



The Association of
Muslim Lawyers (UK)

RECOMMENDATIONS FOR THE FORTHCOMING RELIGIOUS DISCRIMINATION LEGISLATION

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THE PRESENT SITUATION IN THE UNITED KINGDOM WITHIN THE GLOBAL CONTEXT:

1. For many years the Muslim community in the United Kingdom has been campaigning for the introduction of legislation to promote religious freedom, to deter religious discrimination – and to provide appropriate legal remedies when it does occur. If anything the religious discrimination to which Muslims have been subjected, both in the UK and indeed worldwide, has intensified since the bombing last year of the World Trade Centre and the Pentagon – and subsequently of Afghanistan, where innocent civilian casualties have been far greater (more than twice as much) than in America.
2. Events in Palestine have also had an influence. Palestinian Muslims who have had their land systematically stolen, their homes and infrastructure regularly destroyed and their families repeatedly decimated have been depicted as terrorists by Khazar Zionists who as well as wielding influence over much of the world media and many world leaders, and in apparent part fulfilment of the predictions contained in the Chapters 38 and 39 of the Book of Ezekiel, have been terrorising the Palestinians and denying them their democratic rights for more than half a century – from before Deir Yassin to beyond Jenin.
3. The sheer scale of the systematic massacre of Muslim civilians in Iraq, the Caucasus, the Balkans, Kashmir, Gujarat and Indonesia during the last decade has also contributed towards establishing the mindset that supports the view that it is perfectly alright to discriminate against and indeed kill Muslims, especially any Muslim who fights back in self defence, or who happens to be living above or near valuable oil resources.
4. In all of these killing fields many innocent, decent, law-abiding Muslims have been held responsible for the actions of others. They have been targeted on a scale far greater than the way in which, for example, innocent Irish people have been blamed for the actions of the IRA and the UDF. The extreme is depicted as the norm and the main body is then automatically presumed to support that artificially defined norm – and is accordingly criminalised, demonised and regarded as fair game to be hunted down, mutilated and destroyed. In our view, Islam is the middle way and the overwhelming majority of Muslims follow it.
5. Thankfully the Muslims in the United Kingdom have not been subjected to the same degree of discrimination which is taking place further east – and now, sadly, further west. Furthermore, since it is a fact of life that former colonial powers are inevitably colonised by the peoples whom they once colonised, significant efforts are now being made in the aftermath of the British Empire to establish a multi-cultural, multi-ethnic, multi-religious society in the UK – in which it is possible to demonstrate a civilised degree of tolerance which promotes mutual respect over and above bashing anyone whose colour or religious beliefs happen to be different.
6. Religious discrimination is, nevertheless, just as much a fact of life in the UK as race and sex discrimination – the main difference being that at least those who blatantly discriminate on grounds of race or sex can be taken to court by their victims.
7. In contrast, with the exception of Northern Ireland, British justice does not extend to protecting people from religious discrimination or to providing any legal recourse to being granted compensation if direct loss is suffered as a result of such discrimination. No tribunal or judge is able to rule that any act of religious discrimination has infringed any law, because there is no law which outlaws it or protects from it in the first place – which means that

religious discrimination in its present forms has accordingly become institutionalised – perhaps even more subtly than race and sex discrimination.

8. This deplorable state of affairs is, we hope, about to change, largely as a result of laws promulgated in mainland Europe, in particular the *European Convention on Human Rights* and also various Council Directives adopted under *Article 13 of the EC Treaty*, as introduced by the *Treaty of Amsterdam*

THE LEGAL POSITION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE HUMAN RIGHTS ACT 1998:

9. By virtue of *Article 1* of the *European Convention on Human Rights* (the *ECHR*), the UK government, as a signatory to the *ECHR*, is under a legal duty to secure (by passing secondary legislation if necessary) the rights guaranteed by the *ECHR* by providing an 'effective remedy' in the English courts 'without discrimination on any ground' for any violation of these rights. As long as it fails to do so, the government is in breach of *Articles 1, 13 and 14* of the *ECHR* and unless and until this breach is remedied, it is likely to find itself before the Court of Human Rights in Strasbourg.
10. It follows therefore that the UK government will – sooner or later – have to enact secondary legislation to secure *inter alia* the *Human Rights Act 1998* rights to practise one's religion, whether alone or in a group (*Article 9* of the *ECHR*), and to educate one's children in accordance with one's religion (*Article 2* of the *First Protocol* to the *ECHR*).
11. The UK government has delayed fulfilling this obligation firstly, by deliberately not incorporating *Article 13* of the *ECHR* into the *HRA 1998* – *Article 13* provides that an effective remedy must be provided for violation of *ECHR* rights – and secondly, by refusing to sign and ratify *Protocol No. 12 to the ECHR* which was adopted by the Council of Europe on the 4th November 2000, in order to give effect to *Article 14* of the *ECHR*, which although incorporated into the *HRA 1998* is not a free standing right against discrimination and can only be invoked in conjunction with one of the other *ECHR* rights.
12. *Article 1* of *Protocol No. 12* provides for a general prohibition on discrimination:
 - 1 (1) The enjoyment of any right set forth by law 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.
 - 1 (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.
13. If the UK were to sign and ratify *Protocol No. 12*, then the Secretary of State could amend the *HRA* so as to reflect its effect, subject to approval by Parliament, by making an Order under *section 1(4) of the HRA*. This would then oblige the UK judiciary under UK domestic law – in contradistinction to the UK government's obligations as a signatory of the *ECHR* – to secure protection against discrimination by public authorities on all the proscribed grounds, including religion, in all spheres of life. It would appear, however, that the UK government would prefer to define in advance by way of statute how violations are to be defined and what remedies are to be made available, rather than leaving this up to the judiciary.
14. The present government, while simultaneously condoning and even participating in the slaughter of Muslims further east, has unlike its predecessor nevertheless taken positive steps towards formulating appropriate secondary legislation to secure *Article 9* rights in the UK by providing remedies for violations of these rights. Research studies have been commissioned and completed, debates have taken place in both houses of parliament, consultation is taking place.
15. Formulating such legislation is by no means a straight forward matter, since by virtue of the doctrine of equal rights for all it has to protect as equally as is possible not only all the followers of all *bona fide* religions – but also those whose self-made religions predicate denial of the existence of God and the total rejection of all of His messengers!
16. In formulating legislation to protect the right to freedom of religion and belief, many questions need to be considered carefully. For example: To what extent and in what spheres of life should the forthcoming legislation apply? To whom will it apply? Will comedians still be free to crack jokes with religious themes? Will scholars still be able to engage in serious critical religious and theological debate which at times will inevitably involve profound disagreement? At what point will religious extremists lose protection under the law and be defined as criminals? Should the legislation deal with both direct and indirect religious discrimination? How should these be defined? How should God be defined? Is it not in truth God who defines us? How should the word religion be defined? Should a distinction be made between religion and political belief? When should positive religious discrimination be legally permitted? How will the existing law regarding blasphemy, which at present is only for the benefit of the Christian religion, be affected? Should it be expanded to include other religions or simply removed? Will a public body, perhaps to be called the Commission for Religious Freedom, have to be created in order to promote good practice and ensure compliance with the new legislation? All of these issues and more have to be carefully considered before a law can be formulated whose effect it is hoped will be to facilitate justice – and not its opposite.
17. Given that there are so many different factors to consider, it may perhaps be a blessing in disguise that to begin with the forthcoming legislation will probably be limited to the field of employment – although its extent will in time have to go much further if people's religious rights under the *ECHR* are to be secured fully and effectively, for

example as regards housing, education, immigration and the criminal and penal system. This is because of the Employment Directive adopted in November 2000 under *Article 13 of the EC Treaty* as introduced by the *Treaty of Amsterdam*.

THE LEGAL POSITION UNDER THE TREATY OF AMSTERDAM AND THE EMPLOYMENT DIRECTIVE:

18. *Council Directive 2000/78/EC of 27th November 2000* (on the implementation of the principle of equal treatment in employment and occupation – but not in any other spheres of life – without discrimination “on grounds of religion or belief, disability, age or sexual orientation”) was adopted under *Article 13 of the EC Treaty* as introduced by the *Treaty of Amsterdam*. This Directive (the *Employment Directive*) must be implemented by the UK by the 2nd December 2003 in respect of religion or belief, so as to be compatible with the rights set out in the *ECHR*.
19. What provisions therefore would we like to see in the new Act? For the time being we will refer to it as ‘the *Freedom of Religion Act*’, although it could, for example, be called the *Toleration Act* or the *Religious Discrimination Act*, depending on how it is viewed.

RECOMMENDATIONS FOR THE FREEDOM OF RELIGION ACT 2003:

20. Firstly, in my opinion considerable assistance can be derived from the content of the *Race Relations, Sex Discrimination and Disability Discrimination* legislation – and the lessons learnt during the time they have been in force. Lessons can also be learnt from the legal systems of other countries which already have laws which are concerned with the protection of religious freedom and the protection from religious discrimination.
21. As regards the protection of religious freedom, this is already enshrined in *Article 9* of the *ECHR* which has been incorporated into the *HRA 1998*. *Article 9* guarantees everyone living in Europe including the UK the right to *choose* their religion and the right to *practise* their religion, subject to certain limitations:
 - 9 (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.
 - 9 (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.
22. It follows therefore that the main purpose of the *Freedom of Religion Act* (‘the *FRA*’) should be to protect these freedoms from being violated and to provide appropriate remedies if and when they are violated without reasonable justification.

Direct Discrimination

23. We would therefore expect *section 1* of the *FRA* to prohibit employers from treating individuals less favourably than others without reasonable justification because of their religious *beliefs* or *practices*.
24. We would also expect some guidance as to the nature and extent of the proviso contained in *Article 9(2)* of the *ECHR*, particularly as to what limitations are necessary “for the protection of the rights and freedoms of others.”
25. An example of less favourable treatment because of religious *belief* would be if a Muslim employee in Manchester were to be fired because alleged Muslim terrorists were alleged to have destroyed a prominent building in New York – while a Catholic employee in a similar position was not fired because IRA terrorists claimed responsibility for destroying a prominent building in London.
26. An example of less favourable treatment because of religious *practice* would be if a Muslim woman were to be refused employment as a sales assistant in a clothing retail outlet because she was wearing a hijab, while an equally competent orthodox Jewish woman wearing a wig was given the job.
27. To use the terminology employed by the USA *Civil Rights Act 1964*, employers should be required to “reasonably accommodate the religious practices of an [actual or potential] employee, unless to do so would create an undue hardship”.
28. Another example of less favourable treatment on the grounds of religion and a failure to reasonably accommodate the religious practices of an actual or potential employee is enshrined in the *Prison Act 1952*, a remnant from legislation enacted a century earlier: Whereas the prison *chaplain* is defined by the Act as a full-time prison *officer* who enjoys all the powers, authority, protection and privileges of a constable, prison *ministers* may be appointed to visit prisoners who belong to “a religious denomination other than the Church of England”, but theirs is only a part-time post and they are expressly warned in their letter of appointment not to impersonate a prison officer. This disparity means that as regards career progression in the prison service, Jewish rabbis, Roman Catholic ministers and Muslim imams who work as members of the prison chaplaincy are barred by statute from progressing to the status of full-time prison officer – unless of course they become Christian Protestants.

Indirect Discrimination

29. Since experience in race, sex and disability discrimination cases has confirmed that discrimination is often subtle and sometimes even unintentional, it almost goes without saying that as well as outlawing *direct* discrimination on religious grounds, the *FRA* should also outlaw *indirect* discrimination on religious grounds, whether intentional or unintentional. *Article 2(2)(b)* of the *Employment Directive* provides criteria for identifying *indirect* discrimination which are not the same as the criteria contained in the *Race Relations, Sex Discrimination* and *Disability Discrimination* legislation. It reads as follows :

Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless:

- (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving it are appropriate and necessary

This reflects the criteria applied in the case of *Abdulaziz, Cabales and Balkandali v UK [1985] 7 EHRR 47* :

A difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims to be realised. ”

30. Examples of *indirect* discrimination on religious grounds would be if posts for staff in an abortion clinic were restricted to applicants who did not believe in God, thereby discriminating against all believers; or if advertisements for forklift truck drivers in a supermarket warehouse stated that preference would be given to applicants who did not wear beards, thereby disadvantaging practising Muslim males.
31. One of the issues to be decided by those drafting the *FRA* will be whether or not the criteria for indirect discrimination contained in the *Race Relations, Sex Discrimination* and *Disability Discrimination* legislation should somehow be included in the *FRA* definition of *indirect* discrimination, or whether the test should be based simply on the definition provided in the *Employment Directive*

Procedure

32. The *FRA* will need to provide sufficient detail as to how an applicant is to initiate and conduct legal proceedings – including the use of a *FRA* Questionnaire – and what rights of appeal there will be. In my opinion the procedural requirements and rights of appeal provided by the *Race Relations, Sex Discrimination* and *Disability Discrimination* legislation should suffice.
33. Clearly violations of *Article 9* rights which occur in the context of employment should be dealt with by Employment Tribunals in the first instance – but, depending on the extent to which the *FRA* applies, it may be more appropriate to have violations in other spheres of life dealt with by other courts.
34. It is proposed that in this context the *FRA* should include the following features:
- (i) a new definition of indirect discrimination and the reversal of the burden of proof once a *prima facie* case is made out;
 - (ii) the entitlement of a court or tribunal to draw an inference of discrimination on religious grounds without the need for positive evidence where there is a finding of a difference of religion and a finding of discrimination, and the respondent has failed to put forward any adequate or satisfactory explanation;
 - (iii) the duty on tribunals and courts to draw inferences from the failure of respondents to reply to *FRA* Questionnaires;
 - (iv) the protection of volunteers;
 - (v) the protection of former employees from victimisation by an employer.

Compensation

35. In my opinion where the applicant proves on the balance of probabilities that he or she has been subjected to religious discrimination, the same remedies as are available under the *Race Relations, Sex Discrimination* and *Disability Discrimination* legislation should be available, including the power of Employment Tribunals to make a declaration, to order reinstatement and to award damages without an upper limit – even where the discrimination, whether direct or indirect, was not intentional.

Key Definitions

36. Another of the issues to be decided by those drafting the *FRA* will be whether or not there should be definitions of key words and terms such as ‘God’ and ‘religion’ – or whether these should be left to the judiciary to develop, as has happened, for example, in the law governing charities.
37. From a Qur’anic perspective, the following definitions would, it is submitted, be acceptable: a ‘religion’ is ‘that system of beliefs and actions centred round the worship of God which is derived in whole or in part from a book revealed by God to one of His messengers.’ This definition is wide enough to include all denominations of the Jews, the Christians, the Muslims, the Hindus, the Buddhists and the Sikhs – but not man-made religions such as, for example, Scientology and Communism, neither of which involve worship of God. If a definition of ‘God’ were also needed, then although *Surat’al-Ikhlās* would be perfect, perhaps ‘the Source and Sustainer of the universe and all that exists’ would suffice. *Surat’al-Ikhlās* states:

Say: ‘He is Allah, Absolute Oneness,
Allah, the Everlasting Sustainer of all.

*He has not given birth and was not born.
And no one is comparable to Him. (Qur'an: 112. 1-4)*

38. Since, however, the ambit of *Article 9* of the *ECHR* includes 'free' thinkers, this means that the *FRA* will also have to apply equally to people who do not believe in God and who do not follow any religion other than a man-made one, such as, for example, scientologists, communists, humanists, idol-worshippers, money-worshippers and fire-worshippers, to name but a few. The application of this overriding doctrine of equal rights for all, no matter who no matter what, means inevitably that certain aspects of the common law governing religious charities may well have to be changed by statute, since its foundations are religious, not secular. It also means that inevitably there will be situations where a conflict of rights will occur – which will have to be resolved by the courts.

Conflict of Rights

39. One of the key issues which will have to be defined either by statute or by the judiciary – or by a combination of both – is that of the pecking order of rights. In other words, where there is a conflict between the freedom to manifest one's religion or beliefs on the one hand – and on the other hand with reference to the *Article 9(2)* proviso "the rights and freedoms of others", what principles are to be applied in deciding which right has right of way? What happens where there is a conflict between two religions or between a religion and a belief? Who has precedence? At whatever stage the pecking order is defined or decided, it would appear that there will be times when that order will depend very much on the personal views of whoever is deciding what the order should be. For example, a judge who is a devout practising Christian will not always see eye to eye with a judge who is a confirmed gay atheist.
40. For example, a Christian school for young boys might refuse to employ a brilliant geography teacher who is a homosexual, firstly because homosexuality is forbidden in the Bible and secondly as a precaution to safeguard the pupils in its charge. On the other hand the teacher might assert that his freely chosen personal religion is based on the teachings of Sappho of Lesbos, that he only practises with consenting adults – and that he should not be discriminated against because of his beliefs and the practices based on them.
41. For example, a Muslim secondary school for girls might refuse employment to a teacher who does not wear hijab, because this would set a non-Islamic example, while the teacher might assert that this was not part of her religious belief or practice.
42. It would help therefore if the *FRA* could clarify how such conflicts of rights are to be judicially resolved, especially where the conflict is between different religious rights. It would appear, however, that at present there is in certain circumstances a legal bias in favour of religious rights over other rights. This is because as regards any religious organisation, *section 13* of the *HRA* requires any court or tribunal to have "particular regard" to the importance of the right to freedom of thought, conscience and religion in the determination of any question arising under the Act that might affect its exercise of that *ECHR* right. The Home Secretary explained at the Committee stage of the Bill [HC Debates, 20 May 1998, cols. 1023-24] that the purpose of this clause was to reassure religious organisations "against the Bill being used to intrude upon genuinely held religious beliefs or practices based on their beliefs." Of course this reasoning applies just as much to Muslim organisations as to Christian or Jewish organisations.
43. This means that where situations arise where there is a conflict of rights – for example, between religious rights and other rights – in applying the proportionality test any such tribunal or court would also have to take into account *section 13 of the HRA*. In other words, where there is such a conflict of rights – for example, between the right to freely practice one's religion on the one hand, and on the other hand, the right not to be treated less favourably because of one's gender or sexual orientation – there is a statutory requirement to pay particular regard to the former rather than the latter.
44. As regards conflicts of rights between religions and religions, or between religions and beliefs, clearly there is a need to update and upgrade some aspects of current ecclesiastical law whose pecking order (like the *Prison Act 1952*) places Protestant Christians well at the top – followed by Roman Catholics, Jews and 'people of other faiths', in that order, and on a far from level playing field. This could be given effect in a Schedule of the *FRA*.

Positive Discrimination

45. There are of course deeper conflict situations where religious discrimination can be seen to be positive rather than negative – or in other words, where it is a genuine occupational qualification and therefore differential treatment on religious grounds is both reasonable and justified.
46. For example a Catholic school would not wish to employ a Muslim to teach religious education, since he or she would assert that we are not born guilty of sin and that Jesus was not the son of God, but rather a messenger of God who foretold the coming of Muhammad, blessings and peace be on them both – and that he was not crucified, but rather someone whom God made look like him, possibly Judas Iscariot. This would not be compatible with the Catholic doctrines of the trinity, original sin and atonement and forgiveness of sins – and it is argued, the Catholic school should be allowed to appoint a Catholic teacher rather than the Muslim, even if the Muslim is right, since this is a difference of belief that will not be resolved until the second coming of Jesus.

47. Similarly, a Muslim school would not wish to have a Jewish rabbi teaching its pupils religious history, since he would assert that neither Jesus nor Muhammad were prophets of God and that the promised Messiah is still to come. This would not be compatible with what is stated in the revelation of the Qur'an – and it is argued, the Muslim school should be allowed to appoint a Muslim teacher rather than a Jewish rabbi, since this is a difference of belief that will not be resolved until the second coming of Jesus.
48. Similarly, a Muslim school would not wish to have a Christian priest teaching its pupils religious studies, since he would assert that Jesus was the son of God and therefore an indivisible yet distinct part of God, able at will to metamorphose into flesh and blood in the form of bread and wine on a regular basis for over two millennia – and that therefore there was no need for God to send another human messenger after him. This would not be compatible with what is stated in the revelation of the Qur'an – and it is argued, the Muslim school should be allowed to appoint a Muslim teacher rather than a Christian priest, since this is a difference of belief that will not be resolved until the second coming of Jesus.
49. Needless to say, neither a Jewish nor a Christian nor a Muslim school would wish to employ a teacher who, although familiar with the teachings of the major religions, personally believes that God does not exist and that religion is the opium of the masses.
50. It is for this reason that serious thought has already been given to what constitutes 'reasonable justification' for discriminating on religious grounds. In other words, if a religious organisation wishes to preserve its particular religious ethos, can it legally require its employees to fulfil certain conditions which would otherwise be regarded as discriminatory? The short answer is, "In certain circumstances, yes," as in the examples just given. Clearly the longer answer depends on how the word 'ethos' is defined.
51. In my opinion, the word 'ethos' includes two main elements which jointly distinguish one way of life from another: one element concerns inward belief and perception of the nature of existence – while the other element concerns outward action. The second element is usually based on the first element. For example, since Muslims believe that there is no god except Allah and that Muhammad is the final Messenger of Allah, it is their ethos to manifest that inward belief by outwardly worshipping and obeying Allah by following the example and teachings of His Messenger, blessings and peace be on him, to the best of their abilities.
52. In what circumstances, therefore, should a particular religious ethos be protected? And at what point is differential treatment motivated by the desire to preserve religious ethos no longer reasonably justifiable?
53. It is easy to recognise that what I believe and how I worship will not really affect my ability to do certain jobs, for example manufacturing cars, or auditing accounts, or conducting personal injury litigation – but if an employer wishes to employ only like-minded employees, to what extent should the employer be free to do so, especially if the employer is a public authority?
54. For example, a firm of solicitors may do much of its work for the Church of England who would prefer the firm's employees to be practising Anglicans. Another firm might do much of its work for the banking community and would wish to exclude employees who as practising Jews, Christians or Muslims believe that usury is evil, as destructive as cancer and forbidden by God. Should these firms be allowed to discriminate on these grounds in order to maintain their particular ethos?
55. In my opinion, the relative success or failure of the *FRA* will depend largely on how and where the line between what is reasonably justifiable and what is not is drawn. Since the possibilities of what may happen are extremely varied and endless, it would make sense to grant those in judicial office at least some discretion to decide, within certain limits, where the line should be drawn in any particular fact situation.
56. This in turn means that those in judicial office, particularly employment tribunals, should receive adequate training before the *FRA* comes into force.
57. As in the case of the definition of *indirect* discrimination, the question arises as to what criteria should be applied. As we have already seen, in the case of *Abdulaziz, Cabales and Balkandali v UK [1985] 7 EHRR 47*, European law utilises the following criteria :

oA difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims to be realised.o

It may well be that the *FRA* may wish to adopt a different or more detailed definition. The *Employment Directive* defines what the people drafting it consider reasonably justifiable as regards the exercise of positive religious discrimination as follows:

58. Article 4(1) of the *Employment Directive* states:

Occupational requirements

4 (1) à Member States may provide that a difference of treatment which is based on a characteristic related to any of the discriminatory grounds referred to in Article 1 [this includes religion or belief] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational qualification, provided that the objective is legitimate and the requirement is proportionate.

59. Article 4(2) of the *Employment Directive* was substantially amended before adoption of the Directive to provide that:

4 (2) Member States may maintain national legislation in force at the date of the adoption of this Directive or provide for future legislation incorporating national practices existing at the date of the adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a

difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."

60. Thus it is essential that as regards permitting positive discrimination, the *FRA* contains a clear definition of genuine occupational qualification which would require religion to be an essential, defining feature; for example, positive religious discrimination should certainly be permitted as regards the appointment of Directors of Islamic Centres, Imams in Mosques, certain teachers in Muslim schools, and anyone employed in the UK but required to work in places where only Muslims are permitted, such as Makka and Madina in Saudi Arabia – and it should also be permitted where it is necessary to preserve a certain religious ethos.

Exclusion of Religious Extremists

61. Clearly the key concepts to be utilised in determining the permissibility of positive discrimination involve aims which are legitimate and requirements which are both reasonable and proportionate. In my opinion the same concepts can be utilised to exclude religious extremists from the protection to which they would otherwise be entitled under the *FRA*.
62. For example, if a second Guy Fawkes with the same agenda as the first was to seek employment as a Beefeater only to be refused because of his religious beliefs, he would probably not be successful in any application brought before an employment tribunal.
63. Clearly there is a very real danger that *bona fide* individuals (asylum seekers included) or organisations may be unreasonably labelled as 'terrorist' when they are not. They may therefore be denied the protection of the *FRA* to which they are legally entitled, as well as being subjected to various forms of state injustice including, for example, the freezing of assets, prolonged detention without charge and denial of access to legal representation.
64. It is significant to note in this context that it is not a crime under the *Terrorism Act 2000* to support the IRA, but it is a crime to support the PKK.
65. As the Council on American-Islamic Relations has so well documented, this kind of haphazard labelling and denial of basic human rights has proliferated in the USA in the wake of last September in a manner reminiscent of the McCarthy era, only far worse. We can only hope that this knee-jerk, scatter-gun, or possibly cynically crafted, approach is not imitated in the UK and Europe.

Blasphemy

66. Another less physical yet equally insidious form of extremism is blasphemy, which at present is legally defined as the publication of contemptuous, reviling, scurrilous or ludicrous matter relating to God as defined by the Christian religion, Jesus, peace be on him, the Bible or the Book of Common Prayer, intending to wound the feelings of Christians or to excite contempt and hatred against the Church of England or to promote immorality. If written, such words constitute blasphemous libel, where the defendant's intention is irrelevant to conviction. In other words, blasphemy goes well beyond the limits of light-hearted humour and informed theological argument or debate – and should rightfully be deterred. This is in harmony with the following injunctions in the Qur'an:

*Only argue with the People of the Book in the kindest way –
except in the case of those of them who do wrong –
saying 'We have iman in what has been sent down to us
and what was sent down to you.*

Our God and your God are one and we submit to Him. (Qur'an: 29. 46)

[*People of the Book* is a term used to refer to any group who claim to be following a Book revealed prior to the Qur'an – principally the Jews and the Christians; *iman* is belief, faith, acceptance in the heart of Allah and His Messenger. *Iman* consists of believing in Allah, His angels, His Books, His Messengers, the Last Day, the Garden and the Fire, and that everything, both good and bad, is by the decree of Allah.]

*Do not curse those they call upon besides Allah
in case that makes them curse Allah
in animosity, without knowledge.*

*In this way We make the actions of every nation
seem attractive to them.*

*Then they will return to their Lord,
and He will inform them about what they did. (Qur'an: 6. 109)*

67. If the doctrine of equal rights for all is to be applied equally rather than selectively, then clearly the protection at present afforded by the blasphemy laws to Christianity and Christians alone should be extended to the other major religions and their followers, including Islam and the Muslims.

68. It can hardly be described as equitable that the media are free to misrepresent and deride Islam and insult and wound the feelings of Muslims simply because they are not protected by the blasphemy laws. This provides a striking example of the empty rhetoric of an *Article 9* right which has only been partially secured on a selective basis defined largely by a historically determined bias in favour of Christianity.

Commission for Religious Freedom

69. Clearly there is a need for a regulatory body to promote good practice by advising and monitoring employers and by safeguarding employees, to which we have referred in §16 as the Commission for Religious Freedom ('the CRF'). As the number of regulatory bodies increases, however – there are three already and as a result of the *Employment Directive* there is potential for another three – it makes increasing sense to have one Single Equality Body with different specialist departments which can co-operate and co-ordinate as and when there is an overlap of different forms of discrimination – as could occur, for example, against an Asian Muslim woman who could be discriminated against on the grounds of race, religion and gender simultaneously. The DTI is conducting a feasibility study into this which should be concluded in the autumn of 2002.
70. It is proposed that in this context the *FRA* should include the following features:
- (i) the power of the CRF to represent applicants
 - (ii) the power of the CRF to issue new Codes of Practice;
 - (iii) the power of the CRF to obtain legally enforceable undertakings;
 - (iv) the power of the CRF to issue non-discrimination notices.

The Case for Extending the Ambit of the *FRA* beyond Employment

71. In my opinion there is no valid reason why the ambit of the *FRA* should be restricted solely to the sphere of employment. The need for a wider application is already clear – and the government should be able to act on its own initiative without having to wait for a European Council Directive to tell it what it should do. Although there has been much erosion during the last thirty years, and although Britannia no longer rules the waves, it is hoped nevertheless that the UK never surrenders its sovereignty completely to the European Central Bank.
72. From a Qur'anic perspective, it is clear that mankind was not created simply to produce and consume. Although this is part of life on planet earth, we are more than this.
73. We are essentially spiritual beings and in truth we were created to worship our Creator. It is an essential part of human nature to worship. The clear heart worships God. The clouded heart worships other than God. Whatever the condition of the heart, it remains the seat of the soul and the centre of worship.
74. It follows, whether we know it or not, that our *Article 9* rights are perhaps more precious than any other – and should therefore be secured in every sphere of life. Furthermore, *sections 3 and 19* of the *HRA 1998* stipulate that all subsequent legislation must be compatible with it and with the *ECHR*.
75. If we follow this line of reasoning, then it is clear that the *FRA* should also apply not only to the laws of blasphemy but also *inter alia* to the sphere of education, since *Article 2* of the *First Protocol* to the *ECHR* – which is also incorporated into UK domestic law by *section 1 of the HRA* – guarantees everyone living in Europe including the UK the right to have their children educated in accordance with their religious beliefs:
- No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.
- [The UK has entered the following reservation in relation to this Article:
- à in view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.]
76. Other spheres of life in which religious discrimination is known to manifest and should be dealt with include the provision of housing, the application of immigration policy, in particular the application of the Terrorism Act and in general the treatment of those held in custody, both before, during and after trial.
77. It is significant to note, for example, that in the wake of the riots deliberately instigated by right wing BNP 'crusaders' against the Muslim community in the Midlands in the summer of 2001, statistics compiled by Amnesty reveal that approximately twice as many Muslim asians were prosecuted as BNP wasps (white anglo-saxon protestants); and that the sentences of imprisonment handed down were approximately twice as long for Muslim asians as they were for Christian whites for similar offences. The statistics do not reveal what proportion of the Muslims and Christians involved in the riots were practising (fasting and praying) Muslims and practising (communicant) Christians.
78. Thus it is proposed that the *FRA* should include the following features:
- (i) applicability to all public bodies as well as private employers;
 - (ii) applicability to all bodies with responsibilities in the field of education, housing, immigration, criminal and penal law;
 - (iii) extension of the laws of blasphemy to cover all major religions;

- (iv) an amendment of those aspects of ecclesiastical law which deal with 'people of other faiths' so as to put the members of all *bona fide* religions on an equal footing.

79. As regards other proposals for further reform which are relevant to the protection of religious freedom and protection from religious discrimination, the following proposals have already been presented to the government in the past – and since there has been virtually no response, we present them again:

PROPOSALS FOR FURTHER REFORM:

80. As regards further reform, there are two important considerations: Firstly, simply enacting legislation is not in itself sufficient. Codes of Practice can be of great assistance. People need to be educated generally as regards the basic needs and particular religious duties which characterise each religion. Secondly, different religions sometimes have different basic requirements – and these have to be taken specifically into consideration when framing laws, when formulating Codes of Practice and when preparing educational resources.

81. **IT IS PROPOSED** therefore, as regards Muslims, that Muslim employees should have statutory rights:

(i) to be able to do the prayer at their place of work (15 minutes is usually adequate to use the toilet, wash and pray) *provided that* the time spent in such prayer breaks is made up either at the beginning or at the end of the working day;

(ii) to have an extended lunchbreak on Fridays so as to be able to attend the collective *Jumu'a* prayer (an extra hour in addition to the normal lunchbreak is usually adequate to attend the nearest mosque for the *Jumu'a* prayer) *provided that* the extra time spent in such a prayer break is made up during the course of the working week;

(iii) to have a day off work on each of the two annual *'Id* prayers (which are held at the end of Ramadan and during the Hajj) *provided that* any such days off which do not happen to coincide with a public holiday are made up either during the course of the working year or are deducted from annual holiday entitlement.

If these simple needs were to be recognised and legally protected, there would be far less unnecessary friction and far more goodwill in the workplace, probably greater productivity – and hopefully hardly any complainants bringing actions in Employment Tribunals on the grounds of religious discrimination.

82. Similar rights should be granted to the members of other *bona fide* religions so as to ensure that they can perform their obligatory prayers and celebrate their main religious feast days – for example the Sabbath of the Jews and the Diwali of the Hindus.

83. It should be pointed out in this context that the Christians in the UK – both in and out of prison – are already legally permitted to have the whole day off on Sundays, as well as on their two principal religious feast days, Christmas and Easter. Parking restrictions are relaxed on these days to make it easier for worshippers to go to church, whereas, for example, Muslims often have to regularly pay parking and penalty charges on Fridays and *'Id* days – although more enlightened local authorities are now beginning to relax restrictions for an hour or two on such days. In the light of the *ECHR* and the *HRA 1998*, this institutionalised differential treatment on the grounds of religion is no longer reasonably justifiable – and the appropriate statutory amendments should be enacted.

84. **IT IS PROPOSED** also that Muslim employees should be permitted to dress in accordance with their religious teachings. In practical terms this means simply that women should be allowed to cover their hair and dress modestly (a practice which usually results in less cases of sexual harassment and marital infidelity), and that men should be allowed to wear beards. (I once worked as a theatre porter in a hospital, where the requirements of personal hygiene and cleanliness are arguably greater and more necessary than in any food processing plant or kitchen, and three men there including myself had beards without any adverse results.)

85. At present Muslims in the United Kingdom face additional hardship in that their personal law is not recognised. Marriages and divorces conducted in accordance with the *Shari'ah* of Islam are not recognised as valid by the law of the land even though they are acceptable in the sight of God. This leads to difficulties as regards ownership of land, the legal status of children and dealing with public authorities in general, especially when travelling abroad.

86. Similarly, if a Muslim dies intestate, his or her estate is not distributed in accordance with the *Shari'ah* of Islam. This leads to difficulties as regards the entitlement to and ownership of shares in the estate. (Fortunately, local authorities are allocating land for use as Muslim cemeteries and burials in accordance with the *Shari'ah* of Islam are permitted. Muslims are still campaigning for legally recognised exemption from unnecessary routine *post mortem* examinations.)

87. All of these anomalies could easily be remedied to the benefit and satisfaction of the Muslims and without causing detriment to anyone else. Until these anomalies are remedied, the fact that Muslims in the UK are legally prevented from complying directly with these personal aspects of the *Shari'ah* in itself indicates the presence of a form of indirect religious discrimination which is inherent in the English legal system and experienced particularly by Muslims.

88. **IT IS PROPOSED** therefore that legislation should be enacted so that:

(i) Muslim marriages (including polygamous marriages up to the maximum of four wives as permitted by the *Shari'ah* of Allah) and divorces are recognised as legally valid by the law of the land;

(ii) a Muslim's wealth is automatically distributed in accordance with the *Shari'ah* after his or her death;

(iii) since the *Shari'ah* of Islam permits a Muslim man to marry up to four wives provided that he maintains them and their children as equally as is possible, the law of bigamy is re-defined so as to make allowance for valid Muslim marriages. (This is in contrast to English law which punishes bigamy but permits a man

to have as many mistresses as he wishes whom he can treat as well or as badly and as openly or as secretly as he wishes, subject usually only to trial by media for the rich and famous.)

CONCLUSION:

89. We are on the verge of witnessing the introduction of an historical piece of legislation which will probably be far more far-reaching in its effects than all those earlier Acts of Parliament which were concerned principally (and with the benefit of hindsight rather narrowly) with establishing firstly, religious toleration between Christian sects and secondly, legal recognition by Church of England Christians of Protestant nonconformists, Roman Catholic dissenters, Unitarian Christians, and Jews – rather than with the legal toleration and recognition of all different religions.
90. However limited or broad the legislation governing the protection of the freedom of religion and belief and the protection from religious discrimination turns out to be, there is bound to be a knock-on effect for many years to come, including profound changes to English constitutional law.
91. It is inevitable, for example, that not only the law of blasphemy will have to change, but also the law governing the reigning monarch of England who at present is obliged by statute law – including *inter alia* the *Bill of Rights 1688*, the *Coronation Oath Act 1688*, the *Act of Settlement 1700*, the *Treason Act 1702*, the *Union with Scotland Act 1706* and the *Accession Declaration Act 1910* – to be a Protestant Christian. HRH Prince Charles has already stated publicly that he would prefer to be the defender of faith itself rather than of solely the Protestant and Presbyterian Christian faith. As the law stands at present, if HRH Prince Charles publicly embraced Islam now – which we sincerely invite him to do – he would be barred from becoming king, and if he publicly embraced Islam after becoming king, he would be obliged to abdicate. In both cases the application of the current statutory requirements would constitute a fundamental violation of his rights under the *ECHR* and the *HRA 1998* – and in all probability the *FRA*. This aspect of constitutional law – the result of a historical scenario dating back over three centuries which has changed profoundly and ceased to be relevant – is a law whose abolition or amendment is long overdue. Since the law still presumes that the king can do no wrong, he should be permitted by law to make his own choices, comforted no doubt by the fact that he will not be mistaken!
92. What is most important, however, is the need to achieve the best balance possible between on the one hand, permitting the positive exercise of freedom of religion and belief and on the other hand, protecting against negative religious discrimination. If this can be achieved by the *FRA* then this will insh'Allah improve the quality of life not only of the future king of England and his heirs, but also of the vast majority of his subjects.
93. With this in mind, those statutes which govern religious bodies other than the Church of England are in need of amendment so as to place members of all *bona fide* faiths on an equal footing. These include, for example, the *Roman Catholic Relief Act 1829*, the *Religious Disabilities Act 1846*, the *Liberty of Religious Worship Act 1855* and the *Jews Relief Act 1858*. If the requisite amendments were to be included in a Schedule to the *FRA*, then this would be seen by all as an expression of sincere intention as well as resulting in welcome relief for those who are still legally excluded from it.
94. If the Muslims, the Hindus, the Buddhists and the Sikhs, for example, do not enjoy the same rights and freedom of religion as the Christians and the Jews, and if they do not enjoy the same protection from being treated less favourably and discriminated against on religious grounds, then Orwell's thesis that some are more equal than others will prove to be true and the doctrine of equal rights for all will mean little to those who are most definitely deemed by the law at present to be less equal than others.
95. As a Muslim, I have no doubt that if all the laws of the UK were to be brought into harmony with the *Shari'ah* of Islam, then we would indeed have the best legal system in the world. Since this is not at present the democratic wish of the majority of its people, this is unlikely to happen for the time being. I believe, however, that there is one aspect of the wisdom of the *Shari'ah* which could be applied now – and this concerns how best to govern a country in which there are several sizeable religious communities, each with differing beliefs and practices.
96. As far as I can see from my admittedly limited study of history, the best model has repeatedly been that of the *dhimma* contract whereby religious minorities under Muslim rule were permitted to retain their identity and ethos and to be self-governing in their personal law and internal administration. This protection was extended in times of war to the extent that the Muslim authorities were under a duty to protect the *dhimmis* who were not obliged to fight. In return for this protection in both times of peace and war, all adult *dhimmi* males were obliged to pay the annual *jizya* tax of 20 gold *dinars* (about £600 in today's currency) to the Muslim authorities. This is a principle that could easily be applied in the UK – and would provide far less friction and far better value for money than a Poll Tax disguised as Council Tax!
97. There are some who assert that it would not be possible to have a plurality of laws being applied simultaneously in the realm, when in fact this is already the case in the UK: England, Scotland, Wales and Northern Ireland already have their own laws as well as having shared laws. In addition, the Ecclesiastical Courts and the Beth Din have also exercised their distinct jurisdictions for centuries.
98. Alternatively, the *dhimma* contract approach could be viewed simply as an effective mechanism for multi Alternative Dispute Resolution, which would lessen the strain on the main judicial system.
99. Nothing stays the same for ever. Everything is in change. Only Allah is as he was.

100. I began by viewing the situation of the Muslims in Britain within the wider context of the global situation of the Muslims. I would like to conclude by observing that although in a just and balanced society religious freedom flourishes and religious discrimination is minimal, nevertheless religious discrimination (however minimal, extreme, brutal, abhorrent, insidious, or of little consequence) does not come as a surprise to Muslims when it happens. This is because it is in the nature of things. In the words of Allah:

Every self will taste death.

You will be paid your wages in full on the Day of Rising

Anyone who is distanced from the Fire

and admitted to the Garden

has triumphed.

The life of the dunya is just the enjoyment of delusion.

You will be tested in your wealth and in yourselves

and you will hear many abusive words

from those given the Book before you

and from those who are mushrikun.

But if you are steadfast and have taqwa,

that is the most resolute course to take

(Qur'an: 3. 185-186)

[*dunya* is this world, not as cosmic phenomenon, but as experienced; its opposite, the *akhirah* is the next world, what is on the other side of death; *mushrikun* is the plural of *mushrik*; a *mushrik* is someone who commits the unforgivable wrong action of worshipping something or someone other than Allah or of ascribing to something or someone attributes which in fact belong to Allah alone; *taqwa* is awe or fear of Allah, which inspires a person to be on guard against wrong action and eager for actions which please Him.]

[Quotations from the *Qur'an* and some of the definitions of Arabic terms are taken from *THE NOBLE QUR'AN – a New Rendering of its Meaning in English* by Abdalhaqq and Aisha Bewley, (Bookwork, Norwich, 1999). Some of the definitions of Arabic terms are taken from *A Glossary of Islamic Terms* by Aisha Bewley, (Ta-Ha Publishers, London, 1998).]✓