



## **EHF comments on EU draft directive on discrimination beyond employment**

13 November 2008

### **European Humanist Federation**

### **A DIRECTIVE THAT RISKS ENTRENCHING DISCRIMINATION**

A response to European Commission 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

#### **SUMMARY**

- Unfair discrimination by religious institutions enjoying extensive financial and other legal privileges is widespread across Europe.
- The Directive risks institutionalising such discrimination by encouraging legislation that explicitly permits it as an exception to a general ban.
- Any exceptions permitted by the Directive need to be narrowly and tightly drawn, given the effort that will go into weakening them in national legislation and evading them once enacted, and will require strict policing.
- If as a result of Declaration 11 of the Amsterdam Treaty the Commission can find no way to prevent wide exemptions for religious bodies, then the Directive should exclude consideration of religious discrimination altogether.
- In any case, the stipulation that exceptions must be justified and proportionate should be included in the body of the Directive.
- So far as concerns education, the Directive should narrowly define the areas which are reserved to member states and should adopt an approach based on the human rights of the child.
- The ban on harassment on grounds of religion or belief should be excluded from the Directive since it would carry a grave risk to freedom of speech.
- The ban on harassment on grounds of sexual orientation should have no exceptions based on religion, and the Directive should explicitly debar exceptions within one strand (e.g., sexual orientation) based on another (e.g., religion).

#### **The European Humanist Federation**

The European Humanist Federation (EHF), based in Brussels, unites humanist and secularist organisations across Europe. We promote the principles of humanism and of a secular society; and we seek to protect the interests of the non-religious, opposing the discrimination they suffer and fighting for equal treatment.

We work in the European Union (where we are officially recognised as a partner for dialogue) and with the Council of Europe Parliamentary Assembly. We cooperate with like-minded Members of the European Parliament. We are especially active in the human rights wing of the Organisation for Security and Cooperation in Europe, contributing to its conferences and making the case against religious privilege and in favour of democracy and the rule of law.

## **Religion and belief**

All relevant human rights instruments, including the European Convention on Human Rights, give equal standing to non-religious beliefs – Humanism, atheism, etc – as to religious ones. This principle is unchallenged in legal circles but little recognised by politicians and certainly has not been properly implemented. At the Annex we quote some of the relevant references. The result is that not only do states party to these treaties guarantee the freedom of belief for people adhering to religions, they have also undertaken to guarantee the freedom of belief of humanists, atheists, agnostics and others without a religion.

Moreover, the effect of Article 14 of the European Convention is that states also undertake, when Article 9 is engaged, not to discriminate between people on grounds of religion or non-religious belief or lack of belief.

The EHF is strongly opposed to unfair discrimination and we are therefore pleased with the proposed Directive insofar as it will build on the existing framework directive relating to employment etc.

## **Reservations about the draft Directive**

However, we have serious reservations about the draft as it relates to “churches and other organisations based on religion or belief”. Throughout Europe extraordinary privileges are given to some (occasionally to all) religious organisations. Some are “established” as official state churches, some are given immense grants out of taxpayers’ money or are allowed to use official machinery to collect taxes from their members – who may find there are considerable obstacles if they wish to quit a church into which they have been baptised. Rarely are similar benefits given to humanist or secularist organisations (the principal exceptions in the EU are Belgium and the Netherlands).

More relevantly to this Directive, they are given legal advantages and privileges that are already at least questionable under the European Convention. Often there is serious discrimination against people who do not belong to the established or recognised church. For example, in Italy, a judge who objected to administering justice with a Christian cross hanging on the wall behind him, implying contrary to his own conscientious beliefs that he was a Christian administering Christian laws, has

been suspended and sentenced to seven months in prison<sup>1</sup>. In Greece it is assumed by the courts that every witness or other person is a member of the Greek Orthodox church, to the extent of pre-printing this description on official forms and putting serious difficulties in the way of anyone wishing to declare a different belief<sup>2</sup>. Very generally, the churches and other religious bodies routinely discriminate on grounds of religion, even when delivering public services that are paid for wholly or in part by the taxpayer. Indeed, without doubt the churches and their institutions are the major source of unfair religious discrimination in Europe today.

Any serious move to eliminate religious discrimination will therefore inevitably have to disturb present arrangements in order to make them fairer, and is therefore liable to upset both churches and governments. In the United Kingdom, the Government, in its Equality Act 2006 (which in many ways anticipated this Directive), conceded so many exemptions to religious bodies that the Act serves rather to entrench religious discrimination than to outlaw it.

It is vital that this Directive does not follow the same path.

The proposal is that

exceptions to the general principle of equality should be narrowly drawn, the double test of a justified aim and proportionate way of reaching it (i.e. in the least discriminatory way possible) is required.

We agree, but are disturbed that the stipulation that exceptions must be justified and proportionate does not appear in the body of the draft Directive.

Experience with the employment directive shows that any exception will be exploited to the full both by national legislatures and by religious organisations. In the United Kingdom the provisions about 'genuine occupational requirements' seem to have resulted in more rather than less discrimination by employers with a religious ethos: the explicit statutory endorsement of religious discrimination in filling posts has encouraged previously moderate religious organisations to impose strict requirements on a wide range of posts, well beyond what might appear to be covered by the 'genuine occupational requirement' description. Moreover, the UK Government has so far failed to impose – or even recognise the need for – adequate safeguards against religious discrimination in the delivery of services when statutory public services are contracted out to religious organisations.

Any exceptions on grounds of religion or belief from anti-discrimination law must therefore be drawn as narrowly as possible and must be fully justified. General exemptions in any area or for any reason are completely unacceptable.

We are therefore extremely concerned that the Directive is necessarily bound by the provisions of Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty:

The Union respects and does not prejudice the status under national law of the churches and religious associations or communities in the Member States.

This is reflected in Article 3 of the draft:

4. This Directive is without prejudice to national legislation. . . concerning the status and activities of churches and other organisations based on religion or belief. . .

and elsewhere.

We recognise that the Directive cannot make proposals contrary to the Amsterdam Treaty. But we have the gravest fears that the Directive will result in the enactment of national laws across Europe that give explicit blanket exemption to religious organisations from national laws on religious discrimination. Rather than the churches (as at present) merely choosing (often but not always) to discriminate in a way unregulated by law, we shall instead have a body of law, backed by the European Union, that endorses and legitimates unfair religious discrimination by religious bodies – not just churches but any voluntary organisation that is based on a religion<sup>3</sup>. This risks setting back the cause of non-discrimination by years if not by decades.

We urge the Commission to examine with urgency how the Directive can limit this danger. Can the extent of exemptions be narrowly defined within the Directive? Could the Directive build on the Union's commitment to the European Declaration of Human Rights and in particular the combination of Articles 9 and 14 so as to provide safeguards? Might the Amsterdam declaration be interpreted as applying only to existing legislative provisions, so that the Directive might debar enactment of wider exemptions than already exist? Alternatively, building on the precedent of 'genuine and determining occupational requirements' and 'genuine occupational requirements' in the employment framework directive, might the Commission explore the idea of 'genuine service requirements' and whether it might be introduced without contravening the Amsterdam Treaty?

In any case, any exceptions permitted by the Directive will need to be narrowly and tightly drawn, given the effort that will go into weakening them in national legislation and evading them once enacted.

If the Commission can find no way to prevent wide exemptions for religious bodies, explicitly accommodating their present discriminatory practices and implicitly and

encouraging their extension, then the Directive should exclude consideration of religious discrimination altogether.

## **Education**

In education, the first consideration should be the welfare and rights of children, not their parents, still less the churches. In our view there should be no discrimination against children in school on grounds of their (or rather, usually their parents') religion or belief. If schools are run by the state, then there can be no justification whatever for prejudicial treatment of children on the basis of any of the 'strands', including religion or belief. If schools are run by religious bodies, then – even if discrimination is allowed in deciding admissions (which we oppose) – there should be no subsequent discrimination in the treatment of pupils once admitted. Second-class treatment by schools of pupils on the basis of an association with a religion or belief is contemptible; when practised by religious bodies that profess high standards of ethics, it is in addition grossly hypocritical.

We are therefore alarmed at the extent to which education, nominally included within the scope of the Directive, is in fact excluded by all manner of exceptions and saving clauses. We recognise that the EU has no competence in core areas of education. We would maintain that it does and should have competence over the institutional treatment of individuals so far as their human rights are affected.

The OSCE has shown the way to apply basic standards of human rights to education about religion and belief in its 'Toledo guidelines'<sup>4</sup>. The EU should adopt this human rights approach in order to tackle one of the most extensive areas of religious discrimination to be found in Europe today.

## **Harassment on grounds of religion or belief**

We are strongly opposed to extending laws against harassment on grounds of religion or belief to environments outside the workplace. Although non-believers undoubtedly suffer from such harassment, and a ban is attractive in principle, nevertheless we consider that the risk of such legislation to freedom of speech is so grave that harassment on grounds of religion or belief should not be outlawed.

We can see laws against such harassment becoming in effect laws to protect religion from criticism. The alarming current campaigns across the world to introduce laws against defamation of religion demonstrate how serious this danger would be. It would be far worse than the blasphemy laws that have generally now been abolished: any criticism of anyone or anything religious would risk being treated as harassment by extreme religious believers who would bring private prosecutions or urge official action. There are already many cases in Europe of such actions being

brought or sought by followers of several world religions. Even if the courts largely dismissed such attempts, the chilling effect on freedom of speech would be extreme.

If nevertheless the Commission or Council decide to include harassment on grounds of religion or belief in the proposed Directive, it should be limited to protecting people in 'closed' environments, such as schools, hospitals, hospices, prisons and the like – broadly, places where the offended persons are 'captive' by reason of a need to access a service, especially a public service. We would still regard this as a risky course, since it might encourage states to enact more extensive provisions that would, as stated, endanger freedom of speech.

### **Sexual orientation**

We welcome any legislation that will be effective in preventing discrimination based on sexual orientation. We regard sexual orientation as a natural and innate attribute analogous to race for the purposes of discrimination law. Any modern society that seriously seeks to develop a culture of human rights and equality needs to tackle the historic pattern of prejudice, discrimination and harassment based on sexual orientation.

However, a high proportion of existing discrimination – including harassment – on grounds of sexual orientation is based on religious doctrine or prejudice. It is vital that the Directive finds a way of limiting the effect of the Amsterdam Declaration so that the national laws it produces do not endorse homophobic practices by religious organisations. If exemptions for churches and other religious bodies are built into these laws, they will become in effect a charter for bigotry.

We are therefore concerned to see that there is no stipulation here such as there is in the employment framework directive that where discrimination on grounds of religion is permitted it "should not justify discrimination on another ground". We see such a provision as vital. Indeed, it needs to be more explicitly and strongly expressed – and enforced – given that (for example) the United Kingdom has in its laws on employment and on access to goods, services etc explicitly exempted discrimination based on sexual orientation when it is motivated by reasons of religion – even when it is not a religious doctrine that is involved but only the "strongly held religious convictions of a significant number of the religion's followers"<sup>5</sup>.

Schoolchildren are a group particularly vulnerable to harassment based on sexual orientation. Much such harassment occurs in schools run by churches and religious organisations. This serious abuse of the human rights of young people is something that the proposed Directive must find a way to prohibit – by reference, for example, to 'the protection of the rights and freedoms' of young people<sup>6</sup>. (We notice with alarm and surprise the omission from Recital 2 of the UN Convention on the Rights of the Child.)

If the Directive allows exceptions on religious grounds from the duty not to harass on grounds of sexual orientation, it will exacerbate the isolating and damaging effect of homophobia in schools. This would be a disgraceful failure to protect young lesbian, gay or bisexual people who are among the most vulnerable children in our communities.

*13 November 2008*

## **NOTES**

1 See <http://www.iheu.org/node/1908> and <http://cilalp.ouvaton.org/spip.php?article62> [\[back\]](#)

2 For example, see the European Court of Human Rights chamber judgement *Alexandridis v. Greece* (application no. 19516/06) – one of several cases of like nature initiated by the Greek Helsinki Monitor. [\[back\]](#)

3 In law the same (unwanted) privileges would be given to “philosophical and non-confessional organisations” such as ourselves. [\[back\]](#)

4 “Toledo Guiding Principles on Teaching about Religion and Beliefs in Public Schools” – OSCE, 2007 (ISBN 83-60190-48-8), [available online](#). [\[back\]](#)

5 The Employment Equality (Sexual Orientation) Regulations 2003 at 7(3) and the Equality Act (Sexual Orientation) Regulations 2007, at 14(5). [\[back\]](#)

6 See ECHR, Article 14 and Article 2 of the first protocol, and also Articles 2, 28 and 29 of the UN Convention on the Rights of the Child. [\[back\]](#)

## **ANNEX**

### **REFERENCES ON HUMAN RIGHTS AND RELIGION OR BELIEF**

#### **(a) European Convention on Human Rights**

##### **Article 9 – Freedom of Thought, Conscience and Religion**

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

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

## Article 14 – Prohibition of Discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

### (b) Relevant Court Cases under Article 9 of the ECHR

“As enshrined in Article 9, freedom of thought conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, sceptics and the unconcerned.” – *Kokkinakis v Greece*: (1994) 17 EHRR 397, para 31

“The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.” – *Manoussakis v Greece*: (1996), EHRR 387, para 47

Belief means “more than just ‘mere opinions or deeply held feelings’; there must be a holding of spiritual or philosophical convictions which have an identifiable formal content.” – *McFeeley v UK*: (1981), 3 EHRR 161

“In its ordinary meaning the word ‘convictions’, taken on its own, is not synonymous with the words ‘opinions’ and ‘ideas’, such as are utilised in Article 10 (art. 10) of the Convention, which guarantees freedom of expression; it is more akin to the term ‘beliefs’ (in the French text: ‘convictions’) appearing in Article 9 (art. 9) – which guarantees freedom of thought, conscience and religion – and denotes views that attain a certain level of cogency, seriousness, cohesion and importance.” . . . [philosophical convictions] “denotes, in the Court’s opinion, such convictions as are worthy of respect in a ‘democratic society’ and are not incompatible with human dignity.” – *Campbell and Cosans v. UK*: (1982), 4 EHRR 293 p304, para 36 and p305, para 36)

### (c) Universal Declaration of Human Rights

#### Article 18

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

### (d) International Covenant on Civil and Political Rights



## Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

## (e) Charter of Fundamental Rights of the European Union

### Article 10: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

## (f) Commentary

- from the UN Human Rights Committee on Article 18 of the International Covenant on Civil and Political Rights (which is essentially similar to Article 9 of the European Convention):

“Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.” – Human Rights Committee, 1993 (General Comment no 22(48) (Art. 18) adopted on July 20th 1993, CCPR/C/21/Rev.1/Add.4, September 27th 1993, p1.)

- from the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe (OSCE):

The “belief” aspect typically pertains to deeply held conscientious beliefs that are fundamental about the human condition and the world. Thus, atheism and agnosticism, for example, are generally held to be entitled to the same protection as

religious beliefs. – Guidelines for Review to Legislation Pertaining to Religion or Belief (2004) Section A, Paragraph 3.

13 November 2008

## **Reply from EU Commissioner Vladimir Spidla to EHF Comments**

Dear Mr Pollock

Thank you for your e-mail enclosing the European Humanist Federation's remarks on the European Commission proposal for a new anti-discrimination directive extending protection from discrimination on grounds of religion, sexual orientation, age and disability to areas outside employment.

Before commenting on some of the issues raised, may I point out that the prohibition on discrimination based on religion is a fundamental principle underlying the secular nature of our societies. It is also our understanding, based on the case law of the European Court of Human Rights that the prohibition of discrimination based on religion or belief covers both religions and non-religious beliefs, such as atheism or humanism.

The proposed directive will treat all grounds in the same way and thus end the 'hierarchy' between grounds for discrimination. To treat all grounds in the same way, however, does not mean that the same rules must apply to all grounds.

As you point out, the Commission is bound by the Treaty of Amsterdam, which recognises that the status of religious institutions is a matter for national law. In this context, it is in our view vital to strike a balance between two fundamental rights, that is, the right of religious institutions to autonomy in their organisation, and the individual's right not to be discriminated against on grounds of his or her religion or belief.

In light of the above, I believe that the proposal for a new directive strikes the right balance, in particular by ensuring that any exception to the principle of non-discrimination is limited to what is necessary to respect the autonomy of religious institutions. Any such exceptions should abide by the principle of proportionality and should strike a suitable balance between the competing interests and rights. You should also note that similar principles apply to the secular nature of the State and other institutions. We agree with you that such exceptions should be based solely on religion and not on any other grounds.

We note your concern regarding the risk that protection from harassment could be used to limit the right to criticise religions. We believe that this concern is unfounded and you yourself point out that the ECJ in the EU has upheld such an interpretation. The principle of non-discrimination has not been established with the aim of restricting freedom of expression, and harassment is defined clearly as behaviour that has the effect of violating the dignity of another individual and of creating a hostile environment. It does not per se prohibit the expression of any particular views.

Yours sincerely

Vladimir Spidla

7 January 2009