



## **Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper Response of the Alliance Defense Fund**

**31 January 2012**

### Introduction

1. The Alliance Defense Fund [ADF] is an international not-for-profit legal association of more than 2000 allied lawyers, dedicated to the protection of religious freedom globally. ADF is accredited with the United Nations, European Parliament, European Fundamental Rights Agency and the Organization for Security and Co-operation in Europe.
2. Given ADF's areas of expertise, this response to the Discussion Paper will only answer the questions that are most relevant to the issue of religious freedom. In particular, the answers will draw on examples from other jurisdictions (such as the United Kingdom and Canada, where extensive anti-discrimination laws have been in operation for a number of years) to demonstrate the threat to religious freedom that ill-drafted anti-discrimination laws can pose.

### **Question 4: Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?**

3. ADF submits that the duty to make reasonable adjustments should also apply to the protected characteristic of religious belief in the form of "reasonable accommodation", as applied in other jurisdictions such as Canada and the United States. For example, in the United States, Title VII of the Civil Rights Act of 1964 prohibits employers from treating applicants or employees differently because of their religious beliefs;<sup>1</sup> and denying a reasonable accommodation of an employee's sincerely held religious belief.
4. Religion is liberally protected under Title VII and includes "all aspects of religious observance and practice, as well as belief."<sup>2</sup> With regard to sincerity, a plaintiff is not held "to a standard of conduct which would have discounted his beliefs based on the slightest

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<sup>1</sup> See e.g.: *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 281-82 (3d Cir. 2001). See also: *Delegne v. Kinney Sys., Inc.*, 2004 WL 1281071 (D. Mass. June 10, 2004) (Ethiopian Christian parking garage cashier could proceed to trial on religious harassment and discrimination where he was not allowed to bring a Bible to work, pray, or display religious items).

<sup>2</sup> 42 U.S.C. 2000e(j).



perceived flaw in the consistency of his religious practice.”<sup>3</sup> If the employee risks losing his job because of his religious faith, then the sincerity of his belief is practically unquestionable. As one court observed, sincerity of religious belief can scarcely be doubted when the “[p]etitioner is willing to jeopardize [his] job in support of that belief.”<sup>4</sup>

5. Importantly, the EEOC defines religious practices as including “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional views.... The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee.”<sup>5</sup> Employers must also accommodate religious beliefs concerning opposition to homosexual behaviour.
6. Reasonable accommodation is a fluid and liberal term which must be determined on a case-by-case basis.<sup>6</sup> Broadly, an employer is required to accommodate an employee’s religious belief or custom unless such accommodation will actually interfere with the operations of the employer. An employer violates Title VII if it fails to even attempt an accommodation.<sup>7</sup> Under Title VII law, the employer has the burden of proving undue hardship.<sup>8</sup> Evidence of undue hardship must be more than mere speculation.<sup>9</sup>
7. Thus the doctrine of reasonable accommodation for religious belief provides the optimal balance of proportionality. Although the concept of proportionality is present in a less developed form in the definition of “indirect discrimination”, the doctrine of reasonable accommodation provides greater protections for religious believers and enables a correct balancing exercise to be done between the inevitable clashing rights which are prevalent when anti-discrimination provisions are enacted.

**Recommendation: The concept of reasonable adjustment should be extended to the protected characteristic of religious belief, in the form of “reasonable accommodation.”**

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<sup>3</sup> *EEOC v. University of Detroit*, 701 F. Supp. 1326, 1331 (E.D. Mich. 1988), *rev’d on other grounds* 904 F.2d 331 (6<sup>th</sup> Cir. 1990). *See also EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7<sup>th</sup> Cir. 1997) (request of vacation to observe Yom Kippur by Jewish employee was sincere, even though she had not asked for vacation in the previous eight years).

<sup>4</sup> *McGinnis v. United States Postal Service*, 512 F. Supp. 517, 520 (N.D. Cal. 1980).

<sup>5</sup> *Guidelines On Discrimination Because of Religion*, 29 C.F.R. § 1605.1 (“Guidelines”).

<sup>6</sup> *Religious Discrimination*, 22 A.L.R. Fed. at 604; *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10<sup>th</sup> Cir. 1976) *cert. denied*, 433 U.S. 909 (1977).

<sup>7</sup> *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6<sup>th</sup> Cir. 1991).

<sup>8</sup> *See e.g.: Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9<sup>th</sup> Cir. 2004).

<sup>9</sup> *Pyro Mining*, 827 F.2d at 1086; *Haring*, 471 F. Supp. at 1182 (“undue hardship” must mean *present* undue hardship, as distinguished from anticipated or multiplied hardship.” (emphasis in original)).



**Question 7: How should sexual orientation and gender identity be defined?**

8. Although the Australian Government has committed to introducing sexual orientation and gender identity as new protected attributes in the consolidation bill, 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.<sup>10</sup> Indeed, it is questionable whether the phrase “sexual orientation” is anything more than “a jargon that has surfaced in the LGBT movement a decade and a half ago at the earliest, and the meaning of which is uncertain.”<sup>11</sup>
9. Attempts to define sexual orientation and the subsequent protections afforded to it inevitably run into difficulties.<sup>12</sup> In particular, it is not clear whether sexual orientation refers to a person’s sexual attractions/preferences or the practice/manifestation of such attractions/preferences. Although some courts, such as the European Court of Human Rights, have suggested that sexual orientation is comparable to protections based on sex or race<sup>13</sup>—ostensibly on the basis of the assumed “immutability” of sexual orientation—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 preferences (immutable or not) and acting upon those sexual preferences in sexual conduct are clearly distinguishable.
10. Furthermore, the “immutability” of sexual orientation is highly questionable. The claim is certainly not supported by scientific evidence<sup>14</sup> and many fervent homosexual rights

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<sup>10</sup> The dictionary (Merriam-Webster) definition of “[sexual] orientation” states that it is “a person's self-identification as heterosexual, homosexual, or bisexual. Thus, by virtue of “self-identification,” it is clear that orientation is simply a choice.

<sup>11</sup> J. Cornides, “A Brief Commentary on the Yogyakarta Principles”, 2009 at p.2.

<sup>12</sup> For example, even paragraph 74 of the Discussion Paper suggests that it is uncertain how sexual orientation ought to be defined.

<sup>13</sup> For example, see *Karner v Austria* (2004) 38 EHRR 24 and *EB v France* [2008] 47 EHRR 21.

<sup>14</sup> For the scientific evidence, see: Richard C. Friedman and Jennifer I. Downey, SEXUAL ORIENTATION AND PSYCHOANALYSIS: SEXUAL SCIENCE AND CLINICAL PRACTICE 39 (2002); Letitia Anne Peplau & Linda D. Garnets, A New Paradigm for Understanding Women’s Sexuality and Sexual Orientation 56 JOURNAL OF SOCIAL ISSUES 329, 332 (2000); Rosemary C. Veniegas & Terri D. Conley, Biological Research on Women’s Sexual Orientations: Evaluating the Scientific Evidence 56 JOURNAL OF SOCIAL ISSUES 267, 277 (2000); J. Michael Bailey et al., 2000. Genetic and Environmental Influences on Sexual Orientation and its Correlates in an Australian Twin Sample, *Journal of Personality and Social Psychology*, 78(3): 524-536, 533; Scott L. Hershberger, 2001. “Biological Factors in the Development of Sexual Orientation,” in *Lesbian, Gay, and Bisexual Identities and Youth: Psychological Perspectives*

activists do not make such a claim.<sup>15</sup>

11. In the European Union, protection from discrimination on the basis of sexual orientation was introduced in EU Directive 2000/78 EC. When this Directive was being drafted it was proposed 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.”<sup>16</sup> However, this provision was later removed and consequently some Member States are now conflating the concept of sexual *orientation* with sexual *practice*.
12. In the UK, for example, 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 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.”<sup>17</sup>

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27-51, 40 (Anthony R. D’Augelli & Charlotte J. Pattersons, eds.) (New York: Oxford University Press); J.M. Bailey, et al., Heritable Factors Influence Sexual Orientation in Women 50 ARCHIVES OF GENERAL PSYCHIATRY 217 (1993); J.M. Bailey & R.C. Pillard, A Genetic Study of Male Sexual Orientation 48 ARCHIVES OF GENERAL PSYCHIATRY 1089 (1991); Janet R. Jakobsen & Ann Pelligrini, LOVE THE SIN: SEXUAL REGULATION AND THE LIMITS OF RELIGIOUS TOLERANCE 96 (Boston: Beacon Press 2004); Joseph P. Stokes, et al, Predictors of Movement Toward Homosexuality: A Longitudinal Study of Bisexual Men, 43 JOURNAL OF SEX RESEARCH 304, 305 (1997); Roy F. Baumeister, Gender Differences in Erotic Plasticity: The Female Sex Drive as Socially Flexible and Responsive 126 PSYCHOLOGICAL BULLETIN 347 (2000); Letitia Anne Peplau & Linda D. Garnets, A New Paradigm for Understanding Women’s Sexuality and Sexual Orientation 56 JOURNAL OF SOCIAL ISSUES 329 (2000); Lisa M. Diamond & Ritch C. Savin-Williams, Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women 56 JOURNAL OF SOCIAL ISSUES 297 (2000); Karen L. Bridges & James M. Croteau, Once-Married Lesbians: Facilitating Changing Life Patterns 73 Journal of Counseling and Development 134, 135 (Nov./Dec. 1994) (describing C. Charbonneau and P.S. Lander, Redefining Sexuality: Women Becoming Lesbian in Mid-Life in LESBIANS AT MID-LIFE 35 (B. Sang, et al. editors, 1991)); Lisa M. Diamond, Development of Sexual Orientation Among Adolescent and Young Adult Women 34 DEVELOPMENT PSYCHOLOGY 1085 (1998); Susan Rosenbluth, Is Sexual Orientation a Matter of Choice? 21 PSYCHOLOGY OF WOMEN QUARTERLY 595, 605-607 (1997); Sari H. Dworkin, Treating the Bisexual Client 57 JOURNAL OF CLINICAL PSYCHOLOGY 671 (2001); Lisa M. Diamond, Was It a Phase? Young Women’s Relinquishment of Lesbian/Bisexual Identities Over a 5-Year Period 84 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 352 (2003); 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); Warren Throckmorton, Initial Empirical and Clinical Findings Concerning the Change Process for Ex-Gays 33 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 242 (2002).

<sup>15</sup> In the UK, homosexual right activist, 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 and again in *The Guardian* 2006:

“Much as I would love to go along with the fashionable "born gay" consensus (it would be very politically convenient), I can't. The evidence does not support the idea that sexuality is a fixed biological given.”

<sup>16</sup> Commission of the European Communities, 25.11.1999, COM(1999) 565 final, 1999/0225 (CNS), p.8.

<sup>17</sup> *R (on the application of Amicus - MSF section and others) v. Secretary of State for Trade and Industry* [2004] IRLR 430 at § 432. The comment is probably *obiter dictum*.

13. Furthermore, the UK's Supreme Court stated in 2010 that the protection afforded to sexual orientation includes the "right to live freely and openly as a gay man."<sup>18</sup> Hence, "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."<sup>19</sup> 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."<sup>20</sup>
14. Other jurisdictions have taken a similar view, with Richards J.A, of the Court of Appeal of Saskatchewan, Canada, stating that: "Sexuality and sexual practices are such intimately central aspects of an individual's identity that it is artificial to suggest that the practices of gays and lesbians in this regard can somehow be separated out from those individuals themselves."<sup>21</sup> Likewise, it has been held in Australia that: "Sexual orientation, like gender, race and ethnicity, are part of a person's being, or identity."<sup>22</sup>
15. Hence, it appears that the phrase "sexual orientation" is being interpreted far more widely than mere *orientation*. Courts are defining sexual orientation as being inseparable from the manifestation of that orientation in sexual *practice*. Whereas orientation involves attractions and causes little or no conflict with religious beliefs, sexual practice clearly causes a conflict, as many religions do not consider it to be morally neutral.<sup>23</sup> Therefore, where sexual orientation is elevated to a highly protected characteristic, and 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

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<sup>18</sup> *HJ (Iran) (FC) (Appellant) v Secretary of State for the Home Department*, [2010] UKSC 31, per Lord Roger, at § 78. The case involved immigration not discrimination. Nevertheless, the comments are illuminating.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*, per Lord Hope at § 11.

<sup>21</sup> *Hugh Owens v. Saskatchewan Human Rights Commission*, 2006 SKCA 41 § 82.

<sup>22</sup> *Cobaw Community Health Service v Christian Youth Camps Ltd & Anor (Anti-Discrimination)* [2010] VCAT 1613 (8 October 2010) at § 193.

<sup>23</sup> For example, the orthodox position of Christianity is that homosexual behavior is morally wrong. (See Rom. 1:26–28, 32, 1 Cor. 6:9–10). In Judaism, the book of Leviticus states: "Do not lie with a man as one lies with a woman; that is detestable" (Leviticus 18:22). In Islam, the Qur'an explicitly forbids homosexual practice, for example, in 7:80-84. And in Sikhism, the world's highest Sikh authority, Giani Joginder Singh Vedanti, admonished Sikh-Canadian MPs to block the gay marriage bill in Parliament, warning it is against Sikh code and "the laws of nature." See "World Sikh group against gay marriage bill" at <http://www.cbc.ca/canada/story/2005/03/28/sikhguy-050328.html>.



sex and marriage, and those who claim that such a view is discriminatory on the basis of sexual orientation. This “clash” is inevitable: any attempt to eradicate discrimination on the basis of sexual orientation, in reality, will eradicate other fundamental freedoms.

16. Thus, as “sexual orientation” has become a protected characteristic and gained more and more legal protections and privileges, those who hold (and manifest) the view that marriage is strictly between one man and one woman and the only God-ordained place for sexual relations, have increasingly found that they cannot refuse to endorse what they consider to be immoral behaviour without being dismissed from work or sued, and they cannot maintain control over their private organizations that corporately adopt the same view without being shut down or fined. Thus: “If the power of the state is invoked on one side of this argument so that religious groups are prevented (by non-discrimination laws) from treating homosexuality as a moral issue they will have been denied their religious liberty.”<sup>24</sup>

**Recommendation: Sexual orientation and gender identity should be removed as protected characteristics, or, if sexual orientation is to be included as a protected characteristic, a clear dividing line should be drawn between sexual orientation, and sexual behaviour.**

**Question 22: How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?**

### **i. Introduction**

17. To some, the notion of exemptions means that religious people will be “above the law”, or will be allowed to discriminate through legal “loopholes”<sup>25</sup> and that somehow this is unfair or at the very least, it makes the law more complicated. However, there are many exemptions to be found on the statute books. They exist in order to prevent an intolerably blunt application of the law that does not recognise the principle of “different treatment under the law”.<sup>26</sup> Indeed, a liberal democracy can be distinguished from cruder majoritarian forms of democracy by the fact that in a liberal democracy, the government has regard for the views of minorities and does not just create a “tyranny of the majority.”<sup>27</sup>

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<sup>24</sup> R. Adhar and I. Leigh, *Religious Freedom in the Liberal State*, (Oxford University Press: 2005) p.317.

<sup>25</sup> For example, see ‘A Humanist Manifesto for the 2010 General Election’ at <http://www.humanism.org.uk/>

<sup>26</sup> See D Boucher, ‘A Little Bit Against Discrimination? Reflection on the opportunities and challenges presented by the Equality Bill 2009-2010’, *Care Research Paper*, 2010, p.11.

<sup>27</sup> Alexis de Tocqueville, “Tyranny of the Majority,” Chapter XV, *Democracy in America*, Book 1,

18. Moreover, different treatment takes place all the time, yet the (often) emotive language of exceptions is not always used. For example, as one UK commentator pointed out during the passing of the Equality Act 2010—where religious exemptions were the source of much debate—it is illegal to segregate toilets on the ground of race; it is not illegal to segregate toilets on the ground of sex.<sup>28</sup> However, no-one complains that the law is sexist in segregating toilets. Hence, different treatment helps the law to work smoothly, it does not merely create categories that are above the law or create complications.
19. Therefore, regarding Australia’s forthcoming consolidated anti-discrimination laws, it is submitted that religious exemptions should be broadly drafted and robustly protected. Furthermore, they should apply to the provision of goods and services as well as to the field of employment, and should enable lawful discrimination on the grounds of “sexual orientation and gender identity” as well as religion or belief. If religious exemptions are not broadly drafted, there is a real danger that anti-discrimination laws will in fact discriminate against one of the protected groups that they are supposed to protect, by denying religious people their right to act on their religious beliefs.

## **ii. The removal of religious liberty through narrowly drafted exemptions**

### *Religious organisations as employers*

20. In parts of the world where extensive anti-discrimination laws have been introduced, one of the main problems for religious organizations has been that the legislation protecting “sexual orientation” has provided very little room to employers with religious objections to act on their own moral judgments about homosexual conduct. Hence, laws protecting “sexual orientation” result in a substantial narrowing of the right to manifest religious beliefs.<sup>29</sup>
21. For example, in the UK case of *Reaney v. Hereford Diocesan Board of Finance*<sup>30</sup>, the Diocese of Hereford was successfully sued for £47,000 for refusing to employ a practicing homosexual for the position of Youth Officer. It is now clear that religious

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Echo Library, 2006

<sup>28</sup> ‘A Little Bit Against Discrimination? Reflection on the opportunities and challenges presented by the Equality Bill 2009-2010’, *Care Research Paper*, 2010, p.11

<sup>29</sup> See R Adhar and I Leigh, *Religious Freedom in the Liberal State*, (Oxford University Press: 2005) p.323.

<sup>30</sup> ET judgment 17 July 2007 (Case No: 1602844/2006).



organisations are subsequently walking along a legal tight rope when hoping to rely on narrow exemptions reluctantly permitted to them by parliament.

22. Similar cases have taken place in Canada, for example, the case of *Heintz v. Christian Horizons*.<sup>31</sup> In 2001 Miss Heinz brought a human rights complaint against Christian Horizons, a large Christian charity working with developmentally disabled adults in Ontario. As a Christian organization, Christian Horizons had a policy requiring all members of staff to sign a statement of faith. This was done to create a Christian environment where patients would be cared for by employees who “exemplify Christ, and show Christian love in all they do.”<sup>32</sup> Employees were also required to follow a biblical code of conduct that prohibited, amongst other things, extra marital relationships and homosexual relationships. Ms. Heintz had signed the statement of faith and code of conduct upon her employment. However, five years later she entered into a homosexual relationship and was dismissed for breaching her terms of employment. The former employee then sued Horizons for discrimination based on her sexual orientation.

23. In 2008, some seven years after the complaint was filed, the Ontario Human Rights Tribunal held that Horizons discriminated on the grounds of sexual orientation and had created a “poisoned work environment.” The Tribunal ordered that Christian Horizons had to pay Ms. Heintz \$23,000 for discrimination and abolish its lifestyle and morality code requirement.<sup>33</sup> On appeal, the Ontario Divisional Court<sup>34</sup> did somewhat clarify the law, and accepted that Christian organizations could, in certain circumstances, place lifestyle restrictions on their employees. Nevertheless, the Court upheld part of the tribunal order, and stated that Christian Horizons must pay the \$23,000 in damages as well as cease to impose a requirement in its Lifestyle and Morality Statement that support workers not engage in same-sex relationships.

#### *Religious voluntary organizations*

24. Limitations on freedom of association have not just affected religious organizations that act as employers. Voluntary organizations in the UK have also come under threat since “sexual

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<sup>31</sup> *Heintz v. Christian Horizons*, 2008 HRTO 22 (CanLII).

<sup>32</sup> *Id.*, at § 190.

<sup>33</sup> *Id.*, at § 286.

<sup>34</sup> *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII).



orientation” was given protected status. For example, in January 2004 the Christian Union at Hull University was de-ratified from the Student Union after being told that its “Christians-only” leadership policy was discriminatory. The Student Union Council, led by a homosexual rights campaigner, voted to de-ratify the CU because its leadership was obliged to sign a Doctrinal Basis. Only after legal intervention and the threat of court action did the University back down. A similar situation happened at Exeter University, where the 50-year-old Christian Union was banned from campus because of its “discriminatory” membership policies. Only after legal proceedings were launched in the High Court did the matter get settled. Further, in Edinburgh University, the Christian Union was prohibited from running a course on sexual ethics—called “Pure”—because it was deemed “offensive” to homosexuals. The CU was banned from holding the course anywhere on campus.<sup>35</sup>

*Religious organizations that are also commercial*

25. In the UK, the exemptions for religious organizations do not extend to organizations that are “solely or mainly” commercial. Several religious believers have been sued as a result of the change in the law. For example, in the case of *Hall and Preddy v. Bull and Bull*,<sup>36</sup> Mr. and Mrs. Bull were sued for refusing to give double bedded accommodation to unmarried couples.

26. Mr. and Mrs. Bull own a Bed and Breakfast out of their own home and have 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.” In court the Bulls gave evidence that over the years numerous unmarried heterosexual couples had been prevented from sharing a double bed and as a result, the couples either took two single rooms or found another Bed and Breakfast.

27. However, in 2009, following the passing of the Equality Act (Sexual Orientation) Regulations 2007, a homosexual couple was refused a double room. As a result, the police

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<sup>35</sup> For more information see: [http://www.christian.org.uk/issues/2007/cu/briefing\\_april07.htm](http://www.christian.org.uk/issues/2007/cu/briefing_april07.htm).

<sup>36</sup> (Case No. 9BS02095), 18 January 2011.



were called, the incident was registered as a “hate incident” and the homosexual couple subsequently issued a civil claim for allegedly being discriminated against on the ground of their sexual orientation, contrary to the Equality Act (Sexual Orientation) Regulations 2007. The case was backed by the Government-funded Equality and Human Rights Commission and the Bulls were ordered to pay £3,600 in damages. Furthermore, after the court hearing the elderly Christian couple was besieged by abuse from homosexuals and now their business faces closure.<sup>37</sup> Other Christian guesthouses are facing a similar situation.<sup>38</sup>

28. The UK’s treatment of commercial organisations can be contrasted with that of Canada, where it has been held that organisations that are also commercial can be protected under anti-discrimination provisions. For example, in the case of *Brockie v. Ontario (Human Rights Commission)*<sup>39</sup>, Mr Brockie—a Christian and the president of printing company—refused to print material for a homosexual rights organization as he held a sincere religious belief that homosexual conduct is sinful. In the furtherance of that conviction, Mr. Brockie believed that he should not assist in the dissemination of information intended to spread the acceptance of a homosexual lifestyle. Mr. Brockie did, however, draw a distinction between acting for customers who are homosexual (something which he had no objection to) and acting in furtherance of a homosexual lifestyle.<sup>40</sup> Rather than deciding that commercial organisations cannot seek protection under the law (the “UK approach”), the Ontario Superior Court of Justice held that Mr. Brockie would not have to print material “of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed.”<sup>41</sup> ADF submits that this approach should be preferred to the approach of the UK, as religious freedom was protected and a fair balance was created in the law between those who wish to act on a sincere conviction and those that wish to obtain a service. With numerous service-providers operating within society, there is no reason why service-providers who wish to uphold a sincerely held religious conviction cannot be adequately accommodated.

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<sup>37</sup> See *The Daily Mail*, 21 January 2011.

<sup>38</sup> See the case of Mr. and Mrs. Wilkinson, *BBC News*, 21 March 2010.

<sup>39</sup> [2002] O.J. No. 2375 (Sup. Ct. J. (Div. Ct.)). Reviewing the decision of the Ontario Board of Inquiry in *Brillinger v. Brockie*, [2000] O.H.R.B.I.D. No. 3.

<sup>40</sup> *Id.*, at § 3.

<sup>41</sup> *Id.*, at § 58.



*Religious organizations that receive public funding*

29. One of the most disappointing aspects of the introduction of the UK's anti-discrimination laws is the discriminatory affect that they have had on faith-based organizations that wish to access public funds. For example, faith-based adoption agencies have now been closed in England following the introduction of the Sexual Orientation Regulations.<sup>42</sup>
30. When the Regulations were passed in 2007, 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 its religious ethos. This was despite Catholic adoption agencies being widely recognised as some of the best in the country.<sup>43</sup> In 2007, there were fourteen faith-based adoption agencies working throughout the UK, accounting for a third of adoptions within the voluntary sector.<sup>44</sup> Most of these have now had to remove their religious ethos and become secularized<sup>45</sup> or have had to withdraw their services completely.
31. In April 2011 the Charity Tribunal found against the last remaining Catholic adoption agency following a High Court decision.<sup>46</sup> 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 as an adoption agency.”<sup>47</sup>
32. The UK's anti-discrimination laws also allow local authorities to withdraw funding from religious organizations that do not, in the view of the local authority, sufficiently promote issues that are contrary to the religious organization's ethos. For example, in 2008 a Christian care home had funding removed for refusing to promote homosexuality to its

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<sup>42</sup> For more information, see “Adoption Agencies Shut under ‘Equality’ Laws”, *The Christian Institute*, April 2009.

<sup>43</sup> 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.

<sup>44</sup> See House of Commons, *Hansard*, 21 February 2007, col. 110WH.

<sup>45</sup> 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.

<sup>46</sup> *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.

<sup>47</sup> *Id.*, at para 60.

residents.<sup>48</sup> After the anti-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.<sup>49</sup> 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.

33. The Council, citing the new laws, withdrew the £13,000 per year grant.<sup>50</sup> 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.”<sup>51</sup> After more than a year of internal appeals—costing the home £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.

**Recommendation: Religious exemptions should be drafted as widely as possible and should affirm, *inter alia*, that:**

- **Religious employers should be able to govern their own internal affairs by having complete control over their employment practices;**
- **Exemptions should apply to organizations that operate commercially, such as guesthouses and wedding photographers;**
- **Religious exemptions should apply to faith-based organizations that receive public money, such as care homes and adoption agencies;**
- **Religious exemptions should apply to religious individuals as well as to religious organisations.**

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<sup>48</sup> For more information, see “Care home suffers under ‘equality’ laws: How traditional Christian beliefs cost an elderly care home a £13,000 grant”, *The Christian Institute*, May 2009. The residents are looked after in “a family setting, with a distinctive Christian ethos” and in order to maintain this ethos, the residents must sign up to a doctrinal basis.

<sup>49</sup> *Id.*, at p.5.

<sup>50</sup> *Id.* at p.10-11.

<sup>51</sup> *The Daily Telegraph*, 28 December 2008.



## Conclusion

34. In countries that have that have introduced extensive anti-discrimination laws, a reduction in religious freedom has clearly followed. For example, in countries such as the UK and Canada, employees have been unable to act on their conscience in the workplace without being dismissed, religious organizations and religious business owners have been successfully sued and religious welfare organizations such as adoption agencies have been closed. Simply put, there are only two ways to prevent such drastic limitations on freedom of religion: either by removing “sexual orientation” as a protected characteristic or, if it is included, by drafting wide religious exemptions. A failure to enact one of these two mechanisms will inevitably lead to a “clash of rights” and, more than likely, a drastic reduction in religious freedom.