

RE THE EQUALITY BILL 2005

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ADVICE TO  
THE CHRISTIAN INSTITUTE

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**From**

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## RE THE EQUALITY BILL 2005

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### ADVICE TO THE CHRISTIAN INSTITUTE

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- 1) I am instructed to advise the Christian Institute (the Institute) regarding the implications for it, and for Christian believers, Churches and Organisations, of the provisions of The Equality Bill 2005 (the Bill) introduced into the House of Lords on the 18th May 2005.
- 2) The Institute is not a Church or Denomination but is an organisation which exists to represent and defend the views of Christians of many Denominations. In this respect I consider that the Institute would fall within the classification of clause 59(1) of the Bill as being an “Organisation relating to religion or belief”. The main concern of the Institute is the potential for misuse of this legislation so as to stifle Christian witness and mission. There are 3 main areas of concern namely. “Functions and Powers of the Commission”, The provisions relating to “Discrimination on Grounds of Religion or Belief”, and the provisions relating to “Harassment on Grounds of Religion or Belief”.

#### **Functions and Powers of the Commission**

- 3) If one merely goes by the explanatory notes to the Bill then the creation of the Commission appears to involve no more than the merger of the Equal Opportunities Commission, The Commission for Racial Equality and the Disability Rights Commission into one unified Commission which is given the additional functions of enforcing Human Rights Law and legislation relating to Religious Discrimination and Sexual Orientation Discrimination. However the functions of the new Commission are significantly wider than the functions of the existing Commissions which are as follows

#### **S53 Sex Discrimination Act 1975**

53.-(1) There shall be a body of Commissioners named the Equal Opportunities Commission, consisting of at least eight but not more than fifteen individuals each appointed by the Secretary of State on a full-time or part-time basis, which shall have the following duties-

- a) to work towards the elimination of discrimination,
- (b) to promote equality of opportunity between men and women generally, and
- (c) to keep under review the working of this Act and the Equal Pay Act 1970 and, when they are so required by the Secretary of State or otherwise think it necessary, draw up and submit to the Secretary of State proposals for amending them.

**S43 Race Relations Act 1976**

43.-(1) There shall be a body of Commissioners named the Commission for Racial Equality consisting of at least eight but not more than fifteen individuals each appointed by the Secretary of State on a full-time or part-time basis, which shall have the following duties-

- (a) to work towards the elimination of discrimination;
- (b) to promote equality of opportunity, and good relations, between persons of different racial groups generally; and
- (c) to keep under review the working of this Act and, when they are so required by the Secretary of State or otherwise think it necessary, draw up and submit to the Secretary of State proposals for amending it.

**S2 Disability Rights Commission Act 1999**

2. - (1) The Commission shall have the following duties-

- (a) to work towards the elimination of discrimination against disabled persons;
  - (b) to promote the equalisation of opportunities for disabled persons;
  - (c) to take such steps as it considers appropriate with a view to encouraging good practice in the treatment of disabled persons; and
  - (d) to keep under review the working of the Disability Discrimination Act 1995 (referred to in this Act as "the 1995 Act") and this Act.
- (2) The Commission may, for any purpose connected with the performance of its functions-
- (a) make proposals or give other advice to any Minister of the Crown as to any aspect of the law or a proposed change to the law;
  - (b) make proposals or give other advice to any Government agency or other public authority as to the practical application of any law;
  - (c) undertake, or arrange for or support (whether financially or otherwise), the carrying out of research or the provision of advice or information.
- Nothing in this subsection is to be regarded as limiting the Commission's powers.

- 4) The Bill copies this approach in c8 which sets out the duties of the Commission as follows

**c8 Equality and diversity (c8 Equality Bill)**

(1) The Commission shall, by exercising the powers conferred by this Part—

- (a) promote understanding of the importance of equality and diversity,
- (b) encourage good practice in relation to equality and diversity,
- (c) promote equality of opportunity,
- (d) promote awareness and understanding of rights under the equality enactments,
- (e) enforce the equality enactments,
- (f) work towards the elimination of unlawful discrimination, and
- (g) work towards the elimination of unlawful harassment.

(2) In subsection (1)—  
“diversity” means the fact that individuals are different,  
“equality” means equality between individuals, and  
“unlawful” is to be construed in accordance with section 36.

However the Commission is also provided with a "Fundamental Duty" which is set out in clause 3, which will take precedence over clause 8 above and which greatly exceeds any of the powers or functions of the previous three commissions namely

### **3 Fundamental duty (c3 Equality Bill)**

The Commission shall exercise its functions under this Part with a view to the creation of a society in which—

- (a) people’s ability to achieve their potential is not limited by prejudice or discrimination,
- (b) there is respect for and protection of each individual’s human rights,
- (c) there is respect for the dignity and worth of each individual,
- (d) each individual has an equal opportunity to participate in society, and
- (e) there is mutual respect between communities based on understanding and valuing of diversity and on shared respect for equality and human rights.

The section providing for the purpose of the Commission to be the "creation of a society" is, so far as I am aware, unique in British legislation and I am not aware of any example of a Democratic nation where a government body is given the function of creating a particular type of "society". Clause 3 has both legal and philosophical difficulties. From the practical legal point of view it will make the Commission almost immune to a Judicial Review based on Ultra Vires. Ultra Vires is the basic legal principle that an organisation should not step beyond its role and functions as set down by law. However when the basic duty of the Commission involves the creation of a particular type of Society it will be virtually impossible to bring a successful claim for JR. Almost any action could be justified as being part of the “creation of a Society”

- 5) The idea of a public body creating a "society" has unfortunate echoes of Totalitarian regimes of left and right. The Maoist "Great Leap Forward" was devoted to the destruction of the old Bourgeois Society as was the Bolshevik Revolution. Democracy and Freedom is based on the toleration of different and indeed antagonistic points of view about the nature of society and the "society" that then emerges is the result of the interplay between individuals and their different conceptions of society. Totalitarianism by contrast decides on a particular image of

society and then imposes it. To have a Government organisation working for the creation of a particular form of society is a Totalitarian mechanism for imposing a state directed conformity.

- 6) For example clause 3(e) requires the Commission to create a society in which
- (e) there is mutual respect between communities based on understanding and valuing of diversity and on shared respect for equality and human rights.

Under clause 11(2)

(2) In this Part “community” means a group or class of persons (irrespective of whether they regard themselves as a community) who share a common attribute in respect of any of the following matters—

- (a) age,
- (b) gender,
- (c) proposed, commenced or completed reassignment of gender
- (d) race,
- (e) religion or belief, and
- (f) sexual orientation

The law has, up to now, required people to live in peace with one another and not to harm one another. It has not tried to affect personal opinions or to make people like one another but that will change if the Commission is given the legal duty of creating "mutual respect" between communities.

- 7) Though it can appear innocuous Clause 3(e) is potentially the most dangerous section of the Bill because it fails to recognise the subtle but important difference between tolerance and respect. In religious terms this is particularly important. Different Religions, like different political parties, are inherently in conflict in the market place of ideas. Christianity and Islam, for example, are two religions based on completely contradictory views of Gods message and actions on earth. One of them may be right, they could both be wrong, but they cannot both be right. For a Government body to be given the task of obliging religions to respect one another as equals means that the state is itself imposing a religious concept namely the Theistic idea that all religions are ultimately the same and are all praying to the same God.
- 8) Clause 3(e) imposes on Religions a requirement that politicians do not impose on themselves. The Labour and Conservative parties have to tolerate each others existence, they have to allow each other to canvass and to put forward their policies but they are not obliged to respect one another. Why therefore should a religion be

obliged to respect another religion ? To tolerate another religion and to accept that it has the right to exist, to worship and to proselytise is one thing but why should a religion be required to “respect” another religion which it regards as false ? Religious ideas, political ideas and philosophical ideas postulate different ideas of society and human destiny. Ultimately the society that emerges is based on human beings making choices between these different sets of ideas. Creating a government commission to create a particular type of society reduces the ability to make these choices and in that sense subverts the very idea of democracy itself.

9) In c11(1)(c) the Commission is given the duty of working

"towards the elimination of prejudice against, hatred of and hostility towards communities,"

Since "communities" is so widely interpreted by 11(2) this gives the Commission power to intervene in areas intimately affecting religious belief. For example the Commission could become involved in internal Church arguments relating to "Gay Clergy" on the basis that religious teaching that Homosexuality is wrong is a mere "prejudice". Similarly any attempt to preach against the beliefs of another religion could be described as prejudice rather than the expression of personal religious belief. Many Religions are hostile to Homosexuality and many Homosexual Groups are hostile to religion. At present the law does no more than hold the ring between these differing groups, who are not required either to like nor to respect one another. However the Commission has the duty to promote "respect" based on an "understanding and valuing of diversity" and this will permit it to interfere in these internal religious disputes.

10) From a purely legal point of view c3 could be taken out of the Bill without in any way weakening the core functions of the Commission. Clauses 8 & 9 provide the Commission with clear specific and adequate powers and duties equivalent to those of the existing 3 commissions. Clause 3 by contrast allows the Commission almost unfettered discretion to do anything, comment on anything and interfere in anything in pursuit of its purpose of creating whatever is its particular vision of the “society” mentioned in clause 3. However if clause 3 were to be removed from the Bill then the function of the Commission would become the enforcement of Equality legislation as laid down by Parliament.

- 11) The main powers of the Commission are set out in c22, & c30. Under c22(1)(a) the Commission can investigate if a person (or organisation) has "committed an unlawful act" ie an act contrary to ANY Discrimination legislation or the Human Rights Act. The Commission may begin an investigation if it "suspects" that there has been the commission of an unlawful act. This contrasts with the rules applying to Police Officers who may only arrest (the preliminary to an investigation) where they have "reasonable grounds to suspect" that an offence has been committed (s25 Police and Criminal evidence Act 1984). I see no reason why the Commission should have greater powers than the Police and I therefore suggest that clause 22(3) should be tightened up by replacing the word "suspects" with "has reasonable grounds to suspect".
- 12) Under c30 the Commission is allowed to give financial assistance (in essence a form of legal aid) to persons bringing legal proceedings either for Discrimination or under the Human Rights Act. If the assisted person wins their case then the Commission can recover these legal costs (c31). However there is no provision in the Act, or in existing legal aid legislation, for individuals or organisations to be given legal aid if they are being investigated by the Commission or are being sued with the backing of the Commission. Nor does there appear to be any provision for a person or an organisation to recover their legal costs in defending themselves from an investigation or in fighting a legal claim backed by the Commission. I consider that this omission could well be in breach of the Human Rights Act. In the case of **STEEL AND MORRIS v. UK ECtHR (Application no. 68416/01) 15 Feb 2005** (the McLibel case) the European Court of Human Rights accepted that legal aid should be granted in Civil Cases where the resources between the parties was significantly different and where issues involving Convention Rights are involved.
- 13) In any case or investigation where the Commission is involved it is in a dominant position because it has the financial resources of the Government behind it. Also in virtually all cases involving alleged Religious Discrimination it is likely that the European Convention "Rights of Freedom of Religion" and "Freedom of Expression" (articles 9 & 10) will be involved. It is likely that Commission investigations re allegations of Religious Discrimination will be disproportionately focused on

religious organisations and charities. Historically legal aid is granted to individuals and not organisations. However the position of religious organisations and Charities is unusual. Many are small, they are all non profit making, and they are the means by which the right to Freedom of Religion under Article 9 is exercised. In these circumstances unless the Government is willing to offer some form of legal aid to individuals and Religious Organisations there is a real danger that the powers of the Commission will ultimately be held to be a breach of the Convention “Right to a Fair Trial” (article 6(1) and the right to Freedom of Religion (Article 9)).

- 14) Though the Commission as been granted extensive powers to investigate and to bring proceedings in most areas of human life the Bill does not provide the public or Parliament with any form of independent supervision of the Commission. There is no formal complaints procedure, no independent Inspectorate and it is not even clear whether the Commission will fall under the supervision of a single minister accountable to Parliament (see explanatory note 3). I therefore suggest that there is the need for the bill to be amended so that there is some form of independent complaints commissioner or ombudsman with the power to investigate complaints and demand answers from the Commission. There should also be an annual report to Parliament by this Commissioner on how the Commission is working.

### **Discrimination on Grounds of Religion or Belief**

- 15) It should be noted that the provisions in the Bill relating to Religion and Belief (Part 2 c45 – 80) are in addition to the existing provisions of The Employment Equality (Religion or Belief) Regulations 2003 (the 2003 Regulations) and must be read alongside them. This will mean that the legal position re Religious Discrimination is subtly different to the position re Sex, Race & Disability Discrimination each of which is dealt with in one statute covering discrimination in Employment and in Goods and Services. Parts c8 & c35 of the Bill also make it clear that the functions of the Commission include the enforcement of the 2003 Regulations as well as Part 2 of The Bill.

- 16) For reasons which are not explained by the Government the definition of “Religion and Belief” in c45 in the Bill differs from the definition currently used in s2(1) of the 2003 regulations

clause 45 of the Bill reads

- (a) “religion” means any religion,
- (b) “belief” means any religious or philosophical belief,
- (c) a reference to religion includes a reference to lack of religion,
- and
- (d) a reference to belief includes a reference to lack of belief.

S2(1) of the 2003 Regulations reads

"religion or belief" means any religion, religious belief, or similar philosophical belief.”

Under c77 of the Bill s2(1) of the 2003 Regulations is to be amended so as to make it the same as clause 45

- 17) . This change could have an unexpected consequence. The current phrase in s2(1) “religious belief or similar philosophical belief” implies that the philosophical belief is in some sense religious in nature. Buddhism, for example, is technically a philosophy but is regarded as religious in nature. However the new definition of “any religious or philosophical belief” is wider and could cover free standing philosophical beliefs which are not similar to religious beliefs. Potentially, Racism, Fascism, Communism, Anarchism and Veganism could all come within this new definition since they are all “philosophical” beliefs.

The new definition could mean that the 2003 Employment Regulations could be used by the BNP to prevent their members being excluded from employment. In addition the new definition would appear to provide greater protection to Religious Extremists. For example a person who believes in and preaches a form of extremist Islam may be rejected by mainstream Islamic leaders and might be therefore be regarded as not having a true “religious” belief. However they certainly have a “philosophical” belief.

The proposed change to the definition in s2(1) could put employers in a very difficult situation. Someone may be expounding extremist beliefs which, could even be criminal but if they express them in the workplace or in a Shop and are told to leave

then they could claim that they had been discriminated against because of their “philosophical belief”

- 18) This problem has already been faced in s3 of The Fair Employment and Treatment (Northern Ireland) Order 1998” which provides the following protection for Political as well as Religious Views

3. — (1) In this Order "discrimination " means—

(a) discrimination on the ground of religious belief or political opinion;

but it also contains the following proviso

2(4) In this Order any reference to a person's political opinion does not include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear.

There seems no good reason why a similar provision could not be included in the Equality Bill so as to make it clear that protection against discrimination does not apply where the religious or Philosophical belief includes a belief in violence

- 19) C59 & 60 in the Bill provide a number of exemptions to the legislation depending on the nature of what is being done and the degree of “religious” belief involved. Clause 59 in particular provides a clear list of organisations who are permitted to discriminate as follows

59 (1) This section applies to an organisation the purpose of which is—

- (a) to practice a religion or belief,
- (b) to advance a religion or belief,
- (c) to teach the practice or principles of a religion or belief,
- (d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief, or
- (e) to improve relations, or maintain good relations, between persons of different religions or beliefs.

As already mentioned the Institute would fall within category 59(1)(b) & (c) as would the Muslim Council of Britain. In many respects this list is clearer and more unambiguous than the rather vague “Exception for genuine occupational requirement” in s7 of the 2003 Regulations and it may be sensible to take the opportunity to replace

s7 of the 2003 Regulations with the same wording as in s59. This would ensure consistency in terms of the law applying to Discrimination in Employment and Discrimination in Goods and Services

### **Harassment on Grounds of Religion or Belief**

20) "Harassment" on grounds of Religion and Belief is set out in c47 of the Bill.

c47 Harassment

(1) For the purposes of this Part a person ("A") harasses another ("B") if on grounds of religion or belief A does anything which has the purpose or effect

of—

- (a) violating B's dignity, or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Claims of Harassment can be brought under c47 by Individuals as well as by the Commission and those who allege Harassment can apply for Injunctions as well as damages.

21) The wording of s47 is not based on traditional concepts of Harassment in English law or practice. It is based on a definition of Harassment accepted by the EU in Directive 2000/78/EC and effectively obliges the defendant to prove they have not harassed rather than requiring the claimant to prove that they have been harassed. Prior to the adoption of the Directive British Employment Tribunals had dealt perfectly effectively with sexual (and racial) harassment by considering it as being a form of "detriment" and therefore as contrary to existing sex and race discrimination laws. However the EU Directive was created for the benefit of countries which, for cultural reasons, were struggling to understand the concept of sexual harassment in the workplace. Once the EU decided to define harassment that definition has been incorporated into all types of legislation relating to Discrimination in the workplace including the (Religion and Belief) Employment Regulations (reg 5). However that does not mean that the same definition is appropriate for legislation that will apply outside the workplace and can be used as the basis for an application for an Injunction.

22) The danger with the wording of the Harassment provisions is the vagueness of the concept of an "intimidating, hostile, degrading or offensive environment" and the fact that the bill does not provide for a general defence of "behaviour being reasonable in

the circumstances". The Harassment provisions of s47 could be open to abuse in similar ways to the Religious Vilification legislation of Victoria. 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 Koran. Under clause 47 there is the potential for a similar claim being brought in Britain alleging "Harassment" on the basis that such laughter would be "humiliating or offensive" to a Muslim. The same allegation could be brought against those who mock the Bible.

- 23) In Victoria also there has recently been a case brought by a convicted Paedophile who is a witch and who claims to have had his "religious beliefs" vilified by the Salvation Army working within his prison. The proposed Harassment provisions of c47 will apply within prisons and within schools. In those circumstances claims of "Harassment" could be brought under c47 which are similar to these cases brought in Victoria. To take one extreme example many councils collaborate with Churches at Christmas to allow Cribs to be established in town centres. A witch or Pagan could allege that such cribs "violate his dignity and create an intimidating or hostile environment for him" Conversely a Christian might bring a claim that celebrations of Halloween create an "offensive" environment for him. There is a real danger that the Harassment provisions of c47 could be seized on by every type of nutcase with a grievance and even if such claims eventually fail there is an expense of time and money defending them which could be better spent elsewhere.
- 24) I question whether there is any need whatsoever for c47. Within the workplace it is clearly sensible that there should be a consistent definition of Harassment across the various forms of Discrimination that can be brought before an Employment Tribunal and that definition has to be the one adopted by the EU. However that does not mean that there is any necessity for the same, very wide ranging, definition of Harassment to be used outside the workplace or as the basis upon which applications can be made for Injunctions.
- 25) There is already a Tort of Harassment which has been created by s3 Protection from Harassment Act 1997 and which can be used by victims of Harassment as the basis for claims for Damages and for Injunctions. The 1997 Act is neutral in the types of

Harassment it prohibits. It does not matter whether the Harassment complained of is motivated by racial dislike or by religious dislike by sexual desire, or by hatred of a particular sexual orientation, all are equally prohibited. However the 1997 Act contains a far more rigid definition of Harassment than the Equality Bill and provides clear defences so making it less likely to be misused. For example a claim under the 1997 Act requires the defendant to "pursue a course of conduct" ie there must be behaviour on more than one occasion. The behaviour must be such that a "reasonable person in possession of the same information" would consider it to be harassment. Finally there is a general defence that "in the particular circumstances the pursuit of the course of conduct was reasonable"

- 26) I therefore consider that there is no necessity for the creation of this specific Tort of Religious Harassment outside the area of Employment Law and that there are a number of potential problems with such a Tort. I suggest that clause 47 should be taken out of the Bill altogether. This will not however mean that anyone who is the victim of Religious Harassment is left unprotected since they can still bring a claim under the 1997 Act if they wish to. The powers of the Commission could easily be extended to allow it to support claims brought under the 1997 Act.

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