

Religious bodies and the provision of publicly-funded services

Whilst an increasing number of publicly-funded services are being handed over to religious groups to run, the NSS is campaigning to ensure that all publicly-funded services, to which all citizens have an entitlement, are open to everyone and free from proselytization and discrimination based on religion and belief.

What's the issue?

Until recently, the vast majority of public services have been provided by secular bodies, whether public or through contractors. However, publicly-funded services, to which all citizens have an entitlement, are undergoing significant reform. As part of its 'Big Society' agenda and marketisation of public services, the Government has been keen to contract out the provision of public services. This, perhaps encouraged by the greater freedoms allowed by the 2011 Localism Act¹ and lobbying by religious groups, has resulted in many more religious organisations becoming service providers of publicly-funded services², bringing with it the risk of some of the services not being equally open to everyone and free from direct or indirect discrimination based on religion and belief.

The Localism Act devolves powers to local authorities and communities, giving voluntary and community groups – including religious groups – the right to compete

¹<http://www.legislation.gov.uk/ukpga/2011/20/contents/enacted/data.htm>

²<http://blogs.lse.ac.uk/politicsandpolicy/archives/14581>

with local authorities for the provision of their services³. These might include services for homeless people, youth groups, women's centres, community drop-in or advice centres, health initiatives or services for addicts.

Secular authorities, commercial bodies or non-ideological organisations are more likely to, and be perceived to, offer their services equally to all with equal welcome and without imposing ideologically-based conditions. Even if the motive for awarding the service to religious organisations is intended to be targeting those most in need, there are a number of concerns that arise as a consequence of religious organisations being charged with providing publicly-funded services. For example, the potential for uneconomic duplication of services when services are provided in a fragmented way, the potential increase in religious harassment and discrimination (which may disadvantage certain sections of society and undermine social cohesion, particularly on a local level), and in the worst cases, the human rights entitlements of service users' in danger of being undermined.

Conflicts of interest and undermining secularism

Whilst the aim of the Big Society has been to de-centralise power, the NSS is concerned that by handing that power over to religious groups, the government would effectively be re-centralising it and making religious community leaders the gatekeepers of public funding.

An obvious conflict of interest comes out of the government paying a religious group to provide a public service. Instead of offering a service that can be taken up or not according to the want of an individual (as with private charity), these groups provide services to a public, who through individual need and *entitlement* have no alternative but to accept them. Yet at the same time, the organisation from which these services are being sought might express an ethos in diametric opposition to the views or the circumstances (such as being unmarried mothers) of those seeking to avail of the service, making them feeling alienated from a service they are due as a citizen. A further worry is that religious groups may be inclined to treat those receiving its services from a religiously informed perspective, rather than just as citizens owed a service⁴.

³ Clauses 66-88. Clauses 66 to 70 provide a statutory framework enabling relevant bodies to make an expression of interest to a relevant authority in relation to a relevant service. These provisions are designed to hand the initiative to communities with good ideas about how services could be run differently or better, and ensure that idea is properly considered by the authority. Relevant bodies are defined in clause 66(5), (6), (7) and (8); these currently comprise a voluntary or community body, a charity, a parish council, two or more employees of a relevant authority or any other person or body specified by the Secretary of State.

⁴ Research has shown that non-interventionist techniques in service provision is more likely to be pursued by an organisation with a religious ethos, whilst those with interventionist methods are more likely to be secular in nature (Sarah Johnsen, "Blurred Boundaries between the Religious and Secular in Homelessness Services". Access here: http://www.religionandsociety.org.uk/attachments/files/1331806307_Johnsen-FINAL.pdf)

There are also concerns about the role of an explicit religious ethos of a body in intimidating or putting off those entitled to the service on the grounds of differing life stances. An ethos that, according to the Government, religious groups providing a public service *should not remain silent upon*⁵.

Organisations that run local homeless charities, youth groups or health initiatives (for example) could claim that the service offered is purely to help the local community and has no religious ambition motives whilst at the same time promoting their beliefs and values, whether at a low-level (for example posters, leaflets, religious texts, conversations) or more aggressively.

Religiously-based moral judgments concerning, for example, drug use, the role of marriage, sexuality, women's position in society, or start and end of life issues must be prevented from infiltrating the provision of services or the treatment of both those served and employed. In addition, religious views in the area of sexual health and fertility – contraception, morning after pill, HPV vaccine and abortion, for example – must not be imposed on people using the groups' services. There is concern that women particularly will be adversely affected by the desecularisation of publicly-funded services⁶; given the overwhelmingly negative attitudes institutionalised religions tend to have towards the rights of women, and the correlation, found to exist by a recent study, between levels of religiosity and views not favouring women's equality⁷.

In some cases, people may not feel able to object for fear of losing the services or they may not be able to express their objection (for example, there may be language barriers, cultural pressure, literacy or mental health issues).

People who need a service may not approach an organisation if it has the reputation of promoting a religion, and perhaps one with which they associate hostility. If this group is the only one providing a service in that community, people who feel excluded, judged by, or even fearful of, the group's ethos, will be seriously disadvantaged.

There is an additional threat to community cohesion. Religious communities themselves are not homogenous but represent a spectrum of beliefs and practices so allowing a religious group to run a service could even disadvantage members of its own religion.

There is also the potential for some economically costly duplication of services if it is perceived that particular communities have specific needs that can be best addressed by religious organisations acting on behalf of the state. A result of this

⁵ In a letter to the Secretary of State for Justice to Dr Hywel Francis MP on 22 December 2010, Kenneth Clarke QC MP said: "We take the view that faith-based service providers need not remain silent about their religious motivation and ethos, so long as there are no conditions attached to the services they provide".

<http://www.publications.parliament.uk/pa/it201011/itselect/jtrights/131/131we05.htm>

⁶ <http://blogs.lse.ac.uk/politicsandpolicy/archives/14581>

⁷ <http://www.uvm.edu/~ssequino/pdf/Religiosity.pdf> joint

might be that the same services will have to be provided a number of times for different religious communities by different religious bodies. Such a situation would not only lead to an inefficient and costly provision of services where discrepancies would be inevitable, but it would mean that different standards of services would be experienced by people on the arbitrary grounds of the private beliefs they happen to hold. According to research done by the Public and Commercial Services Union, there is “little or no evidence that better outcomes result from service delivery by religious organisations – and actually evidence to the contrary”⁸. Furthermore, unless the payment to religious groups for the services they provide is based on realistic marginal costs, there is a danger that payments could in effect subsidise the religious organisations, which is not a legitimate secular use of public funds.

Concerns arising from the Government contracting out public service provision to religious organisations go beyond conflict of interest and people not feeling they can use or not feeling equally welcomed by the public services they are entitled to. The NSS is concerned about discrimination by religious organisations providing publicly-funded services. The Equality Act 2010, underpinned by the European employment directive⁹, provides religious groups with a right, although limited, to discriminate – both in employment policies and service provision - *even* when working under contract to provide a public service.

Legally-sanctioned discrimination

Discrimination in employment

Schedule 9, paragraph 3 of the Equality Act 2010¹⁰ allows, under some circumstances, particularly where it is an occupational requirement and proportionate, for discrimination exemptions on the grounds of religion or belief in employment. It grants exemptions to religious organisations so that they can in such circumstances discriminate against potential applicants for jobs on grounds of religion or belief and of sexual orientation. It also allows such discrimination against current employees on the same grounds. The NSS is not confident that the occupational requirement limitation is, in practice, much of an obstacle to religious employers wishing to discriminate, as job descriptions can be manipulated to create an unnecessary or bogus occupational requirement, for example by introducing a requirement to lead prayer. Thus, those of the 'wrong' religion, not 'religious enough' or not religious at all, or if their lifestyle doesn't fit the organisations' ethos (gay, divorced, single parents, for example) might be dismissed or ineligible for promotion. There has been shown to be a “glass ceiling” for staff without faith in religious

⁸ *Third Sector Provision of Employment-related Services: A Report for the Public and Commercial Services Union, 2006*

⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTM>

¹⁰ <http://www.legislation.gov.uk/ukpga/2010/15/schedule/9>

organisations, where staff without faith cannot be promoted¹¹. Even more worryingly, this type of discrimination is also allowed against public sector workers who have been transferred to a religious employer; that is, people who were originally working in the secular public sector who, through no choice of their own, are transferred to employment in a religious organisation contracted to provide public services will then face a faith test. Even if transfer of undertaking provisions protect the transferees, they will not protect their successors.

Discrimination in service

In addition to the potential for employment discrimination in the context of religious organisations providing publicly-funded services, there is also the possibility of discrimination in the provision of the services themselves. The Equality Act grants religious organisations an exception¹² so that, in defined and limited circumstances, they can lawfully discriminate in the provision of services on religious grounds¹³. Worryingly, this applies even when an organisation is working under contract to provide public services.

A further concern is the way in which the service can be provided; the lax nature of monitoring sub-contracting organisations¹⁴ providing public services means that in practice proselytization or putting conditions upon the receipt of goods is practicable for groups who wish to do so.

These concerns have been echoed by some religious groups. For example, in a submission to the Parliamentary Public Administration Select Committee about the Big Society agenda, the Unitarian Church warned that the provision of services by religious groups could lead to discrimination against marginalised groups. It stated: “We have concerns that some religious groups that seek to take over public services, particularly at local level, could pursue policies and practices that result in increased discrimination against marginalised groups, particularly in service provision and the employment of staff. Non-religious people and those not seen to confirm to the dominant ethos of a religious body, such as being in an unmarried

¹¹ Sarah Johnsen, "Blurred Boundaries between the Religious and Secular in Homelessness Services", Access here: http://www.religionandsociety.org.uk/attachments/files/1331806307_Johnsen-FINAL.pdf

¹² <http://www.legislation.gov.uk/ukpga/2010/15/schedule/23>

¹³ The law allows organisations to provide goods, facilities or services only to people of a particular religion or belief, so long as they can show that any restrictions exist because of “the purpose of the organisation, or in order to avoid causing offence, on grounds of the organisation’s religion or belief, to followers of that religion or belief”. The organization has to also show that the purpose of its existence is to either: “practise, teach or advance a particular religion or belief; provide benefits for people who hold a particular religion or belief; or promote good relations between people of different faiths” (Equality Act 2010: What do I need to Know?, p8) Accessed here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85027/vcs-religion-belief.pdf

¹⁴ http://www.publications.parliament.uk/pa/cm200708/cmselect/cmworpen/memo/dwp/ucm0402.htm#_ftn2, Sections 1.14 & 1.15.

relationship or divorced and being lesbian, gay, bisexual or transgendered, could find themselves subject to discrimination”¹⁵.

Human Rights Act exempt

Another concern about religious bodies acting as service providers is that the Human Rights Act 1998 (HRA) may not apply to them, since it is not clear whether they constitute ‘public authorities’. The term ‘public authority’ used within the HRA was based on the assumption that most public services would be provided by the state directly, however as noted above, this is increasingly not the case. And whilst any body understood to constitute a ‘public authority’ must comply with all relevant legislation including equalities and human rights legislation when exercising their functions, there is uncertainty as to whether religious organisations providing publicly-funded services constitute ‘public authorities’ since British law, thus far, has interpreted the term very narrowly¹⁶. What is problematic here is that those falling outside the definition of a ‘public authority’ are not bound by the HRA. A report by the Parliament’s Joint Committee on Human Rights argued that “it is unacceptable that service providers and commissioning authorities should continue to enter into contracts for the provision of essential public services without any clarity as to the legal position of the service provider under the HRA”¹⁷.

The same report shows that religious organisations have been particularly resistant to coming under the definition of ‘public authority’¹⁸. It notes that concerns about extending the notion of ‘public authority’ “have been raised on behalf of service providers and their representatives and, particularly, by service providers who provide services on behalf of religious organisations”¹⁹.

Recommendations and conclusions

1. The NSS recommends that the Equality Act should be amended so as to suspend the exemptions for religious groups when they are working under public contract on behalf of the state. Unless these exemptions are suspended there is a danger that when religious organisations are contracted to provide publicly-

¹⁵ <http://www.secularism.org.uk/faith-based-welfare-could-bring.html>

¹⁶ For example, in a 2002 Court of Appeal case (*Callin, Heather and Ward v Leonard Cheshire*) it was ruled that state-funded patients in a privately-operated care home could not sue the private care home under the HRA, because the provision of care was not a ‘public function’ under s6(3)(b) HRA. The Court concluded that “a private body carrying out a public function on behalf of a public body would only be a ‘public authority’ under the HRA if it could be shown that the function itself has a ‘public flavour’.

<http://www.uniset.ca/other/cs3/20022AER936.html>

¹⁷ Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act, Ninth Report of Session 2006–07*, p25 Access online here:

<http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/77/77.pdf>

¹⁸ *ibid.*, see for example, Appendix 1, 7 and 8 where religious groups all reject the extension of the term ‘public authority’ to include organisations such as theirs.

¹⁹ *ibid.*, section 98, p33

funded services, they will continue to discriminate, in some circumstances, on the grounds of religious belief.

2. The NSS recommends that the Human Rights Act should be amended so that contractors delivering general public services on behalf of a public authority are defined as public authorities for those activities, and equally subject to the Human Rights Act legislation.
3. The NSS recommends that all contracts with religious providers of publicly-funded services need to have clear equality, non-discrimination and non-proselytising clauses in them.
4. Additionally, the NSS recommends that public records of contracts with religious groups should be maintained and appropriate measures for monitoring their compliance with equality and human rights legislation should be put in place.

In a climate of more limited public funds, growing numbers of people relying upon public services and larger sections of the populations becoming vulnerable, the need to ensure that our public services are open to all and free of discrimination could not be more pressing.

These services are services meant for all and paid for by the public; it is plainly unjust that some bodies charged with providing such services can be discriminatory both in their employment and their provision. It is entirely inappropriate for a body providing a publically funded service to even inquire about the beliefs of the people it is serving, let alone get involved in the promotion of a certain religious ethos or discriminate on the basis of that ethos. People's beliefs should not help determine which services they feel they are entitled to and should not negate their chances of promotion. The NSS feels extremely strongly that the government needs to radically and urgently reform the way in which the state deals with religious bodies providing publically funded services so that people can access the fair, just and non-discriminatory public services they are entitled to.