



LEGAL GUIDANCE ON RELIGIOUS DISCRIMINATION UNDER THE EQUALITY ACT 2010

AND THE STATUTORY PUBLIC SECTOR EQUALITY DUTY OF GOVERNMENT DEPARTMENTS, LOCAL AUTHORITIES AND OTHER PUBLIC BODIES IN RELATION TO AWARDING OF PUBLIC FUNDING TO INTERFAITH AND FAITH-BASED ORGANISATIONS

The Case of “The Inter Faith Network for the United Kingdom” and Religious Discrimination Contrary to Law

This Guidance has been prepared by the international human rights law firm, Bindmans LLP, further to wide-ranging legal advice, and consultation with faith communities and interfaith organisations. It is publicly issued at an international conference at Parliament on 26 November 2012, for legal experts, academics, government and religious leaders.

The Guidance addresses the issues arising from the case of “The Inter Faith Network for the United Kingdom”, an incorporated body which acts as an umbrella organisation for various faith communities and interfaith groups, and which is majority public-funded through government grants.

The Inter Faith Network is found to have practised discrimination on grounds of religion or belief, contrary to the Equality Act 2010 and other law, in its membership policies against particular faith communities in Britain.

This raises questions pertaining to the Section 149 Public Sector Equality Duty of government, local authorities and other public bodies as it relates to the awarding of public funds to interfaith and faith-based groups which practice unlawful discrimination.

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ADVICE

I. INTRODUCTION

1. Can the U.K. Inter Faith Network ('IFN') lawfully discriminate by refusing to admit a representative body of a significant number of the U.K.'s practising Druids, the Druid Network, as one of its member organisations? This question was brought sharply into focus earlier this year because in May the Druid Network made a formal application for membership which the IFN Executive decided it could not recommend for approval at the IFN's AGM. At that meeting, which took place on 12 July 2012, a vote was nevertheless taken on whether the Druid Network ought to be admitted. A slim majority of IFN members voted against its admission (though to be admitted the Druid Network would have needed to secure the votes of 75% of those voting – see below). In the same meeting, the IFN's members resolved to support a Strategic Review, the recommendations of which will be reported to the next AGM in 2013. This may consider whether the existing membership policy ought to be changed, although the precise terms of the review are unclear (the relevant commitment is to examine "IFN's membership and patterns of engagement and consultation").
2. The Druid Network and other IFN members which support its application for membership are not content to await for the outcome of that review. Their position is that the IFN is not only morally, but also legally, obliged to admit the Druid Network now. The IFN disagrees. Prior to the AGM, it took legal advice on its current membership policy from a firm of solicitors specialising in charity law, Bates Wells and Braithwaite LLP. Their actual advice has not been disclosed despite requests for disclosure, but what purports to be a note of it was appended to the July 2012 AGM papers ('the Advice Note'). It concludes that:

“on the basis of the legal advice it has received, set out in this note, IFN’s Executive Committee is satisfied that the present provisions and procedures relating to IFN membership are in accordance with current legal requirements.”

3. The minutes of the AGM clearly show that the Advice Note played a decisive role in the debate. The legality of the current policy was put squarely in issue by the IFN’s Co-Chair, Bishop Alastair Redfern, and those present were told repeatedly that it was indeed lawful on the basis of the Note. Whether the membership policy ought to be changed for other reasons was said to be an appropriate matter for the Strategic Review to consider.
4. I have been instructed to advise the Druid Network. My view is that the AGM did not have adequate information on which to reach the decision it did. I say this for three reasons:
 - (i) The IFN advice on the Equality Act 2010, assuming it is correctly reflected in the Advice Note, is wrong. The IFN membership policy is undoubtedly discriminatory against Druids and the Druid Network on grounds of religion and belief. Whilst the Advice Note is coy about this, it does not suggest otherwise, nor could it. Instead the Advice Note relies on two exemptions from 2010 Act prohibition on discrimination concerning admissions for membership to associations: in effect arguing that its discriminatory acts are authorised by Parliament. My view is that neither exemption assists the IFN, given the breadth of its objectives and current membership. A claim could be initiated in the County Court to challenge refusal to admit the Druid Network as a member, subject to the normal time limits for claims of this kind. The basis for such a claim will arise whenever the IFN takes a decision to subject the Druid Network to a detriment based on the current membership policy. The claim would be very likely to succeed. For the same reasons it is very likely that an investigation by the Equality and Human Rights Commission, which might be triggered by a complaint to that body, would find fault on the IFNs part and lead to enforcement action.
 - (ii) Maintenance of the current membership policy, even if it were lawful, puts the funding of the IFN seriously at risk - something which the Trustees ought to have been aware of and drawn to IFN members’ attention at the AGM. That is because most of the funding comes by

way of a grant from the Department for Communities and Local Government. The Department has important duties to discharge when making funding decisions, in particular to have due regard to various anti-discrimination and equality issues listed in section 149 of the 2010 Act. If the Department becomes aware of the discriminatory effects of the membership policy operated by the IFN – in particular the fact that, despite its objectives being focussed on “different faiths” and the “different faith communities in Britain”, one in particular has been deliberately excluded - it will be obliged to reconsider whether public funding remains appropriate, notwithstanding those effects. There is a very real risk it will then decide to withdraw or at least put conditions on funding unless and until the membership policy is changed: any other result would mean public money being granted to be used in an overtly discriminatory way for no good, objective reason.

- (iii) There are also serious questions about compatibility of the IFN membership policy with its own Memorandum and Articles of Association which could be raised as a complaint to the Charity Commission calling for investigatory and regulatory action or litigated in Charity Act 2011 proceedings.

- 5. These issues are discussed in more detail below. First it is necessary to set out some of the background to this unfortunate dispute.

II. BACKGROUND

The IFN

- 6. The IFN is a company limited by guarantee and a registered charity. It has operated for 25 years. Its objects are described in its Memorandum of Association at paragraph 3:

“The network is established to advance public knowledge and mutual understanding of the teachings, traditions and practices of the different faith communities in Britain including an awareness of both their distinctive features and their common ground and to promote good relations between persons of different faiths.”

7. The Memorandum goes on to list a number of powers that the IFN has in order to further these objects such as providing “a forum for discussions between members of different faiths”, holding exhibitions conferences and meetings and promoting research. Most of the funding for these activities and for the IFN in general comes, as I have said, in the form of a government grant. The IFN has always been supported in this way and is considered by the government to be a useful means of promoting community cohesion and for identifying common positions held by the U.K.'s faith communities.

Membership of the IFN

8. The IFN's Articles of Association explain that the IFN is composed of 'member bodies' accepted by existing members at a general meeting. Article 4 provides:

“Full membership shall be open to bodies which satisfy one or more of the following conditions: –

- (i) it is a national body representative in whole or part of a faith community in Britain...”

9. The remaining provisions concern other local and national inter faith bodies, along with those concerned with religious education, academic institutions and study centres: see Articles 7(ii), (iii) and (iv) respectively.

10. Applications for membership, regardless of category, are made to the IFN's Secretary and, by Article 7.1, must then be considered by the Trustees:

“... taking into account any existing membership criteria established by rules or bylaws in accordance with Article 102 ('the membership criteria')...”

11. Article 102(a) states materially that the trustees:

“may from time to time make such Rules or By-Laws ... for the purpose of prescribing classes of and conditions of membership”.

12. Article 102(b) empowers the general meeting to alter, repeal or add to these Rules and By-Laws. Those containing membership criteria can only be altered by a majority vote of 75% of those member bodies present or voting by proxy at a general meeting.

13. A 75% vote of this kind is also needed at a general meeting to accept the recommendation of the trustees that an applicant body should be admitted to membership (Article 7.4) or to accept one despite being no such recommendation (Article 7.5). In the latter scenario, however, at least 10 member bodies present must seek a vote on the matter and positively resolve that the applicant body meets the membership criteria (provided such criteria have been set in the proper way - by the making of Rules or Bye Laws).
14. In 2007 the IFN concluded a membership review which was reported to the AGM on 16 July of that year. Tabled at the meeting was an Executive Committee paper reviewing membership issues (the last such review had taken place in 1995). The Committee recommended that faith group membership be limited to groups representing Baha'is, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Sikhs and Zoroastrians.
15. Concern was expressed about this not least because it excluded Pagan faith groups such as Druids. On behalf of the Executive Committee, however, it was argued that the policy should only be changed through consensus. The meeting ultimately endorsed the Executive Committee's recommendations. There does not appear to have been a vote. This decision is the basis for current IFN membership policy (see further below).
16. There is one other significant point to note. People who define themselves as Pagans, including Druids, are actively involved in the IFN because they are members of inter faith bodies that have been granted membership as Article 7(ii) or (iii) bodies. It appears then, that the IFN is prepared to countenance the involvement of such people in its activities, but if, and only if, they do so as members of an inter faith body, rather than one representing the whole or part of their own faith community.

The Druid Network

17. The Druid Network is an unincorporated association and also a charity recognised by the Charities Commission as having an objective of the advancement of religion for the public benefit. There is no suggestion by the IFN that Druidry as promoted by the Druid Network is not a religion; indeed, it has positively accepted that is so: see the e-mail of 16 May 2012 from Dr Harriet Crabtree, the IFN Director, to Mr Ryder stating "the charitable status of the Druid network and its recognised status as a religion are not in doubt".

18. The Druid Network has a number of reasons for seeking IFN membership. For example, it believes that it is a natural progression from its recognition by the Charities Commission for it now to be accepted as an appropriate participant in inter faith activities of the kind that the IFN exists to promote. Further, some local inter faith groups have refused to allow the participation of Druids because no Druid organisation is an IFN member. The Druid Network also considers that IFN membership would help it combat prejudice and discrimination against Druids of which its members have direct experience (there is also documented national and international relating to this problem). Whilst Druidry is undoubtedly a minority religion in the UK at present, it is not insignificant in size. Figures gathered as a result of the 2001 census suggest that it and other forms of Paganism have around 42,500 adherents. The 2011 figures are not yet available, but the Druid Network believes that they will be greater.

The Druid Network's application

19. On 24 April 2012, Phil Ryder wrote on behalf of the trustees of the Druid network to submit an application for membership of the IFN for consideration at the 12 July 2012 AGM. This elicited a response from Dr Crabtree, on 11 May 2012. It says:

“Thank you for your email of 24 April with its application for membership of the Inter Faith Network for the UK by the Druid network.

The 2007 AGM of IFN resolved the category of ‘national faith community body’ be open, at the present time, to organisations from the Baha’i, Buddhist, Christian, Hindu, Jain, Jewish, Muslim, Sikh and Zoroastrian traditions. In view of this membership policy, IFN’s executive committee is not in a position to recommend acceptance of your application to the 2012 AGM.

There have been changes in the inter Faith landscape of the UK and at its meeting last autumn IFN’s executive committee decided that the time had come for a strategic review. In further discussions of this at the meeting last week, it agreed that the review should begin in the early autumn of this year. The review will provide the opportunity for consideration of a range of issues such as IFN is continuing relevance and usefulness; strategic priorities; patterns of membership; and resources. When the review gets underway, the reflections that the Druid Network have to offer be very welcome.”

20. Further correspondence ensued. Whilst the thinking of the IFN is not made entirely clear, one e mail is particularly significant, that from Dr Crabtree to Dr Muhammad Al-Hussaini dated 7 June 2012. There Dr Crabtree sets out her recollection of a conversation with him about the thinking underpinning current membership policy. Her e mail states:

“... The membership policy of IFN, and its engagement with traditions other than the nine at that time (and presently) in membership, was necessarily affected by the degree to which some of the faith communities in membership of it were able or willing to be in formal engagement with these other groups. That is a simple statement of fact.”

21. This intimation that the membership policy, if changed so as to embrace Druids, might have divisive effects echoes comments made at the 2007 AGM. Similar comments were made at the 2012 AGM. The Advice Note also alludes to the “risk of an organisation’s work being seriously affected by the acceptance into membership of a particular organisation”. The source of these concerns is unclear, however. There appears to be no real evidence to bear them out; certainly none has been shared with the Druid Network.
22. Ultimately, a number of existing IFN member organisations indicated that they wanted to rely on the Article 7.5 provision for an AGM vote on membership for the Druid Network notwithstanding there being no recommendation in favour. The matter was then added to the AGM agenda. The IFN took legal advice and the Advice Note was produced and circulated.
23. As mentioned already, there was a vote and the necessary 75% of votes cast was not secured so the Druid Network was not admitted. There was no vote on changing the membership policy.

III. PROHIBITION ON DIRECT DISCRIMINATION ON GROUNDS OF RELIGION OR BELIEF

Associations

24. For the purposes of Part 7 of the Equality Act 2010 the IFN is an ‘association’, that is to say it is a body comprised of more than 25 members whose members are selected using a process regulated by the association’s rules: see section 107(2). The IFN accepts this in its Advice Note. Membership of an association means membership of any description: see section 107(5).

Discrimination by associations

25. By section 101 of the 2010 Act:

“(1) An association (A) must not discriminate against a person (B)—
(a) in the arrangements A makes for deciding who to admit to membership;
(b) as to the terms on which A is prepared to admit B to membership;
(c) by not accepting B's application for membership.”

26. A reader of the 2010 Act might be excused for thinking that a reference to “a person” is a reference to things possessing legal personality. That would include companies as well as individuals, but it would exclude unincorporated associations, such as members’ clubs and so here, the Druid’s Network. However, schedule 1 of the Interpretation Act 1978 provides that the word “‘person’ includes a body of persons corporate or unincorporate”. It follows that the IFN can discriminate against members of the Druid Network collectively and in doing so be caught by the 2010 Act, as well as discriminating against individuals. This also makes sense given the social purpose of the 2010 Act. Many associations are composed of other organisations that themselves represent group interests. If umbrella associations of this kind were beyond the reach of the prohibition on discrimination it would be very easy for those who might wish to discriminate to do so with impunity by constituting themselves as umbrella associations and framing membership criteria so as to exclude groups of people with a particular protected characteristic. It is not realistic that the Courts would interpret the 2010 Act in a way that would allow that to happen.

27. Acts of ‘discrimination’ are defined in a number of ways in Chapter 2 of the 2010 Act. For present purposes, the concern is ‘direct discrimination’ under section 13(1). It occurs when:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

28. The ‘protected characteristics’ are age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation.

29. In most cases, the prohibition on direct discrimination will operate in an obvious, clear-cut way. For example, if a tennis club with more than 25 members decides that it will refuse admission to Asians seeking membership that will be straightforward and unlawful direct discrimination on grounds of race. Similarly, if a federation of tennis clubs which organises national tournaments decides it will refuse membership to any club whose members are predominantly Asian that too will be unlawfully discriminatory. The 2010 Act does not permit any justification for discrimination of these kinds.

30. However, associations benefit from certain exemptions to this general principle in particular, narrowly defined circumstances. For example, schedule 16 provides:

“1 Single characteristic associations

(1) An association does not contravene section 101(1) by restricting membership to persons who share a protected characteristic.”

31. In principle this allows an association to limit membership to those of a single gender, for example, or of a single faith. However, this does not help the IFN because it does not limit its membership in this way by reference to a single characteristic. By definition, its members have, and are representative of, a range of different faiths.

32. Paragraph 2 of schedule 23 concerns ‘organisations relating to religion or belief’ which are defined as those:

“(1)... the purpose of which is—

(a) to practise a religion or belief,

(b) to advance a religion or belief,

(c) to teach the practice or principles of a religion or belief,

(d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief, or

(e) to foster or maintain good relations between persons of different religions or beliefs.”

33. It is clear that the IFN falls into a category (e). It is equally clear that none of the other categories apply.

34. Paragraph 2(3) of schedule 23 states:

“(3) The organisation does not contravene Part 3, 4 or 7, so far as relating to religion or belief or sexual orientation, only by restricting—
(a) membership of the organisation;
(b) participation in activities undertaken by the organisation or on its behalf or under its auspices;
(c) the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices;
(d) the use or disposal of premises owned or controlled by the organisation.”

35. However, this is significantly limited by subparagraph (6) which states:

“(6) Sub-paragraphs (3) to (5) permit a restriction relating to religion or belief only if it is imposed—
(a) because of the purpose of the organisation, or
(b) to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief.” (emphasis added)

36. It follows that:

- (i) if an association (e.g. the IFN) discriminates by treating a person (here the Druid’s Network, an unincorporated association, and the members of it) less favourably by withholding membership; and
- (ii) if that discrimination is on the grounds of the personal characteristic of religion or belief (here Druidry);
- (iii) then that act will be unlawful direct discrimination unless an exemption applies.

Do either of the exemptions apply?

37. As mentioned already, none of the above appears to be disputed by the IFN in the Advice Note. It relies on two exemptions, however, found in paragraph 2(6) of schedule 23.

38. First, the Advice Note says that paragraph 4.7:

“The primary ground on which an interfaith organisation, such as IFN, may, within this context, define its parameters of membership is according to the ‘purpose of the organisation’. If an organisation, the purpose of which is to ‘foster or maintain good relations between persons of different religions or beliefs’ concludes that work could be seriously

affected by the acceptance into membership of a particular organisation (or individual) – regardless of the legal standing of that body and without judgement on its standing in other contexts – the decision not to accept that membership application would be consistent with the relevant provisions in Schedule 23. An example of this might be a decision by an interfaith organisation not to accept a membership application from a particular faith organisation if the admission to membership of the organisation could have the effect of leading to represents the bodies of major faith communities withdrawing from membership of that inter faith organisation.” (emphasis in original)

39. This is shortly followed by the conclusion quoted above that current IFN membership policy is lawful.
40. This part of the Advice Note is seriously flawed for a number of reasons.
41. The starting point is to consider the purposes of the organisation, here the IFN. In the case of a company that is also a charity those purposes are not found exclusively in the Memorandum. Here they are to “advance public knowledge and mutual understanding of the teachings, traditions and practices of the different faith communities in Britain including an awareness of both their distinctive features and the common ground and to promote good relations between persons of different faiths”, words which are reinforced by the IFN’s power to “provide a forum for discussions between members of different faiths” (emphasis added).
42. Beyond the qualification that traditions and practices of faith communities must be those that manifest themselves “in Britain”, nothing is said about which faiths are to be the subject of the IFN’s activities. It is simply not possible to construe the words “different faiths” in a way that excludes faiths other than those the IFN currently considers appropriate to be represented by faith bodies in its membership. The position would be different if the nine preferred faiths whose representative bodies may be admitted as members were positively identified in the Memorandum as those which the IFN was exclusively concerned with. But its purposes are not defined in that constrained way. The Memorandum must be interpreted using the words it actually contains.
43. Of course, there may be some organisations that purport to be faith-based which many would not recognise as such (one example might be a white-

supremacist church). But the Druid Network to not fall into that class at all: the IFN accepts that.

44. Given that the very purpose of the IFN is to promote public knowledge of, dialogue between, and mutual understanding between different faiths in Britain of which Druidry is one, is surprising that the IFN should even seek to argue that this is somehow served by excluding the main group representing that particular faith from membership and activities. The Advice Note seeks to explain this by suggesting that if the IFN concludes that the purpose of promoting good relations between different faiths could be “seriously affected” by the acceptance into membership of a particular organisation, it will be permissible to frame the membership criteria in such a way that such an organisation is excluded.
45. This argument is imaginative, but fundamentally bad. There are four difficulties.
46. First, it conflates two very different things: an organisation’s purpose and the ease with which it can be fulfilled. Parliament has chosen to permit direct discrimination by religious organisations in connection with the membership criteria if this occurs “because of” their purposes. That means there must be a direct link between the purpose and the criteria; the criteria must be necessary because of the purpose. It is easy think of benign examples. Synagogues exist essentially for Jews. It is entirely legitimate that they should be allowed to exclude non-Jews as members. Discrimination against non-Jews is “because of” the association’s very nature as a Synagogue; its purposes can only be realised if it defines its membership in this way.
47. But the IFN does not need to discriminate against Druids “because of” its purposes or at all. Those purposes are not concerned with the relationship or position of any particular set of faiths. They are simply concerned with “different faiths” in Britain.
48. Secondly, if an association were allowed to make membership admission decisions in a discriminatory way because of its opinion as to the consequences (“If an organisation... concludes that...”) that would mean direct discrimination would be legitimised if a subjective justification were available. There is no justification defence of this kind in the 2010 Act save in relation to certain forms of direct disability discrimination and then in a very limited,

tightly defined circumstances. The effects of that would be very serious. To take a further example, it might be easier for the IFN to undertake its activities if it were to exclude groups representing one faith or another that have historically been in conflict, or those that are simply controversial. If the Advice Note is right, it must follow that it would be perfectly lawful to exclude all Islamic groups on the basis that the IFN had concluded that their very presence had a negative effect on the IFN's ability to work effectively Jewish groups. The converse would be equally true. I do not suggest, of course, that this is or has ever been or is a problem. It is simply the logical endpoint of the advice IFN has.

49. There is a third acute difficulty. The Advice Note is premised on a conclusion having been reached that the IFN's work will be "seriously affected" if the Druid Network is admitted. But there has been no such conclusion. Despite Mr Ryder's correspondence pressing for clarity on the point, the IFN does not appear to have any institutional position on what might happen if the Druid Network were admitted as a member. It cannot rely on a justification it is not even adopted, let alone substantiated with evidence.
50. Last, the lack of evidence to support the suggestion that the IFN's work might be affected by admission of the Druid network is mirrored by the presence evidence that the network and its supporters have provided to show the other inter faith organisations, local and national, have managed perfectly well after allowing Druids to participate. But even if this were not enough, the IFN has direct evidence at hand as a result of the operation Articles 4(ii) and (iii) of its Articles of Association. They have meant Druids and other Pagans actively participating in the IFN, as mentioned above, through their involvement in these very local and national inter faith groups which are themselves members of IFN. It follows that, even if a 'undermining of purposes' justification were available to the IFN (and it is not in law), it would have to show why that would occur as a result of the members of a representative organisation like the Druid Network becoming involved in that capacity when there had been no such effects as a result of their involvement, for some years, through local or national inter faith bodies. It is extremely difficult to see how that could be shown.
51. For these reasons, the justification the Advice Note seeks to advance has no basis in the 2010 Act, has no evidential foundation at all, and would represent no defence of substance to a direct discrimination claim.

52. The Advice Note advances a secondary argument which needs to be addressed. It states:

“While the reference at paragraph 2(6)(b) on its face appears to apply in relation to organisations covering a single ‘religion or belief’ he would be likely, within the context of the Schedule to be held to apply by extension to the ‘religions’ or ‘beliefs’ represented within an inter faith organisation.”

53. Put differently, the point made here by the Advice Note is that the words “to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief” are likely to be read by a Court with the effect that membership can be refused on the grounds that granting it would cause offence to one or more persons of all or any of the religions or beliefs to which an inter faith organisation relates.
54. This tortured construction of the 2010 Act is not likely to be adopted by a Court at all. It is untenable. Paragraph 2(6)(b) is plainly not concerned with inter faith organisations, but rather single faith ones of the kind sub-paragraphs 2(1)(a)-(d) identify. Had Parliament wanted to allow inter faith organisations to discriminate in the way the Advice Note envisages to be permissible, it could and would have used the plural. Allowing that would make no sense: there is always likely to be someone of a particular faith who may object to another being involved in an inter faith organisation. Allowing that single objection to create a foundation for exclusionary membership criteria could well bring inter faith organisations generally to an end.
55. It follows that the IFN’s directly discriminatory membership policy is very likely to be held unlawful if challenged. But the IFN faces further, possibly more immediate, problems.

IV. RISK TO FUNDING

56. This risk, as mentioned at the outset, arises from IFN’s relationship with its primary funder, the Department for Communities and Local Government.

The Department’s public sector equality duty

57. The Department is plainly a public authority. By section 149 of the 2010 Act:

“(1) A public authority must, in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) ...

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) tackle prejudice, and
- (b) promote understanding.”

58. This is commonly known as the public sector equality duty. Volume 1 page 6 of the EHRC’s Guidance on the duty explains the purpose of the duty in the following terms:

“The broad purpose of the equality duty is to integrate consideration of equality and good relations into the day-to-day business of public authorities. If you do not consider how a function can affect different groups in different ways, it is unlikely to have the intended effect. This can contribute to greater inequality and poor outcomes.

The general equality duty therefore requires organisations to consider how they could positively contribute to the advancement of equality and good relations. It requires equality considerations to be reflected into the

design of policies and the delivery of services, including internal policies, and for these issues to be kept under review.”

59. The duty to have due regard does not compel a particular decision or result (except where the body subject to the duty realises, through discharging it, that a particular course of action will amount to unlawful discrimination on its part and so must desist). However, the Courts have said that, at a minimum, it will require the public authority to:
- (i) properly identify any negative (or positive) consequences in equality terms of the courses of action being contemplated (*R (Lunt and another) v Liverpool City Council* [2009] EWHC 2356 (Admin), paragraph 44);
 - (ii) balance any such consequences against the other benefits of proceeding (*R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA (Civ) 141 § 31, *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), paragraph 81) and
 - (iii) consider whether, and if so how, any identified negative consequences can be mitigated (*R (Kaur & Shah) v London Borough of Ealing* [2008] EWHC Admin 2026, paragraph 43).

Effect of the Department’s duty on its grant-giving functions

60. Grant-giving to charitable and voluntary organisations is a public function to which section 149 applies, indeed many of the litigated cases concern failures to have due regard when decisions to withdraw funding have been made: see for an example *R (on the application of Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin). There can be no doubt that it will be engaged on each occasion when the IFN applies for grant funding and to each decision on whether to make a grant and, if so, how much.
61. This is reinforced by the Department’s publication ‘Public Sector Equality Duty: DCLG Equality Objectives - 2012-2016. It says at page 5, for example:
- “We will know we have succeeded when... [p]rotected groups are not disproportionately affected by the implementation of business and policy decisions.”

Relationship between the Department's duty and the IFN's membership policy

62. Despite its policies, which are consistent with its legal obligations, as far as I have been able to establish the Department has not considered the effects of the IFN's membership policy with section 149 of the 2010 Act in mind – the necessary steps set out at paragraph 59 above have not been taken. It might be forgiven for not having done so to date because those effects have not been drawn to its attention (though that is not necessary to trigger the duty). However, if it does become aware of those effects, it will be obliged to consider whether ongoing public funding is appropriate when the opportunity next arises, bearing in mind the following:

- (i) The IFN is unique in the UK. There is no parallel national UK inter faith body, less still a publicly funded one, that the Druid Network can join that fulfils the same or a similar role. It cannot be sensibly argued that excluding the Druid Network has no practical effect for Druidry, its relationship with other faiths or the public.
- (ii) The IFN does not primarily exist for the benefit of its members, but rather the public at large, as the IFN itself accepts (see paragraph 3.3 of the Advice Note). Nor does the IFN exist to benefit the public through the advancement of the interests of particular faith groups, or improving understanding of and relations between them. Its concerns are broader the "different faith communities in Britain" and "persons of different faiths".
- (iii) IFN accepts Druidry is a religion in Britain and it does not dispute that the Druid Network is a representative body of its followers.
- (iv) Druids suffer discrimination and prejudice on account of their faith, and their participation in public life is disproportionately low. The exclusion of the Druid Network from the IFN means this is likely to be perpetuated and certainly not ameliorated.
- (v) Better relations undoubtedly could be fostered between the members of some other faiths and Druids. The exclusion of the Druid Network from the IFN means this is less likely to occur than if the Druid Network were admitted.

- (vi) The IFN has admitted to its membership representative bodies of religions that are statistically far less significant than Druidry.
 - (vii) It has made a very deliberate decision not to admit the Druid Network to membership.
 - (viii) This has caused genuine upset and offence, as decisions to exclude from a preferred group with similar characteristics tend to do (see e.g. the speeches of Lords Hope and Manse in *R(E) v Governing Body of JFS* [2009] UKSC 15).
 - (ix) The decision appears to be based on an inchoate concern that admitting the Druid Network to membership would adversely impact on the work of the IFN, possibly by causing other members to consider leaving, but no evidence to support this has been produced and no institutional position has been taken.
 - (x) Conversely, there is positive evidence that the involvement of Druids in inter faith organisations, and through them the IFN, has had no such adverse effects.
62. These are very weighty considerations for a decision maker that is the steward of scarce public resources. Collectively they mean that the effects of making a grant to the IFN when the membership criteria remain as they are will positively undermine the policy imperatives of section 149, particularly the need to advance equality of opportunity between persons who share a relevant protected characteristic (the religion of Druidry) and persons who do not share it and to foster good relations between these groups of people. There would need to be even weightier countervailing considerations to justify pressing on and making a grant, especially one that had no conditions relating to the IFN's membership policy, in these circumstances. Further, if the Department took the view that making the grant would mean the IFN using at least part of it in an unlawful, directly discriminatory way for the reasons set out in part III of this advice, it would be even more reticent to make it.
63. For these reasons there is a very real risk that maintenance of the current membership policy will imperil IFN's funding and thus its existence. This is so even if the membership policy is lawful because an exemption applies. The

Trustees had a responsibility to make themselves, and in turn the IFN members at the AGM, aware of this risk. They did not – the AGM papers do not even hint that this is an issue. No thought was given to the Department’s section 149 duty and how its discharge, on a properly informed basis, could affect IFN’s grant or its future.

V. COMPATIBILITY OF THE MEMBERSHIP POLICY WITH THE IFN MEMORANDUM AND ARTICLES

63. On this issue the Advice Note states:

“... The word different is used twice, and it is applied to two separate objects of IFN, namely:

- (a) advancing public knowledge and mutual understanding etc of the different faith communities in Britain; and
- (b) promoting good relations between persons of different faiths.

...in (a) ‘the different faith communities’ potentially embraces all faith communities in Britain. However, the clear legal advice which has been received is that there is no obligation on IFN’s Trustees to give equal emphasis to every faith community when advancing public knowledge and understanding; the Trustees are entitled, as is deemed necessary, to concentrate their efforts on particular faith communities where they consider that is an appropriate means of furthering IFN’s overall purpose....

In (b), “between persons of different faiths” does not necessarily extend to persons of all faiths and, again, the legal advice is that IFN’s Trustees are entitled to concentrate their efforts in this regard on particular faiths.”

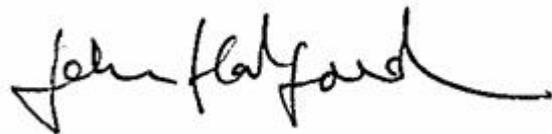
64. Again, this conflates the IFN’s purposes with the means of their achievement. It certainly is the case that the IFN is entitled to prioritise and focus its activities within those reasonably open to it as means of fulfilling its purposes. This is simply another way of saying that, subject to its purposes, it is for the IFN to decide how to exercise its powers. Nothing in the Memorandum or Articles entitles any faith to a particular degree of promotion.

65. But the decision on whether to admit an organisation to membership, or refuse it, is not an activity in this sense. Admission to membership does not automatically compel any particular reordering of priorities. But exclusion from of membership does, by its very nature, undermine the advancement of

knowledge, mutual understanding and good relations – little account is taken of the views of those who are denied the opportunity to air them. It is very difficult to see how a policy with that effect can be squared with the IFN's purposes and the Advice Note offers no answer. If, and only if, those purposes were confined to the interests of defined faith groups in the Memoranda itself would this be permissible.

VI. CONCLUSION

66. The IFN has committed itself to a 12-month review of its membership which is likely to examine its membership policy as the previous review did. But it has done so having assured itself that there is nothing unlawful in equality or charity law terms s regards its current policy. It was wrong to do so. It was also wrong of the IFN to proceed to a decision on Druid Network membership without taking into account the significant risks that refusal would (and now do) present for its funding.
67. It should be emphasised that the Druid Network has been very clear with the IFN and me that it does not want to have to resort to legal action or complaints to the Equality and Human Rights or Charity Commissions to resolve matters. That is very sensible: there are likely to be better ways to resolve this dispute. Formal mediation might well be a possibility. In any event, the IFN should now urgently reconsider its position, ideally at a special general meeting called either by the Trustees or 10% of the member bodies with a right to attend (see Article 16). As the Druid Network and its supporters have argued, it is not appropriate to await the outcome of the review, particularly when the premise for that review is a misdirection on what the law requires.



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20 November 2012

