preclude differences in treatment if the difference in treatment is justified by a legitimate aim and the means of achieving that aim are rationally related to it. Such differences in treatment shall not constitute discrimination. For the purposes of this Directive, the free exercise of conscience on the grounds of religion or belief constitutes a legitimate aim.*

## **Article 2**

### **Article 2(8)**

Article 2(8) of the Directive does not include the word "morals", which is found in Articles 8.2, 9.2, 10.2 and 11.2 of the European Convention on Human Rights.

"Morals" should be included. They are relevant in determining whether the State has the right to interfere with many of the rights protected by the Convention and they were invoked in the following case:

*Bibi v. The United Kingdom*, Appl. 19628/92 9<sup>th</sup> December and 29<sup>th</sup> June 1992. The Commission upheld the UK Immigration Act 1988, which meant that a woman would not be entitled to immigrate to the UK on the basis of a polygamous marriage, if another woman had already been admitted to the UK as the wife of the same husband; the Commission found that there

was an interference with the applicant's right to respect for her family life, but held that it was justified for the protection of morals and the rights and freedoms of others).<sup>xiii</sup>

Given that the institutions of the European Union must respect the spirit and the letter of the Convention as part of the general principles of Community Law, there is no reason why the Directive cannot be more in harmony with the Convention in its protection of morals. We suggest the following amendment to achieve greater harmony:

#### Article 2, paragraph 8

##### **Current Directive**

(8) This Directive is without prejudice to general measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others.

##### **Proposed Amendment**

(8) This Directive **does not apply** to general measures laid down in national law which, in a democratic society, **are subject to only such limitations as** are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health **or morals** and the protection of the rights and freedoms of others.

#### Article 3

Article 1 of the proposed Directive, like Article 1 of the Gender Directive, should refer simply to “combating discrimination on the grounds of disability or age” in access to and the supply of goods and services. Article 3 should then exclude areas of the law that ought to remain within the province of national competence, including education, media and advertising, housing, healthcare, and transport. Transport is not currently included in the proposed Directive, but the European Parliament suggested its inclusion as an addition to Article 3 paragraph 1, subparagraph 1, point d.

Due to the definition of “services” in the case law on Article 50 EC, Article 3(1) subparagraph 1, point d must ensure that the term “services” only applies to professional or commercial activity that is done for remuneration. It should not extend to volunteers. The word “activity” should be followed by the words “that is done in exchange for remuneration” to ensure that voluntary professional work provided free of charge is not covered.

Any references to “without prejudice” in this Article and in the rest of the Directive should be replaced by “does not apply”. The *Maruko* case makes this change necessary, because in it the Court of Justice ignored a Recital containing these words, thereby weakening the effect of such words. In particular, this change should apply to Article 3(2), so that this Directive cannot apply to national laws on marital or family status and reproductive rights.

## **Article 8—Burden of Proof**

Please see comments above regarding the rule of law in the section entitled “Why the Harassment Provision in Article 2(3) Should be Removed” and regarding Recital 1.

## **Article 13**

We are concerned that the second part of Article 13 may infringe upon the freedom to associate. Article 13(b) states that there is a need to declare “any contractual provisions, internal rules of undertakings and rules governing profit-making or non-profit-making associations contrary to the principle of equal treatment” null and void or that they should be amended in order to comply with the principle. Regarding freedom of association, it has been said that:

*Article 11 of the European Convention on Human Rights protects the right of a group to associate, to meet together freely without the imposition of restrictions unless such restrictions are “necessary in a democratic society in the interests of national security or public safety.” Once again, this concept of a group of like-minded individuals being able to meet freely is one of the cornerstones of democracy.” This would have implications for Christian Unions and their freedom to determine their own rules.<sup>xliii</sup>*

The imposition of Article 13(b) would allow aggrieved parties to use the Directives in national courts as an aid to interpreting national law sympathetically as regards all types of associations (including Christian ones) on the grounds of any of the equality “strands” covered by the Directive. For example, single-sex associations would be disallowed because they presuppose discrimination on the grounds of gender. Article 4(5) of the Gender Directive specifically allows for differences in treatment on the grounds of gender, such as single-sex clubs to allow for freedom of association,<sup>xliiv</sup> whereas this proposed Directive only allows for differences in treatment on grounds of age or disability in articles 2(6) and 2(7). Is there therefore a serious omission, whereby no differences in treatment are permitted on grounds of religion or belief, or sexual orientation in the provision of goods and services, except where the measures are designed to prevent or compensate for disadvantages suffered by those groups, or to promote the special needs of those persons as specified in article 5 and recital 21. This needs to be rectified. We would suggest that the proposed Article 2 paragraph 9 (new) and Article 2 paragraph 5a (new), above, would do so.

## **Article 14**

In Article 14 we suggest removing the words “may not be fixed by the fixing of an upper limit” (see our comments above in the harassment section). If the Community is concerned about sanctions being given on the unreasonable basis of religious beliefs or beliefs on sexual ethics, then they should remove this unfair, harsh and punitive sanction.

## General Comments on the Draft Directive

### **Concerns for Churches and Religious Organisations**

We have grave concerns about the lack of protection in the Directive for churches and other organisations based on religion or belief. The wording is vague and unclear in both the Recitals and the Articles. The status of churches and religious associations and communities under national law and the respect for them referred to in Recital 19 is not adequately protected in the enabling Articles.

In our opinion, Article 3(4) of the Directive needs to be changed to state that the Directive does not affect national legislation concerning the status and activities of churches and other religious organisations **or religious associations or communities**. This is because Recital 19 also refers to religious associations or communities in order to avoid any regression of rights for these groups in different Member States.

We note that although this Directive covers religion, it does not mention The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, United Nations General Assembly Resolution 36/55,<sup>xiv</sup> which is relevant to this growing intolerance of religion. Its provisions should therefore be incorporated into the Directive by reference. This is especially necessary, because the Recitals of the Directive mention a UN Convention on the Rights of Persons with Disabilities in recitals 2 and 19 and the European Year of Persons with Disabilities in Recital 4. It even mentions Article 3(2) EC in relation to equality between men and women despite the fact that this Directive does not even relate to gender matters. Surely apart from a mention of the Amsterdam Treaty in recital 19, there should be at least a mention of this UN Resolution on religion or belief, which is after all one of the grounds for the elaboration of the Directive.

This is what one of the relevant Articles of that Declaration states:

#### **Article 4**

*1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.*

### **Amendments Advised by the European Parliament**

The Government consultation does not deal with these proposed amendments. We understand that such amendments have only advisory status. However, we have grave concerns about many of these amendments and request that the Government consult the public prior to accepting any changes that adopt any of these amendments. Many of the proposed amendments would cause churches and religious organisations and faith schools great difficulties in functioning. They also infringe various treaties and conventions, such as Declaration No 11 of the Amsterdam Treaty<sup>xvii</sup> for churches and religious associations or communities in Member States.

The amendments recommended by the European Parliament on access to faith schools appear to be contrary to the exceptions that actually allow for differences in treatment on religious or linguistic grounds in schools in keeping with parental wishes, to be found in Article 2(b) of

the Convention against Discrimination in Education, which does not add all of these suggested provisos.<sup>xlvii</sup> It also appears to be contrary to the EU Charter of Fundamental Rights (Article 14(3)),<sup>xlviii</sup> which states that parents have the right to “ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions”. The Directive itself in Recital 3 says that its provisions respect this particular Charter.

### **Family and Marriage and the Proposed Directive**

The Commission last year stated that the “recognition of marital or family status, adoption, reproductive rights and other similar questions are best decided at national level.”<sup>xlix</sup> The Explanatory Memorandum that precedes the current proposed Directive<sup>l</sup> affirms that “Member States remain free to decide whether or not to institute and recognise legally registered [civil] partnerships. However, once national law recognises such relationships as comparable to that of spouse then the principle of equal treatment applies”. From a religious point of view, marriage and same-sex civil partnership are not equivalent: one is a legal and religious institution, the other a legal ceremony only and they are treated differently in the UK. Assurances were given in the UK when civil partnerships were introduced that they would not be equivalent to same-sex marriage.

Case law in the UK has failed to recognise foreign same-sex “marriages”, due to the distinction between the legal vehicles for civil partnerships and marriage and also because marriage is recognised as being between a man and a woman.<sup>li</sup> The original Commission proposal for a Directive may well lead to pressure to recognise legally-registered, same-sex partnerships as homosexual “marriage” in EU Member States that have not accepted it, contrary to profoundly-held religious beliefs in Holy Matrimony. This would appear to be a breach of Article 9 rights. This Directive will be negotiated under the Swedish Presidency. Homosexual “marriages” have been allowed in Sweden since 1<sup>st</sup> May 2009.<sup>lii</sup> Newspapers are already incorrectly making reference to the terminology of “marriage” when it is a term reserved for the joining of a man and a woman and is not gender-neutral.

In our opinion, to avoid confusion in the division of competence between the EU and Member States and to provide clarity, the Directive should state clearly that the Directive “shall not apply to national laws on marital or family status including reproductive rights”.

“Equality” should mean respecting the diversity of values, but instead it is being used to oppress the church and Christian values. We are extremely concerned that in the UK those asserting rights in connection with sexual orientation have seen their rights trump the rights of those with a religious conscientious objection. This situation has led to the closure of Roman Catholic Adoption agencies in the UK. However, the Commission recommended that such matters as adoption are best decided at national level. The fact that different nations can interpret such laws in different ways means that there is no need for adoption agencies to have to close down here.

The GEO consultation does not ask about the European Parliament amendments which are only of advisory status. However, we note with concern that the European Parliament advised in recital 17<sup>liii</sup> and article 3(2)<sup>liv</sup> that the exception for national determination of the law relating to marriage or family status including reproductive rights is removed and replaced by an overall promotion of EU determination in every area covered by the Directive. It actually says that the Directive does not alter the division between EU competence and its

Member States. However, it will clearly be argued that these areas are within the competence of the EU, as the *Maruko* case<sup>lv</sup> applied the principle of equal treatment to same-sex pensions. This loss of national competence in the areas of marriage and family law is likely to force religious adoption agencies across Europe to close with a loss of respect for the diversity of the religious views of each state on such issues. In the field of reproductive rights, this EU policy may well lead to two-mother families being given IVF treatment, ignoring the child's need for a father (which has already happened as a result of legislation in the UK),<sup>lvi</sup> as well as same-sex-couple adoption and fostering applying Europe-wide. This does not respect Europe's diversity. We would ask the GEO to ensure that the advisory amendments suggested in this area by the European Parliament are not agreed to and to consider a reversal of the national legislation that resulted in Roman Catholic Adoption agency closures in the Equality Bill.

### **CCFON Impact Assessment**

The Directive is likely to have a devastating impact upon Christians across Europe. It will result in job losses because employers, in order to avoid infringing the Directive, will insist that their employees provide services that promote other faiths or sexual ethics that are contrary to their religious beliefs. The lack of balances, exceptions or protection for the religious conscience in the Directive, together with its vague wording regarding religious individuals and faith groups, is likely to result in a lack of protection for churches and other religious organisations who are likely to be required to promote homosexuality or to allow other religious groups to use their facilities, contrary to their core religious beliefs. This may lead to more cases where Article 9 of the European Convention on Human Rights is pleaded, but even here the Directive muddies the waters, for example, in Recital 18, where Member States may allow or prohibit the wearing or display of religious symbols at school. Ironically, a Directive designed to prohibit religious discrimination may well result in more discrimination being perpetrated indirectly. The Directive should remove both "sexual orientation" and "religion or belief" from its first Article. Both would need to be removed, otherwise an unfair hierarchy of rights would continue to develop.

The EU Impact Assessment for this Directive assumed that 3% of the European population—were LGB people,<sup>lvii</sup> compared to 84% of the EU population who consider themselves to be one sort of Christian or another.<sup>lviii</sup> The EU Impact Assessment uses the un-substantiated argument that the changes resulting from this Directive will prevent the loss of income in later life for LGB people as a result of preventing school bullying to justify the arguments in favour of the changes to be made by the Directive. As shown in this response, the level of 'homophobic' bullying is lower than the generic percentage of pupils bullied. In addition, the "Getting Equal" consultation on the sexual orientation regulations in Britain pointed to surveys concluding that: "the average annual salaries of lesbians and gay men are up to £10K higher than the national average with a greater proportion of salary being spent on disposable items and leisure, including holidays".<sup>lix</sup>

These changes may well have an enormous and detrimental economic impact in terms of loss of GDP if Christians lose their jobs and have to claim welfare benefits as a result of standing up for their core religious beliefs. The inter-relationship between the provision of goods and services and the workplace does not even appear to have been considered in documents produced in connection with the proposed Directive, nor does its economic impact.

It would be far better not to include either “religion or belief” or “sexual orientation” in this Directive as the potential conflicts between protections for such issues have not been properly resolved or considered.

### **The Business Sector’s Views on the Directive and Equality Legislation**

The EU impact assessment for the Directive argues that it is difficult to provide reliable and comprehensive information on the costs of discrimination or of the measures to combat it.<sup>lx</sup> However, *Business Europe’s* submission mentioned that a recent German University study implies that new German laws transposing EU Directives resulted in German companies spending an extra €1.73bn annually on compliance. These costs were seen in some cases to be “disproportionate to the number of potential discrimination cases”. In the UK in 2005, the updating of just a single strand of equality law in the Sex Discrimination Act is likely to have cost small employers between £6.3m and £9.5m if they spent only 10-15 minutes reading the guidance.<sup>lxi</sup> This led to the comment that the Government should consider compensating small firms.<sup>lxii</sup>

The EU Impact Assessment stated that business representatives were opposed to the new legislation in principle, which they saw as increasing red tape and costs. *Business Europe*<sup>lxiii</sup> took the view that there was no evidence of discrimination on any of the grounds covered by Article 13 of the Treaty. *Business Europe* also stated that caution should be exercised in relation to the interpretation of the online public consultation, “as the way most of the questions were drafted were biased pointing to the need for further EU legislation, and not allowing for an informed discussion on whether legislation is indeed the most suitable way forward or not”. These comments were not included in the EU Impact Assessment.

Bringing in such a Directive at a time when businesses are struggling to survive, where the burden of proof would be on them in court to prove that they did not discriminate, and where rules more favourable to the claimant (such as the absence of an upper limit on the compensation payable) are proposed, is plainly a course of action that cannot be recommended, especially from the perspective of increasing the regulatory burden on companies.

### **Harassment**

We strongly disagree with the idea of harassment being included in the Directive—it should be removed. The provisions of goods and services entail fleeting encounters and are not the same as an employment situation, which a person encounters daily. Such “equal treatment” provisions are totally inappropriate in “goods, facilities and services” situations.

### **Under 18s excluded from the Directive**

The Directive refers to age discrimination but has no further clarification as regards young people. We do not believe that the Directive should extend to the under 18’s and this point should be included in the Directive. First of all, children are at various different stages of growth and maturity, and giving legal rights against discrimination to a child is not at all

appropriate, as children do not have the life experience needed to judge what is, and what is not appropriate discrimination. Moreover, to bestow such rights on children unilaterally, infringes the responsibilities and prerogatives that parents have in connection with the upbringing of their children. Just as contract law enables adults to contract for the provision of goods and services and requires them to be bound, but does not bind children because they do not have the capacity to contract, so too should the Directive apply to adults and not to children. Children, particularly during adolescence, can easily allege that they have been discriminated against or treated less favourably simply because they do not like the necessary rules being imposed upon them.

We agree with the Government's position concerning the Equality Bill, namely that it should not extend to persons under 18 years of age. The Directive should be amended to make this clear.

### **The Equality Strands in the Directive**

We have no objection to the Directive's application to the strands of disability or age. However, we believe that "sexual orientation" and "religion or belief" should both be removed from the Directive. If sexual orientation is retained, religion should be also, as there is already a hierarchy of rights developing, whereby those of a homosexual, bisexual or transgender orientation are better protected than those who adhere to a religion. We would like to see the Directive returned to its original scope, so that it covers only the non-contentious issues of disability. We also wish to see "sexual orientation" and "religion or belief" removed from the Directive.

### **Further Action the Government should be taking on the Directive**

There are considerable problems with this Directive. There are now many examples of unfair suspensions or dismissals of Christians and the lack of a fair, reasonable and proportionate approach. The majority of service provision does not result in any conflict between the rights of different groups. Even in specialised services such as that of a local authority registrar, 92% of the work to be done involves registering marriages rather than conducting civil partnership ceremonies. Therefore, a public authority could easily timetable rotas so that a registrar did not have to act contrary to his or her conscience. The argument that 100% of service provision needs to be non-discriminatory for all services is unfair on service providers (who are customers with a different "hat" on) and destroys diversity. Equality needs to allow for diversity as well. Equality and diversity only for service users and not for staff is no equality at all.

There are many causes of concern: additional red tape contrary to the Hampton Principles; infringement of the principle of subsidiarity; and vague wording for religious organisations and churches, all of which could seriously erode the fundamental rights of religious people. That is sufficient reason in itself not to proceed with this Directive.

There is a great need for the Government to support religious rights when there is intolerance; indeed, it is part of their function to do so. A *Sunday Telegraph* poll on the 30<sup>th</sup> of May 2009<sup>lxiv</sup> found that thousands of Christians say they have missed out on promotion simply



because of their faith. “Nearly three out of four of those questioned said that there is less religious freedom in the UK now than 20 years ago, and one in five said persecution of Christians is worse in this country compared to other European nations.”

## **Dual or Multiple Discrimination**

We object to “multiple discrimination” being introduced either into the Directive or into the Equality Bill and have produced a consultation response detailing our concerns.<sup>lxv</sup> We are very concerned that the Government has passed provisions in the Equality Bill on dual discrimination in a small Public Bill Committee and not on the floor of the House, where a wider-ranging debate could be brought to bear on it. The consultation responses are not even due to be published until the summer. Respondents to any Government consultation have the legitimate expectation that no such action should be taken prior to responses being made publicly available.<sup>lxvi</sup> The consultation only covered the effect of dual discrimination on businesses and not its general application. The concept of “dual” or “multiple” discrimination lacks legal clarity, and a fair and proper evidential basis, and goes against the stated aim of the Equality Bill to simplify equality law. It is doubtful if those who responded to the consultation even fully understood what “intersectional multiple discrimination” actually means.

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<sup>i</sup> See Article 9 of the European Convention on Human Rights in the Human Rights Act 1998 at: [http://www.opsi.gov.uk/ACTS/acts1998/ukpga\\_19980042\\_en\\_3](http://www.opsi.gov.uk/ACTS/acts1998/ukpga_19980042_en_3).

<sup>ii</sup> See: <http://www.ccfon.org/view.php?id=800>.

<sup>iii</sup> See: <http://www.dailymail.co.uk/news/article-1163810/Gay-couple-sue-Christians-barring-hotel-bed.html> and <http://www.christianpost.com/article/20090323/gay-couple-sues-christian-hotel-owners-for-refusing-them-double-room/index.html>.

<sup>iv</sup> See: <http://www.telegraph.co.uk/news/newstoppers/religion/3999004/Care-home-for-elderly-Christians-in-gay-row.html> and <http://www.mailonsunday.co.uk/news/article-1102206/Home-retired-missionaries-loses-grant--wont-ask-residents-lesbians.html> and <http://www.christian.org.uk/pressreleases/2009/02february/08bfeb09.html>.

<sup>v</sup> See: <http://www.telegraph.co.uk/news/newstoppers/religion/5055107/Head-of-Roman-Catholic-church-in-England-urges-faithful-to-remain-brave.html>.

<sup>vi</sup> Moreover, we strongly oppose including one in the laws of the UK.

<sup>vii</sup> Please see, for example, our answer to question 2 regarding the chilling effect such a provision has on free speech.

<sup>viii</sup> See also our answer to question 3 and our further explanation below under the title “Why the Harassment Provision in Article 2(3) of the Directive Should be Removed”.

<sup>ix</sup> See: <http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html> and <https://wiki.qut.edu.au/display/CPNS/Catch+the+Fire+Ministries+Inc+v+Islamic+Council+of+Victoria+Inc>. (Catch Fire Ministries successfully appealed this case in the Court of Appeal).

<sup>x</sup> See for example the case of *Aktien-Zuckerfabrik Schöppenstedt v. Council* (case 5/71).

<sup>xi</sup> See Neil Parpworth in *Constitutional & Administrative Law*, Oxford, OUP, 4<sup>th</sup> ed. 2006 at pp. 33-34.

<sup>xii</sup> Summary of legal advice of Mr James Dingemans QC, 20 October 2008: <http://www.christian.org.uk/issues/2008/eudirective/dingemansopinion.pdf>.

<sup>xiii</sup> Harassment on grounds of religion or belief was not in the Equality Act 2006 and neither was it in the Equality Act (Sexual Orientation) Regulations 2007—because it was not deemed to be appropriate in the context of the provision of goods and services, as agreed in the debate in the House of Lords. In the House of Lords, considerable concern existed during the passage of the Equality Act 2006 about the difficulty of establishing the threshold for what would constitute harassment by a provider of goods or services. The importance of balancing an individual's basic human rights to freedom of speech and expression with the need to protect individuals from acts that violate their dignity was seen as an important element in this debate. (See point 4.13 at: <http://www.communities.gov.uk/documents/corporate/pdf/565863.pdf>.) The harassment provision was struck out in parallel regulations regarding sexual orientation by the High Court in Northern Ireland because of its scope, lack of proper consultation and the added consideration when the offending matter is grounded in

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religious belief. See paragraph 43 at: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/nie/cases/NIHC/QB/2007/66.html>. Thus, important concerns exist surrounding any introduction of harassment on the grounds of religion or belief and sexual orientation outside the context of employment law.

<sup>xiv</sup> See *Fletcher v Salvation Army Australia* [2005] VCAT 1523 (1 August 2005).

<sup>xv</sup> See: [www.christian.org.uk/issues/2009/freespeechclause/arvideo\\_08jun09.htm?e080609](http://www.christian.org.uk/issues/2009/freespeechclause/arvideo_08jun09.htm?e080609).

<sup>xvi</sup> See an image of leaflet at: [http://www.christian.org.uk/html\\_emails/2009/images/easterinvite\\_600px.jpg](http://www.christian.org.uk/html_emails/2009/images/easterinvite_600px.jpg) and [http://www.christian.org.uk/issues/2009/freespeechclause/jhvideo\\_22jun09.htm?e220609](http://www.christian.org.uk/issues/2009/freespeechclause/jhvideo_22jun09.htm?e220609).

<sup>xvii</sup> See: [http://www.stonewall.org.uk/education\\_for\\_all/research/1790.asp](http://www.stonewall.org.uk/education_for_all/research/1790.asp).

<sup>xviii</sup> See: [http://www.bullying.co.uk/parents/National\\_Bullying\\_Survey\\_2006/Children.aspx](http://www.bullying.co.uk/parents/National_Bullying_Survey_2006/Children.aspx).

<sup>xix</sup> See the Solicitor General's comments at column 321:

<http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090511/debtext/90511-0008.htm>.

<sup>xx</sup> See the provisional report of the debate of 1<sup>st</sup> April 2009 relating to *Equal treatment of persons irrespective of religion or belief, disability, age or sexual orientation* at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090401+ITEM-014+DOC+XML+V0//EN&language=EN>.

<sup>xxi</sup> See the related link for the *Communication on Non-discrimination and Equal Opportunities: A Renewed Commitment* at page 5: <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=373>.

<sup>xxii</sup> See: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0211&language=EN&ring=A6-2009-0149>.

<sup>xxiii</sup> See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61986J0263:EN:HTML> and [http://europa.eu/abc/treaties/index\\_en.htm](http://europa.eu/abc/treaties/index_en.htm).

<sup>xxiv</sup> See: [http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E\\_EN.pdf](http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf).

<sup>xxv</sup> Case C-267/06 *Tadao Maruko Versorgungsanstalt der deutschen Bühnen* at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0267:EN:HTML>.

<sup>xxvi</sup> Summary of legal advice of Mr James Dingemans QC, 20 October 2008:

<http://www.christian.org.uk/issues/2008/eudirective/dingemansopinion.pdf>.

<sup>xxvii</sup> See page 10 Equality Impact Assessment of the Equality Act (Sexual Orientation) Regulations 2007 at:

<http://www.communities.gov.uk/documents/corporate/pdf/equalityimpactassessment.pdf>.

<sup>xxviii</sup> See: <http://www.ccfon.org/view.php?id=684>.

<sup>xxix</sup> See: <http://www.ccfon.org/view.php?id=689>.

<sup>xxx</sup> See: <http://www.ccfon.org/view.php?id=685>.

<sup>xxxi</sup> See: <http://www.ccfon.org/view.php?id=671>.

<sup>xxxii</sup> See: <http://www.ccfon.org/view.php?id=182>.

<sup>xxxiii</sup> See: <http://www.ccfon.org/view.php?id=37>.

<sup>xxxiv</sup> See: <http://www.ccfon.org/view.php?id=783>.

<sup>xxxv</sup> See: <http://www.ccfon.org/view.php?id=716>.

<sup>xxxvi</sup> See: <http://www.christianlegalcentre.com/view.php?id=723>.

<sup>xxxvii</sup> See: <http://www.christianlegalcentre.com/view.php?id=729>. (He was later reinstated).

<sup>xxxviii</sup> See: <http://www.christianlegalcentre.com/view.php?id=69>.

<sup>xxxix</sup> See: <http://www.telegraph.co.uk/news/newstopics/religion/3999004/Care-home-for-elderly-Christians-in-gay-row.html>.

<sup>xl</sup> See: <http://www.dailymail.co.uk/news/article-1160067/Parents-face-court-action-removing-children-gay-history-lessons.html>.

<sup>xli</sup> See: <http://www.archbishopofyork.org/2174?q=daily+mail>.

<sup>xlii</sup> See extract at: <http://www.justice.gc.ca/eng/dept-min/pub/poly/ref.html>.

<sup>xliii</sup> See: <http://www.lawcf.org/index.asp?page=Christianity+Under+Attack>.

<sup>xliv</sup> See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:EN:PDF>.

<sup>xlv</sup> See: [http://www.unhchr.ch/html/menu3/b/d\\_intole.htm](http://www.unhchr.ch/html/menu3/b/d_intole.htm).

<sup>xlvi</sup> See the Treaty of Amsterdam: <http://www.eurotreaties.com/amsterdamfinalact.pdf>.

<sup>xlvii</sup> See: [http://www.unhchr.ch/html/menu3/b/d\\_c\\_educ.htm](http://www.unhchr.ch/html/menu3/b/d_c_educ.htm).

<sup>xlviii</sup> See: [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>lix</sup> See also a related link: *Communication on Non-discrimination and Equal Opportunities: A Renewed Commitment* at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=373>.

<sup>l</sup> See the Explanatory Memorandum that pre-dates the proposal, explaining Article 3, at page 8, at:

[http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/dv/com\(2008\)426\\_/com\(2008\)426\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/com(2008)426_/com(2008)426_en.pdf).

<sup>li</sup> In London, Celia Kitzinger and Sue Wilkinson asked the court to recognise their foreign same-sex marriage, but the court refused to do so, see: <http://www.bailii.org/ew/cases/EWHC/Fam/2006/2022.html>. There was a similar

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case in Ireland by Katherine Zappone and Ann Louise Gilligan:

<http://www.bailii.org/ie/cases/IEHC/2006/H404.html>.

<sup>lii</sup> See: <http://news.bbc.co.uk/1/hi/world/europe/7978495.stm>.

<sup>liii</sup> See amendment 28 amongst the advisory changes voted for by the European Parliament on 2<sup>nd</sup> April 2009. The provisional edition text as at 6<sup>th</sup> April 2009 can be found at the following link headed: “*Equal treatment of persons irrespective of religion or belief, disability, age or sexual orientation*” (scroll approx. ¾ of the way down):

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+20090402+ITEMS+DOC+XML+V0//EN&language=EN#sdocta16>.

<sup>liiv</sup> See amendment 50 amongst the advisory changes voted for by the European Parliament on 2<sup>nd</sup> April 2009. The provisional edition text as at 6<sup>th</sup> April 2009 can be found in the following link headed: “*Equal treatment of persons irrespective of religion or belief, disability, age or sexual orientation*” (scroll approx. ¾ of the way down):

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+20090402+ITEMS+DOC+XML+V0//EN&language=EN#sdocta16>.

<sup>liv</sup> See Case C-267/06 *Tadao Marukov Versorgungsanstalt der deutschen Bühnen* at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0267:EN:HTML>.

<sup>lvi</sup> See: [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH\\_080205](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_080205).

<sup>lvii</sup> See the reference on page 17 to figure of 3% for assessing costs in the EPEC study: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:2180:FIN:EN:PDF>.

<sup>lviii</sup> See pages 17 and 19: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:2180:FIN:EN:PDF>.

<sup>lix</sup> See *Getting Equal: Proposals to Outlaw Sexual Orientation Discrimination in the Provision of Goods & Services* at: <http://www.communities.gov.uk/archived/publications/corporate/gettingequalproposals>.

<sup>lx</sup> See page 5 at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:2180:FIN:EN:PDF>.

<sup>lxi</sup> See point 160 at: <http://www.berr.gov.uk/files/file13952.pdf>.

<sup>lxii</sup> See: [http://www.accaglobal.com/publicinterest/activities/policy\\_papers/archive/business/2371858](http://www.accaglobal.com/publicinterest/activities/policy_papers/archive/business/2371858).

<sup>lxiii</sup> See letter to Belinda Pyke dated 12<sup>th</sup> October 2007 at:

<http://www.businesseurope.eu/Content/Default.asp?pageid=426>.

<sup>lxiv</sup> See the article in *The Sunday Telegraph* and the Comres poll—“Christians risk rejection and discrimination for their faith a study claims” at: <http://www.telegraph.co.uk/news/newstoppers/religion/5413311/Christians-risk-rejection-and-discrimination-for-their-faith-a-study-claims.html>.

<sup>lxv</sup> See: [http://www.ccfon.org/docs/Multiple\\_Discrimination\\_Consultation.pdf](http://www.ccfon.org/docs/Multiple_Discrimination_Consultation.pdf).

<sup>lxvi</sup> See a discussion of the case law on the need to consult properly in this case: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/nie/cases/NIHC/QB/2007/66.html>.