

The proposed EU “equal treatment” directive

How the UK gives other EU member states a glimpse of the future

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Abstract

This article examines the key provisions of a proposed radical European Union “non-discrimination” directive and compares the draft law with similar laws that have already been passed in the United Kingdom. By outlining the significant limitations on freedom of religion that have resulted from the passing of similar laws in the UK, the article seeks to accurately predict the path that other EU countries will follow if the proposed directive is adopted.

Keywords Religious freedom, European Union, non-discrimination, sexual orientation, provision of goods and services.

Lying dormant, somewhere within the inner machinery of the European Union, a draft piece of community law awaits its resurrection. If adopted, the proposed Council Directive 2008/0140 “on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation”, will expand EU discrimination law from employment into the provision of goods and services.² Given its potentially far-reaching scope and a number of

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² It thus builds on Directive 2000/43/EC of 29 June 2000 and Directive 2000/78/EC of 27 November 2000. Directives require the 27 Member States of the EU to achieve a particular result without dictating the exact means of achieving that result.

controversial articles, the draft law has been stayed for nearly three years. Some Member States have had a “cool” reaction to the possible introduction of yet more EU non-discrimination law,³ business leaders have pointed to the large costs involved in its implementation⁴ and one commentator even claimed the Directive is “an instrument with potential for cultural genocide.”⁵

As with all draft laws that are considered for implementation, discussions invariably revolved around the likely consequences of enactment. When, over a decade ago, the employment equality Directive was debated,⁶ some warned that “the harm caused by this Directive far outweighs any benefit that may accrue for religious people”⁷ and that it “placed the modern concept of ‘equality’ over and above religious liberty.”⁸ Such concerns were ignored. The fears were entirely unfounded, we were told.

However, in regard to the present Directive, it is not necessary to rely merely on legal predictions – however accurate they may have been – for successive governments in the United Kingdom have pre-empted the Proposed Directive and already legislated for much of what it seeks to achieve. Non-discrimination legislation has expanded into the provision of goods and services, a compliance body tasked with monitoring and enforcing the new legislation has been created and a “duty” on the public sector to promote equality has been imposed.

It is therefore possible, with a reasonable degree of clarity, to predict what will unfold in other EU Member States should the Proposed Directive be adopted, based on an assessment of the law in the UK. This article will analyze some of the most problematic provisions of the Proposed Directive, comparing the provisions with legislation already passed in the UK. Specifically, this article will address: (1) the concepts of “sexual orientation” and “religion or belief”; (2) the threat posed to religious freedom; (3) the so-called “promotion of equal treatment”, and (4) the outlawing of “harassment” in the provision of goods and services – a significant way in which the Proposed Directive develops non-discrimination law even further than the UK law.

³ L. Waddington, “Future prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive”, *E.L. Rev.* 2011, 36(2), 163-184 at 182.

⁴ 3 On 27 May 2009, the EU employers’ group BusinessEurope called on the EU to withdraw the Proposed Directive, citing the “extra burden” the Directive would place on already strained businesses.

⁵ See Professor William Wagner, “Information and Action Pack on the European Union ‘Equal Treatment’ Directive”, *CCFON*, September 2009, p.1.

⁶ Directive 2000/78/EC of 27 November 2000.

⁷ “European threat to religious freedom, a response to the EU’s proposed Employment Directive”, *The Christian Institute*, June 2000, p.20.

⁸ *Id.* Per Ian Leigh, p.4.

1. “Sexual orientation” and “religion or belief”

The Proposed Directive lays down a framework for combating discrimination on the grounds of, *inter alia*, religion or belief and sexual orientation in fields other than employment and occupation. However, a major difficulty with elevating “sexual orientation” to a highly protected status is that it is not at all clear what is meant by the phrase “sexual orientation” or what is being protected. Indeed it is questionable whether the phrase “sexual orientation” is anything more than “a jargon that has surfaced in the Lesbian, Gay, Bisexual and Transgender (LGBT) movement a decade and a half ago at the earliest, and the meaning of which is uncertain.”⁹

Unsurprisingly, attempts to define sexual orientation and the subsequent protections afforded to it inevitably run into difficulties. In particular, it is not clear whether “sexual orientation” refers to a person’s sexual *attractions* or the *practice* of such attractions. While the European Court of Human Rights has suggested that “sexual orientation” is comparable to protections based on sex or race¹⁰ – presumably on the basis of the so-called “immutability” of “sexual orientation”¹¹ – such comparisons must surely break down once the definition of “sexual *orientation*” automatically includes sexual *practice*. Indeed, it does not make sense to talk of the practice of being male, or the practice of being white, whereas one’s sexual attractions (immutable or not) and acting upon those sexual attractions in sexual practice are clearly distinguishable.

When the predecessor to the Proposed Directive was being drafted, it originally stated that: “With regard to sexual orientation, a clear dividing line should be drawn between sexual orientation, which is covered by this proposal, and sexual behaviour, which is not.”¹² Regrettably, this provision was later removed and the extent to which “sexual orientation” is protected, or the manifestation of “sexual orientation” in the form of sexual practice, remains unclear.

In the UK at least, the courts appear to have taken the view that sexual *practice* is as equally protected as sexual *orientation*. In 2004 the High Court held that: “The

⁹ Jakob Cornides, “A Brief Commentary On The Yogyakarta Principles”, 2009 at p.2.

¹⁰ For example, see *Karner v. Austria* (2004) 38 E.H.R.R. 24 at § 37 and *EB v. France* [2008] 47 E.H.R.R. 21 at §§ 71, 90.

¹¹ The “immutability” of sexual orientation is highly questionable. To date, the claim has not been supported by scientific evidence and many supporters of homosexual behaviour state quite the opposite. In the UK, prominent advocate of homosexual behaviour, Peter Tatchell, has stated: “It [homosexuality] is a choice, and we should be glad it’s that way and celebrate it for ourselves” *The Guardian*, 25 April 1999. For one piece of scientific study, see Robert L. Spitzer, “Can some gay men and lesbians change their sexual orientation? 200 participants reporting a change from homosexual to heterosexual orientation”, 32 *Archives of Sexual Behavior*, 403 (2003).

¹² See Commission of the European Communities, Brussels, 25.11.1999, COM(1999) 565 final, 1999/0225 (CNS), p.8.

protection against discrimination on grounds of sexual orientation relates as much to the manifestation of that orientation in the form of sexual behaviour as it does to sexuality as such. Sexual orientation and its manifestation in sexual behaviour are both inextricably connected with a person's private life and identity."¹³ Furthermore, a Justice of the Supreme Court stated in 2010 that the protection afforded to sexual orientation includes the "right to live freely and openly as a gay man."¹⁴ What, one may ask, does living openly as a gay man mean in practice? Fortunately the Justice continued: "Male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates."¹⁵ Such is the confusion over the term "sexual orientation".

Another of the Supreme Court Justices stated that: "The group is defined by the immutable characteristic of its members' sexual orientation or sexuality. This is a characteristic that may be revealed...by the way the members of this group behave ... To pretend that ... the behaviour by which it manifests itself can be suppressed, is to deny the members of this group their fundamental right to be what they are."¹⁶ Hence, it is clear that the phrase "sexual orientation" is being interpreted far more widely than mere orientation.¹⁷

On the contrary, with regard to religion or belief, the UK courts have consistently drawn a distinction between religious *belief* and the manifestation of that belief in religious *practice*.¹⁸ Thus, when religious believers wished to manifest their deeply held convictions on marriage, they have been denied. Given that the source of protection from religious discrimination and protection from "sexual orientation" discrimination is identical and the wording used to describe the protection is identical, it is hard to see how different tests could be applied.¹⁹

¹³ *R (on the application of Amicus - MSF section and others) v. Secretary of State for Trade and Industry* [2004] IRLR 430 at § 432.

¹⁴ *HJ (Iran) (FC) (Appellant) v. Secretary of State for the Home Department*, [2010] UKSC 31, per Lord Roger, at § 78. The case involved immigration and not discrimination. Nevertheless, the comments are illuminating.

¹⁵ *Id.*

¹⁶ *Id.*, per Lord Hope at § 11.

¹⁷ Other jurisdictions have adopted a similar view. For Canada, see: *Hugh Owens v. Saskatchewan Human Rights Commission*, 2006 SKCA 41 § 82 and for Australia, see: *Cobaw Community Health Service v. Christian Youth Camps Ltd & Anor (Anti-Discrimination)* [2010] VCAT 1613 (8 October 2010) at § 193.

¹⁸ For example, citing *Sahin v. Turkey* (2007) 44 EHRR 5 at § 105, it was held in *Ladele v. London Borough of Islington* [2009] EWCA Civ 1357 that: "Art 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account."

¹⁹ See "Analysis of *Johns v Derby City Council* (2011)", *The Lawyers' Christian Fellowship*, March 2011, p.4.

The differing interpretations are even more difficult to justify given that “sexual orientation” is without mention in almost all human rights documents and by contrast, freedom of religion has been recognized as a fundamental human right in all of the post-Second World War international human rights instruments.²⁰ Indeed, the European Court of Human Rights has declared that freedom of religion “is one of the foundations of a ‘democratic society’” and without the freedom to manifest one’s beliefs, it “would be likely to remain a dead letter.”²¹

Therefore, where sexual orientation is conflated with sexual practice and lifestyle, there will inevitably be “a conflict of rights” between religious believers who wish to uphold the traditional view of sex and marriage with their actions, and those who claim that such actions are discriminatory on the basis of sexual orientation. This “clash” consistently results in the restriction of religious freedom as one “right” invariably trumps the other: freedom to *practice* sexual orientation trumps freedom to *believe* that homosexual practice is wrong. If the Proposed Directive is adopted, such tensions will move from the realm of the workplace and into the marketplace, and, as has been demonstrated in the UK, new areas of religious freedom will be threatened.

2. The threat to religious freedom

The UK passed similar laws to the Proposed Directive in the Equality Act 2006 and the Equality Act (“Sexual Orientation”) Regulations 2007 – now incorporated into the Equality Act 2010. While there is a vital exemption to the general prohibition against discrimination for religious organizations when providing goods or services – as accounted for in Article 3(4) of the Proposed Directive²² – this can only be relied upon in limited circumstances and is not wide enough to cover many situations.²³ Where the exemption does not apply, religious freedom has been severely restricted.

2.1 Individuals, non-religious organizations and commercial organizations are not exempt

First, there are no exemptions for individuals, organizations that are not considered “religious” or commercial organizations. This has led to religious people who pro-

²⁰ For example, Universal Declaration of Human Rights (1948), article 18; European Convention on Human Rights (1950), article 9; International Covenant on Civil and Political Rights (1966), article 18; American Convention on Human rights (1969), article 12; African Charter on Human and Peoples’ Rights (1981) article 8.

²¹ ECHR, *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, at § 31.

²² “This Directive is without prejudice to ... the status and activities of churches and other organisations based on religion or belief.”

²³ See Schedule 23(2) Equality Act 2010.

vide goods and services to be sued for acting upon their deeply held religious convictions. For example, guesthouse owners, Peter and Hazelmary Bull, have recently been successfully sued by a same-sex couple for refusing to offer them double bedded accommodation.²⁴ Mr. and Mrs. Bulls had a policy in place since 1986 which stated "... as Christians we have a deep regard for marriage (being the union of one man to one woman for life to the exclusion of all others). Therefore, although we extend to all a warm welcome to our home, our double bedded accommodation is not available to unmarried couples – Thank you."²⁵ In 2009, a same-sex couple was refused a double room and subsequently issued a civil claim for allegedly being discriminated against on the ground of "sexual orientation". The Bulls were forced to pay £3,600²⁶ in damages and, having recently lost their appeal,²⁷ their guesthouse now faces closure.²⁸ Other Christian guesthouses are facing a similar fate.²⁹

Moreover, the religious exemption does not apply "where the sole or main purpose of the organisation is commercial."³⁰ The meaning of this phrase has not yet been considered in case law, although it has been predicted that determining whether or not an organisation is solely or mainly commercial "may lead to a great deal of litigation".³¹ Indeed, when this issue was first debated the UK government admitted that, "there will be a number of areas where the court ends up having to determine whether [the commercial purpose] is the main or subsidiary purpose."³²

As a result of the provision, a printing business that does not wish to print materials contrary to the core beliefs of its owners could be sued under the legislation³³ as well as organisations that offer preferential rates to certain individuals such as Christian missionaries.³⁴ It is likely that in the future, as the laws begin to take effect, many other examples will become apparent.³⁵ Hence, the law has a greater reach than is desirable and by not providing an exemption to organisations which

²⁴ *Hall and Preddy v. Bull and Bull*, Case No 9BS02095, 18 January 2011.

²⁵ *Id.*, at § 11.

²⁶ *Id.*, at § 60.

²⁷ *Bull and Bull v. Hall and Preddy and Hall* [2012] EWCA Civ 83.

²⁸ See *The Daily Mail*, 21 January 2011.

²⁹ See the case of Mr. and Mrs. Wilkinson. *The Daily Telegraph*, 15 May 2010.

³⁰ Schedule 23(2)(2) Equality Act 2010.

³¹ Addison N, *Religious Hatred and Discrimination Law*, (Routledge Cavendish: 2007), p.53.

³² Baroness Scotland of Asthal, House of Lords, *Hansard*, Col. 1164, 13 July 2005.

³³ For example, see the case of *Ontario Human Rights Commission v. Brockie* [2002] 22 DLR (4th) 174 involving printed promotional material, or *Baker v. Hands on Originals, Inc.* HRC #03-12-3135, currently before the Lexington-Fayette Urban County Human Rights Commission in the U.S., involving the refusal to print t-shirts related to a local "gay pride" parade.

³⁴ See Baroness O'Cathain, House of Lords, *Hansard*, Col. 1163, 13 July 2005.

³⁵ For example, Christian wedding photographers who refuse to photograph same-sex civil partnerships are vulnerable under the law and could well be sued in the future. See the U.S. case of *Wilcock v. Elane Photography* (2008) HRD No. 06-12-20-0685.

are solely or mainly commercial, the legislation effectively removes the ability to manifest freedom of conscience and freedom of religion in the market place.

Given that the Proposed Directive focuses on individuals “only insofar as they are performing a professional or commercial activity”,³⁶ it is unlikely that any exemptions will be permitted for commercial activities if the Proposed Directive is adopted.

2.2 Organizations contracting with a public authority may not be exempt

Secondly, under the UK legislation, an organisation cannot lawfully discriminate on the grounds of “sexual orientation” in the provision of services, where the services are provided on behalf of a public authority. This provision has led to the closure of faith-based (and in particular Catholic) adoption agencies.³⁷ Simply put, after a brief stay of execution while the measures were being introduced, any agency that refused to place children with homosexual parents would be in breach of the law, would lose funding and would be forced to close down or remove their religious ethos. This was despite Catholic adoption agencies being widely recognised as being among the best in the country.³⁸

In 2007 there were 14 faith-based adoption agencies working throughout the UK, accounting for a third of adoptions within the voluntary sector.³⁹ Most of these have now had to remove their religious ethos and become secularized,⁴⁰ or have had to withdraw their services completely. In April 2011 the Charity Tribunal found against the last remaining Catholic adoption agency following a High Court decision.⁴¹ The tribunal stated that “religious conviction in the sphere of personal belief is protected in both domestic and European equality law, so that acts of devotion, worship, and prayer (including ceremonies) are exempt from equality obligations.” However, the Tribunal went on to state that there is an “essential distinction between private acts of worship such as blessings and the provision of a public service such

³⁶ Article 3(1)(d).

³⁷ For a summary of the adoption agency situation, see “Adoption agencies shut under ‘equality’ laws”, *The Christian Institute*, April 2009.

³⁸ Many of the children helped were considered “hard-to-place” (see *BBC News*, 25 January 2007) and furthermore, the breakdown rate was just 3.6% - one of the lowest of all the agencies (see House of Commons, *Hansard*, 21 February 2007, col. 110WH).

³⁹ See House of Commons, *Hansard*, 21 February 2007, col. 110WH.

⁴⁰ For example, Catholic Caring Services in Lancaster has changed to Caritas Care and cut its ties to the church. See *The Observer*, 21 December 2008 and *Third Sector Online*, 11 March 2009.

⁴¹ *Catholic Care v. The Charity Commission for England and Wales* [2010] EWHC 520 (Ch). This decision has now been upheld by the First Tier Tribunal. See *Catholic Care v. The Charity Commission for England and Wales*, CA/2010/0007, 26 April 2011.

as an adoption agency”.⁴² Again the false distinction between belief and practice was re-enforced by the courts.

Other religious organisations have also been affected. In 2008 a Christian care home had funding removed for refusing to promote homosexuality to its residents.⁴³ After the non-discrimination laws were passed, the local council contacted the care home and said that in order to continue receiving a small grant, the home must: (1) provide statistics on the sexual orientation of each of their 17 residents (all aged in their 80s and 90s); (2) promote homosexuality by including photographs of same-sex couples in its publications and by giving an express statement affirming the acceptance of same-sex relationships; (3) publicise homosexual events taking place in the area; and (4) make it compulsory that staff attend training on homosexual issues.⁴⁴ The care home refused to meet these demands as they believed the promotion of an activity contrary to Christian teaching was in direct conflict with its Christian ethos and would distress the residents.

The council, citing the new laws, withdrew the £13,000 per year grant.⁴⁵ A council spokesman said: “The Government specifically states the home must be open to the gay and lesbian community and that it must demonstrate this to qualify for funding. In the absence of any willingness to do this, funding has been withdrawn.”⁴⁶ After more than a year of internal appeals – amounting to £21,000 in legal fees – and after the case was made public, the council eventually backed down. It did not offer to pay any of the charity’s legal fees.

While the adoption of the Proposed Directive will not automatically force other Member States to take the self-defeating decision to close faith-based public services, adopting the Directive will certainly increase the pressure on Member States to take a similar position.⁴⁷

3. The promotion of “equal treatment”

Aside from the dramatic expansion in *scope* of discrimination law, the Proposed Directive also seeks to create positive obligations on the Member States to not only

⁴² *Id.*, at § 60.

⁴³ “Care home suffers under ‘equality’ laws: How traditional Christian beliefs cost an elderly care home a £13,000 grant,” *The Christian Institute*, May 2009.

⁴⁴ *Id.*, at p.5.

⁴⁵ *Id.* at p.10-11.

⁴⁶ *The Daily Telegraph*, 28 December 2008.

⁴⁷ For example, where Member States have given a broader interpretation to religious freedom when it “clashes” with sexual orientation, the European Commission has initiated proceedings against that Member State, insisting that it takes a narrower view of religious freedom. See the European Commission’s proceedings against the Netherlands on 31 January 2008 and the “Reasoned Opinion” of the European Commission against the UK on 20 November 2009.

remove discrimination, but also promote equality. Such “promotion” has become increasingly prevalent in the UK and the effects are discussed below, once again by comparing the UK situation with the likely effects of the Proposed Directive.

3.1 Positive action

Article 5 of the Proposed Directive encourages Member States to take “positive action” to “compensate for disadvantages linked to religion or belief, disability, age, or sexual orientation.” While such “positive action” has been encouraged by EU institutions for many years,⁴⁸ the issue becomes far more complicated and controversial when it involves the often conflicting grounds of religion or belief and sexual orientation.

Such a duty has been introduced in the UK under the Equality Act 2010. The Public Sector Equality Duty places a positive duty on public authorities to “promote equality”. Under the Duty, public authorities and private persons exercising public functions must “have due regard” for the need to eliminate discrimination, harassment and victimisation, advance equality of opportunity and foster good relations between people. Furthermore, public authorities will have to publish “sufficient” information to demonstrate that they are complying with the Duty and “equality objectives” to demonstrate how they are engaged with the protected groups. The Duty also “applies to the allocation (or withdrawal) of funding or grants to the voluntary sector” and it is therefore likely that religious organizations which refuse to promote homosexual behaviour could be denied funding or have existing funding removed. It is unclear whether the approach to be taken by public authorities will result in a breach of EU procurement law.⁴⁹

The so-called “promotion of equal treatment” has already led to some bizarre situations in the UK – before the Duty was even in force. For example, a government funded guidance document stated that it is “potentially unlawful” for schools to require pupils to wear gender-specific clothes (such as skirts for girls)⁵⁰ and a code of practice suggested that holding parents’ evenings or public consultation meetings in the evenings may be sexist because women are less able to attend because of household or childcare responsibilities.⁵¹ In one part of the UK, the local

⁴⁸ See Article 2(4) of the Equal Treatment Directive 76/207 and Case C-312/86 *Commission v. France* [1988] ECR 6315.

⁴⁹ See Directive 2004/17/EC and Directive 2004/18/EC, which state that procurement decisions can only be taken on one of two grounds – the lowest price or the most economically advantageous tender.

⁵⁰ “Provision of goods, facilities and services to trans people: Guidance for public authorities in meeting your equality duties and human rights obligations”, *The Equality and Human Rights Commission*, p.43.

⁵¹ See *The Daily Mail*, 18 October 2010.

council required persons wishing to rent an allotment to inform the council of their “sexual orientation” during the application process, for “monitoring” purposes⁵² and in another part of the UK, a local council was prompted to carry out an expensive two-month investigation to decide whether the historic city of Canterbury was “sufficiently gay”.⁵³

As the Duty has begun to take effect, the ludicrous implications are becoming increasingly apparent. For example, in the city of Norwich, one church has been handing out literature for several years – essentially arguing that Christianity is correct and Islam is incorrect. In April 2012, the church was banned from doing so: the literature was considered to be “hate motivated”, the police were called, and a spokesman for the local council explained: “Although the police advised that no criminal offence had been committed, we have a *duty under the Equality Act 2010 to foster good relations* between people of all backgrounds and religions.”⁵⁴

Moreover, at a time of economic difficulties, the UK government estimates that the recurring costs of “gathering and publishing data, publishing the results of any engagement activity and publishing assessments on the impact of policies on equality” will cost between £23 to £30 million per year, on top of the once-off familiarisation costs.⁵⁵

3.2 Bodies for the promotion of equal treatment

Article 12(1) of the Proposed Directive also requires Member States to establish bodies whose task it is to “promote equal treatment of all persons irrespective of their religion or belief, disability, age, or sexual orientation.” The Directive’s guidance on Article 12 states that: “It is both difficult and expensive for individuals to mount a legal challenge if they think they have been discriminated against. A key role of the Equality Bodies is to give independent help to victims of discrimination.”⁵⁶ While Member States have been obligated to create such “Equality Bodies” in relation to “racial or ethnic origin” since 2000,⁵⁷ the Proposed Directive would drastically extend the scope of these bodies by requiring them to promote several additional and often conflicting characteristics.

Given the tensions that have already arisen between people who hold traditional religious beliefs about sex and marriage and those who claim that such beliefs are

⁵² See *The Daily Mail*, 21 October 2010.

⁵³ See *The Daily Telegraph*, 25 June 2009.

⁵⁴ See *BBC News*, 16 April 2012. Emphasis added.

⁵⁵ “Equality Act 2010: The public sector Equality Duty promoting equality through transparency, a consultation” Government Equalities Office, August 2010, p.45.

⁵⁶ As with Article 7 of the Directive, the presumption of guilt is again made by use of the term “victim” rather than a more neutral term such as plaintiff or claimant.

⁵⁷ Under Article 13 of the Racial Equality Directive (Directive 2000/43/EC).

discriminatory on the basis of “sexual orientation”, it seems clear that a public body set up to promote equal treatment and charged with the mandate of litigating perceived wrongs will find it difficult to protect both groups and will inevitably end up “taking sides.”⁵⁸

In the UK it is the role of the Equality and Human Rights Commission⁵⁹ to bring such litigation and it is quite clear that it has, in fact, taken sides. For example, the Commission attempted to intervene at every stage of the case of *Catholic Care (Leeds) v. Charity Commission*,⁶⁰ and even made *unsolicited* legal submissions,⁶¹ in order to argue that Catholic Care was not allowed to continue its century old practice of placing children for adoption with married couples only. The Commission also intervened in *Johns v. Derby City Council*⁶² and argued that Christians who object to homosexual behaviour or same-sex relationships should not be allowed to foster children. The Commission warned the court that children placed with Christian parents could become “infected” with Christian beliefs – a remark it was later forced to apologize for.⁶³

As well as legal interventions against Christians, the Commission has also provided much funding. For example, it fully funded the civil action against Mr. and Mrs. Bulls discussed above. Although the same-sex couple won the case, the Commission was not satisfied with the level of damages awarded and filed a cross appeal at the Court of Appeal with the intention of getting more money out of the retired Christian couple – a decision that again warranted a public apology.⁶⁴ The Commission has also funded guidance on religion, as provided for by a leading “homosexual rights” organization⁶⁵ and by the British Humanist Association,⁶⁶ while turning down funding to other mainstream Christian organizations such as the Evangelical Alliance.

⁵⁸ See Aughton-Ainsworth Solicitors, “Clearing the ground inquiry, Preliminary report into the freedom of Christians in the UK”, *Christians in Parliament*, February 2012, at p.32.

⁵⁹ The Commission was formed in 2007 by amalgamating the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission.

⁶⁰ [2010] EWHC 520 (Ch).

⁶¹ Charity Commission for England and Wales, *Catholic Care (Diocese of Leeds)*, decision of 21 July 2010 at § 48.

⁶² [2011] EWHC 375 (Admin). The Commission’s legal fees, as paid for by the public, were £29,812.

⁶³ See “Johns v. Derby City Council”, Press Release, 3 March 2011.

⁶⁴ The Commission stated that its legal team had committed “an error of judgment”. See “Commission statement on Preddy and Hall legal case”, Press Release, 11 March 2011.

⁶⁵ Ruth Hunt, “Religion and sexual orientation: How to manage relations in the workplace.” *Stonewall* 2009.

⁶⁶ “Guidance on equality of ‘religion or belief’”, British Humanist Association, 2009. Amongst other things, the guidance suggested that employee evangelism in the workplace is “highly likely to amount to harassment of their colleagues” and prayer rooms should not be designated as “prayer” rooms at all.

Furthermore, the Commission provides millions of pounds of funding to organizations each year and has large discretion about where this tax-payer money goes.⁶⁷

Thus, it is not at all surprising that a recent Parliamentary Inquiry concluded that: "... the commission has failed to sufficiently represent and advocate for the role of religion in public life and sufficiently balance the outworking of religious belief when there is a tension between it and the other equality strands."⁶⁸

3.3 Increased litigation

Thirdly, Article 7(2) of the Proposed Directive encourages "associations, organisations or other legal entities, which have a legitimate interest in ensuring that the provisions of this Directive are complied with" to engage in litigation in support of supposed victims of discrimination. Given the scope of the Proposed Directive and vagueness of some of its provisions, the invitation to "organisations or other legal entities" to engage in litigation could well lead to an increase in potentially costly, baseless and often politically driven litigation.

The Directive's explanatory note encourages organizations which have "a legitimate interest in the fight against discrimination, to help victims of discrimination ...". No doubt there are some organizations which do indeed wish to "fight against discrimination". However, clearly there are others that seek to use the pretext of equality simply to "fight" for a particular agenda – often the removal of religion from public life.⁶⁹ Unfortunately, Article 7 of the Proposed Directive encourages this. Europe is already familiar with organizations using the courts as a context for pursuing a political agenda, as challenges are frequently made to the European Court of Human Rights which are really a matter for the legislature. A further invitation for special interest groups to engage in litigation is not required and will surely lead to further division within society.

Again, one needs only to look to the UK to see that the involvement of politically driven groups in litigation does not necessarily promote equality, but on the contrary can heighten tensions. For example, in 2009 Christian hoteliers, Ben and Sharon

⁶⁷ For example, according to the Commission's website, last year the Lesbian and Gay Foundation received £264,789, the LGBT Centre for Health and Wellbeing received £85,000, the Lesbian, Gay, Bisexual and Transgender (Specialist Support and Advocacy Services) received £393,120 and the extremely wealthy homosexual rights campaign group, Stonewall, received £147,812. The description for many of these grants simply states that the money is being used for "good relations". It does not appear that any of the Commission's £10 million grants funding has gone to churches or religious organisations.

⁶⁸ "Clearing the ground inquiry" *supra* note 58.

⁶⁹ Michael Foster MP warned during the passing of the Equality Act 2010 that churches need to be "lining up (their lawyers)" in preparation for legal challenges by atheists. See *The Daily Telegraph*, 19 December 2009.

Vogelenzang, were arrested and charged by the police for a “religiously aggravated” “hate speech” offence following what turned out to be a polite conversation with a female Muslim guest. The woman was encouraged and supported in her court proceedings by the Islamic Human Rights Commission. Even though the Christian couple was ultimately acquitted, the Islamic Human Rights Commission nevertheless stated that the Christians had “acted out of hatred” and subjected Mrs Tazi to “intense abuse.”⁷⁰ What began as a slight disagreement between people of differing beliefs spiralled into a criminal investigation, a court action and the publishing of widespread abuse levied against the Christians involved.⁷¹ The guesthouse never regained the business that was lost during the proceedings and although the couple was found innocent, the guesthouse now faces closure. At least some of the blame must lie at the door of the group that funded and encouraged the case.

Regarding the case of Mr. and Mrs. Bulls, noted above, it was explained during the first instance court proceedings that in 1996 the guesthouse owners had refused to allow an unmarried *heterosexual* couple to share a double room in their guesthouse. The unmarried couple promptly found somewhere else to stay, a national newspaper reported the story and made light of the Christian couple’s stance on sex and marriage and that was the end of the matter.⁷² When the near-identical situation occurred at the very same guesthouse in 2010 following a “letter of intent” issued by a pro-homosexual lobby group,⁷³ the same-sex couple similarly were able to quickly find another guesthouse to stay in. However, the police were also called, the incident was registered as a “hate incident”, the government-funded Equality and Human Rights Commission financed the entire litigation and the Christian couple was successfully sued, while being defended by a Christian charity. It is very difficult to look at the two near-identical stories – separated by 14 years and several pieces of non-discrimination legislation – and say that the latter incident represents a triumph for equality. Again, the invitation for politically driven interest groups to engage in litigation must take a portion of the blame for the tensions that are generated.

Thus, given that there are widely differing views contained within the societies of the Member States, by inviting organizations to engage in litigation, the Proposed Directive will not help to achieve relative harmony within these societies. On the

⁷⁰ IHRC Press Release, 9 December 2009. Cited in Jon Gower Davies, “A new Inquisition: religious persecution in Britain today”, *Civitas*, 2010, p.15.

⁷¹ For example, the Christians were referred to by commentators in the national media as “pig-ignorant Christian bigots” and “two rude nutters”. See Rod Liddle, *The Sunday Times*, 13 December 2009.

⁷² See Anne Jolis, “Can Britain tolerate Christians?” *The Wall Street Journal*, 15 March 2012.

⁷³ During the court proceedings it was revealed that several days before the same-sex couple arrived at the guesthouse, a warning letter had been sent to the establishment from homosexual lobby group, Stonewall. See *The Daily Mail*, 14 December 2010 for a report of the story.

contrary, there is good evidence to suggest that encouraging such litigation has the exact opposite effect and increases tension rather than community cohesion, creating antagonism where common sense and reasonableness prevailed for so long.

4. Moving beyond the UK's non-discrimination laws

Finally, the Proposed Directive seeks to move even beyond the non-discrimination legislation of the UK, by outlawing "harassment" in the provision of goods and services in relation to "sexual orientation" and "religion or belief".

Article 2(3) of the Proposed Directive states that: "Harassment shall be deemed to be a form of discrimination . . . when unwanted conduct . . . takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment." This definition of harassment is based on the one adopted by the EU in Directive 2000/78/EC. However, the fact that this definition is used in the employment setting does not mean that it is suitable outside of a workplace context. Indeed, it is highly questionable whether it is even suitable within the confines of the workplace.⁷⁴

The concept of "violating the dignity of a person" and creating an "intimidating, hostile, degrading, humiliating or offensive environment" is exceptionally vague. Given this wide definition, it would be easy for individuals to claim that they have been harassed on the grounds of religion or belief or "sexual orientation" and it could be argued that an "offensive environment" has been created by any number of actions. It is therefore questionable as to whether the definition of harassment meets the requirements of accessibility and foreseeability as laid out by the European Court of Human Rights in *Sunday Times v. The United Kingdom*.⁷⁵ The Court held that "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct."⁷⁶ While the Court recognized that "many laws are inevitably couched in terms which, to a greater or lesser extent, are vague", it does seem that the definition of harassment is certainly at the greater end of the spectrum.

When the UK government attempted to introduce an almost identical harassment provision (regarding religion or belief) in 2005-6, the provision was heavily criticized and ultimately rejected. The former Lord Chancellor stated that his "main difficulty [was] the extreme vagueness of the provision" and that he would find it "very

⁷⁴ For example, an employee was suspended from work for merely discussing his views on sexual conduct during a private conversation, initiated by a colleague, at work. See Christian Concern Press Release, "Homeless charity suspends Christian for answering questions about his faith to colleague at work", 12 April 2009.

⁷⁵ [1979] 2 EHRR 245.

⁷⁶ *Id.*, at § 49.

difficult to see precise boundaries”⁷⁷ for the limits of the provision. Additionally, the former Attorney General stated that the provision made “a deep-seated attack on freedom of speech and on freedom of religion.”⁷⁸

It was argued that a Muslim could complain that a Bible in the hospital bedside cabinet was offensive, that crosses at a cemetery or crematorium were offensive,⁷⁹ that Christian welfare charities would receive funding cuts if they said a prayer before meals,⁸⁰ that Christmas celebrations would be removed by local councils⁸¹ and that evangelism would be restricted within prisons.⁸² Accordingly, given the obvious concerns, the harassment provisions regarding religion or belief were ultimately rejected by the UK parliament. Furthermore, the government did not even attempt to include a harassment provision in the later Equality Act (“Sexual Orientation”) Regulations 2007⁸³ and when an attempt was made to introduce a similar provision in Northern Ireland, the harassment provision was quashed by the High Court.⁸⁴

Given that the UK parliament, which has been more than willing to go far beyond the requirements of the current EU non-discrimination laws, rejected the notion of “harassment” within the provision of goods and services in relation to the highly contentious areas of “sexual orientation” and “religion or belief”,⁸⁵ it would be surprising if other EU Member States adopted a provision that, in the context of the provisions of goods and services, has great potential to have a great chilling effect on freedom of speech and severely restrict freedom of religion and freedom of conscience.⁸⁶

5. Conclusion

Over a decade ago, when Directive 2000/78/EC was being drafted, there were fears about how it would affect religious freedom, particularly in relation to its apparent “clash of rights” between the protected grounds of religion or belief and “sexual

⁷⁷ Lord Mackay of Clashfern, *Hansard*, HL, 9 Nov 2005, Col. 660.

⁷⁸ Lord Lyell of Markyate, *Hansard*, HL, 9 Nov 2005, Col. 660.

⁷⁹ Lord Waddington, *Hansard*, HL, 9 Nov 2005, Col. 655.

⁸⁰ *Id.* This was a real-life example.

⁸¹ Baroness O’Cathain, *Hansard*, HL, 9 Nov 2005, Col. 654. This was a real-life example.

⁸² *Id.* This was a real-life example.

⁸³ See “Sexual Orientation Regulations” Consultation Paper, *Department for Communities and Local Government*, 2007, § 4.17 and “Legislative Scrutiny: Sexual Orientation Regulations”, Sixth Report of Session 2006-2007, 26 February 2007 at § 57.

⁸⁴ See *The Christian Institute and Ors, Re Application for Judicial Review* [2007] NIQB 66.

⁸⁵ See section 29(8) Equality Act 2010: “...as it relates to harassment, neither of the following is a relevant protected characteristic— (a) religion or belief; (b) sexual orientation.”

⁸⁶ See James Dingemans QC, “In the matter of the proposed EU Directive on Equal Treatment between persons irrespective of religion or belief, disability, age or sexual orientation (2008/0140)”, *The Christian Institute*, 5 December 2008 at § 28.

orientation.” It is now clear that the predictions made about how the Directive would affect religious liberty in the workplace have been entirely accurate and there have been numerous cases where religious freedom has lost out to “sexual orientation” in the employment setting.⁸⁷

However, with regard to the Proposed Directive 2008/0140, the predictions are not necessary, as the UK has already implemented much of what the Proposed Directive seeks to achieve. As the effects of such laws are becoming increasingly apparent – the large implementation costs, the increases in litigation, the constant legal clashes, the removal of religious freedom and the overriding of individual conscience in the marketplace – other EU Member States must decide, before the Proposed Directive is adopted, whether this is a future they wish to pursue. Although the Proposed Directive has lain dormant for several years and is “strongly opposed” by some Member States,⁸⁸ at any moment it could be resurrected, and if the hard lessons are not learned from the UK, the rest of the EU will surely follow its path.

⁸⁷ See, for example, *Ladele v London Borough of Islington* [2009] EWCA Civ 1357; *McClintock v. Department of Constitutional Affairs*, UKEAT/0223/07/CEA, 31 October 2007; *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880; *Matthews v. Northamptonshire County Council* (Case No. 1901629/2009), 26 November 2010. Two of these cases are now before the European Court of Human Rights. See *Lillian Ladele and Gary McFarlane v. the United Kingdom*, Application nos. 51671/10 and 36516/10.

⁸⁸ Progress Report from the [Czech] Presidency to the Permanent Representatives Committee (Part I)/ Council (EPSCO) on the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (Brussels, May 26, 2009), 10073/09, p.7. See *supra* note 3 at § 183.