

The Impact of the Equality Act 2010 on Charities

Debra Morris, Anne Morris and Jennifer Sigafos

Charity Law & Policy Unit, School of Law and Social Justice, University of Liverpool



Published by:

Charity Law & Policy Unit

University of Liverpool

Liverpool L69 7ZA

August 2013

website: <http://www.liv.ac.uk/law/research/charity-law-and-policy/about/>

© Charity Law & Policy Unit

ISBN 978-0-9536666-6-9

Table of Contents

Executive Summary	1
I Introduction	9
II Overview/ General Themes.....	17
III The Legal Context: Charity Law	29
IV The Legal Context: Equality Laws.....	41
V The Legal Context: Interrelation between Charity and Equality Law.....	90
VI Case Studies	104
Religious Charities	104
Higher Education	117
Single-sex Provision	135
Challenges to Public Sector Spending Cuts	142
VII Conclusion and Recommendations.....	158
Appendix: Research Design and Methods	167
Bibliography	175

About the Charity Law & Policy Unit

Debra Morris, Anne Morris and Jennifer Sigafos are members of the Charity Law & Policy Unit within the School of Law & Social Justice at the University of Liverpool. The Unit carries out research into the legal issues facing charities and third sector organisations. As well as traditional legal research (in which its members have been very active), the Unit has a very strong track-record when it comes to funded research projects. These have had a strong empirical element and have often led to proposals for legal and regulatory reform, thereby making important contributions to policy change in this field. Examples are the Unit's path-breaking work on charity mergers, disputes in the charitable sector, the legal structure of charities and housing the mentally vulnerable.

Further information on the work of the Unit is available at:

<http://www.liv.ac.uk/law/research/charity-law-and-policy/about/>

Acknowledgements

The study has been made possible through the financial support of The Leverhulme Trust (reference no. RPG-372).

The completion of this study and this report, *The Impact of the Equality Act 2010 on Charities*, would not have been possible without the co-operation of the charities, lawyers and regulators who agreed to take part in this project, either by being interviewed or by participating in a focus group. Thanks are due to all who willingly shared their experiences and gladly supplied us with further information when requested. To respect their confidentiality, participants' names and any potentially identifying circumstances are not included in this report.

The study has benefitted from the participation of two external advisors who have provided wise counsel throughout the project. The external advisors are Sir Bert Massie CBE, Former Chair of the Disability Rights Commission and Jean Warburton, Emeritus Professor, University of Liverpool.

Colleagues within the Liverpool Law School are also thanked for their support and advice.

The views expressed in this report are those of the authors.

Debra Morris

Anne Morris

Jennifer Sigafos

August 2013

Executive Summary

Objectives

The Equality Act 2010 ('the Act') substantially altered the landscape for charities in the UK. It consolidated existing anti-discrimination legislation and brought some uniformity to the legislative approach to equality. This qualitative study explores the impact of the Act on charities. It is in the nature of charities to discriminate since many target their efforts toward people within a particular 'equality strand' (for example, females) to the exclusion of others (for example, males). The Act tightened the exceptions from anti-discrimination law that previously protected charities. This is an important, yet little understood area of law, especially by charities, which are largely run by volunteers. They must now ensure that their existing, often long-entrenched, approaches are Equality Act compliant. As the first comprehensive exploration of this area of law, the aims of this study were to draw conclusions on the Act's impact on the charity sector in practice and to provide practical guidance for the sector to supplement and expand upon official guidance. The project sought to provide recommendations for reform of relevant legislation and official guidance and, more broadly, to contribute to knowledge and debate surrounding the aims of equality legislation and its interaction with charity law.

Research Activity

Research Questions

Research Questions:

The narrow focus: Practical impacts of the Equality Act 2010

- Interpretation - What specific legal questions arise from attempts to interpret the Act? Can these legal questions be answered with enough clarity to enable charities to operate in a sufficiently predictable legal environment?
- Compliance - How far does the unique nature of charities make compliance with the Act difficult? What specific issues are they likely to face, and how can they be addressed?
- Perception - Do charities understand what the Act requires them to do?
- Change - Are charities likely to alter their practices in potentially detrimental ways in order to attempt to comply with the legislation? What positive opportunities for charities arise as a result of the legislation?

The broader view: Legislative reform

- In light of the conclusions drawn in the first area, should reform of the law be considered, and if so, what specific recommendations can be made?

The widest context: Implications for wider debates

- What do the insights gained in the above two areas add to perspectives on and evaluation of the fundamental aims of equality legislation, and to debates over the role of charities and the nature of public benefit?

Research Methods

The study had two interrelated elements that inform one another: legal research into the interaction between charity law and equality law and an empirical investigation of the Act in practice. The legal research considered the unique legal issues which charities present in relation to equality law. Experts analysed current legislation and case law in order to determine where the law is unclear. Additionally, a

review was conducted of all of the available official guidance produced by regulators and other agencies. The empirical study was based upon a grounded theory approach and involved 45 interviews with charities, lawyers and regulators, as well as Freedom of Information Act requests of regulators. Interviews were broadly conducted in three separate stages:

- I. Interviews with lawyers and other advisors in the field
- II. Interviews with charities
- III. Interviews undertaken so as to expand upon the identified case study areas.

The study concluded with two stakeholder focus groups to check the validity of the findings and to consider broader policy implications. The design of the project provides a thorough investigation of the topic through a socio-legal lens.

Conclusions

This research reveals that charities' approaches to equality issues vary considerably. However, few charities are considering the wider implications of the Equality Act in relation to their charitable objects. The lack of uniformity is inevitable given that the sector itself is extremely diverse. Some parts of the charitable sector have been more directly affected by the Act, and have a commensurately greater awareness and (in some cases) understanding of its applicable provisions. Moreover, the differing size, legal structure and operation of charities leads to differing responses, with larger, professionally run charities having a more professional approach than the more typical 'voluntary' bodies, which are run by volunteers. Few charities have so far encountered legal problems with the Equality Act, but the *Catholic Care* case raises a spectre of the potentially drastic consequences of the Act for charities.

The research findings are as follows:

Interpretation

- Under s. 193 of the Act, a charity can restrict its support to one equality 'strand' or 'stream' and thus exclude other protected groups as long as the restriction is in furtherance of its charitable purpose AND the restriction is justified under one of two further tests: it is either a proportionate means of achieving a legitimate aim or it prevents or compensates for a disadvantage linked to the targeted group. There is significant overlap between these two tests and an unfortunate lack of clarity about how the proportionality test will operate independently of the disadvantage test. If there are genuinely two separate justifications in section 193(2), the

distinction should be clearer. If the existing wording is to stay in section 193, regulators must give clearer guidance as to how the tests apply.

- The phrase ‘proportionate means of achieving a legitimate aim’ is crucial to a number of key exceptions that charities may rely on and yet it is very difficult to define. Better guidance, specifically tailored to charities, is needed from the Charity Commission and the Equality and Human Rights Commission (EHRC).
- There is a lack of clarity in relation to the precise correlation between the Equality Act charity-specific exception and the public benefit test, which must be satisfied for the achievement of charitable status. It should be made clearer that a charity seeking to operate a discriminatory restriction that does *not* bring itself within one of the exceptions, would, in addition to being in breach of the Equality Act, have difficulty in passing a public benefit test and may therefore lose its charitable status.
- Section 193 offers a defence to direct discrimination. It is arguable that the test for justification should be more stringent than that required for indirect discrimination.
- The *Catholic Care* case has introduced the idea that motive could be a relevant factor when identifying a proportionate means of achieving a legitimate aim. This may prove to be a confusing, and possibly misleading belief, given that many charities struggle with the notion that discriminating for ‘good’ motives may well be unlawful.
- The relationship between Article 14 of the European Convention on Human Rights, which requires non-discrimination in the enjoyment of Convention rights, and the protection against direct and indirect discrimination under the Equality Act 2010 is unclear. Justification of discriminatory treatment is potentially a more flexible concept under Article 14 than it is under the Equality Act and the Directives. Whilst all legislation must be interpreted in the light of the Convention, it is important that the tests for justification are not diluted, especially where direct discrimination is concerned.
- The exceptions in the Equality Act that may apply to charities are numerous and confusing. There are exceptions that apply specifically to charities and there are others that apply to other entities but may well be relevant to some charities. The range and complexity of the exceptions make them very difficult for charities to navigate.
- There is confusion over what precisely the new Public Sector Equality Duty (PSED) requires. While case law is growing, it is not providing clarity, since the cases, whose outcomes all depend very much on their individual facts, do not all follow a uniform approach. The law is not yet clear on the status of a PSED challenge, once the service is reinstated to the individual making the challenge.

Compliance

- Participants were largely unaware that there may be Equality Act implications for a charity's service delivery or its charitable objects. No charity interviewed reported having considered whether or not its objects were in compliance with the Act before some sort of triggering intervention, such as by a lawyer or the Charity Commission itself. The impact of the Act on charities should be given a higher profile.
- There is a tendency to link compliance activity with the risk of getting caught. Equality issues need monitoring and enforcement and yet are perceived to be a low priority for the Charity Commission. Consideration should be given to whether or not the Charity Commission is the most appropriate body to monitor such compliance, and, if so, whether it has the resources to do so.
- The roles of the Charity Commission and the EHRC in relation to providing and updating best practice in equality compliance could be enhanced.
- The justification tests (which allow charities to discriminate under the Act) may be particularly difficult for older charities to satisfy, where their objects are based upon addressing anachronistic disadvantage.

Perception

- The research has shown a level of confusion among charities and legal advisors as to the precise requirements of the Act. Unfortunately, clear guidance is not easily accessible because of the multiplicity of sources, sometimes providing conflicting advice.
- Given the number of protected characteristics covered by the Act, it is uncertain how interests are balanced when there is conflict between them (for example, sexual orientation and religion). A hierarchy of rights may be perceived, whereby the interests of one equality strand trump those of another. Further confusion ensues as some groups may fall within two areas of protection (for example, some religious groups may fall under the protected characteristics of both religion and race).

Change

- The evidence suggests that many charities are unaware that the Equality Act has implications for their service delivery where this is restricted to particular protected characteristics. Therefore, they do not feel the need to make major changes (or any changes) to their service delivery. It is likely that most of these charities will be able to justify their restricted provision under one of the sections under the Equality Act. There are however exceptions, particularly in charities with a religious ethos or with older charities.
- There appear to be external pressures from local authority funders on charities offering a more targeted provision, such as charities providing single-sex services, to provide a more universal service.
- On a positive note, charities have discovered the utility of the PSED challenge - at least for the present.

Legislative reform

- Discrimination on grounds of 'colour' is illogically singled out for the special treatment. This special treatment should be reconsidered.
- Further consideration should be given to whether it is appropriate for charity volunteers to be without the protection of the Equality Act (as opposed to the Employment Rights Act 1996). Without any change to the law, there still appears to be some blurring around whether volunteers can be brought within the 'service provision' parts of the Equality Act. This needs to be clarified. In any event, charity employers who fail properly to assess the working relationships that they have with their 'paid volunteers' may find that their workers are in reality employees. A legal definition of a 'volunteer' should be provided in order to make such relationships clearer for the future.

Implications for wider debate

- Conferral of charitable status should bring with it the responsibility to ensure equal opportunities for beneficiaries, volunteers and trustees, denial of which is contrary to the public benefit principle. Consideration should therefore be given to subsuming, or at least better integrating, equality law issues with the public benefit test. It is possible that a mechanism could be devised under which passing the public benefit test would suffice to indicate compliance with

the Equality Act. While this may not be a universal solution (given the diversity of the charitable sector) there is a significant section of the charitable sector for which such a test would be sufficient. This would greatly simplify the law and decrease the regulatory burden on charities. It would, however, have consequences for the regulator.

- Consideration should be given to the different impact that the Scottish statutory definition of charity may have on this area of law. Its focus on *activities* (rather than the *purposes*) of a charity when assessing its public benefit, together with the need to avoid unduly restrictive conditions may well make for a smoother fit between charity law and equality law in Scotland than in England and Wales.

Policy Recommendations

The research findings led to a number of policy recommendations and some guidance for charities. The three most important general policy lessons to be learned from the research are that charities require clarity, consistency and certainty in relation to the application of the Act to them.

- In terms of *clarity*, participants were largely unaware of the Act's implications for a charity's service delivery or its charitable objects. There should therefore be a higher profile given to this impact of the Act on charities.
- *Consistent* messages should be given in the 'official' sets of guidance documents on the impact of the Act on charities (published by: the Charity Commission; the Equality and Human Rights Commission; and, the Government Equalities Office).
- The law should be *certain*, especially in its application to charities. Charities are already struggling with much uncertainty around the changes to the public benefit requirement. The lack of certainty surrounding the equality exceptions creates potential for them to be misunderstood and misapplied. Outstanding ambiguities (detailed in the report) concerning the application of the Act to charities, and its relationship to the public benefit requirement, should be removed. To address the particular problems around the intersection between charity law and equality law, one solution requiring further consideration might be to subsume equality issues within the public benefit requirement and simply to exempt some charities' service provision from the Act's application.

Advice for Charities

More extensive advice for charities is provided in the concluding section. The key points of advice are:

- Charities' main equality focus currently appears to be on ensuring physical access to facilities for those who are disabled and equality opportunities in terms of employment of staff. The provisions of the Equality Act relating to the provision of services are least appreciated by charities in relation to their general objects. Charities must ensure that they can justify any restricted service provision.
- Charities should do a 'legal health-check,' which includes ensuring Equality Act compliance. This is particularly relevant for older charities with governing documents that have not been updated. With this in mind, it is recommended that, every five years, all charities undertake a 'legal health-check' of their governing documents, making any necessary amendments, including explicit reference to restricted objects where appropriate.
- As part of this 'legal health-check,' a charity using positive action as a justification for its restricted provision of services must ensure that the original need or disadvantage still exists, in order to demonstrate that its practices and policies are effective.
- Charities should consider that the legal obligation to satisfy the public benefit requirement includes issues around equality.
- Charities should be aware that although regulatory interventions are rare, what is perceived as a general lack of enforcement should not make them complacent. It is anticipated that individual challenges by those who have been denied a service will increase as awareness of the Act grows.

I Introduction

This qualitative study explores the impact of the Equality Act 2010 ('the Act') on charities in Great Britain. The study has two interrelated elements that inform one another: legal research into the interaction between charity law and equality law and an empirical investigation of the Act in practice. Experts in charity and equality law consider the unique legal issues that charities present in relation to equality law. The empirical study is based upon a grounded theory approach and involved 45 interviews with charities, lawyers and regulators, as well as Freedom of Information Act requests of regulators. The study concluded with two stakeholder focus groups to check the validity of the findings and to consider the broader policy implications.¹ The design of the project provided a thorough investigation of the topic through a socio-legal lens.

The Equality Act 2010 substantially altered the legal landscape for charities. The Act consolidated existing anti-discrimination legislation and brought a degree of uniformity to the legislative approach to equality. The Equality Act establishes nine 'protected characteristics':

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

The Act requires equal treatment across many activities, including work, the provision of goods and services, and education. It prohibits discrimination, harassment and victimisation based upon protected characteristics.

It is common for respondent charities whose work focuses on a group with a protected characteristic, also referred to as an equality 'stream' or 'strand', to regard the Act ambivalently, or even negatively. Charities working in equality streams that were protected under the predecessor equality legislation

¹ The research theory, design and methods are set out in detail in the Appendix.

often feel that consolidation under one Act has diluted the protections for persons sharing a protected characteristic. Moreover, charities perceive that it is difficult to translate rights afforded via legislation into practice. This is made more difficult by the consolidation into one equality regulator - the Equality and Human Rights Commission (EHRC). Respondents are sympathetic to the position of the EHRC. They are aware that the EHRC is working with a much-reduced budget and perceive that Westminster is hostile to equalities. They report that it is better to have an equalities regulator in a weakened state than to have none at all.

The Act has created uncertainty for charities. It is in the nature of charities to discriminate: many charities target their efforts toward particular populations, often defined by one of the protected characteristics. For example, a charity might be set up to benefit people from Ethiopia (nationality), or women (sex), or deaf people (disability), or deaf women in Ethiopia. Prior to the Act, as long as the charity could establish that its objects were in the public benefit, as regulated by the Charity Commission, this form of discrimination did not contravene the pre-existing equality legislation. However, the Act tightened the exceptions from anti-discrimination law that previously protected charities and charities must now ensure that their existing, often long-entrenched, approaches are Equality Act compliant. It is not only charities that have restricted objects that must be aware of the requirements of the Act. Charities whose objects are not restricted to particular groups must also, of course, comply with the Act. They may take advantage of general exceptions, but if those do not apply they may be liable for direct or indirect discrimination in delivering their services.

There is a limited exception in the Act specific to charities. Under section 193, charities may restrict their benefits to people with a protected characteristic, provided that they do so in pursuance of a charitable instrument and the restriction is either:

- a proportionate means of achieving a legitimate aim; or
- for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.

Many charities that restrict their services can fall within the section 193(1) exception. However, it is an issue for some charities, including older charities established to address a historical social problem that has since been resolved.

Apart from the ‘charity exception’, the Act contains numerous other exceptions that may apply to certain charities, such as those offering single-sex services, or that allow religious associations to restrict their membership based upon religion or belief.² The complicated interaction of these exceptions creates the potential for considerable confusion on the part of charities, advisors, regulators and service users. Indeed, the issues faced by religious charities and organisations providing single-sex services form two of the case studies of this project.

There are issues too around enforcement of the protections guaranteed by the Act. Individuals have the right not to be less favourably treated on the basis of a protected characteristic, but enforcement of this right relies, in general, on the affected individual taking action in the appropriate tribunal.³ In that sense the legislation is reactive - if nobody complains, the inequality will not be addressed. This lack of enforcement is a very real possibility. Respondent charities believe that such a challenge to targeted charitable objects is unlikely, causing a seeming lack of urgency around compliance with the Act. A Freedom of Information Act request of the EHRC confirmed that there are few enquiries in this area. Their Helpline (now defunct) received only 24 calls about potential discriminatory treatment by voluntary sector organisations from October 2010 to October 2012, a rate of approximately one a month.

The Public Sector Equality Duty (PSED) may also impact upon charities. Building on developments in Northern Ireland and in race, sex and disability discrimination, Part 2 of the Act makes provision for the ‘advancement of equality’ by imposing a proactive PSED.⁴ Section 149 of the Act came into effect on 5 April 2011, and requires public authorities, or private bodies carrying out public functions, to:

- eliminate discrimination;
- advance equality of opportunity; and
- foster good relations between persons in protected groups and others.

The PSED has implications for charities in two ways. First, it may apply to charities themselves when they are delivering public services. The ‘Big Society’ concept advanced by the Coalition government was aimed at more charities becoming involved in the direct provision of social services. Public authorities are required to ensure that the PSED is met when commissioning services from these third sector providers, but, in addition, a charity carrying out public functions on behalf of a public body is bound by the PSED. Charities report that contracting local authorities require charities to certify that they are

² The legal context for equality laws is explored fully in Section III.

³ See e.g. Equality Act 2010, ss 114 and 120.

⁴ On 15 May 2012 the government announced a review of the PSED.

compliant with the Act. Second, charities have used the PSED to challenge decisions by local government to cut funding for public services. These challenges involve judicial review of the process by which a local authority has made a cut, alleging that the local authority has not shown due regard to its PSED duties in considering where to make cuts.

Apart from complaints that may be made against charities by individuals alleging unlawful discrimination, or those brought by interested parties under the PSED, charities may face challenges via the Charity Commission or its Scottish equivalent, Office of the Scottish Charity Regulator. Such challenges are potentially significant since an allegation that a charity is breaching the Equality Act may lead to a finding that it is not acting in the public benefit⁵ and therefore fails the charity test.⁶ Indeed, the inter-relationship between the Equality Act and the Charities Act is one of the fundamental questions that this study has shown to be particularly problematic. However, respondents also perceive such challenges, at least for existing charities with discriminatory objects, to be unlikely without some sort of triggering event with the Charity Commission, such as a charity attempting to change its objects or some other kind of regulatory intervention. This is likely to trigger a requirement to prove that discriminatory charitable objects are compliant with the Act. The regulators are operating with reduced resources, and are perceived not to have the ability to investigate the thousands of charities already on the register.

The *Catholic Care* case, which worked its protracted way through the legal system, is a very good example of the impact that equality law can now have on charities. This long-drawn-out litigation confirms that, once under the spotlight, justifying a charity's discriminatory objects as a proportionate means of achieving a legitimate aim under section 193 of the Act is not necessarily straightforward.

The Complicated Case of Catholic Care

Catholic Care is a Roman Catholic charity that was involved in the provision of adoption services. Until the end of 2008, the charity operated a practice⁷ of screening only heterosexual potential adoptive parents and only placing children with adoptive parents who were heterosexual and would constitute what was termed a 'Nazarene family' of mother, father and child. Potential adoptive same sex parents were excluded from consideration under this practice. The practice was said to be required for reasons

⁵ The legal context for charity law is set out in Section III.

⁶ See below p 92 et seq.

⁷ Importantly, this was not an initial explicit restriction in its charitable objects.

of Roman Catholic religious doctrine. The charity had been willing in the past to consider adoptive parents from other denominations and other faiths, provided that they would constitute a Nazarene family.

Changes in the law (pre-Equality Act 2010) making sexual orientation discrimination in the provision of services unlawful meant that in order to continue this practice,⁸ the charity believed that it needed to change its Memorandum of Association to make explicit that it would only provide adoption services to heterosexual adoptive parents, and not to same sex couples. The charity needed Charity Commission consent for this change to its objects.⁹

The Original Charity Commission Decision

In November 2008, the Charity Commission refused to authorise the change on the grounds that the charity would not fall within the (then) charity exception since the proposed explicit restriction was misconceived, being aimed at the adopting *parents*, rather than the adopted *children* who were the charity's beneficiaries.¹⁰

Appeal To The Charity Tribunal

The charity appealed to the Charity Tribunal,¹¹ which ultimately held that the charity's intended means of operation in reliance upon its proposed amended objects would have been unlawful within the Regulations. The appeal was therefore dismissed.¹²

⁸ The original *Catholic Care* hearing concerned the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263 which included a prohibition on refusing to supply services on the grounds of sexual orientation, with the usual (pre-Equality Act 2010) exception for charities whose governing instruments restricted benefits only to those of a particular sexual orientation. Catholic Care Leeds is the only Catholic agency to have continued to try to offer adoption services after the special transitional measures (regs 14-15) for religious charities came to an end in December 2008. The rest have now either stopped their adoption work or severed ties with the Catholic Church.

⁹ Under (what was then) Charities Act 1993, s 64(2).

¹⁰ Charity Commission for England and Wales, Decision on whether or not to grant section 64 consent for Catholic Care (Diocese of Leeds) and Father Hudson's Society to amend their objects, 24 November 2008 (unreported). The case ultimately only concerned Catholic Care as Father Hudson's Society withdrew its appeal before the first Tribunal hearing.

¹¹ The case originally fell under the old system, before the Charity Tribunal jurisdiction was transferred to the General Regulatory Chamber by virtue of Transfer of Functions of the Charity Tribunal Order 2009, SI 2009/1834.

Appeal To The High Court

On further appeal, however, Briggs J in the High Court¹³ held that the question of whether the charity should be permitted to change its objects should be remitted to the Charity Commission for it to decide.¹⁴ He instructed the Commission to consider whether the proposed differential treatment on grounds of sexual orientation could be justified in the light of the public benefit thereby to be achieved. The test to be applied, according to Briggs J was whether this was a proportionate means of achieving a legitimate aim under Article 14 of the European Convention on Human Rights (ECHR).

The Revised Charity Commission Decision (August 2010)

The Charity Commission again decided that the charity could not change its objects to limit its activities to heterosexual adopters, but it revised its reasons.¹⁵ Guided by Briggs J, it considered that the charity could only fall within the exception if this was a proportionate means of achieving a legitimate aim. The charity had not provided 'sufficiently convincing and weighty reasons' to persuade the Charity Commission to authorise the discrimination.

Appeal To The First-tier Tribunal (Charity)

The charity appealed again to what was now known as the First-tier Tribunal (Charity),¹⁶ by which time the Equality Act 2010 was in force, so that the second Tribunal decision was based on the new section 193 exception.¹⁷ This time, the charity argued that the discrimination proposed was proportionate to

¹² *Father Hudson's Society and another v Charity Commission (Equality and Human Rights Commission intervening)* [2009] PTSR 1125.

¹³ Originally, appeals from the Charity Tribunal went to the High Court. Now appeals from the First-tier Tribunal (Charity) of the General Regulatory Chamber go to the Upper Tribunal (Tax and Chancery Chamber).

¹⁴ *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] EWHC 520 (Ch), [2010] 4 All ER 1041.

¹⁵ Charity Commission for England and Wales, *Catholic Care (Diocese of Leeds)*, decision made on 21 July 2010, Application for consent to a change of objects under s 64 of the Charities Act 1993.

¹⁶ As a result of the reorganisation of the Tribunal system under Tribunals Courts and Enforcement Act 2007.

¹⁷ An appeal to the Tribunal takes the form of a re-hearing whereby the Tribunal must consider the decision appealed against 'afresh'; Charities Act 2011, s 319(4).

the achievement of a legitimate aim, which was ‘the prospect of increasing the number of children (particularly ‘hard to place’ children) placed with adoptive families’. The charity argued that, if it did not discriminate against same sex couples, it would lose funding from its Catholic supporters, which would lead to the closure of its adoption service. It was argued that the harm to those children whom the charity would be therefore be unable to assist would be greater than the harm suffered by same sex couples who could not adopt through Catholic Care.

The Tribunal concluded that the charity’s stated aim was in principle a legitimate aim for the purposes of the Act.¹⁸ However, the evidence presented to it did not make out the charity’s case. Whilst it was accepted that it would be a loss to society if the charity’s skilled staff were no longer helping potential adopters, the risk of closure (which was by no means certain) of the service had to be measured against the detriment to same sex couples and the detriment to society generally of permitting the discrimination proposed. The Tribunal ruled that the charity’s case was of insufficient weight to tip the balance in its favour and therefore did not justify discriminating against same sex couples.

Appeal To The Upper Tribunal (Tax And Chancery Chamber)¹⁹

In November 2012, Sales J in the Upper Tribunal²⁰ upheld the decision of the First-tier Tribunal. There must be ‘particularly weighty’ reasons to justify discrimination on the basis of sexual orientation. Although the charity argued that donors would stop supporting it if it allowed same-sex couples to use its adoption service, the Tribunal ruled that the charity had not demonstrated that this would be the case.

Catholic Care decided not to appeal this decision and is no longer providing adoption services.

Many charities are ill-equipped to address the complicated legal questions that arise under the Act. The vast majority of charities are very small organisations, which are run by volunteers and have no money

¹⁸ *Catholic Care (Diocese of Leeds) v Charity Commission* [2011] UKFTT B1 (GRC).

¹⁹ Whilst Catholic Care was initially refused permission by the Tribunal to appeal to the Upper Tribunal on 7 June 2011, the Upper Tribunal itself then granted leave to appeal.

²⁰ *Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC).

for paid advisers or staff.²¹ Charitable resources are often thin, and the economic downturn has exacerbated this problem. There can be unawareness or even unwillingness to recognise that the anti-discrimination legislation might be applicable to charities at all. A prevalent attitude is that charities are the ‘good guys’, and that they are inherently anti-discriminatory. Charities view themselves as being ‘champions’ of equality, rather than as being discriminatory. Although many charities have considered the Equality Act 2010 in terms of their own human resources practices and issues around access for disabled persons, there is a lack of awareness that charities might need to consider the Act’s implications for their *own* charitable missions.

The results of the study will be considered more in depth over the rest of this report. Section II provides an overview of the general themes that emerged during this study. Section III sets out the legal context as it relates to charity law. Section IV explores the legal context with regard to equality law. Section V examines the complex intersection between charity law and equality law. Section VI provides case studies of four issue areas that merit additional exploration: religious charities, higher education, single-sex provision, and challenges to public sector spending cuts. The concluding section considers policy implications and makes relevant recommendations. It also provides advice for charities.

²¹ Public Administration Select Committee, *Appointment of the Chair of the Charity Commission* (HC 2012-13, 315-II) Ev 1 (Dame Suzi Leather, outgoing chair).

II Overview/ General Themes

The data from interviews and focus groups for the empirical element of the study were analysed and coded to find common themes. The general themes are discussed in this section to provide an overview.

The gap between knowledge and understanding

All charity participants reported that their organisations were familiar with the Equality Act 2010 ('the Act'). However, this reported knowledge of the Act did not extend to understanding what the Act means for charities with restricted objects. This is complicated by the fact that most charities are run by volunteers. The Act's requirements relating to employment and access for persons with disabilities were best understood. Participants were largely unaware that there were implications for a charity's service delivery or charitable objects. Significantly, no charity interviewed reported having considered whether or not its objects were in compliance with the Act.

Lawyer, umbrella body and regulator participants were less sure about the level of understanding of the Act in the charitable sector:

I think there's a difference though, between understanding of the Act and awareness of equality issues. And I think on the whole, the charity sector itself is actually very pro-equal opportunities, much more so than society in general. And I think there are a lot of charities around where it is very, very high up their agenda to raise equality issues. But that's quite different from any actual understanding of the Act (Interview 2).

This lack of understanding extends to the lawyers themselves in some areas:

I'm convinced there is a complete lack of awareness, because I have to say that I don't myself understand what the full implications of it are (Interview 7).

A charity participant reported that advice had been required over the Act, but 'even at the QC level there was not a real understanding of the legislation, really' (Interview 1). One lawyer reported that they had sought advice from the Charity Commission on a matter involving registration of a charity with restricted objects. The Charity Commission decided that it needed to consult the EHRC. At the time of interview, six months had passed with no answer. The participant asked, 'If charities' own regulator

finds it difficult to explain what the rules are, then how can charities be expected to know?' (Interview 43)

Because of the diversity of the charitable sector, it is difficult to characterise the sector as a whole. Participants reported that some sectors have been more affected by the Act, and have a commensurately greater awareness and understanding, for example religious charities, women's refuges and higher education.

The structure of larger charities illustrates and may even exacerbate the gap between awareness and understanding, with organisations' equalities experts often located in the human resources team. There seem to be two different perspectives on equalities for charities - that considering whether the charity itself is compliant, usually restricted to human resources and facilities staff, and that considering how the charity redresses inequality through its service provision, that is by working with a particular protected population. The human resources and facilities staff tend to have a defined remit within an organisation, and little involvement with service provision. The service provision staff often have never considered whether the charity's targeted provision of services has any Equality Act implications. Indeed, it is a surprise to many to consider that the Act might apply to the services of the charity in a restrictive way at all. One participant commented that the stature of the equality experts within an organisation has implications for how deeply the Act has been considered, 'ultimately, it's about the equality of your equality people, as well' (Interview 1).

No participant charity had made changes to charitable objects or any part of their governing documents or as a result of the Act without some sort of external pressure, for example from a lawyer or the Charity Commission. One participant, a lawyer, is a trustee of a charity that provides domestic violence services for women. Despite the fact that the participant provides training on the Act and its implications for charities:

Actually, I have to admit we have ... maybe it's due, but we haven't had that conversation at board level. But it would be a very simple exercise for us to demonstrate that women are disproportionately affected by domestic violence, that, you know, the restrictions within our objects are about meeting that disadvantage. But ... it would have to be a retrospective exercise because we haven't yet had that conversation (Interview 4).

Participants reported that the application of the Act was still being determined, and that a 'bedding down' period is required before new legislation is fully situated (Interview 5).

Charities as champions of equality

Charities are widely perceived as champions of the anti-discrimination cause:

I think everyone naturally tends to assume that the promotion of a cause of the elimination of discrimination is something that most charities have been pioneering in (Interview 7).

I think because of the type of organisation that we are that equality and moral issues are very important to us. They're sort of part of our DNA, really. We expect that our employees and our volunteers will behave in that manner throughout their working lives. That's what we expect of them and that's what they expect of us as a responsible employer (Interview 21).

Targeting beneficiaries is seen as advancing equality. As one focus group participant said, targeting is 'differentiation, not discrimination'. A lawyer participant said:

I think people are quite reluctant to accept that anything a charity does might be discriminatory because they have a fundamental understanding that charities are trying to do good ... even if you are doing that good for only a small group of people ... Charities cannot help everybody, so they have to select who they help somehow (Interview 6).

Perhaps because of the assumption that charities are there to do good, there is a perception that the benevolent intent behind discriminatory conduct is important.²² Targeting beneficiaries is not seen in the same way as having a 'genuinely discriminatory' motive. Donors and charities want to help 'people like me' (Interview 10) and are not intending to discriminate against people who are different.

The difficulty of putting rights into practice

Charities still struggle to put the rights guaranteed by the Equality Act into practice internally, and, for those working in the individual equality streams, for their beneficiaries. Whilst one organisation's hard work to have caste included in the Act as a protected characteristic (Interview 42) ultimately paid off when caste was added to the definition of race within the Act,²³ not all disadvantaged groups are directly covered by the Act and are therefore denied its protection. There is a reluctance to extend the

²² As discussed in Section IV, motive is not a defence to direct discrimination.

²³ Under Equality Act 2010, s 9(5) as amended.

scope of the Act as is evidenced by the prolonged campaign to have caste included as a sub-set of race. Matters are complicated by a perceived hostility to equalities:

Because equality and human rights, now, it's become ... political hot potatoes, if you like. Some organisations are scared, if I can use that word, to talk about these things in public ... you know, they don't want to shout too much about it. We just want to provide the services and make sure that we provide the right, inclusive services (Interview 28).

Another participant said:

I'd say that the Act provided a lack of clarity about how important the equality agenda was, or maybe some people would say that it provided great clarity on how unimportant the equalities agenda was. There's a lack of clarity about exactly what is required from organisations [under the PSED], which I think in itself suggests a level of disinterest (Interview 37).

As the primary way that this legislation is enforced is via a claim by an affected individual, a lack of awareness can be an issue. It takes time for the public to become aware that they have potentially enforceable rights. Participants drew comparisons with the time it took for other pieces of legislation to become well known:

When the data protection provisions were introduced, it took quite a little while for people to think, 'Oh gosh, I can exercise a right here, and ... I can use that as a tool.' But once that tipping point was achieved there was no stopping people, and I'm sure that for equality it will be the same (Interview 5).

Internally, it has been difficult for charities to address how they can be compliant with the Equality Act across their whole range of operations, including human resources, research, policy and procurement. It takes time for organisations to adjust. Additionally, organisations have to consider their values:

Compliance with the Act does not necessarily lead to the intended outcome of the Act, and it has to be underpinned with values, understanding and training. Unless we've got the values of the organisation aligned with the principles underneath the Act, then you only get paper compliance where all those other things can happen surreptitiously (Interview 40).

A group of charities has been working together to develop and pilot an Equality and Human Rights Framework for the Voluntary Sector. It has been developed with a diverse group of charities, not only those working in the equalities streams. Currently, the Framework is being piloted with a set of

organisations that volunteered to test it. The idea is popular - the steering group had set a target of 12 to 15 organisations for the pilot group, and ended up with 17.

Dilution of anti-discrimination legislation under the Act

Organisations working in the individual pre-existing equality strands covered under the predecessor anti-discrimination legislation commonly feel that the consolidation under one Act and one regulator has diluted the effectiveness:

We feel that it's also diluted some of the areas ... because they brought everything under one big umbrella. We think there's the danger of groups being left out (Interview 38).

By merging those equalities [streams] together, some of the edges of those campaigns have been lost in a way. So, in the battle for gender equality, say, it's far from won on all kinds of different levels (Interview 44).

Another acknowledged that the predecessor equality streams might feel a dilution, but felt that the Act had at least 'reinvigorated some of the debates' around various protected characteristics (Interview 33).

Consolidation under one regulator is also perceived as problematic, primarily because the EHRC's budget and size have been drastically reduced, to the extent that:

You could end up with a situation where the government only keeps the Equality Commission because under its obligation to the UN it has to have an independent organisation to report to the UN on the UK's association with equality and human rights so they have got to keep something going (Interview 18).

The resultant 'lost momentum' at the EHRC (Interview 33) potentially could harm the Act's effectiveness:

It could be that the Equality Act almost dies on the vine because it is not enforced, and laws that are not enforced tend to disappear (Interview 18).

However, respondents are sympathetic to the fact that the EHRC is trying to get by with a much-reduced budget, and think that it is better to have the EHRC, even in a weakened condition, than not at all

(Interview 40). It is perceived, in addition to these other issues, that the EHRC is challenged from within government:

The Equalities and Human Rights Commission, I think, has a lot of expertise and some very good in-house lawyers. But it has had a very difficult time in terms of the management of the organisation. And that has led to a lack of direction and commitment and effectiveness, from what I can see of my dealings with them. They are now facing massive, massive cuts and ... I get the impression that they're in endless battles with the Government Equalities Office and the ministers about the work that they do (Interview 29).

The Coalition government's Red Tape Challenge is seen to be hostile to equalities:

The stuff that David Cameron came out with recently about how Equalities Impact Assessments were so onerous, and they were going to do away with more red tape, and that somehow, the Equality Impact Assessments were the cause of the economic crisis. It's quite ridiculous (Interview 45).

When the EHRC carried out an assessment of the impact of the cuts contained in the 2010 Treasury Spending Review, it found that in some areas there were problems in relation to non-compliance with the PSED.²⁴ However, it declined to take any further formal action:

You can speculate about why they've refused to take enforcement action, but I think they've taken the view that if they're wanting to survive, because underlying this is all of these consultations about removing red tape ... they're looking to say, well, you know, we don't want to hit somebody who's going to clobber us twice as hard back (Interview 40).

Additionally, the PSED under the Act is perceived to be less onerous than the duties under the predecessor legislation. The legislation is seen as less useful in enforcing and advancing rights:

The difference between using the Equality Act and using the [previous] gender, race and disability duties is that there isn't the same accountability and there aren't the same monitoring mechanisms. ... We've lost that lever that we could use to say, 'Have you done this? It's necessary.' So now all we can do is say, 'Have you done this? Well, you should do it.' (Interview 35).

²⁴ EHRC, 'Making fair Financial Decisions: An assessment of HM Treasury's 2010 Spending Review conducted under Section 31 of the 2006 Equality Act' (2012).

However, this has led to some simplification from an administrative point of view, even if it comes at the expense of a more rigorous duty:

I think it makes it a lot easier for people to understand that there is just one equality duty, one Public Sector Equality Duty, for all protected characteristics, and that it applies to the same public bodies. ... That makes it much easier, much more manageable. The specific regulations are clearly massively watered down and ... I can't see that this is a step in the right direction. ... You don't have to have an equality scheme anymore, and you don't have to say how you're going to assess the impact on equalities of your policies and practices and your decisions. ... Now all you've got to do is publish some information and publish some objectives. ... You'd think they'd [local authorities] have a higher hit rate (Interview 29).

Regulators

A regulatory intervention at the Charity Commission - registration of a new charity, amending objects, a merger, etc. will probably trigger a requirement to meet the Equality Act tests. This is more likely if the class of beneficiaries is very restricted, if there is 'any kind of perceived political connotations' (Interview 14) or if the charity is 'high-profile' (Interview 16). It is unlikely that existing charities that do not have such a regulatory intervention will have their objects examined. The Charity Commission is 'unlikely to go hunting for them' (Interview 6).

I certainly think that charities have drifted along doing all sorts of things, and unless it's something terrible, the Charity Commission haven't taken any action. But when you try to register a new charity, you've got to jump all the hurdles (Interview 2).

One participant noted that Counsel for the EHRC asserted in the first *Catholic Care* case that it is the responsibility of the Charity Commission 'to ensure that every part of the sector was complying with every aspect of law, of which the Equality Act was a part' (Interview 17). Given the volume of charities registered in a year and the size of the existing Register, this would be impracticable. Speaking of the EHRC's contention:

I thought it was mad, because I don't believe the government could have intended in that legislation that the equalities provisions would result in a public authority, in their view, having to completely revisit 200,000 registrations. Nobody had resourced anybody for that sort of thing. But you do get unintended consequences sometimes, of course (Interview 16).

If the Charity Commission does rank revisiting existing registrations relatively low, this may be reasonable:

Compared to the other risk factors, I think it would be pretty low down. Compared to, say, serious fraud, compared to, say, abuse of beneficiaries, compared to, say, money laundering or use of moneys to support terrorism, you know? It feels quantifiably a lot lower down on the pecking order for investigation (Interview 14).

Even if the Charity Commission is interested in pursuing Equality Act issues, it is perceived to be required to do more now with substantially less:

The context for the Commission obviously is that they've got less money and are trying to do more with that. ... So I really doubt the Commission is going to be going out looking for an Equality Act infringement. I really doubt it. If they do, then fine. And likewise I think the EHRC's funding is probably cut as well, isn't it? So, even though they've got the power to bring action they won't be likely to (Interview 4).

Participants also questioned whether the Charity Commission is the appropriate regulator for this issue at all. The Equality and Human Rights Commission is considered more appropriate.

There's this question about whose job it should be to go around checking people are complying with the Equality Act ... there's an issue about what is the Charity Commission's role as opposed to the Equality and Human Rights Commission's role. Because I can see it's the Equality Commission's role to make sure people are complying with obligations under the Equality Act. ... It is less obvious to me why it is the role of the Charity Commission to insist on a particular interpretation of the narrowness or breadth of that exemption [under the Act] as opposed to the Equality Commission (Interview 7).

However, as discussed above, the EHRC's resources are also greatly reduced. This lack of regulatory support from either the Charity Commission or the EHRC has serious implications for the success of the Act. 'It could end up as a piece of legislation that is unenforceable because there is no one to monitor it and no one able to implement it' (Interview 14).

Some charities have been using the Act to persuade the Charity Commission to permit them to widen their objects to a larger class of potential beneficiaries. The Commission might be more likely to allow this, despite the dilution of benefits to current members of the beneficial class, if the Act is the grounds for the broadening:

Sometimes it's actually quite convenient for charities that want to broaden their objects, or kind of modernise, as they see it, what they're doing. Sometimes, you might look at it and say, well, potentially there's a problem here ... and go to the Charity Commission and say we want to broaden the objects to remove this restriction because we think there's a problem with the Equality Act (Interview 9).

Older charities have more issues

Older charities that were set up to address social issues that have been resolved or become less pressing over time are more likely to have charitable objects and service provision that cannot fall into either of the section 193 exceptions for charities. Many of these charities would have been able to meet one of the section 193 tests at the time that they were established, had the Equality Act existed then:

Things that were a problem, social problems, a long time ago, for example, under-representation of women in higher education, aren't really a problem now. So they've got issues that have arisen because the money that came in a long, long time ago was for certain purposes that were socially acceptable then that may not be quite so socially acceptable now (Interview 6).

We've seen organisations that work with the Welsh community in London or with the Irish community in London where, historically, those populations might have been at a disadvantage because the individuals they were working with would have been relatively poor immigrant communities who probably didn't speak English as their first language, probably didn't speak English at all. I mean, I know we still have Welsh speakers in London who don't speak English as their first language, but then they're probably not disadvantaged in the same way that, say, the Welsh immigrant community in the 19th Century would have been. So, I think where you've seen a change of circumstances over a long time, you have something that might have fallen within the exception at the point when the organisation was established, had the Equality Act existed then. But now, because of the passage of time, it wouldn't be (Interview 9).

There are charities out there that benefit things like descendants of French Huguenots. There's another example. They would have been disadvantaged when they came to England hundreds of years ago, but now, can you justify that kind of restriction (Interview 9)?

Participants questioned what this would mean for charities in practice:

What is the position of a charity whose objects suddenly breach the Equality Act? Is it not a charity because it is breaching the public benefit? Is it under a duty to apply for a cy près scheme (Interview 6)?

The Charity Commission has stated that existing charities should check their objects, and if they cannot pass the test then ‘the trustees will need to change the charity’s purposes.’²⁵

Despite the difficulties that it entails, it is appropriate that historic discriminations should not be left unchallenged. An organisation should look at why the discrimination exists, and ‘if it’s because it’s a historic thing, then is it right that the institution continues to perpetuate this historic difference’ (Interview 33)?

Four themes were explored further. These case studies are set out in detail in Section VI.

Religious Charities

Tensions frequently arise in this area in terms of a conflict with gay rights, and sometimes women’s rights. Religious organisations have a number of specific exceptions, including one that permits them to discriminate on grounds of sexual orientation in the provision of non-commercial services. However, the exception does not apply if the religious charity is providing public services. The lengthy *Catholic Care* matter²⁶ has raised a great deal of concern, sometimes unjustified, among religious charities. This is perhaps more of an issue for the more traditional religious denominations. There is an idea that there is a ‘hierarchy of rights’, which privileges some equality strands over others, with religion and belief receiving less generous recognition. Issues arise for Jews and Sikhs, who constitute both a religion and a race. The debates surrounding the inclusion of caste within the Act also illustrate the difficulty of unpicking some categories of race and religion. There is a perception that the Charity Commission is now sceptical about whether proselytising members of another religion is a charitable purpose.

²⁵ Charity Commission, ‘Equality Act guidance for charities: Restricting who can benefit from charities’ (September 2011) para B2.

²⁶ See above at p 12.

Single-sex Provision

Some charities that provide services to women have been pressured by commissioning bodies to operate a universal service. This may be an overt threat, or the implicit threat from commissioners that, in an age of reduced funding, a bidder that can provide a more universal service will be favoured. Some women's charities have opened up their service provision in response, although the new, open services are infrequently taken up by male users. There is reluctance on the part of some women's organisations to provide services to transgendered women. Charities assert that cis-gendered women²⁷ and transgendered women have different issues, and therefore the services are ill prepared to extend an effective service to these potential users. There are also issues around sex discrimination in conjunction with religious charities.

Higher Education

The higher education sector has been strongly affected by the Act. Again, there is often a gap in understanding some of the Act's consequences based upon the compartmentalising of university administrative structures. A major issue concerns the provision of scholarships or bursaries based upon a protected characteristic. This is more of an issue for older universities, which have long-standing scholarship programmes, and which also tend to fund-raise from alumni more frequently. Again, participants report that there is no 'genuine' discrimination. Attempted donations are often made to benefit people from similar circumstances to the donor - the donor wishes to help 'people like me.' Targeted gifts have been rejected, or withdrawn when a university attempts to modify the terms. Older schemes set up to benefit women students are now difficult to justify, as women are in fact over-represented at many universities. Universities rely on Schedule 23 to provide training to non-EEA nationals who will return to their home countries, as part of an 'international development' justification.

Universities also reported positive action via the Athena SWAN programme to encourage the participation of women in STEMM subjects. The programme stagnated for a period, but has been recently revitalised after an announcement that from 2016 all National Institutes of Health research funding would be contingent on medical schools having received an Athena SWAN silver award. This is a very high standard, and has spurred recent activity.

²⁷ Cis-gendered women identify with the gender that matches the sex that they were assigned at birth.

Challenges to Public Spending Cuts

Many charities are commissioned to provide social services, and are thus affected by the austerity measures and funding cuts to service provision. Some charities and service users are using the Act to challenge these funding cuts. They have used the mechanism of judicial review to challenge whether local authorities have properly fulfilled their PSED in the course of making cuts. In some cases, successful challenges have prevented or restored funding cuts, while others have simply resulted in the same cuts after a better process. Umbrella charities have been providing training to their members in the use of judicial review. Some charities have been training their service users. For some types of services, individuals are able to obtain legal aid. When service users bring the challenge, local authorities sometimes act to restore services for that individual, while maintaining the cuts. It is debatable whether this removes the cause of action for that service user, but the individual service users are seldom motivated to continue their cause of action on behalf of others.

Section III will set out the legal context for charity law.

III The Legal Context: Charity Law

Wide-ranging changes in the law and regulation of the charitable sector were introduced in the Charities Act 2006 (later consolidated in the Charities Act 2011). The 2006 Act followed a review of the legal and regulatory framework for charities and other not-for-profit organisations in England and Wales conducted by the then government in 2001-2, published in 2002²⁸ and then widely debated.

The Charity Commission

Charities are subject to their own legal framework, which is largely regulated by the Charity Commission, the regulator of charities in England and Wales.²⁹ Over recent years, the Commission has significantly increased its activities, including a wholesale review of registered charities, publication of a wide range of guidance for trustees, and a programme of charity visits and investigations. However, in the Comprehensive Spending Review initiated by the Coalition Government, the Commission's budget was drastically reduced and the Commission was forced to review and prioritise the scope of its activities.³⁰ The budget cuts coincided with the implementation of the Equality Act 2010, and the need to add equality compliance to the list of legal requirements for charities. Whether or not the Charity Commission is the most appropriate body to monitor such compliance, or indeed whether it has the resources to do so, is one of the emerging themes in this study. During the course of this study, the Commission has also been the subject of two parliamentary reports which have been critical of various aspects of the carrying out of its regulatory functions.³¹

The Commission's statutory objectives include:³²

²⁸ Cabinet Office, 'Strategy Unit, Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector' (HMSO 2002).

²⁹ Charity law and regulation is now devolved (for purposes other than taxation) in Scotland and Northern Ireland, so that there are different legal and administrative regimes. In 2005, the Office of the Scottish Regulator (OSCR) was established, as a result of the implementation of the Charities and Trustee Investment (Scotland) Act 2005, and, in 2009, the Charity Commission for Northern Ireland was established by the Charities Act (Northern Ireland) 2008.

³⁰ http://www.charitycommission.gov.uk/About_us/About_the_Commission/strategic_plan_2012.aspx

³¹ Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (HC 2012-13, 76 incorporating HC 574-i-vi) and Public Accounts Committee, *Charity Commission: the Cup Trust and tax avoidance* (HC 2012-13, 138 incorporating HC 1027).

³² Charities Act 2011, s 14.

- the increasing of public trust and confidence in charities;
- the promotion of compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities; and,
- the promotion of the effective use of charitable resources.

One of its statutory general functions³³ is to encourage and facilitate the better administration of charities and in connection with this function, the Commission may give such advice or guidance with respect to the administration of charities as it considers appropriate. Such advice or guidance may be in any appropriate form and may relate to charities generally, or to a class or to a particular charity. The Commission has published guidance on Equality Act compliance³⁴ and this will be referred to and evaluated in the course of this study.

Registration

The Charity Commission determines which organisations are eligible to be registered as charities according to the law. It maintains an up-to-date public Register of Charities and publishes key information and data about what they do and how they spend their money. Subject to some exceptions, bodies which are exclusively devoted to charitable purposes and which have income over £5,000 must register with the Charity Commission.³⁵ The Charity Commission's latest facts and figures reveal that in March 2013 there were 163,083 registered charities whose total annual income is £59.7 billion.³⁶ Around 75% of these charities have annual income of less than £100,000 and just under 43% have annual income of less than £10,000.

Most of the charities on the Register pre-date its creation in 1960, often by many decades - even centuries. At the registration stage, the Charity Commission is essentially concerned with determining that the body is indeed charitable (see below) and that it is properly formed in accordance with the requirements of the law. Registration then brings the body into the framework of support and supervision that the Charity Commission provides.

³³ *ibid* s 15.

³⁴ Charity Commission, 'Equality Act Guidance for Charities: Restricting who can benefit from charities' (2011).

³⁵ Charities Act 2011, s 30.

³⁶ http://www.charity-commission.gov.uk/about_us/about_charities/factfigures.aspx (accessed 22 July 2013).

Exempt and Excepted Charities

Historically, a few categories of charities have been exempted by legislation from registration and regulation by the Charity Commission. *Exempt* charities cannot register with the Charity Commission but are regulated instead by a 'principal regulator'.³⁷ Nevertheless, exempt charities are still subject to the legal rules generally applicable to charities and the provisions of the Charities Act 2011 (unless specifically excluded). All exempt charities are publicly accountable and must produce proper accounts, although the way in which they do this differs from charities that the Charity Commission regulates. Many exempt charities must produce accounts under their own legal frameworks or regulators' requirements.

Several categories of previously exempt charities have recently been brought within the remit of the Charity Commission's registration requirements (thereby removing their exempt status). Charities that are no longer exempt as a result of this process include: the colleges and halls in the Universities of Oxford, Cambridge and Durham; universities and university colleges in Wales; and, the colleges of Eton and Winchester. In the context of educational charities, which feature in this research report, the following are exempt charities:

- most English universities and higher education institutions
- Academy Trusts (England only)
- the governing bodies of foundation and voluntary schools
- sixth form college corporations (England only)

The Higher Education Funding Council for England (HEFCE) was appointed principal regulator of those higher education institutions in England that it funds and that are exempt charities on 1 June 2010.³⁸ The Secretary of State for Education is the regulator for exempt charity schools and colleges.³⁹

Excepted charities have the benefits and restrictions that charitable status brings, but are excepted, either by legislation or an order made by the Charity Commission, from the requirement to register as such, provided that their gross income does not exceed £100,000.⁴⁰ Most of these charities are:

³⁷ Charities Act 2011, ss 22-28 and sch 3.

³⁸ All but 18 HEIs fall into this category. The Charities Act 2006 (Principal Regulators of Exempt Charities) Regulations 2010, SI 2010/501.

³⁹ Charities Act 2006 (Principal Regulators of Exempt Charities) Regulations 2011, SI 2011/1726. In Wales the principal regulator is the Welsh Government.

- churches and chapels of some Christian denominations (and funds connected with them)
- charitable service funds of the armed forces
- Scout and Guide groups

Excepted charities are fully under the supervision of the Charity Commission.

What is a charity?

'Charitable Purpose'

A charity is an organisation established solely for charitable purposes.⁴¹ A charitable purpose must fall within one of thirteen heads set out in the Charities Act 2011 (below), and must be for the public benefit. Public benefit has always been an essential element in charities. It distinguishes charitable trusts from private trusts, and it is public benefit that is often said⁴² to justify the advantageous taxation treatment afforded to charities.⁴³ The Charity Commission describes it as a kind of covenant that charities have with society: charities bring public benefit and, in their turn, are accorded high levels of trust and confidence and the considerable benefits of charitable status.⁴⁴ The public benefit provided by charities is also the rationale given for charities' preferential legal treatment: as well as enjoying exemption from the 'beneficiary principle'⁴⁵ and the 'certainty of objects' rule,⁴⁶ charitable trusts are not subject to the 'perpetuity rule' which otherwise limits the duration of a trust.⁴⁷ In addition, charities can access resources that others - even other voluntary organisations - cannot. For example, certain grants are only available to charities.

⁴⁰ Charities Act 2011, ss 30-33.

⁴¹ *ibid* s 1

⁴² See e.g. dicta of Lord Cross in *Dingle v Turner* [1972] AC 601 (HL) 624.

⁴³ See e.g. Income Tax Act 2007, pt 10 (charities) and pt 8, ch 2 (donors).

⁴⁴ Charity Commission, 'Charities and Public Benefit. The Charity Commission's general guidance on public benefit' (2011) foreword.

⁴⁵ Under *Morice v Bishop of Durham* (1805) 10 Ves 522, 32 ER 947, a trust that does not have a direct human beneficiary who could apply to the court to enforce it is generally invalid. Even though a charity usually exists for a purpose and not for a person, such a trust survives and is enforced via the Attorney General (*Leahy v Att-Gen for New South Wales* [1959] AC 457 (PC)) or by the Charity Commission (Charities Act 2011, s 114) on behalf of the charity's purpose.

⁴⁶ Under this rule, the objects of a trust (the beneficiaries) must be *certain* i.e. identifiable with sufficient particularity so that the trustee (and the court, if necessary) can appreciate the precise nature of the trustee's obligations. However, provided that the charity's purpose is capable of being applied to a charitable purpose, then that purpose can be quite generally drawn (*Re Koeppler's Will Trusts* [1986] Ch 423 (CA)).

⁴⁷ *Commissioners for the Special Purposes of Income Tax v Pemsel* [1891] AC 531 (HL).

The English common law tradition provided no statutory definition of charity. The starting point was the Preamble to the Statute of Charitable Uses 1601 (known as the Statute of Elizabeth). Though repealed,⁴⁸ it has remained of significance throughout the common law world. The Preamble set out the most typical charitable purposes of the time, ranging from the 'relief of the aged, impotent and poor people' to the 'education and preferment of orphans' and it formed the basis for modern judicial pronouncements on how to establish a charitable purpose. The courts and the Charity Commission have been much influenced by Lord Macnaghten's attempt to distil the spirit of the Preamble by formulating it into clear guidance. In *Commissioners for the Special Purposes of Income Tax v Pemsel*, His Lordship said:

Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads.⁴⁹

Lord Macnaghten's four categories (known as the 'four heads of charity') have acquired considerable persuasive status. To be charitable, the purpose had to fall under one of these headings, it had to have an element of public benefit, and it had to be exclusively charitable. Previously, there was a presumption that purposes within the first three heads of charity were for the public benefit.⁵⁰ The effect was that, when the charitable status of an organisation established for the relief of poverty, the advancement of education, or the advancement of religion was being considered, the organisation's purpose was presumed to be for the public benefit, unless there was evidence that it was not. By contrast, organisations established for all other purposes, which did not benefit from that presumption, were required, at the time that their status was being considered, to provide evidence that their purpose was for the public benefit.

For the first time, the Charities Act 2006 (now 2011) provided a statutory definition of charitable purposes and what might⁵¹ be regarded as a positive requirement for *all* charities to prove public benefit⁵² To be considered charitable, under section 2 of the Charities Act 2011, an organisation must demonstrate that its purposes, as set out in its constitution, fall within one or more of those in the new list of thirteen charitable purposes, and also that it is established for the public benefit.

⁴⁸ By a combination of the Mortmain and Charitable Uses Act 1882 and the Charities Act 1960, s 38(1).

⁴⁹ [1891] AC 531 (HL) 583.

⁵⁰ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) 42 (Lord Wright).

⁵¹ See e.g. to the contrary, the views expressed in Jeffrey Hackney, 'Charities and Public Benefit' (2008) 124 *Law Quarterly Review* 347, 349 and Peter Luxton, 'A Three-Part Invention: Public Benefit under the Charity Commission' (2009) 11(2) *Charity Law & Practice Review* 19.

⁵² See now Charities Act 2011, ss 2(1)(b), 4.

The thirteen specified charitable purposes are:⁵³

- prevention or relief of poverty
- advancement of education
- advancement of religion
- advancement of health or saving of lives
- advancement of citizenship or community development
- advancement of the arts, culture, heritage or science
- advancement of amateur sport
- advancement of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony or equality and diversity
- advancement of environmental protection or improvement
- relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage
- advancement of animal welfare
- promotion of efficiency of the armed forces of the Crown, or of the police, fire and rescue services or ambulance services
- other analogous purposes

In general terms, the new list covers all purposes that have, over the years, become recognised as charitable purposes, but none of them brings with them a presumption that public benefit is automatically provided.

‘Public Benefit’

Public benefit has always been inherent in the concept of charity, even though it was not expressed in the Preamble. Case law has continued to highlight the importance of this element so that it came to be articulated as a separately identified requirement. Section 4 of the Charities Act 2011 now deals with the ‘public benefit’ test referred to in section 2 as part of the definition of a charitable purpose. It provides as follows:

- (1) In this Act ‘the public benefit requirement’ means the requirement in section 2(1)(b) that a purpose falling within section 3(1) must be for the public benefit if it is to be a charitable purpose.

⁵³ *ibid* s 3(1).

- (2) In determining whether the public benefit requirement is satisfied in relation to any purpose falling within section 3(1), it is not to be presumed that a purpose of a particular description is for the public benefit.
- (3) In this Chapter any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.
- (4) Subsection (3) is subject to subsection (2).

There is no statutory definition of ‘public benefit’ as the government decided that the previous non-statutory approach ought to remain, giving flexibility and the capacity to accommodate the diversity of the sector. Decisions about whether a particular charity meets the public benefit requirement continue to be determined by the Charity Commission, on the basis of case law, and ultimately by the courts. Conversely, the comparable Scottish legislation, the Charities and Trustee Investment (Scotland) Act 2005, contains a definition of public benefit,⁵⁴ (with a specific reference to the impact of charging fees) rather than wholly relying on guidance from the Office of the Scottish Charity Regulator (OSCR) and case law, in order to determine whether charitable status should be granted. It is also interesting to note by comparison, that, in Scotland, the law states that: ‘a body meets the charity test if (a) its purposes consist only of one or more of the charitable purposes, and (b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere’.⁵⁵ The reference to the requirement for the *provision* of public benefit clearly makes a charity’s *activities* its yardstick to measure the required public benefit: ‘In Scotland, public benefit is assessed on the basis of how a body exercises its functions; in England and Wales, the issue is whether a particular charitable purpose is for the public benefit’.⁵⁶ In addition, the Scottish legislation makes specific reference to ‘dis-benefit’ when defining public benefit:

In determining whether a body provides or intends to provide public benefit, regard must be had to (a) how any -

(i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and

(ii) disbenefit incurred or likely to be incurred by the public, in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

(b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition

⁵⁴ Charities and Trustee Investment (Scotland) Act 2005, s 8. For a comparative discussion of the position in England and Wales, Scotland, Northern Ireland, and the Republic of Ireland, see Oonagh Breen, Patrick Ford and Gareth Morgan, ‘Cross Border Issues in the Regulation of Charities: Experiences from the UK and Ireland’ (2009) 11 International Journal of Not for Profit Law 5.

⁵⁵ Charities and Trustee Investment (Scotland) Act 2005, s 7(1).

⁵⁶ Office of the Scottish Charity Regulator, ‘Meeting the Charity Test’ (2010) 4.

on obtaining that benefit (including any charge or fee) is unduly restrictive.⁵⁷

This allows OSCR to weigh up benefit and dis-benefit. The fact that some dis-benefit results from the activities of the charity does not in itself mean that the charity test is not met. If, however, taking everything into account, the dis-benefit to the public outweighs the benefits, then public benefit will not be provided. This provision does not exist in the English legislation.

There are two essential elements of the public benefit requirement:⁵⁸ first, the pursuit of an organisation's purposes must be capable of producing a benefit that can be demonstrated and that is recognised by law as beneficial;⁵⁹ and, secondly, that benefit is provided for, or available to, the public or a sufficient section of the public.⁶⁰ In addition, there should be no undue private benefit.⁶¹

'Benefit'

Whilst every charity must confer benefit on the public, the law does not adopt the same practical measures to assess public benefit in every type of case. Despite the fact that the Explanatory Notes to the Charities Act 2006 stated that the relevant provision in the Act abolished the presumption of public benefit, 'putting all charitable purposes on the same footing',⁶² the consolidating section 4(3) of the 2011 Act continues to make it clear that the term 'public benefit' refers to the existing concept in charity law in England.⁶³ That concept was explained by Lord Simonds when he said:

it would not be surprising to find that, while in every category of legal charity some element of public benefit must be present, the courts ... have accepted one standard in regard to those gifts which are alleged to be for the advancement of education and another for those which are alleged to be for the advancement of religion and it may be yet another in regard to the relief of poverty.⁶⁴

⁵⁷ Charities and Trustee Investment (Scotland) Act 2005, s 8(2).

⁵⁸ See e.g. *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC), [2012] 2 WLR 100 [44].

⁵⁹ See e.g. *Gilmour v Coats* [1949] AC 426 (HL).

⁶⁰ *Verge v Somerville* [1924] AC 496 (PC).

⁶¹ See e.g. *Royal College of Nursing v St Marylebone Corporation* [1959] 1 WLR 1077 (CA). Compare, however *General Nursing Council for England and Wales v St Marylebone Borough Council* [1959] AC 540 (HL).

⁶² Explanatory Notes to the Charities Act 2006, para 26.

⁶³ This is also accepted in *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC), [2012] 2 WLR 100 [41].

⁶⁴ *Gilmour v Coats* [1949] AC 426 (HL) 449 (Lord Simonds).

This means that the ways in which benefit can be demonstrated can differ for different charitable purposes. This diversity in how public benefit could be demonstrated or interpreted may be why a lawyer participating in a focus group said: ‘the difficulty is that no one really knows what public benefit really means’ (Focus Group 17/1/13)).

The benefit to the public should be capable of being proven, whether the nature of that benefit is tangible or intangible.⁶⁵ If the benefit is not immediately obvious, it will need to be demonstrated. This is a question to be determined objectively by the court, not by the founder of the alleged charity or the donor.⁶⁶ Most charitable purposes will involve direct benefits. However, indirect benefits, extending beyond the immediate beneficiaries, in many cases to the public generally, may also be taken into account in assessing whether an organisation provides sufficient benefit to the public.⁶⁷

‘Public’

Every charity must provide a benefit that is available to either the public as a whole, or to a sufficient section of the public.⁶⁸ Relatively few charities provide universal public benefit - most have a limited number of beneficiaries. What is ‘sufficient’ will vary from case to case depending upon the organisation’s purposes as well as activities. The courts have looked at what a sufficient section of the public is on a number of occasions. It is not merely a question of the size of the group, but of whether the group constitutes a recognisable section of the community. The courts focus on the connecting link (or common quality) that unites the people intended to benefit. If the connecting link is impersonal, the class or group may be a section of the public. But, if the connecting link is a personal one, often described as a ‘personal nexus’,⁶⁹ the trust will be private and not charitable. Where beneficiaries are

⁶⁵ See *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) 49 (Lord Wright): ‘I think the whole tendency of the concept of charity in a legal sense under the fourth head is towards tangible and objective benefits, and at least, that approval by the common understanding of enlightened opinion for the time being, is necessary before an intangible benefit can be taken to constitute a sufficient benefit to the community to justify admission of the object into the fourth class’.

⁶⁶ *Re Hummeltenberg* [1923] 1 Ch 237 (Ch) 242 (Russell J). For a modern example, see *Re Le Cren Clarke* [1996] 1 WLR 288 (Ch). See also Debra Morris, ‘*Re Le Cren Clarke* - Faith hope and charity in healing’ (1996) 18(1) *Liverpool Law Review* 63.

⁶⁷ See e.g. Lord Wilberforce in *Re Resch* [1969] 1 AC 514 (PC) 544 and also comments in *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC), [2012] 2 WLR 100.

⁶⁸ *Verge v Somerville* [1924] AC 496 (PC).

⁶⁹ For a discussion of the ‘personal nexus’ test and the irrational consequences it can cause in some cases, See e.g. PS Atiyah, ‘Public Benefit in Charities’ (1958) 21 *Modern Law Review* 138, 147.

determined only by reference to a personal relationship, family tie or contract with an individual(s) or company, these have been held to be essentially personal connections. For example, the gift in *Oppenheim v Tobacco Securities Trust Co Ltd* was held to lack public benefit even though the potential beneficiaries - children of employees of a certain company - exceeded 110,000. Lord Simonds said:

These words 'section of the community' have no special sanctity, but they conveniently indicate

(i) that the possible (I emphasise the word 'possible') beneficiaries must not be numerically negligible, and

(ii) that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual.⁷⁰

Whilst width of class will therefore not necessarily validate a charitable trust, the opposite is also true. In some cases, it might be possible to show that a benefit to a small section of the public benefits the public as a whole. The Charity Commission gives the example of an organisation directed towards relieving the suffering caused by a very rare disease.⁷¹ Alternatively, a charity may offer benefit to all members of a specific ethnic group in a particular location, but the actual number of people who may benefit might be very small. This will provide benefit to the public and is open to the public even though few people need to avail themselves of its services. If a charity's benefits are potentially available to anyone who, falling within the (acceptable) criteria, chooses to take advantage of them, it can be considered to provide benefit to the public, even though in some cases the actual number of beneficiaries may be quite small.

One of the Charity Commission's statutory objectives is to promote awareness and understanding of the public benefit requirement,⁷² and in pursuance of this objective it must publish guidance.⁷³ Following a four-month public consultation on draft guidance, which generated nearly 1,000 responses, in January 2008, the Commission published its general guidance on public benefit - over 19,000 words that try to describe what public benefit is and what charity trustees should consider in order to show that their charity's aims are for the public benefit.⁷⁴

⁷⁰ [1951] AC 297 (HL) 306.

⁷¹ Charity Commission, 'Analysis of the law underpinning Charities and Public Benefit' (2008) para 3.25.

⁷² Charities Act 2011, s 14.

⁷³ *ibid* s 17.

⁷⁴ Charity Commission, 'Charities and Public Benefit. The Charity Commission's general guidance on public benefit' (2011). As a result of the decision of the Upper Tribunal Tax and Chancery Chamber in *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC), [2012] 2 WLR 100, some elements of the original guidance have

Under the Charities Act 2011,⁷⁵ charity trustees must have regard to the public benefit guidance when exercising any powers or duties where the guidance may be relevant. They also have a duty to report in their Trustees' Annual Report on how they are carrying out their charity's aims for the public benefit.⁷⁶ The Annual Report will also include a statement by the charity trustees as to whether they have complied with the duty in section 14 to have due regard to public benefit guidance.

The Charity Commission (as a public authority) is required to carry out its functions (including those relating to registration and therefore recognition of charitable status) with due regard to the provisions of the European Convention on Human Rights (ECHR).⁷⁷

Are Charities Public Bodies?

It is important to determine whether charities are public bodies or engaged in public functions, since the application of both the ECHR and the Public Sector Equality Duty (PSED) are dependent upon this.⁷⁸ The ECHR is directly effective in national courts where the claim is brought against a public body (for example, a government department or local authority), or where an organisation which is not itself a public body is engaged in a public function.⁷⁹

been rewritten. Separate guidance that explains the legal underpinning for the principles of public benefit can be found in Charity Commission, 'Analysis of the law underpinning Charities and Public Benefit' (2008).

⁷⁵ Charities Act 2011, s 14(5).

⁷⁶ *ibid* s 162 and Charities (Accounts and Reports) Regulations 2008, SI 2008/629, pt 5. The level of detail required will depend on whether the charity is above or below the audit threshold. An audit is required when a charity's gross income in the year exceeds £500,000, or where income exceeds £250,000 and the aggregate value of its assets exceeds £3.26 m.

⁷⁷ See e.g. the discussion in Charity Commission, Decision of the Charity Commissioners for England and Wales made on 17 November 1999, Application for Registration as a Charity by the Church Of Scientology (England And Wales).

⁷⁸ Although one participant involved in the initial stages of the development of an Equality and Human Rights Framework for the Voluntary Sector questioned why the PSED should apply only to the public sector, and not to large voluntary sector organisations (Interview 28).

⁷⁹ Human Rights Act 1998, ss 6-7.

Since they are not public authorities themselves, not all charities are directly subject to the Human Rights Act 1998.⁸⁰ Nevertheless, where a charity is providing a service on behalf of, or in partnership with, a public authority such as, for example, running a residential home or providing child care facilities under a contract with the authority, then that part of its activities may be a 'public function' and therefore will be covered by the Human Rights Act 1998.⁸¹ It will be seen that the application of the ECHR to charities was considered in the *Catholic Care* case, with Briggs J assuming that Article 14 of the European Convention was applicable to the charity.⁸² The Act would not apply, however, to ancillary matters that are private rather than public. So, hiring staff to carry out the service, or setting terms and conditions of employment, are private rather than 'public' functions. Having said that, all courts deciding claims of whatever nature must apply domestic law in conformity with the Convention Rights⁸³ and the Convention may therefore have an indirect effect upon charities.

The application of the PSED⁸⁴ to a charity is also determined by ascertaining whether or not the charity is carrying out a 'public function' and this is defined as a 'function of a public nature for the purposes of the Human Rights Act 1998'.⁸⁵ Whether or not a function is a public function will depend on the context but will include whether the organisation is providing a service on behalf of central or local government and whether it is working in partnership with a public authority.⁸⁶

Section IV will set out the legal context for equality law.

⁸⁰ See, further, Leslie Turano, 'Charitable Trusts and the Public Service: The Public Accountability of Private Care Providers' (2007) 18 *Kings Law Journal* 427.

⁸¹ Compare *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48 with *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936.

⁸² See below at p 58.

⁸³ Human Rights Act 1998, s 3. See e.g. *Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932, [2005] ICR 1789: employee dismissed for refusing Sunday working.

⁸⁴ Discussed below at p 86.

⁸⁵ Equality Act 2010, s 150(5).

⁸⁶ The fact that a function is carried out by another organisation does not relieve the public authority of its duty since it is non-delegable: See e.g. *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin).

IV The Legal Context: Equality Laws

The Equality Act 2010 was hailed as a measure that would simplify, strengthen and harmonise the law on equalities.⁸⁷ While it is true that the Act has brought within one piece of legislation the different strands of equality law, it is still a complex and unwieldy instrument with 128 sections and 28 schedules. Apart from the generally applicable principles, different parts of the Act apply variously to services, premises, work, transport, education and associations. Each of these sectors has its own rules and exceptions. An individual or organisation is therefore potentially subject to different provisions of the Act depending on the function being undertaken. A charity, for example, may be an employer and/or an association (see below) and may be involved in the delivery of services, while being the owner or lessee of premises. A charity will also be subject of course to the Charities Act 2011 and its associated regulations. Moreover, whereas the Charity Commission carries out regulatory functions in relation to charitable activity, the Equality and Human Rights Commission has a regulatory role under the Equality Act. Bearing in mind that many charities are relatively small organisations, run by volunteers and that even the larger ones have limited and often dwindling resources in a time of austerity, the challenge of understanding and implementing the differing legal requirements is immense.

General principles

Because domestic legislation on equalities is largely derived from and subject to the requirements of European Union law, the Act cannot be read in isolation from European legislation and jurisprudence. In particular there is a series of Directives covering employment and occupation and, to a lesser extent, other areas including goods and services. These are the Race Equality Directive 2000/43/EC,⁸⁸ the Employment Equality Directive 2000/78/EC (the ‘framework’ Directive), the Recast Gender Directive 2006/54/EC on equal treatment in employment, and the Gender Directive 2004/113/EC dealing with sex equality in goods and services. In July 2008, the European Commission published a proposal for an anti-discrimination directive covering goods and services in the four remaining grounds not already covered - age, sexual orientation, religion or belief and disability. Progress on this has been slow⁸⁹ but, while the UK must meet the *minimum* requirements of European Union law, it may go further than required and

⁸⁷ See e.g. EHRC, ‘What is the Equality Act?’

⁸⁸ This Directive is the widest in scope covering not only employment but also social protection, including health care, education and access to goods and services available to the public: art 3.

⁸⁹ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation - Progress Report, November 2012.

all of those protected characteristics are now covered by the provisions in the Equality Act 2010 dealing with goods and services.⁹⁰

Protected Characteristics

The Equality Act 2010 protects nine identified categories from discrimination and refers to this closed list as the ‘protected characteristics’. They are age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation.⁹¹ In addition, the Act provided for caste to be added to the list as a sub-set of race⁹² and this power has been exercised in the Enterprise and Regulatory Reform Act 2013. Outside these characteristics there is no protection against discrimination so, for example, it is not unlawful on the face of it to discriminate against someone because of where they went to school, where they live, or because they are poor. Nevertheless, if an unprotected factor is associated with a protected characteristic it may, indirectly, lead to unlawful discrimination. For example, an employer may refuse to employ anyone who lives in particular inner city area. Discriminating on the basis of someone’s postal address is not on the face of it unlawful but if the majority of the population in that part of the city are black, this will amount to indirect race discrimination (see further below, ‘Indirect discrimination’). Although the Act provides in section 14 that it is unlawful to discriminate against a person on the basis of a combination of *two* ‘relevant’ characteristics (excluding marriage and civil partnership), the current government decided, as part of its campaign to reduce regulatory burdens not to implement this provision.⁹³

Unlawful Discrimination

The Act makes unlawful certain conduct that is linked to any one of the protected characteristics and does so by defining ‘prohibited conduct’.⁹⁴ This includes direct and indirect discrimination, harassment, and victimisation. In addition, there are particular forms of discrimination linked to specific characteristics. Disability discrimination includes ‘discrimination arising from disability’ and a failure to make reasonable adjustments. There are also special provisions for pregnancy and maternity

⁹⁰ The last characteristic added was age, from October 2012: Equality Act 2010 (Commencement No 9) Order 2012, SI 2012/1569. This applies only to people aged 18 or over and is subject to a wide range of exceptions.

⁹¹ Equality Act 2010, s 4.

⁹² *ibid* s 9(5).

⁹³ See HM Treasury, *Plan for Growth*, 2011.http://cdn.hm-treasury.gov.uk/2011budget_growth.pdf

⁹⁴ See Equality Act 2010, ss 13-27.

discrimination and for gender reassignment. In the context of this study the principal forms of discrimination with which we are concerned are direct and indirect discrimination.

Direct discrimination

The Act defines direct discrimination as *less favourable treatment because of a protected characteristic* and it covers any such treatment however minor it might appear to a disinterested observer.⁹⁵

Section 13 (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.

Because it is founded on '*less favourable*' treatment, there must be a comparison and the Act requires that like be compared with like although it is permissible to construct a hypothetical comparator where there is no actual comparator available.⁹⁶

Section 23(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

There is no defence to direct discrimination⁹⁷ and the fact that the unfavourable treatment springs from a 'good' or benign motive is irrelevant. If the less favourable treatment is 'because of' someone's race or sexual orientation (etc.) then the conduct is prohibited. In *James v Eastleigh Borough Council*⁹⁸ the local council gave free entry to a public swimming pool to any person of state pensionable age. Because of the difference between the pensionable age for men and women this meant that Mrs James did not have to pay but Mr James did. He complained that this was unlawful sex discrimination. The council argued that it was merely trying to benefit those of pensionable age (i.e. its *motive* was good) and did not intend to discriminate against men - that was simply a by-product of the state scheme. The House of Lords held that the good intention was irrelevant. Mr James was required to pay because he was a man. If he had been a woman he need not have paid. This was unlawful sex discrimination. In *Amnesty International v Ahmed*,⁹⁹ Ahmed, a UK citizen of Sudanese origin, failed in her bid for promotion because Amnesty International was concerned that her ethnic background made her unsuitable to work in Sudan

⁹⁵ *Gill and Coote v El Vinos Co Ltd* [1983] IRLR 206 (CA).

⁹⁶ *Shamoon v Chief Constable of Royal Ulster Constabulary* [2003] UKHL 11, [2003] IRLR 285.

⁹⁷ Age discrimination is the exception to this: Equality Act 2010, s 13(2). Direct age discrimination may be justified if it is a proportionate means of achieving a legitimate aim.

⁹⁸ [1990] 2 AC 751 (HL).

⁹⁹ [2009] IRLR 884 (EAT).

where there was on-going conflict. Ahmed claimed she had been subjected to discrimination on racial grounds. Amnesty argued it was not because of her race, but because of a belief that her appointment would prejudice its perceived impartiality, and pose an unacceptable risk to her safety. Amnesty was held liable for direct race discrimination: its decision was explicitly based on the fact that Ahmed was by origin from northern Sudan. A discriminator who treats a person less favourably because of a protected characteristic cannot escape liability by pleading the discrimination was well meant. Exactly the same rules would apply, absent any exceptions, to a charitable organisation.

Direct discrimination may be based on a mistaken perception that someone has a protected characteristic. If a man were refused a service because the provider believes wrongly that he is gay (for example) that would amount to direct discrimination because of sexual orientation. Direct discrimination may also occur because of a person's association with others from a protected group even though the target of the less favourable treatment does not herself share that characteristic. To refuse to provide a service to someone who would otherwise qualify for it simply because, say, her son is gay would be direct discrimination against *her* because of sexual orientation. Similarly, if a service provider were to instruct employees not to offer a service available to the general public to, say, Muslims, an employee who is not Muslim, but who refuses to obey the instruction and is then disciplined or dismissed as a consequence, can complain of direct discrimination because of religion or belief.¹⁰⁰ A person denied the service because of the unlawful instruction can also bring proceedings if they have suffered a detriment as a result.¹⁰¹

The Equality Act 2010 makes clear that it is irrelevant if the discriminator shares the protected characteristic(s) of the victim.¹⁰² In other words a woman may discriminate against another woman, a gay man against another gay man *et cetera*.

Indirect discrimination

Direct discrimination focuses on less favourable treatment of an individual and does not take account of the fact that some *groups*, whether they be, for example, women or ethnic minorities, or older people,

¹⁰⁰ Equality Act 2010, s 111. Earlier cases include *Showboat Entertainment Centre Ltd v Owens* [1984] IRLR 7 (EAT) and *Weathersfield Ltd v Sargent* [1999] IRLR 94 (CA). The extent to which volunteers as opposed to employees are covered by this and other provisions has been clarified by a decision of the Supreme Court: below at p 78.

¹⁰¹ Equality Act 2010, s 111.

¹⁰² *ibid* s 24.

may be especially disadvantaged or have difficulty accessing certain benefits. Indirect discrimination, on the other hand, aims to take account of *group* disadvantage.

Section 19 - Indirect discrimination

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- (3) The relevant protected characteristics are -
- age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation.

As Lady Hale observed in *Rutherford v Secretary of State for Trade and Industry (No.2)*:

The essence of indirect discrimination is that an apparently neutral ... provision, criterion or practice ... in reality has a disproportionate adverse impact upon a particular group. It looks beyond the formal equality achieved by the prohibition of direct discrimination towards the more substantive equality of results. A smaller proportion of one group can comply with the requirement, condition or criterion or a larger proportion of them are adversely affected by the rule or practice.¹⁰³

Because of the inclusion of the phrase 'puts or would put' indirect discrimination not only covers individuals who *are* put at a disadvantage by a provision, criterion or practice (PCP), but also those who *would be* put at such a disadvantage and thus do not even try to access a service. For example, a charity promoting health and well-being persuades the local swimming pool to give it a two hour slot during which free swimming lessons are offered. Because there is only one slot available, the sessions are

¹⁰³ [2006] UKHL 19 [2006] IRLR 551 [71].

mixed. A Muslim woman who is interested in learning to swim does not wish to attend mixed session and does not seek to take advantage of the lessons. Muslim women are likely to be disproportionately disadvantaged by the practice of having a mixed session and if the charity cannot justify the arrangement (see below) this is potentially unlawful indirect discrimination on the basis of religion.

A crucial difference between direct and indirect discrimination in the general scheme of the Equality Act is that indirect discrimination may be defended or 'justified'. The European Directives provide:

indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons [with a relevant protected characteristic] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.¹⁰⁴

The domestic provision is worded differently, providing that indirect discrimination will be unlawful unless it can be shown to be a *proportionate* (rather than necessary) means of achieving a legitimate aim. When the Equality Bill was going through Parliament an attempt was made to include the European definition of 'objective justification' linked to a provision, criterion or practice being appropriate and *necessary*. This was rejected by the then Solicitor-General who commented that the proposed change was:

... unnecessary and our phrase is better. The phrase ... has been used for a long time to describe objective justification in British law and its full meaning is well understood by courts and tribunals. Means that are 'proportionate' must be 'appropriate and necessary' ... Both concepts are included in the test that we have used, but they need not be necessary in the sense of being the only possible means of achieving a legitimate aim. It is sufficient that the means are not more discriminatory than any other means that could have been chosen to achieve the same end. Since the test encapsulates what objective justification is, the words 'objectively justified' would add nothing at all. There is a risk that changing language well established in British law could lead to an excessive narrowing of the scope of justification beyond what the directive requires, because that change could be - and 'necessary' has been - interpreted very strictly by our courts. However, they are obliged to interpret the legislation compatibly with the directive and they know how to do that.¹⁰⁵

¹⁰⁴ Race Equality Directive 2000/43/EC, Art 2(1)(b), emphasis added. See also *Bilka-Kaufhaus v Weber von Hartz* C-170/84 [1986] IRLR 317 (ECJ).

¹⁰⁵ Equality Bill Deb, 16 June 2009, col 283.

Her last sentence is important. In *Homer*, an age discrimination case, the Supreme Court observed:

The [Employment Tribunal] ... regarded the terms 'appropriate', 'necessary' and 'proportionate' as 'equally interchangeable' ... It is clear from the European and domestic jurisprudence ... that this is not correct. Although the regulation refers only to a 'proportionate means of achieving a legitimate aim', this has to be read in the light of the Directive which it implements. To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so.¹⁰⁶

For its part, the EHRC Statutory Code of Practice on Services, Public Functions and Associations, influenced no doubt by the view of the government, states that:

Although not defined by the Act, the term 'proportionate' is taken from the EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.¹⁰⁷

The courts are prepared to apply a stringent test in order to comply with the European Directives. According to Mummery LJ in *R (on the application of Elias) v Secretary of State for Defence*¹⁰⁸ a three stage test is applicable: first, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is *necessary* to accomplish the objective? This approach was commended by the Supreme Court in the *JFS* case.¹⁰⁹ Nevertheless, the test for justifying indirect discrimination is open to judicial interpretation. The room for manoeuvre that this provides is important as our research indicates that some respondents believe that this test may be relatively easier to satisfy than that which would apply to direct discrimination under section 193 when attempting to restrict beneficiaries to certain categories. It appears that charities and their advisors may be acting strategically to argue that restricted provision amounts to indirect rather than direct discrimination for this reason:

The guidance that we had from counsel is that, that's just going to be an easier argument to make on indirect than, under the charity exemption, trying to justify direct discrimination. Courts are just going to look at it differently. So, if you can, make things indirect. I am aware of

¹⁰⁶ *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] 3 All ER 1287 [22] (Lady Hale).

¹⁰⁷ EHRC, 'Equality Act 2010 Code of Practice - Services, Public Functions and Associations' (2011) para 5.32.

¹⁰⁸ [2006] EWCA Civ 1293, [2006] IRLR 934.

¹⁰⁹ *R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] IRLR 136.

couple of instances, where universities have said, ‘when you say students from Spain, you mean student resident in Spain, don’t you, donor, rather than Spanish nationals?’ Because you’re getting into the realm of indirect discrimination (Interview 6).

The relationship between direct and indirect discrimination is further complicated by Article 14 of the ECHR, as evidenced in the *Catholic Care* case. This is discussed further under ‘Exceptions.’¹¹⁰

Apart from questions about how indirect discrimination may be ‘justified’, there is the logically prior question of how to establish that it has occurred. As with direct discrimination it is necessary to have a comparison, but because the comparison relates to a group the question arises as to how the group should be defined and how disparate impact can be shown. The choice of a ‘pool for comparison’ is crucial as it can be determinative as to whether any discrimination has occurred.¹¹¹ How that pool is identified has been an on-going problem for litigants¹¹² but in *Somerset County Council v Pike* guidance was provided by the Court of Appeal at least to the extent that it was held that the appropriate pool should consist only of people who have an interest in the advantage or disadvantage in question.¹¹³ For example, where a local charity decides to run a youth club for young people living in its postal district it may decide to restrict membership to those aged 18 and under and to hold its meetings on Friday evenings. The criterion that only those under 18 are eligible *directly* discriminates against older persons, but the charity may seek to justify this under section 13(2) of the Act.¹¹⁴ The practice of meeting on a Friday is apparently neutral but some local youths from the Jewish community complain that they are unable to attend because of religious observance. To decide if there is indirect discrimination it is necessary to ascertain first the number of eligible (aged 18 and under) persons in the postal district, and, second, how many are Jewish. Within the proportion who are Jewish, it is necessary to calculate how many will not be able to attend on a Friday because of their orthodox beliefs. If the whole eligible Jewish population makes up 5% of the pool, 95% of eligible residents will be unaffected by the criterion. If within the 5% who are Jewish, half will be prevented from using the club on Fridays this means that half of the eligible Jewish residents are disadvantaged as compared to none of the non-Jewish youngsters. This indicates that a group with a protected characteristic is put at a disadvantage, and the

¹¹⁰ See below at p 49.

¹¹¹ *Jones v University of Manchester* [1993] IRLR 218 (CA); *Rutherford v Secretary of State for Trade and Industry (No 2)* [2006] UKHL 19, [2006] IRLR 551.

¹¹² *Grundy v British Airways* [2007] EWCA Civ 1020, [2008] IRLR 74 [27].

¹¹³ [2009] EWCA Civ 808, [2009] IRLR 870.

¹¹⁴ See above at p 43.

charity must either establish that meeting on a Friday is a proportionate means of achieving a legitimate aim or move meetings to a different night.¹¹⁵

Relationship Between Direct And Indirect Discrimination

In the general scheme of the Equality Act, direct and indirect discrimination are separate and mutually exclusive heads of discrimination. In *R (on the application of Elias) v Secretary of State for Defence*, Mummery LJ held that:

... the basic differentiation between the two causes of action is plain: it is between one form of discrimination, which focuses on treatment of another person on prohibited grounds and aims at achieving 'formal equality' of treatment, and a different form of discrimination, which aims at achieving 'substantive equality of results' where the application of apparently racially neutral criteria produces disproportionate adverse racial impact ... *the availability of the defence of objective justification for one form of discrimination but not for another emphasises the importance of observing the separate nature of direct and indirect forms of discrimination.*¹¹⁶

Because direct discrimination cannot, generally, be justified, and because charities with restricted objects will frequently be practising direct discrimination, (and those with general objects may fall foul of indirect discrimination) the scope and effect of the exceptions allowed by the law are crucial.

Exceptions

From its inception equality legislation in the UK has contained exceptions. Some are inherent in the objective pursued. It is not unlawful to treat disabled persons more favourably than the non-disabled, for example by providing special equipment or altering terms of employment. The asymmetry is acceptable because the aim of the legislation is ensure that obstacles that prevent the full participation in society of those with disabilities are removed or minimised in order to create a 'level playing field. Similarly it is not sex discrimination to grant rights to pregnant women since men, by definition, do not

¹¹⁵ This example is based on a similar one given in EHRC, 'Equality Act 2010 Code of Practice - Services, Public Functions and Associations' (2011) para 5.22.

¹¹⁶ [2006] EWCA Civ 1293, [2006] IRLR 934 [119]-[121]. Emphasis added.

need that special treatment.¹¹⁷ Other exceptions do, however, deviate from the principle that the protected characteristics should not of themselves dictate access to benefits, employment, education and other services. Since the principle of equality is so fundamental, the law stipulates that any exception must be objectively defensible. A strict approach is reflected in the jurisprudence of both the European Court of Human Rights and the Court of Justice of the European Union (CJEU).

Under Article 14 of the ECHR the enjoyment of the rights and freedoms in the Convention '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'.¹¹⁸ Case law has established, however, that discrimination may be justified if it can be shown to have an objective and reasonable justification, that is, if it is in pursuit of a legitimate aim or if there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.¹¹⁹ Significantly, this is applicable to both direct and indirect discrimination. It has been suggested that the stringency with which the Court approaches the question of justification indicates that there is a hierarchy of grounds and that where the discrimination is on 'sensitive' or 'suspect' grounds the Court requires 'very weighty reasons' to justify discrimination.¹²⁰ In *Kozak v Poland*, for example, the Court held in relation to discrimination based on sexual orientation that:

... when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances.¹²¹

¹¹⁷ Conversely, there are exceptions aimed at the protection of pregnant women and those who have recently given birth: See e.g. Equality Act 2010, sch 3, para 14.

¹¹⁸ Article 14 is not a freestanding right but must be used in conjunction with another Article: *Belgian Linguistic case* (1968) 1 EHRR 252. On the other hand, it is not necessary to show that the substantive right has also been breached: *Hoffmann v Austria* (1994) 17 EHRR 293.

¹¹⁹ *Schmidt v Germany* [1994] 18 EHRR 513. C.f. however, cases involving executive decisions relating to social and economic policies of the member state where the Court will allow a wider margin of appreciation and will find unlawful discrimination only where it is 'manifestly unreasonable': *Stec v UK* (2006) 43 EHRR 1017; *Carson v UK* (2010) 51 EHRR 369.

¹²⁰ See e.g. Robert Wintemute, 'Filling the Article 14 "Gap": Government Ratification and Judicial Control of Protocol No 12 ECHR: Part 2' [2004] European Human Rights Law Review 484, 492.

¹²¹ *Kozak v Poland* [2010] ECHR 280 [92]. See e.g. in relation to sex discrimination: *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471; *Schmidt v Germany* (1994) 18 EHRR 513. For other grounds see e.g. *Hoffmann v Austria* (1994) 17 EHRR 293; *Gaygusuz v Austria* (1997) 23 EHRR 364 and *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 47.

Given that ‘suspect’ grounds have variously been interpreted to include sex, race, sexual orientation, nationality and, possibly, religion,¹²² it is debatable whether the hierarchy is useful in balancing competing rights. Moreover, the nuance of when weightier reasons are required to justify it creates uncertainty for lawyers and charities. One lawyer said:

It’s slightly odd, isn’t it, if ... there are two exemptions for charities in the Act, but we have a single test or, say, two standard tests but we interpret them differently, depending on the nature of the discrimination... So ... well what is a proportionate means of achieving a legitimate aim in the case of nationality is a much easier threshold to pass than it is in the case of sexual orientation. It’s pretty difficult for lay trustees to understand that - it’s the same test but it applies differently depending on what the nature of the discrimination is (Interview 7).

What is clear is that the Article 14 test is heavily context-dependent and that discrimination, even on suspect grounds may be justified in certain circumstances.¹²³

For its part, the CJEU has stressed on many occasions that exceptions must be subject to strict scrutiny. In *Johnston v Chief Constable of the RUC*, a sex discrimination case, the court held that:

... in determining the scope of any derogation from an individual right such as the equal treatment of men and women provided for by the directive, the principle of proportionality, one of the general principles of law underlying the Community legal order, must be observed. That principle requires that derogations remain within the limits of what is *appropriate and necessary* for achieving the aim in view ...¹²⁴

The strict approach to exceptions is, clearly, an issue for charitable organisations whose primary purpose is to benefit only certain sections of the community identified by one or more of the protected characteristics and this is discussed further below.

The following sections will examine the exceptions to the general principle of equal treatment that are found in the Equality Act, starting with the exception specific to charities, then examining other

¹²² *Vojnity v Hungary* [2013] ECHR 131

¹²³ For discussion, see O de Schutter, *The Prohibition of Discrimination under European Human Rights Law - Relevance for European Union non-discrimination directives* (Office for Official Publications of the European communities 2009). The usefulness of this for charities depends on whether they are within the scope of Human Rights Act: see above at p 40 and also the discussion in the *Catholic Care* case below at p 59.

¹²⁴ C-222/84 [1987] QB 129 (ECJ) [38] . Emphasis added.

exceptions that may be relevant to charities but which apply across the different areas of activity covered by the Act, including the provision of services, education, associations and employment.

The 'Charity Exception'

The Equality Act provides a 'charity-specific' exception in section 193. This replaces and, according to the government, narrows the exceptions found in the separate pieces of previous legislation which simply required charities to have the restriction in their governing document.¹²⁵ Under section 193 it remains possible for charities to restrict benefits to groups defined by any of the protected characteristics *provided* they meet the new, additional criteria laid down in the Act. The only exception to the general rule exempting charities relates to 'colour.' Since the Race Relations Act 1976, it has been unlawful for charities to limit their beneficiaries by reference to their colour¹²⁶ and a charitable instrument that does so will be applied as if that limitation did not exist.¹²⁷ Thus, a charitable instrument enabling the provision of benefits to *black* members of a community enables the benefits to be provided to all members of that community. It has been pointed out that the reference only to 'colour' is surprising, as colour is merely one of the facets of the protected characteristic of 'race' under the Equality Act 2010.¹²⁸ Section 9 of the Act defines 'race' to include colour, nationality and ethnic or national origins.¹²⁹ Morris has queried whether this would mean that whilst the word 'black' would be removed from an educational trust for the 'black inhabitants of Liverpool', the words 'inhabitants of Liverpool of African descent' would not fall within the blanket ban.¹³⁰ If section 34 of the Race Relations Act 1976 intended to prohibit 'race' discrimination in charities, it is odd to limit the ban to colour. Even if this were seen as the most important facet of race discrimination in the 1970s, it does not explain its continuation in the new Act, unless it is simply to emphasise that, as the Solicitor General explained, 'There is never any justification for discriminating between people who have different colours'.¹³¹ It could also, of course,

¹²⁵ See Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill* (2008-9, HL 169, HC 736) para 321 et seq.

¹²⁶ Equality Act 2010, ss 193(4) and 194(2). For a critique of the earlier provision see TG Watkin, 'Discrimination and Charity' [1981] Conveyancer 131.

¹²⁷ Equality Act 2010, s 193(4). Previously, see Race Relations Act 1976, s 34 and *Re Harding, decd, Gibbs v Harding* [2007] EWHC 3 (Ch), [2008] Ch 235 where this provision was considered in relation to a gift given to the Diocese of Westminster to hold in trust for the 'black community' of certain areas.

¹²⁸ Debra Morris, 'Charities and the Modern Equality Framework - Heading for a Collision?' (2012) 65 Current Legal Problems 295, 309.

¹²⁹ See also, previously, Race Relations Act 1976, s 1 and s 3 to the same effect. Caste has been added as a sub-category of race by the Enterprise and Regulatory Reform Act 2013. Regulations are awaited.

¹³⁰ It is permissible to use 'Black' in the name of an organisation, provided that membership and access to services are not restricted on that basis. See e.g. Southall Black Sisters, below at p 148 or the example given in the Government Equalities Office publication: 'Equality Act 2010: What do I need to know? A Quick Start Guide for Voluntary and Community Sector Associations' (2011) 4 (Black Women's Culture Club).

¹³¹ Equality Bill Deb, 2 July 2009, col 644.

have unintended consequences as with a charity seeking, for good reasons, to provide special educational resources to, say, black children in Liverpool, due to a special need that they had as a result of previous race discrimination. The only way to avoid the ban in section 193(4) would be to try to find another identifying marker for the group without reference to 'colour'. Lawyers in the research made reference to this:

I think often organisations find that a little bit bewildering ... Because [black minority ethnic] is the terminology that they're being encouraged to use, for example by organisations that give them statutory funding ... I did have an issue where we were trying to register a charity which had the term black and minority ethnic in its objects to define their beneficiary class. And the Charity Commission said, well, you know we'll let you register this, but you know it will have effect as if the word 'black' was deleted from the objects. But then in the end that has the same effect anyway, because you're talking about minority ethnic...So, in practice it wasn't a problem. It was just something that slightly baffles the clients, I think sometimes (Interview 9).

Aside from the particular rule relating to colour, the exception for charities in section 193 appears to be potentially quite wide.¹³² The section provides, in part, as follows:

- (1) A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic if:
- (a) the person acts in pursuance of a charitable instrument, and
 - (b) the provision of the benefits is within subsection (2)
- (2) The provision of benefits is within this subsection if it is:
- (a) a proportionate means of achieving a legitimate aim, or
 - (b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.

There are therefore a number of preconditions if a charity is to be able to rely on the section. First, the restriction must be contained in the charitable instrument.

¹³² And see the views expressed by the EHRC in its evidence to the Joint Committee on Human Rights during its scrutiny of the Equality Bill, Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill* (2008-9, HL 169, HC 736), EHRC Memorandum, Ev 139.

In pursuance of a charitable instrument

Charities may restrict benefits under this exception to people who share the same protected characteristic only if this is in line with their charitable instrument.¹³³ This requirement is consistently considered in all the commentary on this section (and by all concerned in the *Catholic Care* case itself) to mean that the specific restriction must be explicitly stated in the charitable instrument. The wording of the section, however, simply requires that the charity is acting ‘in pursuance of a charitable instrument’. This is slightly looser than the previous provisions in the sex and race legislation which referred to a ‘provision’ contained in the charitable instrument. Arguably the new wording could mean that this requirement is satisfied simply by a charity acting in accordance with its charitable objects (however widely drawn they may be) although it does appear that the intention was simply to replicate and harmonise the previous law rather than to change it.¹³⁴ Certainly, the trigger for the long-running litigation involving the Catholic Care adoption agency was the charity’s attempt to change its charitable instrument so as to fall within this exception (see Introduction for a summary of this case).

Proportionate means of achieving a legitimate aim or preventing or compensating for disadvantage

Prior to the 2010 Act, the general exception allowing charities’ governing documents to restrict their beneficiaries to specified groups, except when defined by colour, required no further justification. In relation to sex discrimination, however, the law was amended in 2008 in order to bring the Sex Discrimination Act 1975 into line with EC Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services available to the public. The amendment, inserting section 43(2A), into the Sex Discrimination Act 1975 imposed the additional criteria that as well as there being provision in the charitable instrument allowing for the discrimination, the conferral of benefits by reference to sex had to be either a proportionate means of achieving a legitimate aim, or for the purpose of preventing or compensating for a disadvantage linked to sex.¹³⁵ This is the formula now extended to all the protected characteristics in the 2010 Act.

¹³³ ‘Charitable instrument’ means an instrument establishing or governing a charity (including an instrument made or having effect before the commencement of the Equality Act 2010): Equality Act 2010, s 194(4). See, in relation to the previous provisions applicable under the Sex Discrimination Act 1975, *Hugh-Jones v St John’s College Cambridge* [1979] ICR 848 (EAT).

¹³⁴ See Equality Act 2010, Explanatory Notes, para 611.

¹³⁵ Sex Discrimination Act 1975, s 43(2A) inserted by The Sex Discrimination (Amendment of Legislation) Regulations 2008, SI 2008/963) reg 2(1), sch 1 para 11. C.f. Briggs J, below at p 58.

It is therefore no longer sufficient simply that the charity is acting in pursuance of its charitable instrument in restricting beneficiaries, the restriction must also be either a proportionate means of achieving a legitimate aim, or be for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.¹³⁶ These provisions have caused uncertainty and speculation as to precisely when and how they might apply. Part (b) - compensating for disadvantage - will be considered first, since it is much more likely to be satisfied than part (a) - a proportionate means of achieving a legitimate aim.

Compensating for disadvantage

The test in section 193(2)(b) would appear to be the more intuitively straightforward given that many charities are, almost by definition, focused on addressing disadvantage. In the event of a challenge, however, it would be for the charity to establish the existence of such disadvantage. For this exception to apply, as well as having a restriction in the charity's governing document, those who benefit from the charity must share a protected characteristic that means that they are more likely than the rest of the general population to face a particular disadvantage or need which the charity is tackling. How, then, would this be proved? What would be the evidence necessary?

The Charity Commission gives two examples where it considers the test would be satisfied.¹³⁷ It states that it would be lawful for a charity to provide software adapted to the needs of visually impaired people. The protected characteristic is based on people with a particular disability and the software compensates for any disadvantages visually impaired people may experience when using computers. This seems straightforward, bearing in mind that the disadvantage, and the solution, or amelioration, is readily identifiable. The other example given is where a charity is set up to tackle unemployment among people of a particular national or ethnic origin. This is stated to be lawful only if unemployment is 'particularly high' for that group and the trustees must be 'satisfied' that unemployment rates are higher for that group than for the population as a whole. The guidance is silent, however, as to how the trustees should satisfy themselves of that. For its part the EHRC provides in its Statutory Code of Practice on Services, public functions and associations that:

To show that restricting its services or benefits to people who share a protected characteristic is for the purpose of preventing or compensating for a disadvantage linked to that protected characteristic, the charity will need to *demonstrate a reasonable connection* between the past or current disadvantage experienced by this group and the benefits provided by the charity. Disadvantage can include lack of opportunity, lack of choice, exclusion, rejection, or barriers to

¹³⁶ Equality Act 2010, s 193(1)(2).

¹³⁷ Charity Commission, 'Equality Act Guidance for Charities: Restricting who can benefit from charities' (2011) 7.

accessing services, education or employment. The disadvantage may be obvious and well known, or may be known to the charity through its funded research or evidence from other sources. The benefits the charity provides should be capable of making a difference in terms of overcoming the disadvantage linked to the protected characteristic.¹³⁸

Statistics on unemployment within minority ethnic communities may be available to the charity, but the EHRC guidance suggests that there should be some connection between the protected characteristic and the disadvantage. If there is high(er) unemployment in a particular inner-city area in which there are clusters of, say, Afro-Caribbean, Somali, Yemeni and Pakistani ethnic groups, along with the White population, it may be that because of prevailing socio-economic conditions the rate of unemployment is uniformly high across all the groups. If a charity wished to benefit only those of, say, African descent, how much higher would the rate need to be among that group? And how is cause established if the number of young people leaving school without qualifications is depressingly similar among all the groups? Similarly, a charity's governing document may restrict benefits to people of a particular religion where the aim is to relieve poverty amongst adherents to that faith. The question would then be whether people of that religion suffer poverty more than the general population and how to prove that.

Participants in one focus group noted that the data required to make a satisfactory case for falling under this test are scarce and inconsistently collected. One participant gave an example of a local organisation that launched an effort to set up a women's network, with the belief that women's equality is one of the strands that has slipped under the single Act. The organisation employed a researcher to try to get baseline data on gender across areas such employment, housing, and health. However, the research effort took much longer than expected and was not very successful, because there were no data to be found. Existing data were only collected irregularly, and the agencies that were collecting them did not know what to do with it. What is more, agencies were reluctant to disclose data and the researcher needed to use Freedom of Information Act requests in order to obtain it. Another participant said, 'If the PSED goes, there'll be even less monitoring, so where are the data going to come from then?' (Focus Group 17/1/13)

Focus group participants also noted that even if there are sufficient data, it can be difficult to prove that the disadvantage is actually linked to the protected characteristic. 'Even if you do your monitoring, who judges that this is sufficient to evidence a legitimate aim? And that the disadvantage is actually linked to the protected characteristic?' (Focus Group 17/1/13). For example, if a charity is working with

¹³⁸ EHRC, 'Equality Act 2010 Code of Practice - Services, Public Functions and Associations' (2011) para 13.37, emphasis added.

unemployed youth in a particular area. ‘How do you know that BME youth unemployment is linked to race, rather than just that all youth in the area are unemployed?’ (Focus Group 17/1/13)

Moreover, the charity will need to demonstrate that the benefits that the charity provides are capable of making a difference in terms of overcoming the disadvantage linked to the protected characteristic. If research indicates that a particular ethnic group is under-represented within higher education because a substantial proportion of that ethnic group are poor, presenting a barrier to entry,¹³⁹ then a charitable fund to promote access to higher education for this group would appear to fall within this exception but, if after some years there is no perceptible improvement in numbers continuing in education, the exception may cease to apply on the basis that it does not appear to be compensating at all.

A proportionate means of achieving a legitimate aim

The test in section 193(2)(a) uses the phrase familiar from indirect discrimination.¹⁴⁰ Indeed in its Code of Practice on Services, the EHRC explicitly links the two tests:

What is required to show that a restriction is a proportionate means of achieving a legitimate aim is discussed in general terms at paragraphs 5.25 to 5.35 [indirect discrimination]. In the case of a charity with charitable status, the restriction would need to promote, or in any event not inhibit, the achievement of one of its stated aims. To be proportionate, the impact of the restriction in furthering the aim in question should be balanced against any adverse impact on the charity’s ability to fulfil its other aims and to meet the ‘public benefit’ test.¹⁴¹

It may, at first sight, seem logical that the two tests - that for indirect discrimination and for the charitable exception - should be construed in the same way, although, with respect, the explanation given in this Code is perhaps not the most helpful, particularly since it introduces ‘public benefit’, itself a problematic concept.¹⁴² But are the two tests necessarily the same? Where a charity restricts its services to, say, women, this is not indirect discrimination, but direct discrimination against men. With the exception of age, direct discrimination is not, normally, defensible under the Directives and the Equality Act 2010. Direct age discrimination may be justified by showing that it is a proportionate means of

¹³⁹ Presuming it is poverty that can be shown to be the barrier.

¹⁴⁰ See above at p 44.

¹⁴¹ EHRC, ‘Equality Act 2010 Code of Practice - Services, Public Functions and Associations’ (2011) para 13.36.

¹⁴² See Section V on the interrelationship between charity law and equality law.

achieving a legitimate aim.¹⁴³ Whether or not direct age discrimination may be justified in the same way as indirect age discrimination has given rise to debate, domestically and in the CJEU.¹⁴⁴ The question is, admittedly, more complex because of the flexibility granted to Member states in relation to social policy and the organisation of the labour market, but it is notable that Elias J (as he then was) observed in *MacCulloch v Imperial Chemical Industries plc*¹⁴⁵ that where direct (age) discrimination is reflected in general rules or policies, the discriminatory effect of the measure will necessarily be greater than where a rule is cast in apparently neutral terms but has indirect discriminatory adverse effects and, to that extent, direct discrimination may be harder to justify. In other words, the question of proportionality is subject to stricter scrutiny where discrimination is direct, an approach recently confirmed by the Supreme Court in *Seldon*.¹⁴⁶ Section 193 allows charities to discriminate directly against sections of the community when they restrict their benefits or services. Arguably, therefore, the stricter approach evidenced in direct age discrimination will also apply to section 193.

To date, section 193 has been subject to judicial scrutiny only in the *Catholic Care* case.¹⁴⁷ The utility of this case as a precedent is unclear, not only because it began prior to the Equality Act 2010, but also because the court chose to apply the Article 14 'test' rather than one derived from the case law on the Directives and earlier equality legislation. In the High Court, Briggs J referred to section 43 of the Sex Discrimination Act 1975 which gave charities the right to discriminate on grounds of sex. Although the section was amended to comply with the requirements of Directive 2004/113¹⁴⁸ Briggs J, with the assent of counsel, inferred that the amendment 'was introduced so as to bring the express terms of section 43 into compatibility with Convention rights, and with Article 14 in particular.'¹⁴⁹ On that basis, with effect from the implementation of the Human Rights Act 1998 *all* the exceptions in the various, separate pieces of legislation would, implicitly, have required objective justification in order to make them compliant with the ECHR and Article 14 in particular. This interpretation certainly came as a surprise to charity lawyers:

You know, that may be a case of saying that, oh, actually that was technically what the law said, but most lawyers probably wouldn't know that, let alone most lay people (Interview 9).

¹⁴³ Equality Act 2010, s 13(2).

¹⁴⁴ See e.g. *R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform, Case C-388/07* [2009] ICR 1080 (ECJ); *Seldon v Clarkson Wright and Jakes (A Partnership)* [2012] UKSC 16, [2012] 3 All ER 1301.

¹⁴⁵ [2008] IRLR 846 (EAT).

¹⁴⁶ *Seldon v Clarkson Wright and Jakes (A Partnership)* [2012] UKSC 16, [2012] 3 All ER 1301.

¹⁴⁷ See above at p 12.

¹⁴⁸ See above at p 54 and see the Explanatory Notes to the Regulations.

¹⁴⁹ *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales* [2010] EWHC 520 (Ch), [2010] 4 All ER 1041 [51].

The question that Briggs J then formulated for the Charity Commission in applying the Regulations was whether the less favourable treatment contemplated by the proposed change to the charity's objects clause would be justified under Article 14. Does this matter: is the test under the ECHR different from that under the Equality Act? It is possible that Article 14 is, depending on the circumstances, more flexible, especially where the Court grants the member state a wide margin of appreciation.¹⁵⁰ When the point has been considered (although not decided) by domestic courts the approach has been that, on the particular facts, the outcome would have been the same¹⁵¹ but this does not mean that this would always be the case. In any event, it is a further layer of complexity and adds to the potential for confusion.

As a consequence of framing the question for the Commission within Article 14, Briggs J naturally employed the language of the ECHR case law. He noted, for example, that sexual orientation discrimination not only falls within the ambit of Article 14¹⁵² but, moreover, is one of those forms of discrimination where a difference in treatment will be justified only if particularly convincing and weighty reasons are shown.¹⁵³ When, eventually, the case returned to the Upper Tribunal, Sales J also considered justification under Article 14, that having been the basis of the earlier proceedings.¹⁵⁴ In doing so, however, he did observe that it had been common ground that Article 14 was applicable and significantly his Lordship noted that, '... it is unnecessary to examine further the precise basis on which Article 14 principles come to infuse the interpretation of section 193.'¹⁵⁵ . He went on:

Leaving aside technical and potentially difficult questions such as whether the Charity is to be regarded as a public authority for the purposes of application of Article 14 under the Human Rights Act 1998 or whether Article 14 might be regarded as imposing a positive obligation on the Commission and FTT to decide the Charity's application in a particular way, on any view Article 14 provides a powerful analogy for the operation of section 193 ...¹⁵⁶

This highlights not only the problem of deciding whether and when a charity may be considered a public authority for the purposes of the Human Rights Act but also suggests that any future cases might,

¹⁵⁰ See e.g. *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704, [2012] 3 All ER 1287 [23] (Lady Hale).

¹⁵¹ See e.g. *Hockenjos v Secretary of State for Social Security* [2004] EWCA Civ 1749, [2005] EuLR 385; *Humphreys v HM Revenue and Customs* [2010] EWCA Civ 56, [2010] 1 FCR 630.

¹⁵² *Salgueiro Da Silva Mouta v Portugal* (2001) 31 EHRR 47.

¹⁵³ Citing *Kozak v Poland* [2010] ECHR 280 [92]) Briggs J noted that the State's margin of appreciation in such cases is narrow, and that the principle of proportionality requires that the measure chosen to realise the legitimate aim must be both suitable in general, and *necessary* in the circumstances.

¹⁵⁴ *Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC).

¹⁵⁵ *ibid* [13].

¹⁵⁶ *ibid*. See also above at p 39.

possibly, focus more on the case law derived from indirect discrimination in the equality legislation and Directives.

Sales J held that while seeking to place 'hard-to-adopt' children with adoptive families was a legitimate aim, the means proposed were not proportionate. In reaching this conclusion his Lordship made some general observations, two of which are noteworthy in this context. First, in addressing the issue of whether the fact that same sex couples seeking to adopt could have gone elsewhere was a relevant factor Sales J held:

... whilst the availability of adoption services to same sex couples from other sources could not of itself justify a practice of discrimination ... it is something which could in some circumstances be relevant to the question of objective justification ... ¹⁵⁷

This would be surprising to equality lawyers. It would simply not be relevant to direct discrimination, exceptions to which are narrowly drawn. It is tantamount to an employer who refuses someone a job because of her race, saying she can always work somewhere else. Even with indirect discrimination it is the criterion itself that must be justified rather than its discriminatory effect.¹⁵⁸ However, having raised the possibility of using alternative services as a defence, his Lordship went on to state that the fact that same sex couples could access adoption services elsewhere, while it may have tended to reduce the detrimental effect,

did not remove the harm that would be caused to them through feeling that discrimination on grounds of sexual orientation was practised at some point in the adoption system nor would it remove the harm to the general social value of promotion of equality of treatment for heterosexuals and homosexuals - a value endorsed by Parliament in assessing and responding to the needs of society by legislating general rules to promote equality of treatment for homosexuals.¹⁵⁹

This is crucial, since it might be tempting to some charities to argue that the restriction of benefits, especially when driven by religious belief, should be tolerated where the benefits were available to the protected group elsewhere.¹⁶⁰

¹⁵⁷ *ibid* [28].

¹⁵⁸ *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704, [2012] 3 All ER 1287 [23] (Lady Hale).

¹⁵⁹ *Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC). [66].

¹⁶⁰ And by analogy see *Bull v Hall and Preddy* [2012] EWCA Civ 83, [2012] 2 All ER 1017.

Sales J's second notable observation relates to motivation: he held that the *motivation* of third party donors is capable of being relevant to the balancing exercise required under Article 14. Catholic Care had argued that motivation (*why* someone is excluded) is irrelevant if the outcome is lawful. Sales J did not accept that motivation was never relevant: he agreed with counsel that the insistence by a donor who was a racist bigot that some benefit be conferred on children in need only if they are of a particular race, would be very unlikely to be found to be justified. On the other hand:

where third party donors are motivated by sincerely held religious beliefs in line with a major tradition in European society such as that represented by the doctrine of the Catholic Church (and particularly where, as here, their activities do not dominate the public sphere in relation to the activity in question - provision of adoption services - which are otherwise widely available to homosexuals and same sex couples), the position is rather different.¹⁶¹

The view that *direct* discrimination against a protected group may be justified by a 'good' motive must be approached cautiously. As a general principle, *direct* discrimination cannot be defended by pleading a benign motive.¹⁶² Since section 193 is an exception to this fundamental principle, care should be exercised in allowing motive to play a part in legitimising discrimination. It is also important not to conflate aims and means. If Sales J is suggesting that someone who holds racist views can never have a legitimate aim we enter the difficult territory of distinguishing motive and intention.¹⁶³ If a racist bigot donated money to a housing charity to engineer the eviction of an ethnic minority from the area, the aim itself is illegitimate. If a rabidly anti-English donor were to limit educational bursaries to a class defined by descent from Welsh ancestry, it is arguable that the question of whether there is a legitimate *aim* is separate from a 'racist' motivation. Assuming the aim is legitimate, there is still the question of whether the means are proportionate: justification requires both. Is it *proportionate* to restrict the bursaries to the Welsh? If the only reason for doing so is bigotry rather than, say, a greater incidence of disadvantage, it cannot be said to be a 'necessary' (proportionate) restriction. Motives - good or bad - are an uncertain basis on which to justify discrimination that would be unlawful save for the exception. Charities rarely set out to restrict beneficiaries for anything other than good motives (as they would see it). Indeed, promotion of the traditional family, as argued by Catholic Care, has figured in cases before the European Court of Human Rights where discrimination against same sex families has been found not to be justified.¹⁶⁴ In other words, 'good' motives are not by themselves sufficient to legitimise otherwise unlawful discrimination.

¹⁶¹ *Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC) [44] (Sales J).

¹⁶² *Above, Amnesty International v Ahmed* [2009] IRLR 884 (EAT).

¹⁶³ See e.g. *R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] IRLR 136.

¹⁶⁴ *Karner v Austria* (40016/98) [2004] EHRR 24; *Kozak v Poland* [2010] ECHR 280.

The Relationship Between The Two Tests In Section 193

Section 193 allows charities two ways of justifying a restriction of benefits: either it is a proportionate way of achieving a legitimate aim (section 193(2)(a)) or it is to prevent or compensate for disadvantage (section 193(2)(b)). Sales J commented in *Catholic Care* that section 193(2)(a) is in wide terms and is clearly not confined to legitimate aims in the form of acting to help persons who suffer disadvantages as a result of having a protected characteristic, since that is expressly covered by section 193(2)(b).¹⁶⁵ He did not, unfortunately, explain what section 193(2)(a) might, instead, cover and it is difficult to think of examples where part (b) would not be satisfied, while part (a) was found to apply. Lawyers stated:

I have yet to see someone come up with something that's a convincing argument within the other limb [section 193(2)(a)] that isn't based on disadvantage or need (Interview 6).

It's not very easy to think of any examples that would come within that limb [section 193(2)(a)] but not the other limb [section 193(2)(b)]. And so, it's almost robbed of any effect (Interview 7).

This suggests that part (a) is a more difficult test to satisfy than part (b) and this is borne out by the research:

I think because of the state of the law on that, it is just a more difficult test to meet. I think because there is not much case law on it and it is a little bit uncertain; so I think it is fair to say, generally speaking, that the evidence requirement for that part of the test would always be higher; and will be more likely to include different types of data. Just because it is more difficult to ... disadvantage is, relatively speaking, it is easier to talk about and see (Interview 11).

Indeed, guidance from the Commission turns the test around and calls paragraph (b) 'Test A' and paragraph (a) 'Test B', suggesting it was presumed that part (b) would be the more common route for charities to follow in order to justify a restriction. The Charity Commission gives a couple of possible examples in its guidance including one involving a charity set up to provide housing for men who have worked in the police force and who are in financial need. Since this is sex discrimination, the charity must satisfy one of the tests. The guidance suggests that 'Test A' (section 193(2)(b)) could not be used unless there is evidence that *men* who were police officers are more likely to experience poverty or homelessness than women who worked in the force. It then states that to use 'Test B' (section 193(2)(a)) the trustees would have to show a legitimate aim (presumably combating poverty and homelessness) and then show that 'benefiting only men was a fair, balanced and reasonable

¹⁶⁵ *Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC) [4].

(proportionate) way' of achieving it. But there, of course, lies the problem. This example restates the test but does not give any indication of when such a restriction would be proportionate. If there is no greater poverty amongst men, why would it be proportionate to exclude women?

Section 193(2)(a) cannot require those who may benefit from the charity to be at greater disadvantage than the rest of the general population (otherwise section 193(2)(b) would apply) but the restriction must be justified. The Charity Commission's guidance explains 'legitimate aim' as one that

has a reasonable social policy objective ... is consistent with the lawful carrying out of the charity's stated purpose for the public benefit ... and *is not itself discriminatory*.¹⁶⁶

The last phrase is confusing since, by definition, the restriction in question will be discriminatory otherwise there would be nothing to justify. If it means the general aim of, for example, alleviating poverty, that is unexceptional. But if a charity is set up to alleviate poverty among *women*, that is sex discrimination and must be justified. The Code of Practice on Services, Public Functions and Associations puts it like this:

In the case of a charity with charitable status, the restriction would need to promote, or in any event not inhibit, the achievement of one of its stated aims.¹⁶⁷

That phrasing seems more in line with the purpose of the provision. The requirement that an aim must not in itself be discriminatory derives from indirect discrimination rather than from the situation where a charity is directly discriminating against protected groups. In general terms, indirect discrimination arises where a neutral (that is apparently non-discriminatory) provision, criterion or practice (PCP) has a disproportionate effect on one group. If the PCP were not neutral then it would be direct and not indirect discrimination. If a school has a rule that no jewellery is to be worn, that is a neutral requirement which may be found to have a disproportionate impact on Sikh pupils and which must therefore be justified.¹⁶⁸ If, on the other hand, the rule only prohibits the wearing of the Sikh kara, while allowing other jewellery, that is direct discrimination on grounds of religion or belief (and cannot be justified unless there is a specific exception).

Legal advisors are finding this area difficult to advise upon:

¹⁶⁶ Charity Commission, 'Equality Act guidance for charities: Restricting who can benefit from charities' (2011) para C4.

¹⁶⁷ EHRC, 'Equality Act 2010 Code of Practice - Services, Public Functions and Associations' (2011) para 13.36.

¹⁶⁸ *R (Watkins-Singh) v Aberdare Girls' High School* [2008] EWHC 1865, [2008] 3 FCR 203.

All you can really do is to be informed by the guidance, which itself makes it very clear that it's not definitive. So it's a judgement call, isn't it? And that's going to be difficult (Interview 5).

Another lawyer commented on the time that it was taking the Charity Commission to decide on the registration of a body as a charity, where the Commission had raised issues relating to the Equality Act. The Charity Commission had decided to consult the Equality and Human Rights Commission:

So, they [the Charity Commission] obviously find it difficult. But if charities' own regulator finds it difficult to explain what the rules are, then how can charities be expected to know? And so, I think that leads to excessive caution (Interview 43).

The Charity Commission guidance suggesting the aim must not itself be discriminatory appears to create an additional obstacle for charities wishing to use section 193. It might be thought that a legitimate aim for a charity would be to ensure that services and benefits are targeted at those who most need them. In the homelessness example given above it could be argued that relief of male homelessness or poor former police officers serves the legitimate aim of relieving poverty amongst that group. But the aim (to help only *men*) is in itself sex discrimination. Does that mean (per the Guidance) that it cannot be legitimate? Of course, if men have special need for relief of poverty above those of women, 'Test A' would apply. There is significant overlap¹⁶⁹ between the two tests and an unfortunate lack of clarity about how the proportionality test will operate independently of the disadvantage test. This is well illustrated by the *Catholic Care* saga which simply confirms that satisfying section 193 is not going to be straightforward.

A question that was raised by the research and that remains unanswered is, when looking at a charity's restricted provision to see if it falls within the exception, will the regulators be looking at what the charity does as a whole, or will it examine each restricted area of provision separately? One lawyer posed the question in this way:

If a charity provides accommodation for old people all over the country and it decides to let one of the homes [it] runs...be a specialist in a particular religion so that all the Muslims for example can be put in this home where they'll all be together and they could have things like appropriate catering and appropriate religious services and pastoral care, something like that. Whether the courts would look at the whole offering of the charity and say, 'Well, it's perfectly okay to have a specialised home,' bearing in mind that people who are not...who don't come in to that category

¹⁶⁹ See [2010] EWHC 520 (Ch), [2010] 4 All ER 1041 [52] (Briggs J).

are not excluded at that, they are amply provided for in all the other homes where there's no specialised service (Interview 43).

The lawyer later concluded:

Well, I think it's quite difficult unless we had some case law to know how particular questions are likely to be answered by the courts (Interview 43).

The same question as to at which level of a charity's activity the test must be satisfied, arises in the context of Universities providing a suite of scholarships, each one of which is limited in some way to members of one equality strand.¹⁷⁰ Must each scholarship comply or is it the whole offering of scholarships that should be considered?

Apart from section 193, there are other relevant exceptions.

Exceptions Available To Charities

Membership charities

Charities may make acceptance of a religion or belief a condition of membership.¹⁷¹ They may also refuse members access to benefits if they do not accept a religion or belief where membership itself is not subject to such a condition. In either case, they may only do if they first imposed such a condition before 18 May 2005 and have done so continuously since then.¹⁷² Under this provision, the Scout Association may continue to require children joining the Scouts to promise to do their best to do their duty to God.¹⁷³

¹⁷⁰ See higher education case study at p 117.

¹⁷¹ Equality Act 2010, s 193(5).

¹⁷² *ibid* s 193(6).

¹⁷³ See also associations at p 69.

Single-sex participation

A new provision in the Equality Act 2010¹⁷⁴ allows participation in activities to promote or support charities to be restricted to men or women (such as women only fun-runs).

Supported employment for the disabled

Charities must not restrict benefits consisting of employment, contract work or vocational training to people who share a protected characteristic (subject to exceptions in the relevant parts of the Act: see below). There is, however, an exception that allows people to provide, and a Minister to agree, arrangements for supported employment¹⁷⁵ only for people with the same disability, or disabilities of a description to be set out in regulations.¹⁷⁶ This would allow, for example, the RNIB to provide training for visually impaired people in preference to other disabled people.

Exceptions Applicable Generally

The Equality Act provides charities with their own exceptions but it also has a wide range of exceptions that apply both to individuals and organisations in particular contexts. The following section lists the exceptions that might be particularly relevant to charities as service providers, or as employers.

Schedule 23: 'General exceptions'

Schedule 23 contains a range of 'general exceptions' but of most relevance to charities are the exceptions for organisations relating to religion or belief, communal accommodation and non-EEA training.

¹⁷⁴ Equality Act 2010, s 193(7).

¹⁷⁵ 'Supported employment' means facilities provided, or in respect of which payments are made, under Disabled Persons (Employment) Act 1944, s 15: Equality Act 2010, s 194(7).

¹⁷⁶ Equality Act 2010, s 193(3) and s 22.

Organisations relating to religion or belief

Throughout the Act there are exceptions which apply specifically to religion or belief the scope of which differs according to context.¹⁷⁷ Schedule 23 provides a general exception for all *non-commercial* religious or belief organisations.¹⁷⁸ In order, however, to take advantage of the exception, the organisation must not only be non-commercial, it must also exist for particular purposes. Its purposes must be one or more of the following: to practise, advance or teach a religion or belief; to allow people of a religion or belief to participate in any activity or receive any benefit related to that religion or belief; or to foster or maintain good relations between people of different religions or beliefs.¹⁷⁹ One lawyer advised:

So, I think that's one of the things that the Equality Act makes it even more important to do, to draft your objects carefully within and not just your actual objects and your purpose but also to legally jump in through the hoops of what the Equality Act requires because it's so unclear, with no case law on most of these provisions. You really want to be ticking the boxes in, for example, Schedule 23 about religious organisations. You might think you're a religious organisation but you might as well encompass the wording of the Equality Act to make sure that it looks like you are as well (Interview 3).¹⁸⁰

The exception allows such an organisation (or person acting on its behalf)¹⁸¹ to impose restrictions in relation to *two* protected characteristics: a person's religion or belief, or their sexual orientation. With reference to those characteristics, the organisation may apply restrictions to: membership; participation in activities; use of any goods, facilities or services that it provides; and use of its premises.¹⁸² Where the discrimination is based on *religion or belief* the exception applies only where a restriction is necessary to comply with the purpose of the organisation, or to avoid causing offence to members of the religion or belief that the organisation represents.¹⁸³ In relation to discrimination based on *sexual orientation*, the exception can apply only where it is necessary to comply with the doctrine of the organisation, or in order to avoid conflict with the strongly held convictions of members of the religion or the followers of

¹⁷⁷ See e.g. Equality Act 2010, sch 3, pt 7; sch 9: 'Work Exceptions'; sch 11, Schools and see below at p 75.

¹⁷⁸ Equality Act 2010, sch 23, para 2.

¹⁷⁹ *ibid* sch 23, para 2(1)(2).

¹⁸⁰ See also the case study on religions charities in Section VI and specifically below at p 113.

¹⁸¹ Equality Act 2010, sch 23, para 2(4).

¹⁸² *ibid* sch 23, para 2(3). In addition, a minister of religion may impose restrictions by reference to a person's religion or belief or their sexual orientation on participation in activities carried on in the performance of the minister's functions in connection with or in respect of the organisation; and the provision of goods, facilities or services in the course of activities carried on in the performance of their functions in connection with or in respect of the organisation: sch 23, para 2(5)(8).

¹⁸³ *ibid* sch 23, para 2(6).

belief that the organisation represents.¹⁸⁴ If, however, an organisation contracts with a public body to carry out an activity on that body's behalf then it cannot discriminate because of sexual orientation in relation to that activity.¹⁸⁵

Communal accommodation

Schedule 23 provides that communal accommodation¹⁸⁶ along with associated benefits, facilities or services may be restricted to one sex only, as long as the accommodation is managed in a way which is as fair as possible to both men and women.¹⁸⁷ When restricting communal accommodation to one sex only, account must be taken of: whether and how far it is reasonable to expect that the accommodation should be altered or extended or that further accommodation should be provided; and, the frequency of the demand or need for use of the accommodation by persons of one sex as compared with those of the other.¹⁸⁸ Where such accommodation or related benefit is refused in the field of work, alternative arrangements must be made where reasonable so as to compensate the person concerned.¹⁸⁹ It also provides that, in relation to potential discriminatory treatment of transsexual people, account must also be taken of whether and how far the conduct in question is a proportionate means of achieving a legitimate aim.¹⁹⁰

Training provided to non-EEA residents

Schedule 23 provides an exception to nationality discrimination in relation to training for non-EEA residents. This is discussed further below in the case study on higher education. The Act provides that it will not be unlawful discrimination on grounds of nationality to provide training for non-EEA residents where the education provider believes that the person does not intend to use the skills gained in Great Britain.¹⁹¹

¹⁸⁴ *ibid* sch 23, para 2(7)((9).

¹⁸⁵ *ibid* sch 23, para 2(10).

¹⁸⁶ 'Communal accommodation' may include shared sleeping accommodation for men and women, ordinary sleeping accommodation or residential accommodation, all or part of which should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation: sch 23, para 3(6).

¹⁸⁷ *ibid* sch 23, para 3.

¹⁸⁸ *ibid* sch 23, para 3(3).

¹⁸⁹ *ibid* sch 23, para 3(8).

¹⁹⁰ *ibid* sch 23, para 3(4).

¹⁹¹ *ibid* sch 23, para 4.

Schedule 16: Associations

Part 7 of the Equality Act deals with ‘associations’ which are defined as having at least 25 members, where admission to membership is regulated by the association’s rules and involves a selection process.¹⁹² In this context it does not matter whether its activities are carried out for profit, or whether the association is incorporated.¹⁹³ Since a charity may also be an association, the exceptions that apply to associations may be available to a charitable organisation. This can be confusing for charities, and their advisors:

And, as I say, without the case law explaining to charities, I think a lot of them will just look at it and there are so many different provisions set out in different places. You’ve got general exceptions, which ... can apply to charities. You’ve got the rules on associations. So, unfortunately, people get a bit tied in knots (Interview 3).

While the general rule is that an association must not discriminate in the way it treats members, associates and guests, it is permissible for an association to restrict membership to persons who share a protected characteristic, with the exception of colour.¹⁹⁴

Schedule 3: Services and public functions

Schedule 3 contains exceptions that apply specifically to the provision of services and public functions. Charities that are engaged in such activities are subject to the rules that apply in this context. The basic principle is, of course, that services must be available without discrimination on any of the protected grounds unless there is a relevant exception. The permissible exceptions in relation to the provision of services etc are as follows.

Separate and single-sex services¹⁹⁵

¹⁹² *ibid* s 107(2).

¹⁹³ *ibid* s 107(4).

¹⁹⁴ *ibid* sch 16. The exception does not apply to political parties.

¹⁹⁵ Discussed further in the single-sex provision case study at p 135.

These are exempt from the prohibition on sex discrimination provided certain conditions are met. It is not unlawful sex discrimination to provide *separate* (but the same) services for each sex if:

- a joint service for persons of both sexes would be less effective; and
- the limited provision is a proportionate means of achieving a legitimate aim.¹⁹⁶

Moreover, it is not unlawful sex discrimination to provide separate and *different* services for each if:

- a joint service for persons of both sexes would be less effective;
- the extent to which the service is required by one sex makes it not reasonably practicable to provide the service other than separately and differently for each sex; and,
- the limited provision is a proportionate means of achieving a legitimate aim.¹⁹⁷

Exceptions may also apply where a service is provided only to one sex.¹⁹⁸ Single-sex services are permitted where any of the following applies:¹⁹⁹

- only people of that sex require it;
- there is joint provision for both sexes but that is insufficiently effective on its own;
- a joint service would not be as effective and it is not reasonably practicable to provide separate services for each sex;
- they are provided in a hospital or other place where users need special attention (or in parts of such an establishment);
- they may be used by two or more persons at the same time and a woman might object to the presence of a man (or vice versa); or,
- they may involve physical contact between a user and someone else and that other person may reasonably object if the user is of the opposite sex.

In each case, the single-sex provision must be a proportionate means of achieving a legitimate aim.

The exceptions for both separate and single-sex services also cover public functions in respect of the 'back-room' managerial, administrative and finance decisions which allow such single-sex services to be provided.

¹⁹⁶ Equality Act 2010, sch 3, para 26(1).

¹⁹⁷ *ibid* sch 3, para 26(1).

¹⁹⁸ *ibid* sch 3, para 27. A similar provision exists in relation gender reassignment discrimination in *ibid* sch 3, para 28.

¹⁹⁹ *ibid* sch 3, para 27(1)(a),(2)-(7).

Services relating to religion: sex discrimination

There is an exception to the general prohibition of sex discrimination to allow ministers of religion to provide separate and single-sex services.²⁰⁰ The minister can provide such services so long as this is done for religious purposes, at a place occupied or used for those purposes and it is either necessary to comply with the doctrines of the religion or for the purpose of avoiding conflict with the strongly held religious views of a significant number of the religion's followers. This exception would allow a synagogue to have separate seating for men and women at a reception following a religious service. It is important to note that the view appears to be that this does not apply to acts of worship themselves as these, being private, are not 'services' within the meaning of the Act so no exception is required.²⁰¹

Services generally provided only for persons who share a protected characteristic

A service provider does not breach the requirement not to discriminate in the provision of a service if he or she supplies the service in such a way that it is commonly only used by people with a particular protected characteristic (for example, women) and he or she continues to provide that service in that way.²⁰² If it is impracticable to provide the service to someone who does not share that particular characteristic, a service provider can refuse to provide the service to that person.

Schedule 11 and 12: Education/HEIs²⁰³

Apart from exceptions specific to education providers, institutions may, of course, use exceptions that apply in the context of the provision of services, such as those relating to communal accommodation and competitive sport.²⁰⁴

²⁰⁰ *ibid* sch 3, para 29. In relation to religious exceptions generally, see Russell Sandberg and Norman Doe, 'Religious Exemptions in Discrimination Law' (2007) 66(2) Cambridge Law Journal 302.

²⁰¹ See e.g. EHRC, 'Equality Act 2010 Code of Practice - Services, Public Functions and Associations' (2011) para 13.69.

²⁰² Equality Act 2010, sch 3, para 30.

²⁰³ Higher Education is the subject of a case study in Section VI.

²⁰⁴ Equality Act 2010, sch 23; s 195.

Schools

There are exceptions from the prohibition on sex discrimination in schools so as to allow for the existence of single-sex schools and for single-sex boarding at schools.²⁰⁵ There are also some exceptions to the prohibition on discrimination because of religion or belief in relation to schools with a religious ethos or character (often referred to as faith schools) and to acts of worship or other religious observance in any school.²⁰⁶ It is also provided that schools may apply authorised forms of selection for admission by reference to ability and aptitude and that this will not amount to disability discrimination.²⁰⁷

Further and higher education

It is permissible to have single-sex institutions²⁰⁸ or to restrict admission on grounds of religion or belief, although in order for the latter to apply the institution must be so designated in regulations issued by a Minister of the Crown.²⁰⁹ If an education provider has charitable status, section 193(2) may apply if there is a restriction in the charitable instrument.²¹⁰ In the case of higher and further education, this may not be likely if the charity is the education provider - say, a university. It may be the case, however, that a university sets up a separate charity to administer a charitable donation, for example, a fund to provide scholarships and that may include a restriction. Indeed, a university with general educational aims may have a range of scholarships or bursaries administered as charities, and with qualifying criteria such as sex (for example, for women), race (for example, for students of Afro-Caribbean descent), or belief (for example, for Muslim students). On the face of it, each of these falls foul of the Act because they directly discriminate on the basis of protected characteristics. One way in which the university might seek to continue to provide benefits to restricted groups is to use the provisions on positive action which allow for time-limited schemes intended to redress previous disadvantage or under-representation. This is discussed in more detail below. Apart from positive action, however, the only provision which would justify the particular discrimination in each of these funds would be section 193(2).

²⁰⁵ *ibid* sch 11, pt 1. This includes transitional provisions relating to single-sex schools which are in the process of becoming co-educational.

²⁰⁶ *ibid* sch 11, pt 2.

²⁰⁷ *ibid* sch 11, pt 3.

²⁰⁸ *ibid* sch 12, para 1.

²⁰⁹ *ibid* sch 12, para 5; Equality Act 2010 (Designation of Institutions with a Religious Ethos) (England and Wales) Order 2010, SI 2010/1915.

²¹⁰ See above at p 54.

Take as an example a large donation received from an alumnus of the university who wishes to confer scholarships on students from his home country, Norway. The donor stipulates that the scholarship is to be available to Norwegian women pursuing an Engineering degree. This discriminates on the basis of sex and race (nationality). A charity is set up to administer the fund on this basis. Assuming that the Charity Commission is prepared to find that this is of sufficient public benefit, the next question is whether this is a proportionate means of achieving a legitimate aim, or is for the purpose of preventing or compensating for a disadvantage that is linked to the protected characteristics. Other than donor preference - which will not by itself justify discrimination - the institution could attempt to show that Norwegian women are in particular need of this assistance. Alternatively, it may be a legitimate aim to encourage more women to study Engineering (if figures support this). But is it proportionate to restrict it to *Norwegian* women?

Apart from Schedule 12, Universities might also seek to use the Schedule 23 exception covering the training of non-EEA residents.²¹¹ For example, a university could offer bursaries to Libyan students who are studying civil engineering. That would not be unlawful discrimination against a British student. Arguably, however, it does discriminate against other non-EEA residents. A student from Tunisia is not eligible for the scholarship - that could be argued to be unlawful race discrimination.

Schedule 9: Work

Schedule 9 provides the exceptions that apply within employment and related relationships.²¹² Many charities employ staff in a variety of roles, some of which will be ancillary to the main charitable aim of the organisation, for example in administrative or 'back office' jobs. The type of job undertaken is crucial in deciding whether or not discrimination will be permitted. Although the Equality Act 2010 provides protection from discrimination for a range of people in the labour market,²¹³ the focus in this section is on employees and applicants for jobs, since these are the most relevant for charities.²¹⁴ One employment lawyer who is used to advising charity employers suggested that charities that work with protected groups in terms of their objects may sometimes be judged by higher standards in terms of discrimination law as it applies to them as employers compared to other employers:

[Tribunals] have different expectations, so, they would much more frown upon a charitable employer [that provides services to the disabled] that, say, discriminates against [their disabled employees]. I mean it's unlawful whoever does it, but I think they're much more held to a higher

²¹¹ See above at p 68.

²¹² Volunteers are not 'employees': see *X v Mid-Sussex Citizens Advice Bureau* [2012] UKSC 59, [2013] IRLR 146 and see further at p 77.

²¹³ Equality Act 2010, ss 39-52.

²¹⁴ Apart from the Equality Act 2010, an employee may seek to use art 14 ECHR. See e.g. *Eweida and Others v United Kingdom* [2013] ECHR 37.

expectation ... Say an anti-discrimination charity, they would definitely very much expect that (Interview 13).

The exceptions in the Equality Act must comply with European law and in particular the European Union Directives that deal with equality across the different protected characteristics. Domestically, in the earlier, separate pieces of legislation, the pattern was to provide both specific exceptions²¹⁵ and also for a general exception where there was a 'genuine occupational requirement' to be of a particular sex, or racial origin. This pattern is retained. The formula used in the Directives is typified by Article 4 of the Framework Directive (2000/78):

Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 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 requirement*, provided that its objective is legitimate and the requirement is proportionate.

This is supposedly implemented by Schedule 9 of the Equality Act 2010, which provides that it is not unlawful discrimination to require a person to have a particular protected characteristic if it can be shown that, having regard to the nature or context of the work it is 'an occupational requirement', and the application of the requirement is a proportionate means of achieving a legitimate aim. Examples given in the Explanatory Notes to the Act include an organisation for deaf people who might legitimately employ a deaf person who uses British Sign Language (BSL) to work as a counsellor to other deaf people whose first or preferred language is BSL, and a requirement for a counsellor working with victims of rape to be a woman. The second example is interesting, since it apparently assumes that all victims seeking help will be women, but, of course, this is not necessarily the case.

Because access to employment should never be unjustifiably restricted on grounds related to a protected characteristic, it is to be expected that the exceptions will be applied strictly. The exceptions have been especially problematic in relation to belief and sexual orientation. Article 4(2) of the Framework Directive provides that Member States may permit a difference of treatment based on a person's religion or belief:

... 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

²¹⁵ E.g. Sex Discrimination Act 1975, s 19, relating to ministers of religion; s 20 relating to midwives.

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 ...

In Schedule 9, paragraph 2 deals with employment 'for the purposes of an organised religion'. In such cases it is provided that if certain criteria are met it will not be unlawful to apply to employees or applicants any of the following:

- a requirement to be of a particular sex; a requirement not to be a transsexual person;
- a requirement not to be married or a civil partner; a requirement not to be married to, or the civil partner of, a person who has a living former spouse or civil partner;
- a requirement relating to circumstances in which a marriage or civil partnership came to an end; or,
- a requirement related to sexual orientation.

The qualifying criteria are that the employment is for the purposes of an organised religion, and the application of the requirement engages the compliance or non-conflict principle, and the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).²¹⁶ Application of a requirement engages the compliance principle if the requirement is applied so as to comply with the doctrines of the religion, while the application of a requirement engages the non-conflict principle if, because of the nature or context of the employment, the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

Paragraph 2 clearly permits exceptions such as an insistence that a Catholic priest must be an unmarried man, but because it is restricted to employment for the purposes of an organised religion it has been defended as being limited in scope. In a case which was brought under the legislation which pre-dated the Equality Act 2010, a challenge was mounted to a provision couched in similar terms, allowing discrimination based on sexual orientation. In *R (on the application of Amicus) v Secretary of State for Trade and Industry*, it was held that the relevant regulation²¹⁷ afforded an exception only in very limited circumstances.²¹⁸ The fact that it applied only to employment 'for the purposes of an organised religion', and not 'for the purposes of a religious organisation' was stated to be an important initial limitation. The other conditions were also very restrictive. The fact that the employer had to apply the requirement 'so as to comply with the doctrines of the religion' was to be read as an objective test: it had to be shown

²¹⁶ The provision about reasonable belief in the failure to meet the requirement does not apply to sex: Equality Act 2010, sch 9, para 2(8).

²¹⁷ Employment Equality Sexual Orientation Regulations 2003, SI 2003/1661, reg 7(3).

²¹⁸ [2004] IRLR 430 QBD [2004] EWHC 860 (Admin).

that employment of a person not meeting the requirement would be incompatible with the doctrines of the religion. Although the 'conflict' criterion was wider, it too was hemmed about by restrictive language. The conflict to be avoided was with religious convictions, which had to be 'strongly held' and they had to be the convictions of a 'significant number' of the religion's followers, which was held a very far from easy test to satisfy in practice.

Despite this judicial confirmation of its narrowness, in November 2009, the European Commission issued a Reasoned Opinion to the United Kingdom expressing its view that the exceptions to the principle of non-discrimination on the basis of sexual orientation for religious employers were broader than that permitted by the directive.²¹⁹ In the light of this, the Equality Bill contained a strict definition of 'purposes of organised religion' and the explanatory notes at the time suggested that it would not be permissible to require someone such as a church youth worker be heterosexual. That definition did not, however, make it to the statute book and the question remains as to how strictly the paragraph will be interpreted. The Explanatory Notes now suggest that the exception 'is unlikely to permit a requirement that a church youth worker who primarily organises sporting activities is celibate if he is gay, but it may apply if the youth worker mainly teaches Bible classes.'²²⁰ Whether such a distinction would find favour with the courts remains to be seen. An illustration of a possible approach is in *Reaney v Hereford Diocesan Board of Finance*.²²¹ Reaney acknowledged on his application form for a job as a youth worker with the diocese that he had been in a same-sex relationship until recently. An interview panel decided that he was the best candidate but his appointment was vetoed by the Bishop of Hereford, even though Reaney had undertaken to remain celibate for the time he was employed. In addressing the question of whether this would be an appointment for the purposes of an organised religion (Church of England) the Tribunal noted that the role was to represent the Diocese in youth work. The work could be said to be closely bound up with the Bishop as the Head of the Diocese and it did fall within that small number of posts outside of the clergy that are for the purposes of organised religion. Requiring Reaney to be celibate was a requirement that could be said to be in compliance with the doctrines of the religion, or to avoid conflicting with the strongly-held religious convictions of a significant number of the religion's followers. Given, however, that Reaney met the requirement (celibacy) it was not reasonable to refuse to employ him.

There is a further and more generally applicable exception for religion that is wider than that which applies for employment for the purposes of organised religion. Paragraph 3 provides that it is not unlawful, where the employer has an ethos based on religion or belief, to apply in relation to work a

²¹⁹ Employment equality rules: reasoned opinion to the UK, 2009, http://europa.eu/rapid/press-release_IP-09-1778_en.htm?locale=en

²²⁰ Explanatory Notes, para 793.

²²¹ 2007 ET/1602844/06 EOR 168.

requirement to be of a particular religion or belief if the employer shows that, having regard to that ethos and to the nature or context of the work it is an occupational requirement; the application of the requirement is a proportionate means of achieving a legitimate aim, and the person to whom the employer applies the requirement does not meet it (or there are reasonable grounds for not being satisfied that the person meets it). The employment does not have to be for the purpose of an organised religion, there just has to be an ethos based on religion. The scope of this is open to argument and was the subject of protracted debate as the Bill went through. An illustration under earlier legislation is the Employment Tribunal decision in *Sheridan v Prospects* and *Hender v Prospects*.²²² A Christian charity set up to assist adults with learning difficulties introduced a recruitment policy requiring that posts, except for some administrative jobs, be filled by practising Christians. Existing non-Christian employees were told that they could keep their jobs but would not be promoted. Two employees resigned and claimed both unfair dismissal and religious discrimination. The Employment Tribunal held that the recruitment policy was discriminatory. It was accepted that the jobs had a religious element (it was argued that staff could be required to provide spiritual support to beneficiaries of the charity), but this came nowhere near showing that being a Christian was a genuine occupational requirement.

Volunteers

Charities rely heavily on volunteers for all aspects of their operations, including their governance by unpaid trustees. In 2012, 45% of people surveyed in the Cabinet Office Community Life survey reported that they volunteered formally through a group or an organisation at least once in the previous year, with 30% volunteering formally at least once a month.²²³ Some volunteers may give up an hour or two occasionally to help with fund-raising, or to participate in special events. Others, however, will devote many hours on a regular basis to working in charity shops, providing advice, delivering services, dealing with finances, running IT systems or any of the other myriad functions needed to make the charity operate successfully and to serve its beneficiaries. Many of these volunteers will have significant responsibilities. To what extent are volunteers protected by law and in particular, in the context of this study, by the Equality Act 2010? A charity might refuse to accept a volunteer because they are, for example, disabled, or gay.²²⁴ A charity might dispense with the services of a volunteer because she is pregnant, or because a service user has complained that he does not want to be visited by someone from an minority ethnic group. This is clear discrimination - does the volunteer have recourse to the

²²² [2008] ET/2901366/06 and [2008] ET/2902090/06.

²²³ Cabinet Office, 'Community Life Survey: Q2 2012-13 (August-October 2012) Statistical Bulletin' (February 2013).

²²⁴ See e.g. the allegation in *Newham Citizens Advice Bureau v Murray* [2003] ICR 643 (EAT) that a volunteer was refused on grounds of mental health.

Equality Act?²²⁵ The answer for *unpaid* volunteers, following the decision of the Supreme Court in *X v Mid-Sussex Citizens Advice Bureau*²²⁶ would appear to be ‘no’ unless it can be argued that a volunteer is a service user, or possibly, even, a member of an association.²²⁷

The lack of protection for volunteers had been criticised by the House of Commons Work and Pensions Committee in the run up to the passing of the Equality Act 2010,²²⁸ and it recommended that the Government clarify the position of volunteers in terms of protection from discrimination in the Equality Act.²²⁹ An attempt to extend the protection against discrimination to ‘unremunerated work that is comparable to employment’ was unsuccessful.²³⁰ Whilst Vera Baird, then Solicitor General, accepted that volunteers should be treated with respect and care, she did not believe that the legislation should cover volunteers in the same way as employees, partly due to their diversity. There was no clear evidence, she said, of ‘systematic discrimination’.

Unless otherwise stated, it is assumed in the following section that a volunteer is someone who offers their services without being legally obliged to do so, and is not remunerated except for actual out of pocket expenses.

Employment protection rights, including protection from discrimination, are dependent on the status of the potential claimant. However, the necessary status differs according to the right sought to be exercised. In order to complain of unfair dismissal, for example, the claimant must be an ‘employee’ under a contract of employment.²³¹ The legislative definition of an employee is fleshed out by volumes of case law but, in summary, in order to be an employee and claim the widest range of employment rights, a claimant must show, at the very least, mutual legally binding obligations on both parties which will

²²⁵ We do not consider here how the law might apply in relation to health and safety, criminal record checks, social security payments, etc. See, further, e.g. Debra Morris, ‘Volunteering - The Long Arm of the Law’ (1999) 4(4) *International Journal of Nonprofit and Voluntary Sector Marketing* 320.

²²⁶ [2012] UKSC 59, [2013] IRLR 146.

²²⁷ Tom Royston, ‘Treating Volunteers as Members of an Association and the Implications for English Discrimination Law’ (2012) 12(1) *International Journal of Discrimination Law* 5, and see further below.

²²⁸ Work and Pensions Committee, *The Equality Bill: How disability equality fits within a single Equality Act* (HC 2008-9,158-I) paras 134-7.

²²⁹ *ibid* para 137.

²³⁰ Equality Bill Deb, 23 June 2009, col 440. The extension was proposed by Lynne Featherstone, Liberal Democrat MP who became Minister for Equalities.

²³¹ Employment Rights Act 1996, ss 230(1)(2).

include a promise to work in return for a wage.²³² On this basis, volunteers are not entitled to the protections that apply to *employees*, as they do not satisfy the criterion of paid work. Other rights, however, are available more generally and apply to a wider class than ‘employees’. The Working Time Regulations 1998,²³³ for example, which govern hours and holidays, apply to ‘workers’, a category which includes both employees and also *some* self-employed people (those whose work is dependent almost entirely on one employer).²³⁴ Nevertheless, a worker must also work under a contract that involves mutual obligations, including consideration (payment) for the work done. It is possible that a volunteer could be construed as a worker, but this would depend very much on the precise terms of the agreement that was entered into,²³⁵ and in particular whether there were obligations (as opposed to mere ‘expectations’) on both parties, including remuneration.²³⁶

When it comes to protection against discrimination, the Equality Act 2010 has its own definitions of those who come within its scope. As far as protection in employment is concerned, section 83 provides that employment means ‘employment under a contract of employment, a contract of apprenticeship or a contract personally to do work ...’. Thus, a volunteer who suffers discrimination by being declined, ‘dismissed’ or otherwise penalised must bring him or herself within section 83. It was a predecessor to this provision, together with the relevant European Directive, that was the focus of *X v Mid-Sussex CAB*.

X was an unpaid volunteer advisor at the Citizens Advice Bureau (CAB). She entered a ‘volunteer agreement’ which was described as *not* being a contract of employment and *not* being legally binding. She undertook a nine month training period and then provided advice to service users. X agreed to attend the CAB on certain days but was frequently absent. No complaint was made about this and the CAB did not seek to control her hours. X was eventually told her services were no longer required and she alleged that her ‘dismissal’ was due to her disability, contrary to the Disability Discrimination Act 1995. The preliminary question for the Employment Tribunal was whether it had jurisdiction to hear her claim at all: was she within the scope of the Act?²³⁷ The Tribunal found that there was no contract between X and the CAB and, therefore, she was not ‘in employment’. For good measure, the Tribunal

²³² See e.g. *Carmichael v National Power plc* [1999] ICR 1226 (HL). Payment alone is not sufficient: there must be an obligation to accept work offered. See *Breakell v Shropshire Army Cadet Force* (EAT) unreported, [2011] UKEAT 0372_10_1104.

²³³ Working Time Regulations 1998, SI 1998/1833.

²³⁴ E.g. *James v Redcats (Brands) Ltd* [2007] IRLR 296 (EAT).

²³⁵ E.g. whether there was a *requirement* to work certain hours, whether payment over and above actual expenses was paid.

²³⁶ C.f. *South East Sheffield Citizens Advice Bureau v Grayson* [2004] IRLR 353 (EAT); payment will not necessarily establish a contract: *Breakell v Shropshire Army Cadet Force* (EAT) unreported, [2011] UKEAT 0372_10_1104.

²³⁷ Disability Discrimination Act 1995, s 68. The section was similar though not identical to Equality Act 2010, s 83. Arguably, the new provision is slightly wider, since it does not contain the phrase ‘for the purpose of’ simply referring to arrangements made for deciding to whom to offer employment.

also found that X was not undertaking ‘vocational training’²³⁸ nor were the volunteering arrangements made ‘for the purpose of determining who should be offered employment’.²³⁹ When X appealed to the EAT, she turned to European law and argued that a volunteer fell within the meaning of ‘occupation’ in Council Directive 2000/78 which establishes ‘a general framework for equal treatment in employment and occupation’.²⁴⁰ Article 3 of the Directive defines its scope as covering, amongst other things, ‘conditions for access to employment, to self-employment or to occupation ...’.²⁴¹ The EAT held that ‘occupation’ does not include unpaid work. The Court of Appeal upheld that decision. The Equality and Human Rights Commission was, however, allowed to put forward the argument that a volunteer is capable of falling with the EU concept of ‘worker’ and that a voluntary post could be a form of vocational training which is also included in Article 3 of the Directive. The Court rejected that argument, holding that vocational training must have as its purpose training for a job and that was not the purpose of a volunteer adviser.²⁴² Elias LJ observed that ‘workers’ in European Law were persons who receive remuneration for their services and ‘occupation’ was not intended to cover non-remunerated work.

In the Supreme Court, X argued, again, that she was covered by the Framework Directive by virtue of her being in an ‘occupation’ and that the domestic legislation should be construed accordingly. Having considered in detail both the Directive and its legislative history, the Supreme Court held that the Directive did not impose an obligation on Member States to outlaw discrimination as against volunteers. X and the EHRC had conceded that, in any event, not all volunteers would be covered and the Supreme Court observed that attempting to draw lines between those who were covered and those who were not would lead to uncertainty. According to the Supreme Court, ‘occupation’ has the meaning given to it in *Hashwani v Jivraj*:

the expression ‘access ... to self-employment or to occupation’ means what it says and is concerned with preventing discrimination from qualifying or setting up as a solicitor, plumber, greengrocer or arbitrator.²⁴³

X was therefore unable to claim the protection of the equality legislation via the employment provisions.

Of course, X’s case was decided on its particular facts, including the express exclusion of a legally binding agreement, the lack of any remuneration and the absence of any ‘mutual obligations’. Not all volunteers

²³⁸ See now Equality Act 2010, s 56(6).

²³⁹ See now *ibid* s 39(1).

²⁴⁰ Directive 200/78, OJ 200, L303/16.

²⁴¹ *ibid* art 3.

²⁴² Or at least, not in this case.

²⁴³ [2011] UKSC 40 [49] (Lord Clarke).

work under identical arrangements. Does this mean that different types of volunteers might be covered by the Equality Act 2010? In some cases, there might, in fact, be ‘vocational training’ or ‘work experience’ as defined in the Equality Act 2010.²⁴⁴ The Supreme Court observed that volunteers:

come in many forms, including the cheerful guide at the London Olympics, the charity shop attendant, the intern hoping to learn and impress and the present appellant who provided specialist legal services. The intern might well fall within article 3(1)(b) [of Directive 2000/78/EC]
...²⁴⁵

Article 3(1)(b) applies to those seeking access to ‘vocational training’ and ‘practical work experience’. Thus, a charity who is giving work experience to someone who hopes to go on to be employed by the organisation *might* indirectly (via the Directive, and assuming a purposive interpretation of the domestic legislation) be protected against discrimination even though they are unpaid. But this is not the typical volunteering arrangement.

It seems that volunteers will find no redress for unlawful discrimination using the employment-related provisions of the Equality Act 2010. But suggestions have been put forward that other parts of the Act might assist. One such suggestion is via the goods and services provisions.²⁴⁶ The argument goes thus: volunteers who are given the opportunity to work for a charity are ‘service users’ and like any other service user they are protected under Part 3 of the Act, in which section 29 provides

(1) A person (a ‘service-provider’) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

If an organisation does provide ‘a service’ to volunteers it must not discriminate and if it does an aggrieved individual will have a remedy via the County Court rather than in the Employment Tribunal. It is not immediately apparent that volunteers are in reality, and using the term as usually understood, ‘service users’. Nevertheless, it is possible to imagine situations where this would be possible. As

²⁴⁴ Equality Act 2010, s 56. See under previous legislation, *Treasury Solicitors Department v Cheng* [2007] IRLR 386 (EAT): ten day, unpaid vacation placement scheme fell within ‘vocational training’ in Race Relations Act 1976, s 13.

²⁴⁵ [2012] UKSC 59, [2013] IRLR 146 [20] (Lord Mance).

²⁴⁶ See e.g. Declan O’Dempsey and Olivia-Faith Dobbie, ‘Treated equally: Protecting all volunteers from discrimination’ (2013) 157(5) *Solicitors Journal* 12. See also the EHRC Guidance: ‘Your rights to equality from voluntary and community sector organisations (including charities and religion or belief organisations)’ (2011) 22.

Royston²⁴⁷ notes, some organisations have as their object the provision of services to volunteers and he cites the example of the objects of the Free Representation Unit, which are:

- (1) To relieve poverty by providing legal advice and representation before tribunals and courts in the United Kingdom for those who cannot afford such advice or representation; and,
- (2) To assist in the education and training of law students, pupils, trainees, junior barristers and solicitors through the delivery of (1) above.²⁴⁸

Other organisations might use volunteers who are themselves the target of the charitable objective as where, for example, a charity for people with a disability uses its disabled 'clients' as volunteer workers thereby providing opportunities for the volunteers to increase their own skills. While it might be possible to argue in such cases that volunteers are service users, it seems more artificial to do so in those cases where a volunteer is giving up their time, for free, in order to advance the objectives of the charity. Even where training is provided, that would normally be incidental to the duties of the volunteer. Admittedly, if paid employment is hard to find volunteers might be glad of the chance to boost their CVs by a spot of unpaid work experience but there remains the problem of showing that the services offered specifically to volunteers are offered 'to the public' as required by section 29. The point is as yet undecided as it does not seem to have been argued in any of the reported 'volunteer cases' to date.

Another possibility which Royston puts forward is to use the provisions on associations, found in Part 7 of the Act, arguing that volunteers may be 'members' of the association.²⁴⁹ He sees this as a more convincing argument, likening volunteers to those who join a political party and who give up time to fund raise, canvass, deliver leaflets and so on. In order to qualify as an 'association' the organisation must have at least 25 members and admission must be regulated by its rules and by a process of selection.²⁵⁰ Royston observes that this would exempt smaller, informal organisations and would not include the type of volunteering where everyone is invited along to participate in an event such a picking up litter in the local park.

²⁴⁷ Tom Royston, 'Treating Volunteers as Members of an Association and the Implications for English Discrimination Law' (2012) 12(1) *International Journal of Discrimination Law* 5.

²⁴⁸ From the Charity Commission Register of charities: <http://www.charitycommission.gov.uk/find-charities/> (accessed 22 July 2013).

²⁴⁹ Tom Royston, 'Treating Volunteers as Members of an Association and the Implications for English Discrimination Law' (2012) 12(1) *International Journal of Discrimination Law* 5.

²⁵⁰ Equality Act 2010, s 107.

Leaving aside speculation as to whether volunteers might be included within the ambit of the Equality Act by virtue of being 'service users' or 'members', the most that can be said about the present state of the law is that the 'typical' *unpaid* volunteer is probably not protected from discrimination. This is odd and does not, of course, answer the question of whether they should be protected. Lord Mance said, in *X v Mid-Sussex*:

Any responsible organisation aims to combat discrimination on the grounds of disability - or indeed any other characteristic protected by the Equality Act 2010 - and will do so for the benefit of persons serving or wishing to serve as volunteers in the organisation no less than anyone else.²⁵¹

However, he then went on to say that the case was not about the moral imperative not to discriminate, but about whether the *law* as it is drafted, applies. The extension of protection to volunteers is opposed by various sections of the voluntary sector who argue that it would have cost implications and would alter the nature of volunteering.²⁵² Before the decision of the Supreme Court was handed down, one participant (representing church charities) commented on its potential implications:

Well, if that goes against Mid Sussex CAB, never mind the churches, but the voluntary sector in general is going to be like having an elephant die in the living room, you know? You'll never be able to have a volunteer again for fear that you suddenly employ them (Interview 12).

Another large charity also commented on the potential consequences of the decision, if it had been decided in favour of the volunteer in that case:

There was a huge amount of concern about what that would mean for the organisation in terms of the financial kind of resources. I think we're now comfortable with our position in the sense that volunteers are not employees (Interview 26).

After the decision had been handed down in *X*, a lawyer who acted for the CAB claimed that charities would welcome the judgment because:

²⁵¹ [2012] UKSC 59, [2013] IRLR 146 [1].

²⁵² See e.g. Volunteering England, 'Volunteer Rights Inquiry. Recommendations and call to action' (2011) 2: 'Despite many volunteers having failed in their attempts to invoke existing equality and employment legislation, several of the volunteer involving organisations and volunteers we spoke to had strong concerns about introducing additional regulation and/or legislation. It was felt that this may present more barriers to volunteering and prescribe universal action that is not proportionate to the needs of a diverse sector.'

Volunteers do not need legal protection ... Employees and workers need to be protected against discrimination because they are reliant on earning a wage. But if a volunteer is discriminated against, they can leave and volunteer for another charity.²⁵³

The idea that to discriminate against a volunteer is not as reprehensible as discrimination against an employee is bizarre. If there is a moral imperative not to discriminate, it must, surely, cover those who are, altruistically, giving up their time for the good of the organisation. Charities are of course concerned about the additional bureaucracy and costs of extending protection to volunteers, particularly in relation to the 'reasonable adjustments' that may be required in relation to volunteers with disabilities, but in deciding what is reasonable, the court will take into consideration factors such as the resources available to make those adjustments.

Positive Action

Apart from the various specific exceptions considered above, there is a further mechanism that charities may seek to use if they wish to focus their activities on particular groups. Broadly speaking, positive action may come into play where a group identified by one or more of the protected characteristics (for example Muslim women, Afro-Caribbean schoolboys) are perceived to be socially or economically disadvantaged, or to be subject to systemic discrimination. Such disadvantage may include, but is not limited to, poverty and social exclusion. The Equality Act 2010 provides that if it is reasonably thought that persons sharing a protected characteristic suffer a disadvantage connected to the characteristic, or that persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or that participation in an activity by persons who share a protected characteristic is disproportionately low, then action may be taken which is a proportionate means of achieving one or more of the aims of enabling or encouraging persons with the protected characteristic to overcome or minimise that disadvantage, meeting those needs, or enabling or encouraging persons who share the protected characteristic to participate in that activity.²⁵⁴

While positive action is a valuable tool in the advancement of equality, it has limits. First, it must be distinguished from positive discrimination, which remains unlawful. If a university as part of its widening participation programme noted that participation from local Muslim students was very low and

²⁵³ 'Volunteers do not have protection from discrimination in law, Supreme Court rules' Third Sector Online, 12 December 2012..

²⁵⁴ Equality Act 2010, s 158.

therefore decided that it would adopt a 'quota' system for admissions so that, for example, 10% of all students would be drawn from the local Muslim community even if the qualifications they obtained did not meet entry requirements, that would be positive discrimination, not positive action and would be unlawful. If, on the other hand, the university had an out-reach programme which involved university representatives visiting local schools and offering mentoring for pupils, with a view to increasing participation from the Muslim community, that would, probably, be considered a proportionate positive action. Positive action can involve, among a range of activities, targeting resources on identified groups, providing specially designed training or other opportunities or the provision of special incentives for that group. The provision is within Part 11 of the Act, entitled 'Advancement of Equality' and it is in that sense that the purpose and nature of positive action should be seen: it is a tool to help to achieve equality but it is not a 'get out' clause for charities.²⁵⁵

It will be lawful to adopt positive action measures only if the criteria laid down in the Act are met. First it must be 'reasonably thought' that one of the conditions applies, such as disadvantage or disproportionately low participation. It can only be reasonably thought if there is some basis for the belief. It is unlikely to require detailed statistical evidence, but there must be some verifiable, factual basis and, importantly, it must be current. This is crucial as far as charities are concerned as it is apparent that positive action is time-limited. While it is permissible to take positive action to redress a disadvantage, once the disadvantage has been redressed, positive action is no longer needed and differential treatment would become unlawful. For example, a charity may have been set up many years ago to support women seeking to gain access to medical training. At the time, let us assume, women were disproportionately under-represented in medical schools. The charity has provided bursaries and other assistance to female students. By 2013, it becomes clear that women are no longer under-represented but are now, in fact, the majority.²⁵⁶ The charity can no longer claim that positive action is needed (nor indeed, would section 193 assist, as it would not be compensating for disadvantage and there would no longer be a legitimate aim). On the other hand, it does appear that a significantly lower proportion of students in medical schools are from the lowest socio-economic groups.²⁵⁷ In other words, under-representation is no longer sex-based but socio-economic. Positive action could thus be targeted at these groups - which would necessitate a change of objects for the charity. Any charity using positive action is thus well advised to ensure that the original need or disadvantage still exists. Moreover, if after many years of engaging in positive action, there appears to be no change, it may be that the action would be judged to have failed and would - again - not be seen as proportionate. In this context 'proportionate' will have the same meaning as that discussed above, being dependent on context.²⁵⁸ For example, the provision of full fees scholarships to particular protected groups who are under-

²⁵⁵ An example from higher education, which is discussed below in the higher education case study, is the Athena SWAN scheme: <http://www.athenaswan.org.uk/content/history-and-principles>

²⁵⁶ Mary Ann Elston, *Women and Medicine: the future* (Royal College of Physicians 2009).

²⁵⁷ BMA, 'Equality and Diversity in UK Medical Schools' (2009).

²⁵⁸ See above at p 57.

represented in higher education will only be proportionate as positive action if that is what is required so as to overcome the disadvantage. One university representative stated:

But it's still quite a fragile basis for saying that they need positive action in terms of a scholarship, because again, our legal services office are very cautious on this and say, you know, they don't think that a full fees and tuition scholarship is proportionate unless you can prove that it's lack of finance that inhibits the students from applying here (Interview 23).

Whilst many charities would clearly be able to justify their restricted provision as positive action, the research revealed that, for the majority, this was not an issue that had been positively addressed to date:

So, I don't think we have done or I'm not aware of any sort of specific exercising going on [to determine if, in our service provision,] are we compliant with the Equality Act (Interview 45).

Well, I wouldn't say we've had an exercise internally to do that. I think we've been arrogant and believed that, you know, the reason we exist is because there's always been that disparity (Interview 38).

The Public Sector Equality Duty

An important, though currently controversial,²⁵⁹ aspect of 'the advancement of equality' in the Equality Act 2010 is the Public Sector Equality Duty (PSED). It has been seen earlier that this applies to specified 'public authorities'²⁶⁰ and also to private organisations (including charities) who are carrying out 'public functions'.²⁶¹

All such organisations are required to comply with the 'general' public sector duty set out in section 149 of the 2010 Act. This means that in the exercise of their functions they must have 'due regard' to three aims:

²⁵⁹ In May 2012, the Government announced a consultation on the operation of the duty as part of the 'red tape' challenge:
<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120515/wmstext/120515m0001.htm#12051577000007>

²⁶⁰ See Equality Act 2010, sch 19. The limited exceptions to the general duty are found in sch 18.

²⁶¹ Equality Act 2010, s 149(2). See above at p 39.

- the need to eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
- to advance equality of opportunity between people who share a relevant protected characteristic and those who do not; and,
- to foster good relations between people who share a relevant protected characteristic and those who do not.²⁶²

The general duty is supported by a number of specific duties. There are significant differences in the specific duties that apply in England, Wales and Scotland, with the Welsh and Scottish duties being more detailed and extensive.²⁶³ Local authorities in England that are listed in the relevant Regulations are required to publish annual information to demonstrate compliance with the general equality duty.²⁶⁴ The information must include, in particular, information relating to people who share a protected characteristic who (a) are its employees and (b) people affected by its policies and practices.²⁶⁵ In addition, each listed public authority must prepare and publish one or more objectives that it thinks it needs to achieve to further any of the aims of the general equality duty. This must be done at least every four years. The objectives must be specific and measurable. Both the equality information and the equality objectives must be published in a manner that is accessible to the public.

In pursuit of the advancement of equality (the second aim of the general duty) the Act provides that it involves, in particular, having due regard to the need to:

- remove or minimise disadvantages suffered by people due to their protected characteristics;
- take steps to meet the needs of people with certain protected characteristics where these are different from the needs of other people; and,
- encourage people with certain protected characteristics to participate in public life or in other activities where their participation is disproportionately low.²⁶⁶

It is also provided that steps involved in meeting the different needs of disabled persons includes taking steps to take account of disabled people's disabilities.²⁶⁷ Fostering good relations involves tackling

²⁶² *ibid* s 149. The relevant characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation: s 149(7). Public authorities are however required to have due regard to the need to eliminate unlawful discrimination in employment against someone because of their marriage or civil partnership status.

²⁶³ See below at p 119 et seq.

²⁶⁴ Equality Act 2010 (Specific Duties) Regulations 2011, SI 2011/2260; Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, 2011/1064 (W 155); Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, SSI 2012/162.

²⁶⁵ Public authorities with fewer than 150 employees are exempt from the requirement to publish information on their employees. Reg 2(5).

²⁶⁶ Equality Act 2010, s 149(3).

²⁶⁷ *ibid* s 149 (4).

prejudice and promoting understanding between people from different groups.²⁶⁸ Finally, it is provided that compliance with the general equality duty may involve treating some people more favourably than others but that does not permit conduct which would otherwise be prohibited.²⁶⁹ Because the general equality duty requires organisations to have ‘due regard’ to the listed aims, they must be proactive in pursuing equality as opposed simply to reacting to complaints or challenges. Organisations must actively demonstrate that equality is an integral part of their policies and procedures and that all decisions are equality compliant.

Statutory enforcement of the PSED lies with the Equality and Human Rights Commission (EHRC) since failure to comply with the duty does not confer on any person a cause of action at private law.²⁷⁰ The powers of the EHRC include section 31 of the Equality Act 2006, under which it can assess whether an authority has complied with the equality duty and in a case of failure to meet the duty the Commission may issue a notice requiring the public authority to comply with its duty and to provide within 28 days written information of steps taken or proposed. It may also apply to court for an order requiring the public authority to comply with the notice.²⁷¹ Apart from statutory enforcement, however, it is possible for either the EHRC or a party or parties with sufficient interest²⁷² in the matter to apply to the High Court for judicial review in order that a decision or policy may be subject to judicial scrutiny in order to decide whether the duty has been breached. It is this route, rather than the statutory powers, that has been used on a number of occasions and this has allowed the courts to ‘flesh out’ what the duty entails and in particular what the authority, or other body exercising public functions, must do in order to be found to have had ‘due regard’ to its obligations. The PSED is not a novel concept: there were previously separate duties relating to race, sex and disability. Although the Equality Act 2010 has extended and standardised the duty across the relevant characteristics, earlier case law on the duties will be relevant in assessing how the equality duty will be applied.

Impact

The PSED is important for charities in a number of respects. First, some charitable bodies will themselves be subject to the duty, as is the case with universities.²⁷³ Second, if the charity is exercising a public function on behalf of a public authority, it too must have due regard to the duty regardless of the fact

²⁶⁸ *ibid* s 149 (5).

²⁶⁹ *ibid* s 149(6).

²⁷⁰ *ibid* s 156.

²⁷¹ Equality Act 2006, 32.

²⁷² Senior Courts Act 1981, s 31(3).

²⁷³ Equality Act 2010, sch 19.

that the duty is non-delegable (above) since section 149(2) provides that 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 duty. This would mean, at the least, additional administrative and other costs for the charity. There is also, however, a positive aspect to the PSED for charities since they may use the mechanism of judicial review to challenge decisions made by public authorities in relation, for example, to adverse funding decisions. An example is found in *R (Kaur & Shah) v London Borough of Ealing*²⁷⁴ albeit in relation to the previous duty under the race relations legislation. This is discussed in greater detail in Section VI in the case study on challenges to public sector spending cuts.

The strength of the public sector duty is that, as Dyson LJ pointed out in *Baker*, the obligation goes well beyond merely avoiding formal non-discrimination:

the promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination.²⁷⁵

It will be seen in the challenges to public sector cuts case study that this has proved to be a powerful tool for charities.

The next Section examines the complex interrelation between charity law and equality law.

²⁷⁴ [2008] EWHC 2062 (Admin).

²⁷⁵ *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2009] PTSR 809 [30].

V The Legal Context: Interrelation between Charity and Equality Law

This study has found that the particular problems that arise for charities as a result of the Equality Act 2010 largely focus around the intersection between charity law and equality law. The two areas of law do not always naturally fit together in their application. The application of the public benefit rules to a charity's purposes, for example, when considered alongside the separate question of whether that charity can fit its activities within one of the exceptions in equality law²⁷⁶ can cause significant confusion.

The Trigger for Consideration of the Interrelation between Charity and Equality Law

Before turning to the thorny issue of the crossover between the requirement to satisfy the public benefit test and the question of whether a charity can bring itself within one of the exceptions in the Equality Act, how are these crossover issues likely to come to light? Whilst complaints against charities for breaching the principles laid down in the Equality Act may be made by individuals alleging unlawful discrimination, or brought by interested parties under the Public Sector Equality Duty (PSED), it is most likely that the specific tensions between charity law and equality law will be picked up by the charity regulator. The Charity Commission and its Scottish equivalent OSCR have wide powers in relation to existing registered charities. For its part, OSCR has already stated that it will be taking a rigorous approach when considering whether charities comply with equality law, and whether they meet the requirement to provide public benefit, developing a more proactive approach to its regulation of charities' compliance with the requirements of equality legislation²⁷⁷ and the Charity Commission is expected to follow suit.²⁷⁸

As a result of the Commission's financial resources being severely cut - a 33% budget cut over the current spending period,²⁷⁹ leading to a loss of around 140 staff - it is impractical to expect that this

²⁷⁶ See above at p 49 et seq.

²⁷⁷ OSCR, 'Consultation on Equality Strategy 2012-15' (2012). The Action Plan attached to the strategy includes 'assess all applications for charitable status or consent for changes to purpose to identify possible unlawful discrimination'.

²⁷⁸ Currently, the Charity Commission's published equality strategy is very much focused on the Charity Commission's own behaviour in the context of equality and diversity; See Charity Commission, 'Equality and Diversity Strategy 2012' (2012).

²⁷⁹ In June 2013, it was announced that the Charity Commission would be subject to a further 6% budget cut in 2015/16; HM Treasury, *Spending Round 2013* (Cm 8639, 2013) 55.

regulation will be by way of the Commission's monitoring of charities' annual reports, which are required to be submitted and which must report on public benefit.²⁸⁰ Lawyers acknowledged this:

There's a lot of charities on there already that have objects that are potentially breaching the Act. And I don't know what on earth the Charity Commission with its current resource constraints is going to do ...I get the impression that currently with the Charity Commission's restrictions on its funding, and all the rest, unless somebody comes to them with, 'I think this charity is discriminating,' I'm not sure they're really doing anything about it (Interview 6).

But there is an enormous range of pieces of legislation that affect charities and I don't think the Commission is in a position where every time there is a change in the law they can completely review 200,000 charities. It's not going to happen and that's the reality of it (Interview 16).

The Charity Commission's new strategic plan²⁸¹ has its activity largely focused on proportionality and risk and:

Compared to the other risk factors, I think it would be pretty low down compared to say serious fraud, compared to say, abuse of beneficiaries, compared to say, money laundering or use of moneys to support terrorism, you know? It feels quantifiably a lot lower down the pecking order for investigation (Interview 16).

It is most likely that organisations applying for registration in the future, or charities seeking to change their objects (like *Catholic Care*) will be the ones that will need to prove *both* their public benefit *and* their Equality Act credentials:

I think one of the times it may come is on the registration of new charities, because whilst I don't think the Charity Commission will trawl through to the register to get rid of the old ones or question the old ones, they have to look at new ones (Interview 6).

So, I reckon from what I've seen, and I do work with quite a wide-range of small to medium charities, I reckon from what I've seen that in practice, it's probably really only the registration stage that this has actually come up as a big issue (Interview 2).

I imagine that as the Commission have matters come before them, that's going to be on the checklist and so I think they are probably going to start up picking it up (Interview 16).

²⁸⁰ Charities Act 2011, s 162.

²⁸¹ Charity Commission, 'Strategic Plan 2012-2015' (2012).

For new organisations applying for registration, clearly this issue will come up for examination. Part of the registration process requires the Charity Commission to look at a charity's objects in order to assess its public benefit. A class of beneficiaries limited to a protected characteristic would clearly sound alarm bells at this stage and would require further explanation (by reference to the lawful exceptions) by the body seeking registration.

Public Benefit and Equality Law

The relationship between the requirement to provide public benefit and the proscribed forms of discrimination would seem on the face of it to be straightforward: how can something be for the public benefit if it is discriminatory? But, while it is trite to observe that considerable public harm is caused by discrimination and that there are clear benefits to promoting diversity in society, it is also the case that focusing resources on specific groups may also be of benefit and many charities work in this way:

Because of where the organisation started from, we've always targeted, you know, marginalised, disadvantaged, vulnerable communities, certain ethnic groups (Interview 38).

Certainly, the *elimination* of inequalities has been held to be a charitable purpose: the promotion of equality of women with men was recognised as a charitable purpose in 1977,²⁸² and, in 1983, the Charity Commission determined that 'promoting good race relations, endeavouring to eliminate discrimination on the grounds of race and encouraging equality of opportunity between persons of different racial groups' were good charitable purposes.²⁸³ The promotion of religious or racial harmony or equality and diversity are now included in the statutory list of charitable purposes in the Charities Act 2011,²⁸⁴ and the Charity Commission illustrates this charitable purpose with charities promoting equality and diversity by the elimination of discrimination on the grounds of age, sex or sexual orientation.²⁸⁵ Previously, the Charity Commission had already recognised that to promote equality and diversity for

²⁸² *Halpin v Seear* (unreported) 27 February 1976, Whitford J; Also see the discussion of the Women's Service Trust in [1977] Ch Com Rep 14-15 (paras 34-36).

²⁸³ [1983] Ch Com Rep 9-11 (paras 15-20). This was despite the earlier decision in *Re Strakosch* [1949] 1 Ch 529 (Ch) where it was held that 'appeasing racial feeling within the community' was a political purpose.

²⁸⁴ Charities Act 2011, s 3(1)(h).

²⁸⁵ Charity Commission, *The advancement of human rights*,

http://www.charitycommission.gov.uk/Charity_requirements_guidance/charity_essentials/public_benefit/Advancing_human_rights.aspx

the benefit of the public was a charitable purpose,²⁸⁶ noting that ‘there is a common understanding of enlightened opinion that promoting diversity and equality is for the benefit of the public’.²⁸⁷

Nevertheless, while some charities seek to advance equality, others have always discriminated between classes of potential beneficiaries, in accordance with their stated objects. Many charities view targeting their service provision as advancing overall equality in society, by redressing inequity. Indeed, discrimination appears to be a feature of many charities that restrict their beneficiaries to those sharing a particular religion, nationality, place of birth etc. It may be necessary to restrict benefits to persons of a particular religion if the object of the charity is the advancement of religion, or to restrict benefits to persons residing in a particular place if the object of the charity is to improve conditions for local residents. It is wise for charities to apply their limited resources in a focused manner but often these restrictions are not justified by any reference to the *public* benefit which the charities’ objects are intended to achieve. For example, where the object of the charity is the advancement of education, it is difficult to see the public benefit of restricting beneficiaries to those of a particular nationality. On the contrary, this appears simply to be discrimination on grounds of race. It could even be suggested that public benefit cannot be achieved through discrimination. Arguably, conferral of charitable status should bring with it the responsibility to ensure equal opportunities for beneficiaries, volunteers and trustees, denial of which is contrary to the public benefit principle.

As one lawyer put it:

There’s an overlap: something which is contrary to the Equality Act, cannot be for the public benefit, and all charities have to be for the public benefit apart from anything else. So there is a...it sort of runs through the whole question of charitable status and if it’s not overtly referred to, it has to be implicitly referred to because it’s fundamental to one of the main conditions of being a charity (Interview 43).

A charity set up to support *women* suffering from domestic violence and who will not assist male victims is, no matter how noble its intentions, discriminating against men because of their sex. An organisation that confines its activities to, say, the local *Chinese* community may do much that is valuable, but if it turns away people of Bangladeshi origin it is discriminating on grounds of race. The focus on the deserving or needy is the *raison d’être* of many charities and, therefore, the scope of permissible exceptions to the general rule requiring equal treatment is crucial. Particular problems may arise where the charity seeks to discriminate, not in *favour* of a group with a particular need, but *against* a group

²⁸⁶ Charity Commission, ‘Promotion of Equality and Diversity for the Benefit of the Public’ (2003).

²⁸⁷ *ibid* para 6.

who are disapproved of. A charity established for the purpose of providing counselling to gay teenagers, because of their specific vulnerability to bullying at school may be viewed differently from one set up to counsel couples having relationship difficulties but which turns away same-sex couples because that conflicts with the religious convictions of the organisation's members.

The charity law reform process that led up to the passing of the Charities Act 2006, with its strong focus on the public benefit test to be satisfied by charities, provided an opportunity for Government to send a strong message on equality. However, whilst arguments linking public benefit and lack of discrimination were put forward, they were not accepted.²⁸⁸ One response from the Home Office was that public benefit should be judged on the results of the work that a charity does to meet the needs of its service-users or beneficiaries²⁸⁹ and that the policies and practices a charity adopts to meet those needs are not reasonable criteria for judging public benefit. This would suggest that a charity can provide public benefit overall by, say, helping those who are poor, even though it intentionally limits its benefits to men for no reason other than sexism on the part of the trustees. This seems anomalous and would almost certainly be unlawful under the Equality Act.

Furthermore, to confer the benefits of charitable status (including the fiscal benefits) upon a body that does discriminate must be considered in the light of the Human Rights Act 1998 and the European Convention on Human Rights (ECHR). The Equality and Human Rights Commission made the point in its evidence to the legislative scrutiny of the Equality Bill by the Joint Committee on Human Rights that:

Conferment of 'charitable status', with its attendant tax and other benefits, is a public function. It is exercised, in England and Wales, by the Charity Commission... A 'public benefit' must be defined compatibly with section 3 HRA: in other words, an ostensibly charitable object cannot be regarded as 'charitable' unless it is compatible with ECHR standards. Thus, a charitable instrument which limits conferment of a benefit to a group defined by reference to a status which falls within Article 14 ...must be objectively justified on the Strasbourg standard. If the discrimination in the terms of the ostensibly 'charitable' instrument cannot be justified to that standard, then the Charity Commission, or, on appeal, Charity Tribunal would act contrary to the ECHR and unlawfully if it treated the object as being 'of public benefit'.²⁹⁰

²⁸⁸ Joint Committee on the Draft Charities Bill, *The Draft Charities Bill*. (2003-04 HL 167-III, HC 660-III) vol 3: Written Evidence, Memorandum from Peter Tatchell (DCH 92) Ev 377.

²⁸⁹ *ibid.*

²⁹⁰ Memorandum submitted by the Equality and Human Rights Commission to the Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill* (2008-9, HL 169, HC 736) Ev 132, 139.

This was part of the consideration before the Court (before Briggs J)²⁹¹ and the Tribunal (before Sales J)²⁹² in the *Catholic Care* case. One participant who is advising an applicant religious charity noted that this seemed to be a concern of the Charity Commission:

They clearly sounded as though they were anxious about their own Public Sector Equality Duty and whether they could actually be seen to comply with that duty and still let this charity onto the register (Interview 2).

Public Benefit and Positive Action

Equality law does not always require the same treatment for all. In a diverse society, equality does not mean treating everybody in exactly the same way. In some cases it means providing special or different treatment. On occasion, an element of discrimination may bring with it public benefit, when it is necessary to overcome some disadvantage or social exclusion.²⁹³ Modern case law is providing a growing jurisprudence on the need to recognise and cater for difference through specially tailored provision, to ensure fair and equal treatment. Groups may be treated unequally to ‘correct factual inequalities’ between them. At the state level, in taking decisions about social and economic policy, particularly those concerned with the equitable distribution of public resources, the European Court of Human Rights allows Member States a generous ‘margin of appreciation’.²⁹⁴ At a local level, there is legal support for local authorities (sometimes via charities) providing targeted support. For example, in *R (Kaur & Shah) v Ealing LBC*²⁹⁵ Moses J stated:

There is no dichotomy between the promotion of equality and cohesion and the provision of specialist services to an ethnic minority ... [I]n certain circumstances the purposes of [the Public Sector Equality Duty] may only be met by specialist services from a specialist source.²⁹⁶

It has been seen that the Equality Act 2010 itself provides for positive measures, generally allowing action to be taken to support those with a protected characteristic, as long as it is a ‘proportionate

²⁹¹ See above at p 59.

²⁹² See above at p 61.

²⁹³ See more generally above at p 84.

²⁹⁴ *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681.

²⁹⁵ And see further above at p 86.

²⁹⁶ [2008] EWHC 2062 (Admin) [55]-[56].

means'.²⁹⁷ However, the public benefit requirement must not be forgotten by charities. Charities engaging in positive action must ensure that they are still satisfying the public benefit test.

Positive action has obvious attractions for the many charities that pride themselves on their ability to target specific needs but it should be remembered that this is not a universal or even long-term solution.

Public Benefit and the Section 193 Exception

The charity-specific exception in section 193 which allows a charity to restrict its beneficiaries based on protected characteristics has been discussed earlier.²⁹⁸ Section 193 does not refer to the concept of 'public benefit'. The complex nature of the relationship between that concept and potentially unlawful discrimination was raised throughout the study and will now be considered.

Is it possible to have a charitable object that *meets* the public benefit requirement but is *not* Equality Act compliant since it unjustifiably discriminates on grounds of a protected characteristic, because it is not a 'proportionate means of achieving a legitimate aim, or for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic'? Alternatively, does compliance with the Equality Act mean the public benefit test is also passed? These questions will be considered by reference to the views of the Charity Commission, the Equality and Human Rights Commission and the judiciary.

Charity Commission

The Charity Commission considers the intersection between equality law and public benefit law in both its statutory guidance on public benefit and in its guidance on the Equality Act.

²⁹⁷ See above at p 84.

²⁹⁸ See above at p 52.

Turning first to the statutory guidance on public benefit,²⁹⁹ in the section that relates to the need for a charity's benefit to be for the public, or a section of the public, there is reference to discrimination law. The Charity Commission notes that restricting benefits by reference to some personal characteristic, such as gender, race, ethnic origin, religion, sexual orientation, or other defining characteristic may or may not be considered reasonable, depending upon the charitable aims that are to be carried out:

For example, restricting benefits to men or women only would be reasonable in the case of an organisation that is concerned with men's or women's health issues, as the class of beneficiaries is clearly linked with the charitable aim. However, restricting benefits in such a way would not be reasonable in the case of an organisation that is concerned with providing a village hall or community centre, which should be a general facility for use by all the local inhabitants regardless of their gender.³⁰⁰

There is a connection, however, between satisfying the public benefit test and justifying any restrictions, and the Charity Commission has stated that it will consider the likely impact of any restriction in the charitable instrument, and whether it can be justified, when determining whether the aims of a charity meet the public benefit test.³⁰¹ Where the beneficiaries are defined by some personal characteristic (including, presumably, Equality Act protected characteristics), the Charity Commission will consider in each case: why the restriction is there; and, why the restriction is reasonable in the context of the charitable aims to be carried out (such as what special need of the service or facility do those people have)? Presumably, if these questions cannot be answered to the Commission's satisfaction, the charity will fail the public benefit test; if the class of people whom the aims are intended to benefit is unreasonably restricted then they are not 'a section of the public'. Where that is the case, the organisation would have to widen the class of people who can benefit, or it would not meet the public benefit requirement. If a body does not meet the public benefit requirement, it is not a charity and therefore questions of compliance with section 193 are irrelevant. The only bodies that can take advantage of the section 193 exception for discrimination law are those that satisfy the statutory definition of a charity contained in the Charities Act 2011.³⁰²

²⁹⁹ Charity Commission, 'Charities and Public Benefit. The Charity Commission's general guidance on public benefit' (2008 2011). As a result of the decision of the Upper Tribunal Tax and Chancery Chamber in *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC), [2012] 2 WLR 100, some elements of the original guidance have been rewritten. Separate guidance that explains the legal underpinning for the principles of public benefit can be found in Charity Commission, 'Analysis of the law underpinning Charities and Public Benefit' (2008).

³⁰⁰ Charity Commission, 'Charities and Public Benefit. The Charity Commission's general guidance on public benefit' (2011) para F6.

³⁰¹ *Ibid.*

³⁰² Equality Act 2010, s 194(3).

The Charity Commission has also published specific guidance for charities on the Equality Act 2010. Its first version³⁰³ - summary guidance - was followed a year later by a fuller publication³⁰⁴ that contains information about how charities' exceptions apply in different circumstances and gives more illustrative examples. The guidance focuses on the section 193(1)(2) exception, referring to Test A and Test B,³⁰⁵ but does make reference³⁰⁶ to other exceptions that may apply to some charities.

On several occasions in the Equality Act guidance, the Charity Commission begins to conflate the equality law requirements with the public benefit test.³⁰⁷ For example, it states that, where charities want to limit benefits to people who share a protected characteristic, if section 193 is not satisfied, the Commission may not be able to register the organisation 'as it is unlikely to be able to show that it is for the public benefit.'³⁰⁸ A similar statement is made in relation to *all* the charity exceptions:

If it is difficult to apply either Test A or Test B, and no other exception applies, the charity's purposes may no longer be capable of being carried out for the public benefit.³⁰⁹

Later in the guidance, the same sentiment is repeated in a stronger manner, this time only in the context of the section 193 exception, when it is stated that if Test A or B are not met and benefits are nevertheless restricted, such an organisation 'will not be able to show that it is for the public benefit and cannot therefore be a charity'.³¹⁰ This time, there is no room for doubt.

To summarise, the Charity Commission's view is that, if restrictions cannot be satisfied under section 193 or any other exceptions, there will be no public benefit either. It cannot, however be said that satisfying section 193 will automatically mean that the public benefit test is passed.

³⁰³ Charity Commission, 'Supporting specific beneficiary groups - Equality Act summary guidance' (2010).

³⁰⁴ Charity Commission, 'Equality Act guidance for charities: Restricting who can benefit from charities' (2011).

³⁰⁵ See further above at p 62.

³⁰⁶ See section F which discusses exceptions for: membership associations; single-sex fund-raising; membership based on religious belief; positive action in service provision; religious or belief organisations; admission to education; and, sport.

³⁰⁷ The earlier summary version of the guidance did not make this connection.

³⁰⁸ Para B2.

³⁰⁹ Para D1.

³¹⁰ Para E2.

Equality And Human Rights Commission

The Equality and Human Rights Commission (EHRC), in its statutory code of practice on Services, Public Functions and Associations,³¹¹ also comments on the interrelationship between equality law and public benefit law. As a Statutory Code, it has been approved by the Secretary of State and laid before Parliament. However, the Code does not impose legal obligations. Nor is it an authoritative statement of the law:³¹² only the courts and tribunals can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Courts and tribunals must take into account any part of the Code that appears to them relevant to any questions arising in proceedings. It therefore provides good guidance to service providers on how to comply with the law. The EHRC states³¹³ that, to be a proportionate means of achieving a legitimate aim, the impact of the restriction in furthering the aim in question should be balanced against any adverse impact on the charity's ability to fulfill its other aims and to meet the 'public benefit' test.

When discussing whether or not one of the two tests in section 193(2) is satisfied, this time, the requirement for charities to pass the 'public benefit test' is referred to in a positive way by the EHRC. It is stated that passing the public benefit test 'may assist, but it will not guarantee that any such restriction meets either of the tests specified in the [Equality] Act'.³¹⁴ This means that passing the public benefit test does not necessarily mean that one of the two tests in section 193(2) is satisfied, but the fact that it 'may assist' suggests that passing the public benefit test is likely to mean that section 193(2) is satisfied.

Turning the question round, the EHRC states that the Charity Commission:

will consider the likely impact of any restriction on beneficiaries in the charitable instrument, and whether such restriction can be justified, in assessing whether the aims of a charity meet the 'public benefit' test.³¹⁵

The Government Equalities Office, now part of the Department for Culture, Media and Sport,³¹⁶ has also published a series of short specialist guides to the Equality Act, focusing on the key changes in the law

³¹¹ EHRC, 'Equality Act 2010 Code of Practice - Services, Public Functions and Associations' (2011).

³¹² This is taken from the Code at para 1.5. This is despite the fact that earlier in the foreword, at p 15, it stated that the Code is 'the authoritative, comprehensive and technical guide to the detail of law.'

³¹³ EHRC, 'Equality Act 2010 Code of Practice - Services, Public Functions and Associations' (2011), para 13.36.

³¹⁴ *ibid* para 13.35.

³¹⁵ *ibid* para 13.35.

made by the Act. Whilst many of these guides are relevant to charities and their activities,³¹⁷ none of them make any reference to a charity's requirement to satisfy the public benefit test or the way that this interacts with any of the charity's exceptions to the Equality Act provisions.

Judiciary

In the course of the *Catholic Care* litigation, the EHRC, in its early intervention,³¹⁸ argued that a charity which discriminates on grounds of sexual orientation and does not fall within the section 193 exception would fail the public benefit test and so not be charitable. The Tribunal was disinclined to accept that submission, although it did not find it necessary finally to rule upon it in its preliminary decision. Briggs J in the High Court also considered it unnecessary finally to decide whether a discriminatory purpose could ever be for the public benefit and whether a body which existed for the pursuit (inter alia) of such a purpose could be charitable. He did, however state:

The essentially public (rather than private) benefit which underlies the concept of charity leaves me less concerned than was the Tribunal about the notion that an acceptance of [the EHRC's] submission might extend the Convention beyond its proper field.³¹⁹

He did go on to suggest that any discriminatory treatment by a charity that went beyond that allowed by the exception in what is now section 193 would likely give rise to 'large public dis-benefit' and we can presume that this would not allow a charity to satisfy the public benefit test:

³¹⁶ The Government Equalities Office was established in October 2007 as a new self-standing government department. It was later merged into the Home Office, before transferring to the Department for Culture, Media and Sport in September 2012 following a Cabinet reshuffle.

³¹⁷ See e.g. guidance from the Government Equalities Office and Equality and Diversity Forum, 'Equality Act 2010: What Do I Need To Know? Quick Start Guide To Discrimination By Association And Perception For Voluntary And Community Organisations' (2011); 'Equality Act 2010: What Do I Need To Know? A Quick Start Guide For Voluntary And Community Sector Associations' (2011); 'Equality Act 2010: What Do I Need To Know? A Quick Start Guide To Gender Reassignment For Voluntary And Community Organisations In The Provision Of Goods And Services' (2011); 'Equality Act 2010: What Do I Need To Know? A Quick Start Guide To Harassment In Service Provision For Voluntary And Community Organisations' (2011); 'Equality Act 2010: What Do I Need To Know? A Quick Start Guide To Positive Action In Service Provision For Voluntary And Community Organisations' (2011); 'Equality Act 2010: What Do I Need To Know? A Quick Start Guide To Religion Or Belief Discrimination In Service Provision For Voluntary And Community Organisations' (2011); 'Equality Act 2010: What Do I Need To Know? A Summary Guide (2011).

³¹⁸ *Father Hudson's Society and another v Charity Commission (Equality and Human Rights Commission intervening)* [2009] PTSR 1125.

³¹⁹ [2010] EWHC 520 (Ch), [2010] 4 All ER 1041 [99].

An organisation which proposes to fulfil a purpose for the public benefit will only qualify as a charity if, taking into account any dis-benefit arising from its *modus operandi*, its activities nonetheless yield a net public benefit ... Thus, a charity which proposed to apply differential treatment on grounds of sexual orientation otherwise than as a proportionate means of achieving a legitimate aim might thereby fail to achieve charitable status (or lose it, if it sought to pursue such activities by amendment of its objects).³²⁰

The concept of 'dis-benefit' is included in the Scottish charity legislation dealing with the requirement to prove public benefit. To determine whether a body provides or intends to provide public benefit, the Office of the Scottish Charity Regulator (OSCR) and the courts are essentially required to weigh up any public benefit against any public 'dis-benefit' that may be incurred in the provision.³²¹ This is not included in the English legislation dealing with the public benefit requirement, where there is no explanation as to what needs to be proved. Nevertheless, it appears that the 'dis-benefit' concept is one which may gain currency in discussions of public benefit under the English provisions too.³²²

The Charity Commission applied the approach laid down by Briggs J when it came to re-considering (and again denying) Catholic Care's request to change its objects:

The proposed discrimination on the basis of sexual orientation is not likely to be for the public benefit unless it is a proportionate means of achieving a legitimate aim.³²³

In the charity's later appeal, the Charity Commission once more argued that a charity which discriminated on grounds of sexual orientation which was not justified under article 14 of the ECHR could not meet the public benefit requirement.³²⁴ Again, the point was not specifically dealt with in the Tribunal's decision, which was very fact based, focusing on whether the charity's activities amounted to

³²⁰ *ibid* [97].

³²¹ Charities and Trustee Investment (Scotland) Act 2005, s 8. See further above at p 36.

³²² See e.g. the Charity Commission's decision to reject the application for charitable status of a Plymouth Brethren meeting hall, the Preston Down Trust, discussed below in the religious charities case study. The letter of refusal to the Preston Down Trust said that the Commission must balance the benefit and disadvantage in all cases where detriment is alleged. It made reference to public criticism of the Brethren's practice of 'shutting up' and of the effect the practice of separation had on family, social and working lives, but noted that it had no evidence to support these concerns at this stage.

<http://www.parliament.uk/documents/commons-committees/public-administration/LetterfromKennethDibble.pdf>

³²³ Charity Commission for England and Wales, Catholic Care (Diocese of Leeds), decision made on 21 July 2010, Application for consent to a change of objects under s 64 of the Charities Act 1993, para 7.2.

³²⁴ *Catholic Care (Diocese of Leeds) v Charity Commission* [2011] UKFTT B1 (GRC) [13].

a proportionate means of achieving a legitimate aim. On further appeal to the Upper Tribunal, Sales J made no mention of the complex interrelationship between justification of what would otherwise be discriminatory treatment and the public benefit test for charities.

Public Benefit and Association Exception

A charitable organisation may be an association, and thus able to restrict its membership under the association exception discussed above.³²⁵ However, it will still be subject, as a charity, to rules on public benefit. This would mean that while the membership may be restricted to, for example, persons of a particular ethnic origin, in order to retain *charitable* status, any restrictions on those eligible to benefit from its services or activities would need to be connected to the stated charitable purposes that are themselves for the public benefit.

The Charity Commission gives the example³²⁶ of an association set up to provide a place of worship in a particular area, with the membership being limited to a particular ethnic group in reliance on the association exception. The Commission is of the view that should the association also wish to limit use of the place of worship on the same basis, such a restriction would not be for the public benefit, since the place of worship should be available for those members of the local community who wish to worship there. The association would therefore fall within the association exception, but would not be a charitable association, since it would not satisfy the public benefit test. This could be questioned, at least, on the basis of existing case law. Cross J in *Neville Estates v Madden*³²⁷ when dealing with the charitable status of a synagogue which was open only to members, stated: ‘some benefit accrues to the public from attendance at places of worship of persons who live in this world and mix with their fellow citizens’.

Conclusion

While the precise correlation between the Equality Act exceptions for charities and the public benefit test remains unclear, it is at least arguable that a charity seeking to operate a discriminatory restriction that does *not* bring itself within one of the exceptions, would, in addition to being in breach of the

³²⁵ See above at p 69.

³²⁶ Charity Commission, ‘Equality Act guidance for charities: Restricting who can benefit from charities’ (2011) para F1.

³²⁷ [1962] 1 Ch 832 (Ch) 853.

Equality Act, have difficulty in passing a public benefit test. This would result in the organisation failing to achieve charitable status. On the other hand, one knowledgeable charity consultant who participated in the research was of the view that an organisation could pass the public benefit test with restricted objects and still fail to fall within one of the Equality Act exceptions:

My sense is, to meet the legal requirement for public benefit, to have charitable purposes to provide for public benefit, is actually narrower than the equalities legislation. My sense is, in practice, you could probably still be a charity but not meet all the requirements of the equalities legislation. I might be wrong but that's my sense (Interview 14).

This issue is yet to be determined.

VI Case Studies

Religious Charities

Religious charities were frequently cited as having issues with the Equality Act, and indeed the most high profile case law around charities and equality legislation has involved religious charities. The *Catholic Care*³²⁸ case, discussed above, raised the awareness of potential conflicts on the part of religious charities:

I think that's the case that has flagged out for most organisations that the problem can come early on with the Charity Commission and then subsequently over time with the judges. But I suspect that means the people are a little bit more aware, particularly in the religious community because that case had such a high profile (Interview 3).

This case study is based upon 12 interviews with religious groups and their lawyers. An effort was made to ensure representation from a cross-section of religious denominations. Additionally, the evidentiary submissions to the *Clearing the Ground* inquiry³²⁹ were reviewed.

There are differing views of what being a member of a religion or faith means. 'With religion, there's a perception underneath that religion is quite fundamentally different from the other protected characteristics. There's the argument that it is a choice. But this is not the lived reality for many' (Focus Group 18/1/13). The Equality Act is perceived as presenting more difficulties for more traditional religions and communities (Interview 27).

The primary issue for religious charities has been conflicts between religious beliefs and equal treatment of members of protected groups under the Act, particularly around sexual orientation and sex. 'It's the only protected characteristic that really comes into conflict with the others' (Focus Group 18/1/13). The Act itself does not offer guidance on how to resolve these conflicts, though case law is evolving. A

³²⁸ *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] EWHC 520 (Ch), [2010] 4 All ER 1041.

³²⁹ Evangelical Alliance, 'Clearing the Ground inquiry: preliminary report into the freedom of Christians in the UK' (2012). See below at p 105.

representative for a multi-faith group said that this is an issue for religious organisations, with a differing impact on different religions:

I think we're in the early days of competing rights. Your rights, my rights, my religious rights, your gender rights, your disability rights as opposed to my faith rights. I think a lot of these things have not been tested or worked out. And I think it presents particular difficulties for faith groups. They find equalities legislation is a new phenomenon for them sometimes. Some groups have got open structures and a forum where you can discuss issues openly. Other groups, other faith groups, there wouldn't easily be a forum for discussion around equalities. And so it's a real difficulty to know how to break in to the mind-set or beliefs (Interview 44).

Religious groups commonly feel that religion is afforded a lower level of protection than the other protected characteristics - that there is a 'hierarchy of rights' (Interview 12), with religion at the bottom. Not all respondents were opposed to this hierarchy.

You can't avoid the hierarchy of rights and we all know that in principle, rights under ... the ECHR are indivisible and they're all equal. But we equally know that some are more equal than others and how could they not be? (Interview 12).

The question is how to balance those rights. Christians in Parliament, an All-Party Parliamentary Group, held an inquiry to determine to what extent Christians were marginalised in the UK, and what needed to be done in response. The report's 'key finding' was that, 'Christians in the UK face problems living out their faith and these problems have been mostly caused and exacerbated by social, cultural and legal changes over the past decade'.³³⁰ Moreover, the report stated that 'the Equality Act 2010 fails to deal with the tensions between different strands of equality policy' and 'Court decisions have relegated religious beliefs below other strands and effectively created a hierarchy of rights'.³³¹ This perceived conflict also has led to greater awareness of equality issues for some in the religious community:

I think that there might be a little bit more awareness among certain faith groups just because I think some of them already perceive themselves to be at odds with other social changes and changing social attitudes (Interview 9).

Other participants were more sceptical of the idea that religion was threatened somehow by this conflict:

³³⁰ Ibid 5.

³³¹ Ibid 6.

I mean, actually, the Christian faith is, I reckon, quite considerably privileged in our system. United Kingdom is not a secular state. It is not France, still less Turkey. We still have bishops in the House of Lords and we're likely to continue to have bishops in the House of Lords, though the shape of the future House of Lords is still up for grabs. But, apart from that, you know, Christianity is a kind of inculturated norm for the way people behave (Interview 12).

Exceptions

There are specific exceptions that allow religious groups to discriminate in some areas. These are discussed in Section IV, above.³³²

Discrimination Based Upon Sexual Orientation

The most common, and most high profile, conflict is between religion or faith and sexual orientation. It is an issue for many, but not all religions.

Gay, lesbian rights and faith is also a particularly tricky one within the Church of England as well. That has been right on the forefront of media attention. And I think within different faith communities, you'll find authorities have different views. It usually takes time for faith communities to discuss and come to minds on issues that our society might've come to mind on ahead of it so to speak. Some faith communities have been more open and accepting of gay rights and equalities of gay people (Interview 44).

Participants reported that although religious charities had been sensitised by media attention, they were often unaware that there were exceptions for religious groups. For example, one lawyer reported that:

I've come across organisations that are providing marriage support-type services or retreats from a faith-based position. And they seem to fall in a religious organisation exception where they're looking at saying can we restrict providing services only to married heterosexual couples as opposed to unmarried couples or homosexual couples. So, that would probably be a case of where an organisation thinks they have a problem but at the moment they actually fall within one of the exceptions (Interview 9).

³³² See above at p 67 and p 71.

If, however, an organisation contracts with a public body to carry out a public service then it cannot discriminate because of sexual orientation in relation to that activity.³³³ The long-running *Catholic Care* matter, set out above,³³⁴ is an example of a case where the Schedule 23 exception could not apply since the charity was funded by the local authority to provide public services. As many religious organisations provide services, this is a potentially thorny issue. One participant said that one of the reasons why the Catholic church was proactive in attempting to amend Catholic Care's charitable objects in response to the Sexual Orientation Regulations³³⁵ was that, 'the church immediately saw a whole range of different ways in which it was going to affect its services' (Interview 7). The lawyer said:

I'm told, for example ... that there are issues about homeless hostels. So for example, a number of religious charities now have closed down all of their double rooms or now they only offer single rooms in case they are forced to accept same-sex couples in hostels for homeless, for example. There's obviously going to be an issue at some stage about nursing homes for old people and presumably there's going to be a challenge at some point to some sort of charity ... probably with some religious connection that runs a retirement home or a care home ... a nursing home, with a same-sex couple who want to share a room (Interview 7).

Discrimination Based Upon Sex

Participants also reported conflicts between women's rights and cultural norms within some religious communities. These sorts of cultural norms are difficult to address via legislation. One participant reported 'huge issues' around gender and religion that 'are not being addressed' (Interview 44). He described a meeting that he had attended at a religious organisation:

This was a celebratory meeting. Three quarters at least were men. The quarter of women, who were there, at least two thirds of those women were sitting behind a small screen so as not to see the men or the men to see them. And then a small number of women were visible. The food has been brought to the tables just by men but women were working somewhere behind the scene (Interview 44).

The issues extend across faiths:

³³³ Equality Act 2010, sch 23, para 2(10).

³³⁴ See above at p 12. See also OSCR, 'Report under section 33 of the Charities and Trustee Investment (Scotland) Act 2005; St Margaret's Children and Family Care Society, Scottish charity number SC028551' (2013).

³³⁵ Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263.

I'm thinking some of the minority African, African Caribbean churches. There are a large number of them. They have very similar kind of ideas around headship of man and woman (Interview 44).

These cultural norms frequently restrict the governance of religious organisations to males:

I don't think I have ever seen a female trustee at a temple, except in the Hindi faith. I don't think I have ever seen a female trustee of a mosque but it's not something that they usually want to do through the constitution. It's something that happens within the community and the way that women perceive their role or the way the men treat ... I don't know. You'd have to be in that community, I guess, to know the true answer (Interview 16).

Although the Equality Act does not prevent those sorts of cultural norms from affecting gender equality, sometimes religious charities try to reinforce cultural norms around gender by including them as restrictions in their governing documents. At this point the Equality Act is a barrier. One lawyer had recently advised an Islamic charity that wanted to restrict membership of the charity, as well as trusteeship, to men:

The trustees are arguing something that I have never seen argued within Islam before and they are suggesting that females shouldn't be allowed to be members of the charity and they are also suggesting that ... therefore females should never be allowed to be trustees. If you take out the perversion for a second, because I am not entirely satisfied that that is what Islam says, I think that this is just something that they just dreamt up. But what we've ... said that you can't do this. The Commission is not going to be able to deal with that under the charity exceptions in the Act at all because ... what you are proposing is certainly discriminatory and it's a protected characteristic so you know you really can't do this (Interview 16).

Some of these restrictions are in older charities and are based upon historic practices. Another participant lawyer had a client that is a very old charity, with an historically separate membership system for men and women, 'so they are treated differently and that *prima facie* is discrimination since the Equality Act came in' (Interview 3). The client organisation is considering how to address the situation.

Faith And Race

Jews and Sikhs have particular issues because they are both a race and a religion. This can present issues in terms of how membership of the religion is defined.

Jewish charities...I mean Orthodox Judaism, the difficulty for them is that Judaism is a race and a religion. ... So the exemptions for religious organisations exempt them from religious discrimination. Fine, if you are a catholic charity. Not fine for a Jewish charity because if you require people to be Jewish as recognised by Jewish Law, it's by descent and therefore race. And so that exemption means you're exempt from discrimination based on religion. But you're also discriminating on the ground of race. And actually, there isn't such an exemption for that (Interview 6).

One high profile case, *JFS*,³³⁶ under the predecessor legislation, illustrates the potential issues for Jewish charities that attempt to limit membership to members of their own religions. E challenged the refusal of JFS (formerly the Jewish Free School) to admit his son, M. JFS is a Jewish faith school. It is over-subscribed and gave priority in admission to children recognised as Jewish by the Office of the Chief Rabbi (OCR). The OCR only recognises a person as Jewish if: (i) that person is descended in the matrilineal line from a woman whom the OCR would recognise as Jewish; or (ii) he or she has undertaken a qualifying course of Orthodox conversion. E and M are both practising Masorti Jews. E is recognised as Jewish by the OCR but M's mother is of Italian Catholic origin. Because she converted to Judaism under a non-Orthodox synagogue her conversion is not recognised by the OCR. M was therefore rejected by JFS as he did not satisfy the OCR requirement of matrilineal descent. E challenged the admissions policy as directly discriminating against M on grounds of his ethnic origins contrary to section 1(1)(a) of the Race Relations Act 1976³³⁷ Alternatively, E claimed that the policy was indirectly discriminatory. The Court of Appeal, unanimously reversing the decision of the judge at first instance, held that JFS directly discriminated against M on the ground of his ethnic origins.

In the Supreme Court there were nine separate judgments. If M had been rejected on religious grounds, there would not have been a dispute since faith schools are allowed to discriminate in their admissions.³³⁸ It was crucial therefore to decide what were the grounds for M's rejection. Much of the argument focused on the niceties of establishing Jewishness, essentially whether it centres on origins or

³³⁶ *R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] IRLR 136.

³³⁷ Jews constituted a racial/ ethnic group under the Race Relations Act 1976; *Seide v Gillette Industries Ltd* [1980] IRLR 427.

³³⁸ Equality Act 2010, sch 11, para 5.

belief. The majority (5) held there was direct discrimination on grounds of ethnic origins. Of the minority, two held that there was indirect discrimination (and the policy was not proportionate). Two would have allowed the appeal by JFS (i.e. no direct discrimination).

The result in the JFS case still presents issues for Jewish charities:

The JFS case has had a profound effect on the community and its effect is continuing. And there's no certainty or settled feeling within many, many Jewish communal charities as a result of the JFS case ... The JFS case is a, is a major problem, because it effectively says that to provide services to people who are Jewish is capable of being discriminatory to those who are not Jewish. Because of the so-called ethnic, so-called ethnic element to it. That was the crux of the case (Interview 27).

Many Jewish schools are now employing a religious practice test, often based upon synagogue attendance. This presents practical issues of how to record attendance on a day when observant Jews do no work, so that registering by ticking a box, for example, would be forbidden by the religion (Interview 6). But it is also contrary to the religious norms, and 'just goes against the whole grain of what it is to be Jewish' and 'has created an absurdity' (Interview 27):

Now, you might say that's not such a terrible thing. If you want to go to a Jewish school, practice Judaism, that's fine, you know, what's the problem? And in truth, at the right wing end of the spectrum, where you've got the most observant Jews, they have not been as affected by the decision because they've always adopted a Jewish practice test. ... They were always happy to say, 'We will only have particular type, who is really Orthodox, is really observant, to come in. '... Where you had a problem was in the Jewish mainstream. Schools such as JFS, and there are others in London and Manchester areas, where they were open to all Jews regardless of their level of observance ... And they're now being told... you cannot, any more, create admissions criteria which has that as its criteria, that you're Jewish (Interview 27).

The Act provided for caste to be added to the list as a sub-set of race³³⁹ and this power has been exercised in the Enterprise and Regulatory Reform Act 2013. Prior to this exercise, the Government had resisted enforcement of the measure. One participant religious charity had worked to get caste included and then enforced under the Act as a result of the experience of their membership:

³³⁹ Equality Act 2010, s 9(5).

The members that come to the temple have indicated that they have experienced discrimination when purchasing goods and services, some in the education field, and people who have gone to their doctors or who have experienced it in care service, so in the health field as well. We have had examples of people who have set up businesses and their partners have turned nasty and have abused them on a caste basis ... Also, with marriage when you're having a lot of inter-caste marriages and there's disparity and then you have got the families intimidating and threatening the person from the other caste, so that also happens as well in the personal sphere (Interview 42).

Challenges To Religious Charities

As discussed above,³⁴⁰ the most likely channel for enforcement of the Act against charities is via the mechanism of a challenge from an interested party. This is more likely to happen in the case of religious charities, as they have faced challenges from secular and humanist organisations in addition to the interested potential beneficiaries that might challenge other types of charities' practices. For example, in Scotland the National Secular Society (relying on the decision in the *Catholic Care* case) alerted the Office of the Scottish Charity Regulator (OSCR) to what were found to be discriminatory practices by a charity, the St Margaret's Children and Family Care Society. The charity was requiring all would-be adoptive parents to have been married for two years, thereby denying their services to same-sex couples, who are unable to marry legally. OSCR initiated an inquiry and concluded that the charity's practices were discriminatory based upon sexual orientation, as well as on religion.³⁴¹ Also, in 2012 the British Humanist Association applied for judicial review of the London Borough of Richmond's approval of the establishment of a new Roman Catholic faith school.³⁴² Although judicial review was not granted, this illustrates further that anti-faith groups are also willing and able to bring challenges to religious charities.

³⁴⁰ See above at p 11.

³⁴¹ OSCR, 'Report under section 33 of the Charities and Trustee Investment (Scotland) Act 2005; St Margaret's Children and Family Care Society, Scottish charity number SC028551' (2013)..

³⁴² (1)*The British Humanist Association* (2) *Jeremy Rodell (a member of the Richmond Inclusive Schools Campaign) v London Borough of Richmond upon Thames and The Roman Catholic Diocese of Westminster and The Secretary of State for Education* [2012] EWHC 3622 (Admin).

Charitable Structure

Issues also arise around the structure of religious charities and any affiliated organisations. Some religious charities also have a commercial trading subsidiary that leases out facilities owned by the religious charity when they are not required for use by the charity itself. These arrangements are fiscally advantageous for the parent charity and are recognised by the Charity Commission as a way of protecting the charity from any commercial risk to which the subsidiary may be exposed.³⁴³ That trading subsidiary cannot take advantage of the Schedule 23 exception for a non-commercial organisation. An interviewee raised a hypothetical example of a religious charity that owns a holiday camp facility. When it is not in use by the charity to provide religious retreats, the trading subsidiary hires out the facilities and the profits are directed back into the charity. However, the trading subsidiary will not be able to restrict who rents the camp facilities based upon religion or sexual orientation. One lawyer participant commented:

I find that slightly odd, because that effectively means that some organisations that are making premises or facilities available, then if they're doing that through their trading subsidiary, they potentially have to make their facilities available to other organisations that might be inimical to their own charitable purposes ... They appear to be in a situation where they can't restrict the use of facilities. ... So, it seems quite restrictive on their private contractual freedom of who they provide their facilities to (Interview 9).

In another issue related to charitable structure, charities are sometimes motivated by a religious ethos, but set up with charitable objects that address more secular issues. This can be an issue if they subsequently wish to take advantage of the exceptions for religious organisations. Charities must draft their objects carefully to ensure that they 'jump in through the hoops of what the Equality Act requires because it's so unclear, with no case law on most of these provisions' (Interview 3):

You really want to be ticking the boxes in, for example, Schedule 23 about religious organisations ... You might think you're a religious organisation but you might as well encompass the wording of the Equality Act to make sure that it looks like you are as well. ... So it may be that it's blindingly obvious to them that they have faith-based motivation. But let's say their object is the relief of poverty. They would put down their objects as the relief of poverty. Now, the fact that that is solely based on the religious command to relieve poverty may not make it into their objects in anything that comes before the Charity Commission. So they will find themselves potentially in a bit of difficulty later when they're providing their services. They're going to say, 'We're religious charity. This is why we're discriminating.' So, I think it's quite

³⁴³ Charity Commission, 'Trustees, trading and tax' CC35 (2007).

counterintuitive that they have to put not only what their purpose is but actually fundamentally where that comes from if they're a religious organisation (Interview 3).

Religious Charities And Public Benefit

It is not just when it comes to equality issues that some religious charities are feeling under attack. It has always been a requirement that charities are established for public benefit and religious organisations have always had to advance religion among the public in order to qualify for charitable status. However, as a result of the renewed focus on the public benefit requirement when determining charitable status,³⁴⁴ religious charities are increasingly finding themselves under the microscope.³⁴⁵

A good example of this is the ongoing dispute between the Charity Commission and an exclusive Plymouth Brethren congregation, which is seeking to register its meeting rooms. The dispute focuses on the status of a Brethren meeting hall, the Preston Down Trust. The Trust is being used as a test case for the status of other similar meeting halls.³⁴⁶

The Charity Commission decided in 2012 that the Trust did not qualify as a charity due to insufficient proof of public benefit.³⁴⁷ Despite the fact that nearly 20% of registered charities are for the advancement of religion, and hundreds of Christian charities are registered each year,³⁴⁸ this particular decision has proved to be a source of intense current concern among Members of Parliament³⁴⁹ and has been interpreted by some as a threat to the charitable status of other Christian (and other religious) groups. A participant lawyer noted that many charities had been registered under the previous

³⁴⁴ See above at p 34.

³⁴⁵ See the discussion in Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (HC 2012-13, 76 incorporating HC 574-i-vi) on the Plymouth Brethren case.

³⁴⁶ Charity Commission, 'Parliamentary Briefing, Charitable registration and public benefit' (Westminster Hall, 13 November 2012)

³⁴⁷ Letter from the Chief Legal Adviser and Head of Legal Services re Preston Down Trust - application for registration as a charity, 7 June 2012.

³⁴⁸ Charity Commission, 'Parliamentary Briefing, Charitable registration and public benefit' (Westminster Hall, 13 November 2012).

³⁴⁹ For example, whilst Peter Bone, Conservative MP for Wellingborough, presented a Ten Minute Rule Motion in the House of Commons on 19 December 2012 seeking leave to bring a bill to amend the Charities Act 2011 to 'treat all religious institutions as charities', Paul Flynn, the Labour MP for Newport West and a member of the Public Administration Select Committee, tabled a parliamentary motion supporting the Charity Commission's action in relation to the Preston Down Trust.

presumption of charitable purpose for religious organisations, and pointed to the current Plymouth Brethren case as evidence that the Charity Commission may now be interested in re-opening some of those earlier decisions:

Well, that's what they're doing in the case of the Brethren because there was a decision in 1981, a court decision, which said that a group of Brethren were charitable. And the Commission's refusal now to register one of these organisations is an indication that they believe that decision was made on the basis of the presumption, which is gone. And therefore, if they are right, if the Tribunal upholds, and the Upper Tribunal upholds them if they are going to appeal, then there will be a whole range of charities which have been already registered on the basis of presumption or assumption that they were benefiting the public which will have to be scrutinised (Interview 43).

In considering whether the Preston Down Trust provides a public benefit, the Charity Commission's denial letter indicates that the adherents to this particular faith sharply limit their interactions with those outside the faith and so the Charity Commission concluded that:

The beneficial impact of the Preston Down Trust is perhaps more limited than other Christian organisations as the adherents limit their engagement with the wider public, arising as a consequence of the doctrines of their religion. It raises a concern as to whether Preston Down Trust is established primarily for the benefit of its followers or adherents. The extent to which Preston Down Trust encourages followers or adherents to conduct themselves in the wider community to put the values held by the religion into practice in such a way as to lead to the moral or spiritual welfare or improvement of society is uncertain. The evidence in relation to any beneficial impact on the wider public is perhaps marginal and insufficient to satisfy us as to the benefit to the community.³⁵⁰

The Trust had planned to appeal this decision to the Tribunal, but it was announced in early 2013³⁵¹ that the Charity Commission and the Trust are now in negotiations to attempt to resolve the issue short of a full Tribunal hearing. The promoters of the Preston Down Trust have requested that the Commission consider whether there is an alternative to appealing to the Tribunal against its decision to refuse registration, primarily on the grounds that the appeal process will incur them significant legal costs. The Commission's position has not, however changed and a resolution may be difficult to reach:

³⁵⁰ Letter from the Chief Legal Adviser and Head of Legal Services re Preston Down Trust - application for registration as a charity, 7 June 2012.

³⁵¹ Charity Commission, 'Updated statement on Preston Down Trust' (6 February 2013)

The Commission is very clear that its position remains the same; any application for registration put forward by the Exclusive Brethren must set out exclusively charitable purposes and explain how these will be advanced for the public benefit. The application must satisfy the Commission as to the nature of its intended practices and how these will advance religion for the public benefit. The Attorney General, in his role as the guardian of charity, will also need to be satisfied. Issues of detriment and harm will be considered. The Commission does not and will not register any organisation that does not wholly fulfil the legal requirements for registration. If it is not possible to deal with the issue this way, the Trust will not be registered, and the Trustees will have the option of lifting the stay of legal proceedings and continuing with the Tribunal process. The Commission will continue to ensure it is ready to take part in any such proceedings. It remains the Commission's position in general that the Tribunal is the right and proper place for decisions of the Commission to be appealed, as an effective form of redress.³⁵²

At one point earlier on its deliberations on this matter, the Charity Commission was considering making a 'reference' to the Tribunal to seek clarity on the law relating to public benefit and the advancement of religion in the context of this specific application. The reference procedure enables the Attorney General or the Charity Commission, with the Attorney General's permission, to ask the Tribunal to consider wider questions to help to clarify or to develop charity law. This may well have been helpful in clarifying how the removal of the presumption of public benefit for the charitable purpose of the advancement of religion in the Charities Act 2006³⁵³ impacts on the principles distilled from earlier case law on religious charities. For example, in *Neville Estates Ltd v Madden*³⁵⁴ it had earlier been held that where only the adherents of a particular religion may attend the religious rites, this will not be considered a private class where the adherents are free to mix with the community and the benefit of the religion as bestowed on them by example will edify and improve the community, thereby providing public benefit. There is some uncertainty as to whether this principle is still valid since the 2006 Act. However, the Commission stated³⁵⁵ that it ultimately decided that whilst there are some matters which remain uncertain and could be usefully clarified by a reference to the Tribunal, it would not proceed with a reference as it did not consider it is appropriate to widen this issue beyond the current application. It has since been reported in the press³⁵⁶ that the Charity Commission asked the Attorney General to refer 'closed or exclusive religious organisations' (including Hasidic Jews) to the Tribunal. Apparently, the Attorney General was asked and refused to make a reference to the Tribunal to consider the public benefit of religious groups 'where the adherents have limited interaction with the wider public'.

³⁵² *ibid.*

³⁵³ See now Charities Act 2011, s 4(2).

³⁵⁴ [1962] Ch 832 (Ch).

³⁵⁵ Letter from the Chief Legal Adviser and Head of Legal Services re Preston Down Trust - application for registration as a charity, 7 June 2012.

³⁵⁶ 'Charity Commission asked Attorney General to refer "closed religious organisations" to charity tribunal' Third Sector Online, 28 January 2013.

In an interesting contrast to the Charity Commission's position with regard to charities that sharply limit outside contact, participants also reported that the Commission is also increasingly sceptical of proselytising being of sufficient public benefit.³⁵⁷ One aspirant religious charity's registration was rejected because the Commission found that proselytising was not in the public benefit (Interview 43). These contrasting reasons may point to a more general discomfort on the part of the Charity Commission with religious charities.

Conclusion

Religion is the protected characteristic that most frequently comes into conflict with others. Some religious charities perceive a hierarchy of rights within the protected characteristics, with religion at the bottom, although other participants from religious charities disagreed. Although exceptions exist, this tension is most frequently seen around the interaction with the protected characteristics of sexual orientation and sex. High profile cases have sensitised religious charities, who are wary of changes. A multi-faith religious body reported disaffection around equalities issues:

I think that it isn't hard for people to find reasons to distance themselves from equalities, rules and legislation. I think people also see that a whole train of lawyers and bureaucrats and public money is needed to promote this house of equal rights. And again that feeds certain amount of cynicism. And that the idea that it's a luxury in a world where other priorities probably come to forum (Interview 44).

Moreover, some religious charities are also having difficulty in proving that they are in the public benefit. The revocation of the presumption of public benefit for religious charities could have potentially far-reaching implications.

³⁵⁷ Note that in Charity Commission, 'The advancement of religion for the public benefit' (2008, as amended) Annex B it is stated that in the majority of cases, proselytising is carried out sensitively and without coercion and does not present any public benefit difficulties.

Higher Education

Higher education institutions (HEIs) are complex, and affected at many levels by the Act. Again, there is often a gap in understanding some of the Act's consequences based upon the compartmentalising of university administrative structures. Awareness varies by 'functional areas,' with some typically having better awareness (Interview 33). These would include staff services such as HR, Health and Safety, and student services, such as counselling, welfare and Chaplaincies. However, in other functional areas, such as estates and facilities, finance, international recruitment, awareness is lower. At some universities awareness is low even for academic practice and learning and teaching.

Even those who are aware may still have a gap in understanding. 'Individuals in management positions or people who have decision making responsibilities, probably on the whole are aware that we are required to comply with legislation whether they know that ... there's been changes for that legislation or not' (Interview 37). Institutional structures vary in terms of where equality practitioners are located in the organisational chart. What department houses the equalities practitioners, and the extent of their organisational remit can affect awareness of equality issues.

A lack of central control is a barrier to effective implementation of equality practices. The devolved nature of authority in a university means that change has to be made through persuasion, rather than via fiat.

I mean academics obviously pride themselves on not kowtowing to management. So you have to really persuade them of the necessity. And of course, we have an extremely participatory democracy here. So you will get the opportunity to persuade them; it's just it's a very slow process. You know, major issues will need to go through - or even not-so-major issues - may need to go through lots of committees, lots of discussion, revisions, and consensus building (Interview 23).

One participant university said that they have taken advantage of useful 'levers' to facilitate awareness among academic staff.

The REF - Research Excellence Framework - has been helpful because HEFCE mandated that anybody who took part in the selection of staff outputs for the REF has to have compulsory Equality and Diversity training. ... I would say 90% of those participants...were already aware of the basics, and quite a few had quite a subtle understanding (Interview 23).

Four of the lawyers interviewed in the first round of interviews identified higher education, and particularly targeted scholarships and bursaries, as a major issue. We subsequently approached ten universities, conducted two interviews at two universities and one interview with an umbrella body for higher education. We also reviewed university websites, looking for references to scholarships or bursaries that are restricted based upon a protected characteristic. Finally, a Freedom of Information Act request was made of the EHRC, requesting information about the numbers of enquiries made to its helpline about discrimination in the provision of scholarships or bursaries in higher education.

PSED

HEIs are subject to the general Public Sector Equality Duty (PSED).³⁵⁸ The general PSED is supported by specific duties, which are more rigorous in Wales and Scotland. The specific duties are intended to help the public sector organisation to meet the more general duty. The predecessor single-strand equality legislation also included specific duties, which differed from one another. Having one set of duties is reported to be more streamlined, and in England the new specific duties are much less demanding than the previous race, disability and gender specific duties. Nevertheless, the interplay between the general PSED and the specific duties has created ‘some confusion and some difficulties for institutions’ (Interview 33).

The removal of the explicit requirement to conduct an Equality Impact Assessment (EIA) has assisted some institutions, where there was resistance to the idea. Although institutions still need to gather and analyse data in order to demonstrate due regard, the change in terminology and the loosening of potential approaches has helped:

Technically it’s true that institutions no longer have to carry out ... an equality impact assessment. I think that can be quite helpful for some institutions who’ve had difficulties trying to embed that within the institution ... Some institutions, for example, have thought about saying to people, ‘Well this is about inclusive policy making, you know, we’re talking about trying to include all students,’ and that’s managed to engage with more academics, for example. Or, they’re saying, ‘Actually, what I want you to do is think about your teaching practice and how you can engage more with different types of students.’ And that again has engaged more people - academics, for example. But in practice, it’s doing the same thing. It’s looking at, say, a validation process or a teaching and learning process and thinking about the equality impact, but not calling it that. And not following a prescribed method, which the previous duties had. So,

³⁵⁸ See above at p 86.

there has been some impact and I think there were some positives there because of the change (Interview 33).

Others reported confusion about what the changes meant:

What's the difference in ... giving due regard to equality in decision making instead of saying that you have to do Equality Impact Assessments? ... I'm not saying Equality Impact Assessments were a good thing, and I'm not saying that they improved the experiences from protected groups and protected characteristics in any huge way. But in terms of writing legislation in a way that can be understood by large and tiny organisations to interpret, it was pretty clear. Whereas, now it's much less clear how to evidence that you've done the right thing in order to comply. ... They have reduced the burdens somewhat, but by reducing it they've made it less clear (Interview 37).

Specific duties: England

The following specific duties were established in regulations from September 2011:³⁵⁹

- Duty to publish information annually demonstrating compliance with section 149(1) for employees and any other affected by the services who share a protected characteristic.
- Duty to prepare and publish specific and measureable equality objectives every four years.

Specific duties: Scotland

In May 2012, regulations were published setting out the following specific duties for Scotland:³⁶⁰

- Duty to report progress on mainstreaming the equality duty
- Duty to publish equality outcomes and report progress
- Duty to assess and review policies and practices
- Duty to gather and use employee information
- Duty to publish gender pay gap information
- Duty to publish statements on equal pay, etc.

³⁵⁹ Equality Act 2010 (Specific Duties) Regulations 2011, SI 2011/2260.

³⁶⁰ Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, SSI 2012/162.

- Duty to consider award criteria and conditions in relation to public procurement
- Duty to publish in a manner that is accessible, etc.
- Duty to consider other matters.
- Duty of the Scottish Ministers to publish proposals to enable better performance

The Scottish duty to mainstream equality and to publish a mainstreaming report has required clarification, but this has been hard to obtain since the EHRC has been prevented from publishing further statutory codes of practice for the Equality Act. Any ‘guidance’ that the EHRC may produce does not have a binding effect.

Specific duties: Wales

These specific duties, which commenced in April 2011, are the most detailed. Some of the most important aspects are:³⁶¹

- Equality objectives: there is an obligation to publish equality objectives and these must be reviewed at least once every four years.
- Engagement: in specified circumstances the authority must involve those it considers to represent the interests of persons who share one or more of the protected characteristics and who have an interest in the way the authority carries out its functions. The circumstances which require such involvement include considering and designing equality objectives; carrying out an assessment of the likely impact of proposed policies and practices; and preparing, publishing or reviewing a Strategic Equality Plan.
- Information: an authority must identify the relevant information that it holds and identify and collect information that it does not hold. It must identify and collect information on pay differentials between those who have or share one or more of the protected characteristics and those who do not and the causes of such differences. An authority must take all reasonable steps to ensure that any documents or information that it is required to publish are accessible by persons who share one or more protected characteristics.
- Impact: an authority must assess the likely impact of proposed policies and practices on its ability to comply with the general duty. If the assessment shows there is likely to be a substantial impact on an authority’s ability to comply with the general duty, a report must be published. An authority must monitor the impact of its policies and practices on its ability to comply with the general duty.

³⁶¹ Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, 2011/1064 (W 155).

- Reporting: an authority must publish a report in respect of each 'reporting period'.
- Knowledge: an authority must make such arrangements as it considers appropriate for promoting amongst its employees knowledge and understanding of the general duty and specific duties and should identify and address any employee training needs in relation to the duties.
- Pay: an authority must have due regard to the need, in respect of its employees, to have equality objectives that address the causes of any pay differences. It must publish an action plan setting out any policy it has relating to the need to address the causes of any gender pay difference and any gender pay equality objective published by the authority. The action plan must set out how long the authority expects it will take to achieve in order to fulfil a gender pay objective.
- Strategic Equality Plan: the SEP must contain a statement setting out a description of the authority, the authority's equality objectives, details of the steps the authority has taken or intends to take in order to fulfil its objectives, how long it will take in order to fulfil its objectives, and details of arrangements it has made or intends to make to comply with these Regulations. The SEP must be kept under review. It must be published.
- Public procurement: where an authority is a contracting authority it must have regard to whether award criteria should include considerations relevant to performance of the general duty. Also a contracting authority must have due regard as to whether any conditions imposed by them should include considerations relevant to performance of the general duty.

According to the Equality Challenge Unit (ECU), an umbrella body for the higher education sector, in order to be compliant with the specific duties, HEIs in Wales will need to:³⁶²

- 'Create an evidence base relevant to their functions'
- 'Engage staff, students and other people'
- 'Assess the impact of policies and practices'
- 'Develop pay difference objectives'
- 'Develop equality objectives'
- Report on compliance with the duty'
- 'Embed equality into all functions'

One respondent said:

³⁶² ECU (2011) The public sector equality duty: specific duties for Wales Implications for higher education institutions, p 4.

I think Wales has probably the most specific [duties] ... I think it's been unhelpful and helpful in equal measures. Helpful because it reminds the institutions to think about the whole range of protected characteristics. Unhelpful, I think, to some equality practitioners because to them it's become, 'we have to meet all these things' and I think one loses sight of the bigger picture of the general duty amid what one's trying to do to meet the three arms of the duty (Interview 33).

The Act affects universities across their functions. The key areas of friction that emerged are discussed below.

Admissions

Section 91 of the Equality Act 2010 prohibits discrimination against students in:

- Admissions (including the decision to admit and the terms of offers)
- Providing educational provision, or failing to so provide
- Access to benefits, facilities or services
- Exclusion or other detriment

Section 91(3) applies only to disability discrimination, and prohibits discrimination against disabled people who are not students but are applicants for a qualification which a university confers³⁶³ in relation to:

- Arrangements for determining upon whom to confer a qualification
- Terms upon which qualifications are offered
- Failing to confer a qualification
- Withdrawing or varying a qualification

Section 91(9) requires an HEI to make reasonable adjustments for disabled students and applicants.

³⁶³ EA 2010, s 91(3). This meaning is not immediately apparent from the wording of the sub-section, but is found in both the Explanatory Notes and also the EHRC technical guidance on the Act for higher education providers: EHRC, 'Equality Act 2010 Technical Guidance on Further and Higher Education' (2011) para 10.6.

Universities certainly are aware that equality legislation applies to their admissions processes. One university reported that admissions processes were performed with 'absolute rigour'. 'It's about the only thing we do ... that is done in absolutely a very, very consistent and transparent and robust and equal way across every department' (Interview 23). This risk-averse behaviour may be attributable to concerns over potential challenges to admissions decisions.

One university reported that there had been issues at admission in determining what would be reasonable adjustments for a potential medical student with a degenerative condition, as the evaluation of fitness to practise is subject to regulatory standards by the General Medical Council. The university is using what it reported to be increasingly innovative methods to accommodate students, but is not clear on what the limits are:

Increasingly by widening access we are looking at things like what is reasonable. And ... sometimes it's very difficult to know what is reasonable. Because often it's not about money. It's not a budget issue in higher education because they look at your entire budget. So, it would have to be a huge expense for us to say... on the basis of money that it's not reasonable (Interview 37).

Instruction

Inequities in educational attainment remain even between university students:

So one of the things that troubles the sector and troubles us is that the, there's a degree attainment gap. So, black and minority ethnic students, even after controlling for all sorts of factors like A-level attainment, prior educational achievement and parental income and socio-economic status, are still getting worse degrees than their white peers. So then there's about an 18% gap between them (Interview 33).

The ECU has been assisting universities to consider ways in which the Act might require them to work in different ways in order to address the varying needs of different groups. The ECU has implemented a 'systemic change programme' to consider what might be wrong with systems to lead to this attainment gap. For example, teaching practices, assessment techniques, or outreach might favour or disadvantage particular students. The ECU studied why men were obtaining degrees of a lower standard than women, on average, and considered the student experience to be instrumental. Male students were less likely to access pastoral care when they needed it, and that affected their educational outcomes. Changes may need to be made in how pastoral care services are advertised and targeted in order to engage male students in need. Issues were reported around accommodating students with mental health problems.

One university participant said, 'If they don't communicate [that] with their academic department and then ... if they don't pass exams ... and it turns out there's a mental health problem, [it] can get quite messy' (Interview 37).

Abroad

An issue arises as to the extent of the reach of the Act for universities that have campuses abroad or that have staff and students based abroad. In terms of employment, the extent of the reach of the Act depends on 'a complex set of arrangements depending on whether the institution runs the courses and employs the staff, whether the staff can prove a connection to the UK, whether it's a franchise arrangement of another institution abroad' (Interview 33). The complexity of the law is exacerbated by the absence of specific territorial scope provisions in either the Employment Rights Act 1996 or the Equality Act 2010. Thus, for example, the Explanatory Notes to the Equality Act 2010 state:

As far as territorial application is concerned, in relation to Part 5 (work) and following the precedent of the Employment Rights Act 1996, the Act leaves it to tribunals to determine whether the law applies, depending for example on the connection between the employment relationship and Great Britain. ... In relation to the non-work provisions, the Act is again generally silent on territorial application, leaving it to the courts to determine whether the law applies.³⁶⁴

Case law has attempted to lay down guidance but the question of who precisely can bring either employment or discrimination claims remains very much dependent on the facts and context.³⁶⁵

Although employment law covers some of the complexities of the potential arrangements for employees, there is no equivalent to determine the extent of the Act abroad for students. One participant said, 'one can only take precedent from previous case law and to try to interpret what it will mean for students' (Interview 33).

³⁶⁴ Explanatory Notes, para 15.

³⁶⁵ For a recent example that also discusses previous cases, see *Clyde & Co v Bates van Winkelhof* [2012] EWCA Civ 1207.

Pregnancy And Maternity

Around one third of part-time students and 7% of full-time students in higher education are parents.³⁶⁶ Research into student parents in the UK found that pregnant students were commonly expected to defer their courses. 59% of respondents who had been pregnant while studying felt they had not been supported by their institution.³⁶⁷

Section 17 of the Act extended protections for pregnancy and maternity beyond the workplace to HEIs. HEIs must not:

- Treat a student unfavourably because of her pregnancy;
- Within 26 weeks of the date of the birth, treat a student unfavourably because she has given birth; or,
- Within 26 weeks of the date of the birth, treat a student unfavourably because she is breastfeeding.

The ECU considers that universities must not penalise students who miss exams or deadlines as a result of pregnancy and maternity, including related illness or appointments. The effect of the pregnancy and maternity provision in the context of students was one of the issues that was unclear after the Act. 'In the employment world you have a clearly defined period of maternity leave ... you have your 26 weeks, or whenever you choose to return to work, and that's what your maternity leave is. For students that wasn't as clear. What is the period of maternity leave needed clarity' (Interview 33). The ECU recommends that students be required to take two weeks of mandatory maternity leave, or four weeks if they are on a placement in a factory. At a minimum, the ECU recommends that a student be allowed to take one year of maternity leave from their course, during which time the higher education institution should make efforts to ensure that she is kept up to date with developments in her field.³⁶⁸

³⁶⁶ NUS, 'Meet the Parents: the Experiences of Students with Children in Further and Higher Education' (2009).

³⁶⁷ *ibid* 20.

³⁶⁸ Equality Challenge Unit, 'Student pregnancy and maternity: implications for higher education institutions' (2010)

Positive Action

Universities use positive action measures to attempt to address some inequalities in applicants, students and employees. This is the only means for universities to target beneficiaries, as they will not have a restriction in their governing document that allows for discrimination within the scope of section 193. As discussed above,³⁶⁹ positive action measures are limited in scope and time. One university said of the restrictions on positive action, 'I think it forces us to be really, really rigorous and scrupulous about really understanding the evidence, and what the evidence is telling us, and what the problem is' (Interview 23). As is discussed below, some of the ways in which universities undertake positive action are more problematic than others. In some cases the extent of what is allowable under positive action is little understood, or there is no consensus, leading to doubt about whether the actions are actually allowable at all.

Athena SWAN

Universities reported positive action via the Athena SWAN programme to encourage the participation of women in Science, Technology, Engineering, Mathematics and Medicine subjects.³⁷⁰ The charter is jointly owned by the ECU and the Research Councils UK. The programme stagnated for a period, but has been recently revitalised after an announcement that from 2016 all National Institutes of Health research funding would be contingent on medical schools having received an Athena SWAN silver award, which has spurred recent activity (Interview 23). One interviewee pointed out, 'to give you an indication, only one science department in the whole country has a gold award. So the benchmark is very high' (Interview 23).³⁷¹ As many universities have a very diffuse management structure, with sometimes little ability to coerce from central administration, departmental 'buy-in' is required in order to advance equalities. One university equality officer said:

Which is why Athena SWAN has been wonderful because there's so much money at stake. And also, once they've got into it, they're [the university departments] all competing against each other, being all departments run by men. And so in the sciences, they are all competing against each other to do well. So that's really gaining momentum. And in medicine, where they had initially dismissed Athena SWAN, now that they've got £100M funding hanging on it they're all quite enthusiastic (Interview 23).

³⁶⁹ See above at p 84.

³⁷⁰ It has been announced that a similar scheme is being introduced to cover the arts, humanities and social sciences: *Times Higher Education*, 1 August 2013.

³⁷¹ The first gold winner was the University of York's Department of Chemistry. A second gold award was won in April 2012 by the University of Edinburgh's School of Chemistry

Athena SWAN set out the criteria for the levels of awards as follows:³⁷²

Bronze Award holders:	Silver Award holders:	Gold Award holders:
Demonstrate particular challenges and plan activities for the future.	Demonstrate particular challenges and plan activities for the future.	Demonstrate a substantial and well-established activity and achievement record in working towards equality in career progression in STEMM.
Use quantitative and qualitative assessment to identify challenges and opportunities.	Demonstrate that action has been taken in response to previously identified challenges.	Show initiative to increase numbers of women students.
Have a plan that builds on this assessment, and lessons from any activities already in place.	Demonstrate the impact of the actions implemented.	Demonstrate beacon activities in gender equality to the wider community.

The programme relies upon a pipeline concept, with participating departments considering key points of attrition, looking at every stage from undergraduate applications to professors. One participating university reported that:

And what you see typically in most disciplines is parity, or even more at undergraduate level, with men, and then drop off at each level. And so we have been thinking about...we've been thinking generally about what forms of positive action we can take, specifically around our science departments (Interview 23).

The Act limits one approach to the problem:

You can't throw money at the problem. Unless you can prove that women would be not applying for engineering because they haven't got any money, you can't offer them bursaries

³⁷² <http://www.athenaswan.org.uk/>

and scholarships to encourage them to apply. And we know that there are plenty of women who have ... the requisite science A-levels, and they tend to apply for medicine and maths, and there are cultural reasons why more of them don't go into engineering. ... I mean obviously the easy thing is to say, 'Well, let's just have a bursary. Let's have a bursary for women.' But we can't do that (Interview 24).

Participants wanted to find a solution that worked, not necessarily only the most expedient one:

We want to find a method that's both legal and effective, because, I mean, you know, the easy route might be to set up targeted scholarships, but if they're not going to solve the problem, that isn't what we're would want to support anyway. So trying to think through what exactly ... Which is why I think Athena is such a powerful tool, because it's really about understanding what the issues are that are particular to the discipline, and the interplay of the discipline with the institution (Interview 23).

The issues around targeted bursaries and scholarships will be discussed in greater detail below.

Bursaries/ Scholarships

A major issue for some HEIs concerns the provision of scholarships, bursaries and prizes where the potential recipients much share a protected characteristic. These have to be justified as positive action, if they are offered by the university itself, rather than through an outside charity, which may be able to rely on section 193 or another Equality Act exception. An internet search revealed a number of scholarships and bursaries, at old and new universities, that apparently are in conflict with the Equality Act. It is difficult to determine the legality of a particular award, as many scholarships are offered through charities affiliated with a university, and therefore the awards may be able to be justified under section 193. We approached eight universities offering scholarships located through a web search, but none responded to our overture.

The Act 'doesn't disallow [a] scholarship, if in fact, it's a positive action measure. It just, it should make institutions think about it more. And for the right reasons' (Interview 33). Many universities are aware of the potential issues. The ECU has briefed the sector on it. However, some universities haven't fully engaged with the issue.

So, it's been a real issue in universities. They are now very aware of it. I suspect that individually, they are quite reluctant to raise their heads above the parapet and say 'Hey, we've got all these

discriminatory scholarships.’ So, as a sector, they are aware of it. But I don’t know how, individually, how open they are about how much of an issue it is for them (Interview 6).

According to the ECU, the restrictions regarding the provision of targeted scholarships and bursaries were even more complicated under the predecessor legislation:

The Race Relations Act, the Sex Discrimination Act and the Disability Discrimination Act ... had different provisions depending on different protected characteristics. So for race, for example, at that point, where we had the Race Relations Act, you could only offer, if I remember this correctly, bursaries and scholarships to people on vocational training courses and you had to think about how you defined vocational, which made it ... complex. Could one say that ... doing a course of a year in industry was vocational or not? And there was a much more complex set of arrangements than I think there are now (Interview 33).

Although there were previous restrictions on the provision of targeted scholarships and bursaries, more universities are engaging with what they can and cannot do in the way of positive action via bursaries and scholarships under the Equality Act. This was attributed to the new legislation having focused attention, and the fact that ‘the positive action provisions have been drawn together much more tightly across its protected characteristics’ (Interview 33).

The Equality Act ... doesn’t disallow institutions from offering bursaries and scholarships. In fact, it’s a positive action measure. ... What it should make institutions do is to really consider why they’re offering the scholarships and bursaries, as opposed to just offering them because they have been historic. We’ve done it all this time because we’ve always got money to do so from a charitable grant. They should really be thinking about why they’re doing it and whether it’s the right thing to do. So I think it’s made the law simpler, but it’s made people think because it’s new (Interview 33).

This is typically a problem for older universities, which have long-standing scholarship programmes. These historic scholarship programmes may have been set up to redress a disadvantage that has been resolved. ‘There are scholarships at older institutions to support women going there to do English Lit, which was great at the time; there were hardly any women doing English Lit. But now, I mean, 70% of them are women. So things have changed’ (Interview 6). Some of these older scholarships may be targeted in a way that no longer meets societal norms. Universities have ‘issues that have arisen because the money that had come in a long, long time ago was for certain purposes that were socially acceptable then that may not be quite so socially acceptable now (Interview 6).

An example is sectarian scholarships at Scottish universities, for example reserved to Catholic students. One participant had questioned the reasons for such a scholarship:

Well, why? You know, why is it so? If it's because there is an under-representation and you can show it and there is a specific disadvantage and you can prove it, then it's fine to continue doing so. If it's because it's a historic thing, then is it right that the institution continues to perpetuate this historic difference? And if it's because it's being offered by a Catholic charity and they want to support the development of say, theology for the priesthood for example, then it can be offered by, through the Catholic charity. And that's fine because charity law, there are exemptions in the Act for charities (Interview 33).

Another participant reported that they were struggling to determine whether there was sufficient evidence to support a scholarship that had previously been restricted to a British Muslim. They had considered evidence:

Which does suggest that Muslim students, or students from primarily Muslim backgrounds, are more likely to live at home, less likely to attend an old university, or a research-intensive university ... But it's still quite a fragile basis for saying that they need positive action in terms of a scholarship, because again, our legal services office are very cautious on this and say, you know, they don't think that a full fees and tuition scholarship is proportionate unless you can prove that it's lack of finance that inhibits the students from applying (Interview 23).

Scholarships, bursaries and prizes are also frequently restricted by nationality. 'We've had the same ... issue about schools having scholarships from alumni associations for example. So, Hong Kong alumni associations fund scholarships for someone from Hong Kong' (Interview 6). Some scholarships are even restricted by locality, which may have a discriminatory effect. 'I think we still have a scholarship for people from Norfolk and Suffolk (laughter) So they changed it to people who resided in Norfolk and Suffolk rather than who came from Norfolk and Suffolk' (Interview 23).³⁷³ As is illustrated in here, many of these awards have been changed to apply to anyone resident in particular country, rather than nationals of a country. This makes the restriction indirect, rather than direct, discrimination, which therefore can sometimes be justified under the Act.

Schedule 23 allows scholarships to be restricted to persons resident in nations outside of the European Economic Area:

³⁷³ This appears to be with the intent of making any discrimination indirect, rather than direct.

The Schedule 23 exemption, which allows institutions to offer scholarships to non-EEA students and this is really come through [the work] of the UK for international development. And I think it's the right approach to it. ... It's the provision allowing institutions to offer scholarships to non-EEA students ... provided that they don't use their skills within the UK. That they would leave the UK after that, and apply their skills outside of the UK and it is about international development. But there have been some institutions that ... say can we use the scholarship to offer to any non-EEA student. We just want to attract more international students. And that's the wrong reason. You know, that's not what the exemption is there for (Interview 33).

An issue still arises around these scholarships between non-EEA nationals, because although the exception provides that by restricting these awards the university is not unjustifiably discriminating against EEA nationals, the university is still discriminating against other non-EEA nationals. For example, as discussed in Section IV,³⁷⁴ a scholarship for a student from Nigeria would not be illegal discrimination against a French student, but would be against a student from Niger. One university had received conflicting information on this. Having interpreted some guidance to mean that scholarships for non-EEA nationals had to be offered to all non-EEA nationalities, they consulted a lawyer, who agreed that:

The intention of the legislation there was to provide benefits for people from developing countries, and it would frustrate the intention if you then had to offer all those scholarships to Americans, Canadians, Australians ... So we're going to ignore that. But it just shows that this is a very mobile area without any case law, and we don't know what we're doing, and nobody sort of warned us about it before they did it (Interview 23).

Universities are struggling to address this, and some hope that scholarship programmes will be looked at collectively, rather than considering each scholarship individually. One lawyer said that:

The argument that they [universities] would like to put forward collectively, and are hoping will succeed, is that each university provides a suite of scholarships. The aim of the suite of scholarship is to ensure that anybody who's able can come to the university ... and that is a legitimate aim. And within that legitimate aim, it is proportionate for individuals to fund parts of that programme. So ... someone from Greece to fund the Greek...the Greek part, for Greek students, someone from Ethiopia to fund the Ethiopian part, et cetera, provided that there is something for everybody. And that their scholarship programme should be seen in the round, rather than looking at individual scholarships. And that's the argument that would make it all go away for them. I think there are practical difficulties with that on a lot of levels because no university has that much money that it can say, 'we will provide scholarship for everybody' ... So,

³⁷⁴ See above at p 73.

whilst the big ones maybe able to say, we do have scholarships for everybody, I don't think that will work for everyone ... Trying to make sure there is a scholarship for everybody from every country is just practically I think quite difficult (Interview 6).

These sorts of calculations require case law to be certain. Another participant, when asked if fund-raising as much money as possible to support as many students as possible might be a legitimate aim for a university, laughed and said, 'That would be for a court to decide. I wouldn't be able to say (Interview 33).

The problem is not restricted to established scholarships. Older universities tend to have more problems even with newer scholarships, because older universities also tend to fund-raise from alumni more frequently. 'They obviously have more alumni, who might stipulate, you know, I want to offer a scholarship to a particular group of students' (Interview 33). Attempted donations are often made to benefit people from similar circumstances to the donor - the donor wishes to help 'people like me.' Again, participants report that there is no 'genuine' discrimination.

One lawyer had advised a client who wanted to establish an art prize limited to students of a particular nationality. As the restriction could not be justified, the prize had to be run with no nationality restriction.

Targeted gifts have been rejected, or withdrawn when a university attempts to modify the terms. A lawyer reported that a university client had been offered a large gift to support women law students, but had been unable to accept it on those terms because the gift fell foul of the Equality Act. The university approached the donor to try to broaden the terms of the gift, but it was ultimately withdrawn. Charity lawyers had predicted that an inability to comply with the wishes of some donors wanting to place restrictions of this kind on the use of their gifts might lead to a drop in funding for some charities.³⁷⁵

In the past, even without the extended reach of equality law, one way that the English courts have traditionally dealt with the problem of a potentially discriminatory charitable gift that have been made

³⁷⁵ Charity Law Association, 'EHRC Consultation on Equality Act 2010 non-statutory guidance Response from the Charity Law Association Working Party' (2010).

in a will is by way of using the equitable doctrine of *cy près*. This allows the courts to alter the terms of a charitable trust when the testator's intent is frustrated due to the impossibility, impracticability, or illegality of carrying it out exactly as the donor specified. On several occasions, the courts have been asked by charity trustees to make *cy près* orders to remove a condition or subsidiary term providing for racial discrimination in respect of the charity concerned. These have been cases where the donor wishes to support a specific institution, such as a college, and the racial restriction is made applicable to those who will receive some benefit from the institution. *Cy près* is based on the settlor's intention. Adopting a liberal approach, the court may find that the donor's primary intent was to establish or aid the institution concerned and that the racial restriction is now preventing the institution from accepting the gift. On that basis, the court may then remove the restriction. For example, in *Re Dominion Students' Hall Trust*³⁷⁶ a charity maintained a hostel in London for male students of European origin from the overseas dominions of the British Empire. The charity wished to delete the 'colour bar' (which was in fact a requirement that its beneficiaries be 'of European origin') so that all male dominion students could come to the hostel. The amendment, which was supported by the Attorney-General, was approved by Evershed J on the ground that the requirement might defeat the charity's object of promoting community of citizenship, culture and tradition among all members of the British Commonwealth of Nations. Similarly, in *Re Lysaght*³⁷⁷ Buckley J deleted an exclusion of persons of the Jewish or Roman Catholic faith from a gift by will to the Royal College of Surgeons of England for studentships.

Enforcement

Universities, like others, sometimes balance the risk of a potential Equality Act violation, especially in an area where the law is unclear, or where there is no case law, with the potential risk of enforcement. If the risk is low, and the law is unclear, then they may take a 'wait and see' approach. The risk of a regulatory challenge is perceived as very low. A participant said that the EHRC had indicated previously that it is not very concerned about the HE sector. 'And, I know, in Wales, their key issue for the HE sector is equal pay and they've written to the Welsh minister to say so. So I doubt that there will be any regulatory challenge to this' (Interview 33).

The low chances of regulatory intervention mean that the only practical likelihood of enforcement is via a claim from an interested individual. Again, participants generally perceived that challenges to charities are unlikely:

³⁷⁶ [1947] Ch 183.

³⁷⁷ [1966] Ch 191.

When we speak to higher education institutions about this, a lot of them say, 'Well, nobody's ever going to make a claim. Why do we care? And actually, even if he does make a claim, we'll just give him a scholarship and he'll go away. So most people I've come across in the sector are looking at it in terms of claims. I guess, there will be a reputational side to it too, because, you know, it's what we always say to charities: pass the Evening Standard test. Imagine this is a headline by someone who actually wants to damage you (Interview 6).

One of the issues I think of the Equality Act is - well, I think one of the issues with every bit of law - is institutions will measure the risk of litigation against what they're doing and whether what they're doing has a benefit to them. I need to think about this, but if... I mean, let's come back to the issue of the non-EEA scholarships for example. Now the risk of litigation, I suspect, is small. So, let's use the example of the Nigerian versus the student from Niger. The likelihood that a student from Niger will know that there is this exemption in the law and be able to pursue it through some kind of judicial system is slim. And I suspect institutions with scholarships will be thinking the same thing. You know, that the likelihood of someone being able to take a case who will know how to do so and have the resources to do so if they fall outside the bursary rules, it's probably slim. And so, they would say actually the risk of litigation is probably quite slim and they may not change something (Interview 33).

However, this may be becoming less true for higher education:

But ... student pressure and student fees recently have been increasing, increasing, increasing. So actually you think the pressure there means that claims ... are possibly more likely. So if someone misses out on a scholarship because they're not from the right country, and that makes the difference between whether they go to university or not or to the university of their choice. Actually, there is potentially loss there and there is potentially an incentive to make that claim (Interview 6).

Conclusion

The complexities of universities' circumstances cause a number of potential points of friction with the Equality Act. As was true in charities generally, the sector has good general awareness of the Act, but a more limited awareness of the implications in some areas. Universities undertake positive action in different areas, with greater and lesser degrees of clarity as to what are the acceptable limits. Restricted scholarships and bursaries are a particular issue for the sector, and participants report that more certainty is required, and that there was no 'genuinely' discriminatory intent.

Single-sex Provision

Problems being experienced by charities that provide services for women only were identified in a number of the interviews with lawyers in the initial round. Subsequently, two interviews were conducted with an umbrella body for women's groups. Online searches were also conducted for reports about the difficulties encountered by entities providing single-sex services.

Apart from certain specific exceptions that were dependent on context³⁷⁸ the Sex Discrimination 1975 allowed charities to provide services and benefits to one sex if that was why the organisation had been set up.³⁷⁹ It was, therefore, lawful to have women-only services, for example, for the victims of domestic violence or sexual abuse or to have services directed specifically at particular communities of women, for example those in minority ethnic communities. This was seen not only as a way of targeting support where it was most needed, but also as a way of addressing gender inequalities and as a way of empowering women. Research carried out by the Women's Resource Centre in 2006 found that:

... the primary reason women's organisations are successful (in changing women's lives, wider communities and society as a whole) is because their approaches are women-centred and based on values of empowerment, rights and self-determination. They tailor their services to the needs, aspirations and experiences of their service users and recognise that violence and discrimination against women exists within, and is enabled by, social, political and economic structures.³⁸⁰

It is unsurprising, therefore, that women's voluntary organisations are adamant that there is a continuing need for women-only services.³⁸¹ The Equality Act 2010 does not outlaw women-only (i.e. single-sex) services although these must now fall within criteria set out in Schedule 3 of the Act.³⁸² In particular, single-sex services are permitted, for example, where a joint service would not be as effective and it is not reasonably practicable to provide separate services for each sex; or where they may be used

³⁷⁸ See e.g. Sex Discrimination Act 1975, s 35(1C) where 'serious embarrassment' could be caused by mixed sex facilities.

³⁷⁹ Sex Discrimination Act 1975, s. 43.

³⁸⁰ Women's Resource Centre, 'Why Women Only? The value and benefit of by women, for women services' (2007) 15.

³⁸¹ Women's Resource Centre, 'Women-only services: making the case' (2011).

³⁸² Equality Act 2010, sch 3, para 27. See above at p 70.

by more two or more at the same time and a woman might object to the presence of a man (or vice versa). This would appear to cover many (though not all) of the services offered exclusively to women but, in addition, the single-sex provision must be a proportionate means of achieving a legitimate aim. In other words, women-only services must be justifiable under the formula if they are not to be unlawful sex discrimination against men.

The Equality Act's provision for positive action³⁸³ may also be of relevance to the provision of women-only services in certain circumstances. The Athena SWAN programme, discussed in the case study on higher education³⁸⁴ is a good example of this.

Despite the legislative recognition of the potential for women-only services, this research has uncovered significant concerns about threats to such services. These relate in particular to pressure from funders who demand, or are perceived to prefer, services that are open to all. This may result from a misunderstanding of the law or from the need to make a smaller budget stretch further. An example of the former can be seen in the *Southall Black Sisters* case,³⁸⁵ but that case also shows how the law can be used to challenge the decisions of local authorities.

The Committee of the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) expressed concern in 2008 that specialised women-only services, in particular domestic violence shelters and rape crisis centres, may be jeopardised by a shift to larger, more generic service providers.³⁸⁶ A survey of Rape Crisis centres conducted in 2007/8³⁸⁷ found that, while women-only services were effective and wanted by service users, 15 out of 35 centres that responded to the survey had been challenged by a range of statutory agencies on the basis that they only provided their services to women. Some centres had funding refused on the basis of being women-only or had been pressured to deliver services to men. This research has confirmed that the shift from grant aid towards commissioning procedures, together with the funding cuts is continuing to have a detrimental impact on women-only services:

Frequently, they're in competition with non-women's sector organisations so more broad organisations. And the preference is to go with those broad organisations (Interview 35).

³⁸³ See above at p 84.

³⁸⁴ See below at p 126.

³⁸⁵ [2008] EWHC 2062. See below at p 148.

³⁸⁶ CEDAW 41st session (30 June-18 July 2008), Part of A/63/38 1, Fifth and sixth periodic reports, United Kingdom of Great Britain and Northern Ireland, para 273 *at*

<http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.GBR.CO.6.pdf>

³⁸⁷ Women's Resource Centre and Rape Crisis (England and Wales), 'The Crisis in Rape Crisis' (2008).

There also appears to be a misconception amongst some funders that equality for women has been achieved:

There is a lot of rhetoric in government and in the sector about wanting to help men... In addition to the funding problem, and the competition problem, there is this general rhetoric against women-only services (Interview 35)

This 'equality myth' is resulting in women-only service providers increasingly feeling under pressure to offer their services on a gender neutral basis:

So many are opening their doors to men, and losing the very purpose for which they were set up (Interview 35)

Despite the outcome in the *Southall Black Sisters* case, it may still not be well understood that compliance with the PSED may involve treating some people more favourably than others.³⁸⁸ For example, services do not necessarily have to be provided on the same basis or scale for both men and women. Whilst it is clear that the PSED requires public bodies to acknowledge and to take steps to meet different needs and to act to remove disadvantage, it appears that there is still a tendency among some funders to believe that the Equality Act requires everyone to be treated the same. An umbrella body for charities providing services to women only noted:

We are still seeing local authorities and broader funders saying 'no, you have to provide services to men too, or else we're not going to fund you'. They're basically saying that, without doing that, the organisation is going to be in contravention of the Equality Act, which isn't actually the case (Interview 35).

The research found evidence of a single-sex hostel whose trustees were told by the local authority funder that it had to admit men (Focus Group 17/1/13). Even though the charity knew that it was entitled to run a single-sex service and had argued this point, it was nevertheless pressured into opening up its doors to men. This has now led to increased work for the charity as each male applicant must be risk-assessed before being allowed to use the services of the hostel.

³⁸⁸ Equality Act 2010, s 149(6).

It has been suggested in an EHRC Research report on this area that procurement officers are concerned that if they fund women-only services, this may leave their procurement process open to challenge from other bidders to challenge on the grounds of discrimination.³⁸⁹ In fact, the Women's Resource Centre, the national umbrella organisation for the women's charities, with over 500 members, has even gone so far as to publish a draft template letter promoting women-only services to local councils,³⁹⁰ that charities can use to counter such concerns. It includes specific reference to the Equality Act 2010 and reminds local authorities that by engaging with women's organisations and the women that they work with will enable them to meet specific duties and obligations under the Act.

The main impetus for the 'attack' on women's services seems to be the austerity measures and the consequent increase in competition for limited resources. Women-only services may simply be seen as unaffordable when budgets are coming under pressure:

There's definitely a move toward people being able to say that they can cover everything. Because if you're a single equality stream organisation, it's much harder to get funding now (Interview 35).

Whether such services are actually being accessed by men in any great numbers is questionable, but charities seeking funding are feeling the need to be able to report in funding applications that their services are open to men. There is concern that this may lead to some women being deterred from accessing such services. In August 2007, the Women's Resource Centre commissioned a poll which asked a random sample of 1,000 women in the UK about their views and experiences of women-only services and spaces.³⁹¹ An overwhelming majority of respondents (97%) stated that a woman should have the choice of accessing a women-only support service if they had been the victim of a sexual assault. When asked about the advantages of women-only services generally, 84% of respondents stated that these included the ability to talk more openly about their lives and experiences. Other themes that emerged were that women had a feeling of safety, of being listened to, being more confident to participate in discussions and empowered - all without the unwanted attention of men.

³⁸⁹ Andy Hirst and Sini Rinn, 'EHRC Research report 86: The impact of changes in commissioning and funding on women-only services' (2012) 21.

³⁹⁰ <http://thewomensresourcecentre.org.uk/our-work/equality-act/>

³⁹¹ Women's Resource Centre, 'Why Women Only? The value and benefit of by women, for women services' (2007) 51-56.

Trans-Gendered Women

Another issue that was raised in interviews related to concerns about whether or not women-only services could be restricted to cis-gendered women³⁹² only or whether they had to be offered to trans-gendered women. The Act itself provides, in Schedule 3, paragraph 28, that it is not unlawful to restrict women-only (single-sex) *if* that is a proportionate means of achieving a legitimate aim.³⁹³ However, the EHRC Statutory Code of Practice observes that, subject to that exception, a provider of single-sex services should treat transsexual people according to the gender role in which they present.³⁹⁴ The Code goes on to state that:

Service providers should be aware that where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary.³⁹⁵

Moreover, the Code suggests that denial of a service to a transsexual person should be exceptional. Policies should be applied on a case-by-case basis and the needs of the transsexual person for the service and the detriment to them if they are denied access, must be balanced against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. The provider will also need to show that a less discriminatory way to achieve the objective was not available.³⁹⁶

The interviews suggested that pressure is being brought to bear on women-only service providers to open up their services to transgender women:

So, yes, some women-only services have had to open up to transgender women (Interview 35).

Whilst this issue has not come before the courts in this country, in Canada, the Court of Appeal in British Columbia has held that a Rape Relief centre was entitled to refuse a post-operative transsexual woman

³⁹² Cis-gendered women identify with the gender that matches the sex that they were assigned at birth.

³⁹³ The Explanatory Notes to the Act suggest that it would be lawful to exclude trans-women from a group counselling session for female victims of sexual violence.

³⁹⁴ EHRC, 'Equality Act 2010 Code of Practice - Services, Public Functions and Associations' (2011) para 13.57.

³⁹⁵ *ibid* para 13.59.

³⁹⁶ *ibid* para 13.60.

access to its volunteer training scheme.³⁹⁷ She was rejected from the training programme because she did not share the same life experiences as women born and raised as girls and into womanhood. The British Columbia Court of Appeal held unanimously that Vancouver Rape Relief had the right to prefer to train women who have never been treated as anything but female. Chief Justice Finch said:

The respondent Society was entitled to give preference to women who are not post-operative transsexuals, because there is a rational connection between the preference and the respondent's work or purpose.³⁹⁸

In this particular case, the denial of service to a transsexual was considered to a proportionate means of achieving a legitimate aim. This test will require each case to be considered on an individual basis.

Women's Giving Circles

Shared giving, or giving circles, are becoming quite common in the USA³⁹⁹ and are starting to be set up in the UK. They are a way of multiplying the potential effects of individual donations, by joining with others to decide to whom and how to give your support. They have been of particular interest to women donors who are seeking to help other women and girls. One of the lawyers interviewed reported difficulties in gaining charitable status for such an entity, with the Charity Commission initially suggesting that a 'women-only' focus would not be compliant with the equality legislation.

We've had two or three sets of instructions of that type in the last few years, and the first one that came to us was on a rebound from the Charity Commission, because the Charity Commission said, 'Look, you can't do this.' (Interview 5)

This particular organisation was later recognised by the Charity Commission as being Equality Act compliant once it made it clear that it would be focusing its activities on areas where there was particular dis-benefit for women and girls. Such charities need to ensure that they fit within one of the exceptions that will allow them to support women-only projects.

³⁹⁷ *Vancouver Rape Relief Society v Kimberly Nixon* 2005 BCCA 601, 262 DLR (4th) 360, [2006] 4 WWR 213.

³⁹⁸ *ibid* para 77.

³⁹⁹ See e.g. Angela M Eikenberry and Jessica Bearman, With Hao Han, Melissa Brown, and Courtney Jensen, 'The Impact of Giving Together: Giving Circles' Influence on Members' Philanthropic and Civic Behaviors, Knowledge and Attitudes' (Forum of Regional Associations of Grantmakers The Center on Philanthropy at Indiana University The University of Nebraska at Omaha 2009).

Charities Providing Single-sex Accommodation

Charities that have traditionally provided housing to members of one sex may now be required to consider whether they should be opening up their services to members of the opposite sex. Our research suggests, that, without the intervention of a regulator, a challenge from a member of the public (who cannot access the service due to being the 'wrong' sex) or perhaps the charity's legal advisor (should they have one), these issues may well not be considered by such organisations. Even when these issues are taken on board, the practical realities of making such a change are considerable:

one of the issues that they'll have to think about very carefully is how ...they introduce a cohort of women into that environment. They don't really want to have one woman, amongst many, many more men ... you'll need to be able to achieve a community balance, and that's really not easy because that possibly means leaving units vacant for a little while until you can actually achieve critical mass which actually is very frustrating if you know that there are so many people who are in desperate need. But it's one of the difficulties of introducing change in practice, isn't it? (Interview 5)

Clearly such charities may fit within one of the exceptions that will allow them to continue to operate on a single-sex basis, but the research suggests that many such organisations have not considered the issue at all.

Conclusion

Single-sex services remain lawful under the Act, as long as they are a proportionate means of achieving a legitimate aim. Women's charities remain adamant that there is still a need for their services. However, organisations are frequently under pressure, whether overt or perceived, from funders to open up services to all. Women-only giving circles may be allowable if they focus on a particular dis-benefit to women or girls. The resistance on the part of some women's organisations to offering services to trans-gendered women is more difficult to justify under the Act.

Challenges to Public Sector Spending Cuts

In the initial round of interviews, it became apparent that the interaction of the public sector equality duty and charities was an important area for further investigation. We also conducted five interviews focused upon this case study, one with a public lawyer, one with an umbrella body, one with a charity that challenged cuts via the PSED, one charity that was challenged via the Act, and one with a voluntary sector organization that advises a public body.

As discussed in more depth in Section IV,⁴⁰⁰ Part 2 of the Equality Act 2010 makes provision for the 'advancement of equality' by imposing a proactive Public Sector Equality Duty (PSED). Section 149 establishes the 'general duty,' and requires public authorities,⁴⁰¹ or private bodies carrying out public functions,⁴⁰² to show 'due regard' to the need to:

- eliminate discrimination;
- advance equality of opportunity; and
- foster good relations between persons in protected groups and others.⁴⁰³

The PSED in the Equality Act 2010 has 'deepened and expanded'⁴⁰⁴ from its origin in the predecessor equality legislation which also established a duty to show 'due regard'. The first was section 71 of the Race Relations Act 1976, which came into effect in April 2001. It required public authorities, in carrying out their functions to 'have due regard to the need:

- to eliminate unlawful racial discrimination; and
- to promote equality of opportunity and good relations between persons of different racial groups.⁴⁰⁵

⁴⁰⁰ See above at p 86.

⁴⁰¹ See Equality Act 2010, sch 19. The limited exceptions to the general duty are found in sch 18.

⁴⁰² Equivalent to functions of a public nature under the Human Rights Act 1998: Equality Act 2010, s 150(5).

⁴⁰³ Equality Act, s 149. The relevant characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation: s 149(7). Public authorities are however required to have due regard to the need to eliminate unlawful discrimination in employment against someone because of their marriage or civil partnership status.

⁴⁰⁴ Sandra Fredman, 'The Public Sector Equality Duty' [2011] 40(4) *Industrial Law Journal* 40.

⁴⁰⁵ Race Relations Act 1976, s 71, as amended by Race Relations (Amendment) Act 2000, s 2. The duty arose out of Sir William Macpherson's Inquiry into the police investigation of the murder of Stephen Lawrence, which found 'institutional racism' in the Metropolitan police and concluded that 'It is incumbent upon every institution to examine their policies and the outcome of their policies and practices to guard against disadvantaging any section

Similar duties for sex⁴⁰⁶ and disability⁴⁰⁷ were introduced in the relevant legislation.

The general PSED in the Equality Act 2010 duty is supported by a number of specific duties, which require authorities listed in the relevant Regulations to publish annual information to demonstrate compliance with the general equality duty.⁴⁰⁸ The information must include, in particular, information relating to people who share a protected characteristic who (a) are its employees and (b) people affected by its policies and practices.⁴⁰⁹ In addition, each listed public authority must prepare and publish one or more specific and measurable objectives to further any of the aims of the general equality duty, at least every four years. Both the equality information and the equality objectives must be published in a manner that is accessible to the public.

Because the general equality duty requires organisations to have ‘due regard’ to the listed aims, they must be proactive in pursuing equality as opposed simply to reacting to complaints or challenges. Organisations must actively demonstrate that equality is an integral part of their policies and procedures and that all decisions are equality compliant.

Apart from statutory enforcement by the EHRC,⁴¹⁰ it is possible for either the EHRC or a party or parties with sufficient interest⁴¹¹ in the matter to apply to the High Court for judicial review in order that a decision or policy may be subject to judicial scrutiny in order to decide whether the duty has been breached. It is this route, rather than the statutory powers, that has been used on a number of occasions and this has allowed the courts to ‘flesh out’ what the duty entails and in particular what the authority, or other body exercising public functions must do in order to be found to have had ‘due regard’ to its obligations. Most of the extant case law relates to the duties from the predecessor legislation. However, it will be relevant in assessing how the new equality duty will be applied.

of our communities.’ Home Office, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (Cm 4262-I, 1999) para 46.27.

⁴⁰⁶ Discrimination Act 1975, s 76, as amended by the Equality Act 2006.

⁴⁰⁷ Disability Discrimination Act 1995, s 49A as amended by Disability Discrimination Act 2005, s 3.

⁴⁰⁸ Equality Act 2010 (Specific Duties) Regulations 2011, SI 2011/2260; Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, 2011/1064 (W 155); Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, SSI 2012/162.

⁴⁰⁹ Public authorities with fewer than 150 employees are exempt from the requirement to publish information on their employees: Equality Act 2010 (Specific Duties) Regulations 2011, SI 2011/2260, reg 2(5).

⁴¹⁰ Equality Act 2006, s 32.

⁴¹¹ Senior Courts Act 1981, s 31(3).

Development of the PSED via case law

Reported cases based upon the PSED increased after the seminal case of *R (Elias) v Secretary of State for Defence*.⁴¹² The matter concerned the *ex gratia* compensation, introduced by the government in 2000, for British subjects who were held as prisoners of war by Japan in the Second World War. Among the groups entitled to compensation were British civilians. Later, the eligibility criteria were clarified to restrict eligibility to British subjects with a 'bloodlink' to the UK. In *Elias* the judge in the High Court upheld a challenge to the scheme based upon section 71 of the Race Relations Act 1976. On appeal in the Court of Appeal, Arden LJ stated that:

It is a clear purpose of section 71 to require public bodies to whom the provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement and this provision must be seen as an integral and important part of the mechanism for ensuring the fulfilment of anti-discrimination legislation. It is not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important matter. In the context of the wider objectives of anti-discrimination legislation, section 71 has a significant role to play.⁴¹³

The concept was developed further in *R (Baker) v Secretary of State for Communities and Local Government*. Compliance is a matter of substance and there must be evidence⁴¹⁴ that the organisation has directed its mind to the relevant questions and the statutory requirements.⁴¹⁵ Having due regard to the duty does not require the organisation to achieve a result, for example, by eliminating inequality, but it does require the policy-maker:

*to have due regard to the need to achieve these goals. The distinction is vital. What is due regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged [...] group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.*⁴¹⁶

⁴¹² [2005] EWHC 1835 (Admin).

⁴¹³ [2006] EWCA 1293, [2006] 1 WLR 321 [97]-[98].

⁴¹⁴ E.g. by express reference to the legislation and relevant guidance or other documentation.

⁴¹⁵ *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2009] PTSR 809.

⁴¹⁶ *ibid* [31] (Dyson LJ). Emphasis in the original.

Due regard is thus subject to a test which involves weighing the impact of the policy against the objectives of the decision-maker. It is for the court to decide whether 'due regard' has been given, but the concept of due regard is restricted to whether there has been a proper consideration of the statutory criteria: it does not allow the court to interfere on the basis that it would have decided the question differently:

Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para 34) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.⁴¹⁷

The strength of the public sector duty is that, as Dyson LJ pointed out in *Baker* case, the obligation goes well beyond merely avoiding formal non-discrimination:

the promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination.⁴¹⁸

Some general principles, drawn from the cases, were suggested by Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions*.⁴¹⁹

First, those in the public authority who have to take decisions that do or might affect relevant groups must be made aware of their duty to have due regard to the identified goals. An incomplete or erroneous appreciation of the duties will mean that due regard has not been given to them.

Secondly, the duty must be fulfilled before and at the time that a particular policy is being considered. It involves a conscious approach and state of mind.

Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority.

Fourthly, the duty imposed on public authorities is a non - delegable duty. The duty will always remain on the public authority charged with it. If another organisation is carrying out the policy,

⁴¹⁷ *R (Hurley and Moore) v Secretary of State for Business Innovation & Skills* [2012] EWHC 201 (Admin) [77] (Elias LJ).

⁴¹⁸ *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2009] PTSR 809 [30].

⁴¹⁹ [2008] EWHC 3158 (Admin) [90]-[96].

the duty to have due regard will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the due regard duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its due regard duty.

Fifthly, (and obviously), the duty is a continuing one.

Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty.

Prevalence of judicial reviews relying on the PSED

The PSED has become the most popular ground for judicial reviews to challenge funding decisions, because it is the most successful. In a recent article, Hickman concluded that the 'PSED are powerful grounds of judicial review,'⁴²⁰ noting that among the successful cases are a number of challenges to budgetary decisions, which are difficult to challenge successfully via judicial review. A participant lawyer specializing in judicial review said that the duty has been evolving:

But before the equality duties were introduced, or before they became a realistic strategy for challenges, I just used general public law grounds... But the equality duty has become more significant as it has evolved over the last, I would say, six or seven years. When I started doing this type of case, there was only the race equality duty and the first couple of challenges were in relation to the race equality duty. And then the government introduced the disability equality duty, and the gender equality duty and you got more cases that were testing the issues as it were. So, it was really just the case law evolving and lawyers like me and others trying out the arguments and trying to get somewhere with them. And that's just the way case law evolves (Interview 29).

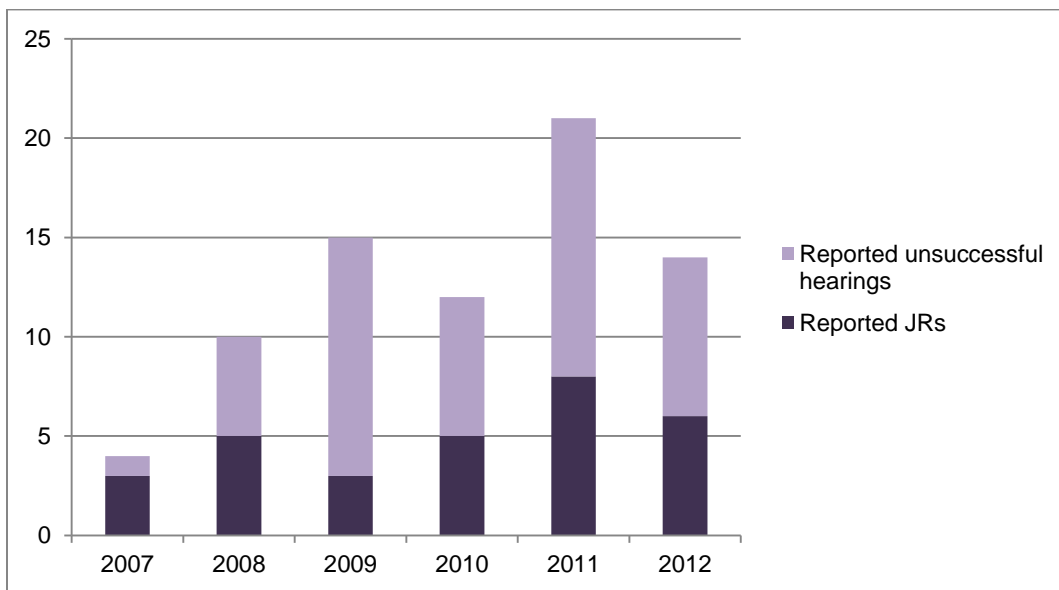
An umbrella body that assists its members to bring these sorts of challenges to funding cuts also said that these sorts of funding challenges had become more common:

⁴²⁰ Tom Hickman, 'Too hot, too cold or just right? The development of the public sector equality duties in administrative law' [2013] Public Law 325, 332.

So, that would be the kind of most typical type of situation - where it's a government decision and we're kind of checking or challenging that decision, sometimes using the Equality Act as basis to do that (Interview 8).

Figure 1, below, sets out the numbers of reported substantive hearings and granted judicial reviews under the PSED. Some were supported by charities, which use the mechanism of judicial review to challenge decisions made by public authorities in relation, for example, to adverse funding decisions. However, this can be a double-edged sword for charities, as one PSED judicial review challenged the admissions practices of the Jewish Free School, a charity.⁴²¹

Figure 1 Reported PSED hearings, 2007-2012⁴²²



⁴²¹ *R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] IRLR 136.

⁴²² Data from BAILII searches, including planning decisions. Figures were also confirmed in Tom Hickman, 'Too hot, too cold or just right? The development of the public sector equality duties in administrative law' [2013] Public Law 325.

Selected relevant cases

Southall Black Sisters

An example is found in *R (Kaur & Shah) v London Borough of Ealing*,⁴²³ albeit in relation to the previous duty under the race relations legislation. Section 71 of the 1976 Act imposed a duty on public authorities to have due regard for the need (a) to eliminate unlawful racial discrimination, and (b) to promote equality of opportunity and good relations between persons of different racial groups. That section was supported by a statutory Code of Practice (Code of Practice on the duty to promote Race Equality 2002 CRE), which was to be taken into account by a court where relevant.⁴²⁴ At that time the specific equality duties were more detailed and in the case of race required the authority to publish a race equality scheme setting out the arrangements for meeting the duties and also to set out arrangements to assess the likely impact of proposed policies on the promotion of race equality.

Southall Black Sisters provides specialist services to Asian and Afro-Caribbean women particularly in relation to issues arising from domestic violence. It was funded partly by the London Borough of Ealing and partly by voluntary contributions, but in 2007 Ealing decided that rather than funding individual organisations it would commission services from community and voluntary organisations by open competition according to published criteria. The aim was that the service provider would have to provide the service to 'all individuals irrespective of gender, sexual orientation, race, faith, age, disability, resident within the Borough of Ealing experiencing domestic violence'. A consultation was held during which Southall Black Sisters suggested that the criteria would have a disproportionate impact on black and minority ethnic women, and that there had been no racial equality impact assessment. Concerns were also expressed as to the impact on specialist services provided to black minority ethnic women likely to be caused by awarding funds to a provider who provided services to all, whatever their ethnic origin. Southall Black Sisters stressed the importance of specialist provision, making the point that targeting services did not undermine social cohesion. Southall Black Sisters also pointed out that proposals for a borough-wide service available to all would have a detrimental and disproportionate impact:

The main reason for this (a disproportionate impact) is that not all women experience domestic violence in similar circumstances. Issues of racism, culture, language and immigration status, for

⁴²³ [2008] EWHC 2062 (Admin).

⁴²⁴ The Government decided there will be no statutory code to support the Equality Act 2010 duty, since this would place an unnecessary burden on public bodies. The guidance documents that have been produced do not carry the same legal weight as a statutory code.

example, make the task of accessing services much more harder ... for black and minority women. There is therefore a greater need for part of its specialist resources and staff.⁴²⁵

Ealing fell into error by assuming that cohesion could only be achieved through making a grant to an organisation which would provide services equally to all and moreover that they would not be permitted to fund an organisation that would supply services exclusively to one racial group. As a result of Ealing's failure to give due regard to the race equality duty, and its misunderstanding of what the equality duty required the Southall Black Sisters succeeded in having the decision quashed.

Fawcett Society

In an ambitious attempt, the Fawcett Society challenged the government's 'emergency' budget under the Gender Equality Duty, claiming that adequate consideration had not been paid to the disproportionate impact of the cuts on women.⁴²⁶ They claimed that £5.7 billion of the proposed £8.1 billion in cuts would be borne by women. The challenge was so outré that the Treasury was reported to be 'stunned'.⁴²⁷ The government admitted that it had not conducted equality assessments for two of the policies. However, Ouseley J considered that the challenges had not been brought in a timely enough fashion, considering the enormity of the relief requested:

The original proceedings taken to quash the Budget were started some five weeks after the Budget and indeed after some of the measures had been passed into law in the Finance Act 2010. The claimant knew well of the target which it was eventually to take aim at and although ... the claimant is a small charity and the claimant did not in the context of judicial review litigation generally act without promptitude, in my judgment her submissions on delay omit the nature of the decision challenged and the relief sought in respect of it. It is in my judgment no answer to the problems which a challenge may bring through its delay to say that the claimant is a small charity. These were proceedings which were capable of having a very significant impact on the important issues of the Budget for a new government. They should have been brought very much more quickly and if that meant that this particular claimant could not bring them, that does not, in my judgment, alter the question of what is prompt for a decision of this nature being challenged.⁴²⁸

⁴²⁵ *R (Kaur & Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin) para 34.

⁴²⁶ *R (Fawcett Society) v Chancellor of the Exchequer* [2010] EWHC 3522 (Admin).

⁴²⁷ Beatrix Campbell, 'The Fawcett Society takes the cuts to court' *The Guardian*, 22 October 2010.

⁴²⁸ *R (Fawcett Society) v Chancellor of the Exchequer* [2010] EWHC 3522 (Admin) [19].

He dismissed the case as ‘unarguable - or academic’. Even though the case was dismissed at the permission stage, the detailed briefings required suggest the potential importance of the PSED. As Hickman points out, ‘It is difficult to imagine any other ground of judicial review being capable of posing a serious challenge to the national budget’.⁴²⁹

London Councils (Roma Support Group)

Although the Fawcett Society was not successful, many judicial review challenges to funding cuts have been. In another recent case, two users of the services of the Roma Support Group, a charity, challenged £10 million in funding cuts to voluntary sector organisations from the London Boroughs Grant Scheme, a joint programme run by the London Councils, an organisation comprised of the London Boroughs and the City of London. Reductions in public sector spending had made it necessary for the London Councils to conduct a ‘scoping consultation’ of contracts with voluntary sector organisations. The result was that the Roma Support Group had been placed at a low priority. Calvert-Smith J held that there had not been an equalities assessment during the prioritisation process. The equality duties were fundamental and ‘in a case where large numbers of vulnerable people, many of whom fall within one or more of the protected groups, are affected, the due regard necessary is very high.’⁴³⁰ The process was quashed, and the London Councils ordered to retake the decision having conducted adequate equality impact assessments.

Birmingham Advice Case

Birmingham cut funding to thirteen advice agencies before an alternative scheme was in place, creating a gap in service. Service users from three of the advice agencies challenged the decision.⁴³¹ Although an equality impact assessment (EIA) had been prepared, it was not considered in the initial decision. After the challenge was filed, the council retook the decision, having considered the EIA, but reached the same decision. Blake J held that it was insufficient for the council to be aware of the EIA. It must apply it. Quoting the court in *Brown*: ‘The duty must be exercised in substance, with rigour, and with an open mind and must be integrated within the discharge of the public function as opposed to merely ticking boxes.’⁴³² The EIA was flawed because it had not considered the disadvantage to current users of the

⁴²⁹ Tom Hickman, ‘Too hot, too cold or just right? The development of the public sector equality duties in administrative law’ [2013] Public Law 325, 333.

⁴³⁰ *R (Hajrula) v London Councils* [2011] EWHC 448 (Admin) [62].

⁴³¹ *R (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin), [2011] Eq LR 705.

⁴³² *ibid* para 51, quoting *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin).

service and had not involved proper consultation. The judge quashed the budget decision, but only for the three agencies whose users had brought the challenge.

Barrett

The claimant was both a director of a charity for people with learning disabilities, People First Lambeth (PFL), and a user of its services. The local authority had been forced to make budget cuts and decided to withdraw the entirety of its grant to PFL, which comprised 90% of PFL's income. The claimant challenged the cut in her capacity as a service user.⁴³³ The local authority argued that this was an abuse of process, as the claimant was able to obtain legal aid when PFL could not. The Court held that, as a service user, the claimant was entitled to bring a claim, and she was not debarred because she was also a director of PFL.

Although an EIA had been performed, the cabinet approved the cut without being aware of the EIA and the full council approved the cut without seeing the EIA. In response to the threatened judicial review, the local authority later set aside the cut, performed another EIA, set out the type of services it now wished to commission, and decided to re-commission some of the services from another provider. Ouseley J said that the first decision was unlawful, but as it had already been set aside no relief needed to be granted. As the second decision was lawful, the case could be dismissed. A distinction could be drawn between stopping the services provided by this provider and stopping services of this kind. A legitimate consultation process did not need to provide and consider specific proposals, or to compare providers' service provision and consult users on the differences between providers. It was clear that the local authority had not had a closed mind about the services that it commissioned, even if it perhaps had a closed mind about commissioning further services from PFL.

Talawa

A black theatre company challenged funding cuts from the Arts Council England by initiating a judicial review.⁴³⁴ Although not all funding was restored, an agreement was reached before proceedings occurred to secure two additional years of funding to allow the theatre company to survive.

⁴³³ *R (Barrett) v Lambeth LBC* [2012] EWHC 4557 (Admin), [2012] BLGR 299.

⁴³⁴ *R (Talawa) v Arts Council of England* CO/775/2005; John Halford and Saadia Khan, 'Equality Act will Pressure Authorities to Listen' *The Law Society Gazette*, 28 April 2011.

Process

The initial process, if an interested individual or charity thinks that a local authority has made a funding cut in an unlawful manner, is to send a letter to the local authority. The local authority then has fourteen days to respond. Empirical evidence suggests that many matters are resolved at this stage, which would mean that the PSED is a more useful lever than even the number of cases shown in Figure 1 indicate. A lawyer outlined three possible responses to the letter before claim, of roughly equal frequency:

If they come back, they will sometimes say, 'Okay, you're right. We'll withdraw our decision and start again.' Sometimes they'll say, 'Oh, you've just misunderstood what's gone on,' and they will give a different account to what your client group has understood happened. They might disclose the documents that change the position. Or the third option is they refuse to withdraw the decision and then you start your judicial review claim (Interview 29).

A voluntary sector umbrella group said that a more informal letter to the authority was a form of advocacy that would not necessarily evolve into legal advocacy, 'it's kind of softer advocacy than that' (Interview 8). They will try to facilitate a better relationship between the charity and the funder before they resort to a more legalistic letter. They have helped with perhaps fifty challenges, some of which became judicial reviews, handled through a partner law firm.

From 2006-2012, Empowering the Voluntary Sector, a Big Lottery-funded project was run by the National Council for Voluntary Organisations, the National Association for Voluntary and Community Action and the Public Law Project (until 2009). The project was designed to help voluntary sector organisations use public law as a tool, and combined public law training courses via workshops with practical legal assistance. NAVCA explains that the purpose of the workshops was to: 'Explore the use of public law and the Compact'⁴³⁵ as a tool to develop relationships with the public sector and when

⁴³⁵ 'The Compact: The Coalition Government and civil society organisations working effectively in partnership for the benefit of communities and citizens in England' (2010) is an agreement between the government and the voluntary sector, setting out principles for their relationship and establishing way of working together.

necessary, to challenge unfair, unlawful decisions.⁴³⁶ According to the evaluation report for their first three years, the Southall Black Sisters case was an outcome of the project.⁴³⁷

A representative for a campaigning disability charity said that it used Freedom of Information Act requests of local authorities, querying proposed budgetary decisions and consultations. The charity then follows up the information with letters to the authority, asking to see the Equality Impact Assessment backing up the budgetary decision under consideration, or for details of who is being consulted. The letters ‘mainly focus on the consultation aspects but also start talks. You know, ‘we feel that this would be a disproportionate cut ... and feel this may have implications under the Equality Act. You might like to consider ...’ (Interview 45).

Charities also enable their service users to challenge funding cuts. Some charities prefer that their service users be the ones to initiate claims. First, there is the policy perspective that bringing their own claim is empowering for the users, in line with many charities’ missions. Second, it has been easier for service users to get legal aid to support their cause of action, though the Legal Aid, Sentencing, and Punishment of Offenders Act 2012⁴³⁸ may make legal aid impossible to access even for service users. Finally, charities fear an award of costs against them should they be unsuccessful, which is less likely in the case of service users. A representative of a charity that brought a judicial review in its own right said, ‘that was a very big decision for us. We put ourselves financially at risk in doing that’ (Interview 45).

In order to enable their service users to bring challenges, some charities bring in lawyers to conduct training, or publish guides to judicial review.⁴³⁹ A charity reported that a barrister provided some training at the charity, and urged them to consider the strategy of having clients bring judicial reviews, which they have been pursuing, but not without difficulties.

It’s quite difficult to find [clients] to take cases. Not because - because [they are] at the heart of it. Quite often what happens is that the council reinstates any services for [them], so that they go away. However, what we’re wanting to challenge as an organisation is the cut overall.

⁴³⁶ <http://www.navca.org.uk/services/learningopps/evs/evsworkshops>

⁴³⁷ NAVCA and The Public Law Project, ‘Empowering the voluntary sector to challenge unjust public body funding and consultation decisions: Evaluation report’ (2009) http://www.publiclawproject.org.uk/documents/Evaluation_report_EVS.pdf

⁴³⁸ The Act abolishes legal aid for welfare benefit, debt, employment (except discrimination) and housing matters, with limited exceptions, as of 1 April 2013.

⁴³⁹ See e.g. Steve Broach and Kate Whittaker, ‘Using the Law to Fight Cuts to Disabled People’s Services’ (2012) based upon an earlier briefing paper for the Every Disabled Child Matters Campaign; Women’s Resource Centre and NAVCA, ‘Keeping it Legal; A guide for third sector organisations on public law and equality rights’ (2010).

Eventually, you can then put another family forward and another family forward. But at some point you will end up just hitting the silent families that don't come forward (Interview 45).

The charity has had fewer than ten clients initiate a legal action but none got past the letter before action stage because of this strategy by local authorities. The charity has received differing legal advice as to whether or not a client whose services have been restored would still have a cause of action to pursue on behalf of the larger cause.

I read it and my understanding of it was that they can sue anyway on the basis that it could have a detrimental impact ... Because obviously, even if the council is saying, 'Oh we're going to make sure that [you've] got the same support this year' the fact that the overall service is weaker means they can't get that guarantees forever more. The challenge is based on the lack of consultation over the changes and the reductions being made. So all of those things still apply. They still illegally made the decision. That has the potential to impact on them. But it is a bit tricky. I'm not - there seems to be some kind of legal question marks there (Interview 45).

Results

Although judicial review has only a procedural remedy - the public body can be instructed to retake a decision with an inappropriate process - substantive victories often result. One lawyer said, 'In every case that I have won, the group has held onto their funding' (Interview 29). The lawyer continued:

I think that's partly because when the public body engages properly, they do realise that what they were trying to do wasn't a terribly good idea. So, I think there is an element of, you know, without overstating it, I think there's an element of education there. [...] I think the second reason, cynically, is that they don't want to get judicially reviewed again (Interview 29).

A campaigning charity agreed that, in cases where the local authority decides (or is forced) to go through another process to decide on the cuts, they don't just automatically make the same cuts as a result. However, this doesn't necessarily bode well for the future.

But they're getting better basically, at going through the process. I mean, I think they have to. They've got so many big decisions to make around spending at the moment that will disproportionately impact on vulnerable groups, that it's without doubt that they're going to fall the wrong side of equalities law if they're not careful. So they're learning and I think they will learn how to make the cuts legally (Interview 45).

Funding is also often restored in cases where a substantive hearing is allowed, or even where judicial review is only threatened. In one lawyer's experience, in about one third of cases public bodies will retake a decision after a letter before claim. Approximately half the time the funding was simply restored, and in the other half the decision was made with a better process but the same funding cut resulted (Interview 29). This indicates that the PSED has a greater impact on public decision-making than the reported cases reveal. This is in line with Hickman's speculation that, 'It might be the case that a particularly high proportion of threatened or actual claims based on the PSED are conceded by public authorities, and therefore that the PSED are a yet more effective grounds of challenge than the reported judgments suggest.'⁴⁴⁰

Sometimes delaying the cut, often announced with little or no warning, is enough to allow the charities some time to find alternative sources of funding. However, simply averting or delaying the cuts is not the only reason behind the use of an Equality Act strategy. Even in situations where the cuts will still need to be made, the charity views real engagement by local authorities with service users as leading to better cuts.

My personal opinion of the Equality Act is it's not just about ... slowing it down. We're using it tactically to slow down cuts decisions so that they can't impact on families but we also use it to genuinely engage families in the decisions around how their services are delivered ... So if they are reorganising something and they're saying, 'Okay well we've got to reduce the pot of money by X amount', it just to me makes absolute common sense ... to speak to [users] before deciding ... what service you want to get rid of. Because they will tell you. They'll make better decisions if they actually speak to the families ... because they'll be able to tell them this would have less of an impact on us. ... And so, it's not to me a sensible way of going about things to cut services without consulting the people that are using them. Equality Act or no Equality Act, it just doesn't make sense. You make better decisions if you speak to the people that are using the service (Interview 45).

Uncertain Future

It may be that the PSED has been too successful for its own good. The government has brought forward a review of the equality duties, including the PSED. The duties had only been in effect for thirteen months at the date of the announced review. A month-long call for evidence closed 12 April 2013. The loss of the PSED would weaken the ability of groups to challenge public sector cuts.

⁴⁴⁰ Tom Hickman, 'Too hot, too cold or just right? The development of the public sector equality duties in administrative law' [2013] Public Law 325, 332.

However, charities' skill and willingness to use the law to challenge cuts may find another means. The Public Services (Social Value) Act 2012 came into effect in January 2013. It places a duty on public bodies to consider social value ahead of a procurement for the provision of services, or the provision of services together with the purchase or hire of goods or the carrying out of works. Under section 1(3), the authority must consider:

- how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area; and,
- how, in conducting the process of procurement, it might act with a view to securing that improvement.

Sir Stephen Bubb, Head of the Association of Chief Executives of Voluntary Organisations, said in a blog post, 'ACEVO will be looking for any examples of a poor contract award where the charity lost out and the commissioner did not score social value, and we will be ready to take any such lawbreakers to Court. Bring it on!'⁴⁴¹

Conclusion

The PSED has become an important ground for challenges to the appropriateness of public decision-making, including decisions around funding. Participants reported that it was a more useful tool than is revealed by the reported decisions and hearings. Even the threat of a judicial review is often enough to change or avert a funding cut. Although it is a procedural mechanism, substantive victories sometimes result. Charities have become more aware of the potential legal means at their disposal, training service users and providing support to enable challenges to funding cuts. The PSED has empowered some charities and service users.

Nevertheless, public law remedies such as judicial review remain difficult to access, expensive and precarious.⁴⁴² Moreover, they create the possibility of a competition between protected groups. The context of the government spending cuts means that the success of a particular charity or protected group in challenging funding cuts is likely to be at the expense of another. It truly is a zero sum game.

⁴⁴¹ 21 March 2013, <http://bloggerbubb.blogspot.co.uk/>.

⁴⁴² Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) 711-748.

'Ultimately, the due regard standard cannot produce more funding: at most it can prompt a reconsideration of priorities among those competing for reduced resources. This means that the duty could well give rise to conflicts between status groups and other poor and disadvantaged groups, redistributing poverty without redistributing wealth'⁴⁴³ A challenge via a PSED and judicial review cannot create additional resources for a cash-strapped local authority to distribute. It can only effect a considered re-distribution.

⁴⁴³ Sandra Fredman, 'The Public Sector Equality Duty' [2011] 40(4) Industrial Law Journal 40, 41.

VII Conclusion and Recommendations

This research has revealed the diversity of approaches to equality issues adopted by charities. Some focus their efforts in one area, for example, formal equality in relation to their employees, while others take a broader view. Few are considering the wider implications of the Equality Act in relation to their charitable objects. The lack of uniformity is inevitable given that the sector itself is extremely diverse. Some parts of the charitable sector, for example religious charities, have been more directly affected by the Act, and have a commensurately greater awareness and (in some cases) understanding of its applicable provisions. The size, legal structure and operation of some charities mean that they are almost indistinguishable from commercial ventures and in such cases equality concerns may be dealt with as part of a strategic plan to achieve the charities' objectives. These charities have skilled boards of trustees whose decisions as to the running of the charities are then carried out by professional paid charity staff. At the other end of the scale are the more typical 'voluntary' bodies, surviving on a shoe string and run by amateur volunteers. Here charities may be more likely to fail to consider equality issues until faced with a problem. In between are many variations. Whilst few charities have so far encountered legal problems with the Equality Act, the *Catholic Care* case is a salutary reminder of the possible difficulties and of the potentially drastic consequences.

The research has shown that charities are aware of the Equality Act, if not of its possible ramifications for their own activities. The evidence plainly indicates that what charities need above all else is clarity, consistency and certainty.

Research Questions

The research questions that this project addressed were:

Practical impacts of the Equality Act 2010

- Interpretation - What specific legal questions arise from attempts to interpret the Act? Can these legal questions be answered with enough clarity to enable charities to operate in a sufficiently predictable legal environment?
- Compliance - How far does the unique nature of charities make compliance with the Act difficult? What specific issues are they likely to face and how can they be addressed?
- Perception - Do charities understand what the Act requires them to do?
- Change - Are charities likely to alter their practices in potentially detrimental ways in order to attempt to comply with the legislation? What positive opportunities for charities arise as a result of the legislation?

The broader view: Legislative reform

- In light of the conclusions drawn in the first area, should reform of the law be considered, and if so, what specific recommendations can be made?

The widest context: Implications for wider debates

- What do the insights gained in the above two areas add to perspectives on and evaluation of the fundamental aims of equality legislation, and to debates over the role of charities and the nature of public benefit?

Conclusions

Interpretation

- There is significant overlap between the two tests in the charities exception in section 193(2) and an unfortunate lack of clarity about how the proportionality test will operate independently of the disadvantage test. If there are genuinely two separate justifications in section 193(2), the distinction should be clearer. If the existing wording is to stay in section 193, regulators must give clearer guidance as to how the tests apply.
- The phrase ‘proportionate means of achieving a legitimate aim’ is crucial to a number of key exceptions that charities may rely on and yet it is very difficult to define. Better guidance, specifically tailored to charities, is needed from the Charity Commission and the Equality and Human Rights Commission (EHRC).
- There is a lack of clarity in relation to the precise correlation between the Equality Act charity-specific exception and the public benefit test. It should be made clear that a charity seeking to operate a discriminatory restriction that does *not* bring itself within one of the exceptions, would, in addition to being in breach of the Equality Act, have difficulty in passing a public benefit test and may therefore lose its charitable status.
- Section 193 offers a defence to direct discrimination. It is arguable that the test for justification should be more stringent than that required for indirect discrimination.
- The *Catholic Care* case has introduced the idea that motive could be a relevant factor when identifying a proportionate means of achieving a legitimate aim. This may prove to be a confusing, and possibly misleading belief, given that many charities struggle with the notion that discriminating for ‘good’ motives may well be unlawful.

- The relationship between Article 14 of the ECHR, which requires non-discrimination in the enjoyment of Convention rights, and the protection against direct and indirect discrimination under the Equality Act 2010 is unclear. Justification of discriminatory treatment is potentially a more flexible concept under Article 14 than it is under the Equality Act and the Directives. Whilst all legislation must be interpreted in the light of the Convention, it is important that the tests for justification are not diluted, especially where direct discrimination is concerned.
- The exceptions in the Equality Act that may apply to charities are numerous and confusing. There are exceptions that apply specifically to charities and there are others that apply to other entities but may well be relevant to some charities. The range and complexity of the exceptions make them very difficult for charities to navigate. The Equality Act must also be read in the light of charity law requirements, in particular the public benefit requirement. The result is that certain exceptions that may seem helpful at first sight will only be of use to a charity if that body continues to satisfy the public benefit requirement. For example, an association with restricted membership may be able to take advantage of the exception in Schedule 16 of the Act, but, in order to achieve or maintain its charitable status, an association with a restricted membership will still need to ensure that it satisfies the public benefit requirement. The complicated interaction of the exceptions is well illustrated by the case studies on religious charities and single-sex provision.
- There is confusion over what precisely the new Public Sector Equality Duty (PSED) requires. While case law is growing, it is not providing clarity, since the cases, whose outcomes all depend very much on their individual facts, do not all follow a uniform approach. The law is not yet clear on the status of a PSED challenge, once the service is reinstated to the individual making the challenge.

Compliance

- Participants were largely unaware that there may be Equality Act implications for a charity's service delivery or its charitable objects. Significantly, no charity interviewed reported having considered whether or not its objects were in compliance with the Act before some sort of triggering intervention, such as by a lawyer or the Charity Commission itself. There should therefore be a higher profile given to the impact of the Act on charities.
- There is a tendency to link compliance activity with the risk of getting caught. Equality issues need monitoring and enforcement and yet are perceived to be a low priority for the Charity Commission. Consideration should be given to whether or not the Charity Commission is the most appropriate body to monitor such compliance, or indeed whether it has the resources to do so.

- The roles of the Charity Commission and the EHRC in relation to providing and updating best practice in equality compliance could be enhanced.
- The justification tests may be particularly difficult for older charities to satisfy, where their objects are based upon addressing anachronistic disadvantage.

Perception

- The research has shown a level of confusion among charities and legal advisors as to the precise requirements of the Act. Charities' awareness and understanding of the intricacies of the Act is, unsurprisingly, variable. Unfortunately, clear guidance is not easily accessible because of the multiplicity of sources, sometimes with conflicting advice.
- Because many equality strands are protected under one Act, it is uncertain how interests are balanced when there is conflict between them (for example, those both of a particular sexuality and religion). A hierarchy of rights may be perceived, whereby the interests of one equality strand trump those of another. Further confusion ensues as some groups may fall within two areas of protection (for example, some religious groups may fall under the protected characteristics of both religion and race).

Change

- The evidence from this qualitative study suggests that many charities are unaware that the Equality Act has implications for their service delivery where this is restricted to particular equality strands. Therefore, they do not feel the need to make major changes (or any changes) to their service delivery. It is likely that most of these charities will be able to justify their restricted provision under one of the sections under the Equality Act. There are however exceptions, particularly in charities with a religious ethos (the obvious example being *Catholic Care*).
- There appear to be external pressures from local authority funders on charities offering a more targeted provision, such as charities providing single-sex services, to provide a more universal service.
- On a positive note, charities have discovered the utility of the PSED challenge - at least for the present.

Legislative reform

- The illogical singling out of discrimination on grounds of 'colour' for the special treatment should be reconsidered.

- Consideration should be given to the appropriate level of protection that should be given to charity volunteers. Whilst many charities welcome the decision in *X v Mid-Sussex Citizens Advice Bureau*, it does not send the right message to charities in their dealings with the huge army of volunteers upon which many rely. Further consideration should be given to whether it is appropriate for charity volunteers to be without the protection of the Equality Act (as opposed to the Employment Rights Act 1996). Without any change to the law, there still appears to be some blurring around whether volunteers can be brought within the ‘service provision’ parts of the Act. This needs to be clarified. In any event, charity employers who fail properly to assess the working relationships that they have with their ‘paid volunteers’ may find that their workers are in reality employees. A legal definition of a ‘volunteer’ should be provided in order to make such relationships clearer for the future.

Implications for wider debate

- Conferral of charitable status should bring with it the responsibility to ensure equal opportunities for beneficiaries, volunteers and trustees, denial of which is contrary to the public benefit principle. Consideration should be given to subsuming, or at least better integrating, equality law issues with the public benefit test. It is possible that a mechanism could be devised under which passing the public benefit test would suffice to indicate compliance with the Equality Act. While this may not be a universal solution (given the diversity of the charitable sector) there is a significant section of the charitable sector for which such a test would be sufficient. This would greatly simplify the law and decrease the regulatory burden on charities. It would, however, have consequences for the regulator.
- Consideration should be given to the different impact that the Scottish statutory definition of charity is having on this area of law. The definition and emphasis on the *provision* of public benefit in the Scottish charity legislation requires that the Office of the Scottish Charity Regulator (OSCR) focuses on the *activities* (rather than the purposes) of a body when assessing its public benefit and whether it passes the charity test. OSCR must also consider whether any restriction on benefit is undue and it has stated that, where restrictions on benefit are not permitted under equality legislation, then OSCR will consider such restrictions to be unduly restrictive.⁴⁴⁴ The ‘dis-benefit’ concept in the Scottish legislation also allows OSCR to consider whether the dis-benefit to those persons disadvantaged by any discrimination and to the public in general, on account of a charity’s unlawful action in discriminating, outweighs the public benefit that the charity provides. A body with undue restrictions on access to the benefit it provides, or where any dis-benefit outweighs benefit would clearly fail the Scottish charity test.

⁴⁴⁴ Office of the Scottish Charity Regulator (2010), *Meeting the Charity Test*, Dundee: OSCR, 24.

Recommendations

- A Statutory Code regarding the PSED, of the kind produced under the pre-Equality Act legislation, would be of great assistance.
- Further guidance on positive action is required for higher education. Questions remain about whether the entirety of an institution's offerings for bursaries and scholarships should be considered, or whether it is each individual bursary or scholarship. Also, the effect of Schedule 23 for other non-EEA nationals should be considered.
- When there is a clear link between ensuring equality and funding, the results are significant buy-in. The Athena SWAN programme which operates in higher education institutions is evidence of this. Government and other funders should be aware of the effectiveness of such programmes and consider other situations in which they can be used.
- Currently there are at least three 'official' sets of guidance documents on the impact of the Act on charities (published by: the Charity Commission; the EHRC; and, the Government Equalities Office). It would be extremely beneficial if the same clear messages were being sent in all the guidance that charities may access, to assist them with their interpretation and application of the Act and in particular the exceptions that charities may use. All these official publications should be reviewed together, so as to ensure that they are giving consistent advice.
- Rather than simply producing guidance that focuses on the Act itself, the Charity Commission should consider integrating Equality Act issues into other guidance that it produces. For example the recently published *Big Board Talk - 15 questions trustees need to ask*,⁴⁴⁵ which is described as a checklist reflecting 'a good practice approach your charity should use when regularly reviewing the way it operates', makes no mention of equality issues. The same goes for recently published guidance on decision making for charity trustees.⁴⁴⁶ This would be a good opportunity to mainstream equality issues.
- It would also assist if each guidance document provided a comprehensive exposition of all potentially relevant exceptions, with cross-referencing between the different exceptions. Currently, they are all considered in isolation, making it very difficult for charities and their advisors to gain a complete picture.
- There should be a very clear reference to the public benefit requirement that charities must satisfy since this often links with the application of an exception. For example, the Government

⁴⁴⁵ Available at <http://www.charitycommission.gov.uk/media/91859/ccnews29check.pdf>

⁴⁴⁶ Charity Commission, 'It's your decision: charity trustees and decision making' (2013).

Equalities Office publishes at least seven guides that are aimed at the voluntary and community sector, yet none make any reference to the public benefit requirement that applies to all charities. If this is not complied with, the exceptions from the Equality Act for 'charities' are irrelevant since the body will not be a charity.

- Certain charities, for example, religious charities, are struggling to understand what the public benefit requirement is. More accessible practice-based guidance is needed and the Charity Commission's final revised public benefit guidance is awaited with interest.

Advice for Charities

- Charities' main equality focus currently appears to be on ensuring physical access to facilities for those who are disabled and equality opportunities in terms of employment of staff. The provisions of the Equality Act relating to the provision of services are least appreciated by charities in relation to their general objects. Charities should familiarise themselves with these provisions in order to ensure that they can justify any restricted service provision.
- Charities should do a 'legal health-check,' which includes ensuring Equality Act compliance. This is particularly relevant for older charities with governing documents that have not been updated. With this in mind, it is recommended that, every five years, all charities undertake a 'legal health-check' of their governing documents, making any necessary amendments, including explicit reference to restricted objects where appropriate. Similarly, the employment status of all charity workers should be clearly spelt out. There should be somebody in every charity responsible for this task, even in small charities. In large charities, it may be passed over to professionals. Umbrella bodies of charities should pass on this message and encourage their members to undertake a 'legal health-check'.
- As part of this 'legal health-check,' a charity using positive action as a justification for its restricted provision of services must ensure that the original need or disadvantage still exists, in order to demonstrate that its practices and policies are effective. Charities should be advised to keep carefully minuted discussions explaining the rationale for the positive action and consideration of the impact on other groups, and alternative measures considered. It must also consider periodically whether there is any change in the situation. If, after a reasonable period of time, it appears that the positive action has given rise to no positive change, it may be that the action would be judged to have failed and would not be seen as proportionate. In practical terms, charities must be adequately informed to make sure that they have sufficient information in terms of evidence when deciding to use and continue to use positive action.
- Charities should not focus excessively on section 193(2). All the charity exceptions and other general exceptions that might be of assistance should be considered, to see where a charity can best fit its activities.

- When seeking to justify discrimination under section 193(2), charities should appreciate that the fact that excluded classes can access benefits elsewhere is not an automatic justification.
- Charities should always focus on the public benefit requirement. Whilst section 193 and the other charity specific exceptions do not refer to the concept of 'public benefit', the only bodies that can take advantage of these exceptions are those that satisfy the statutory definition of a charity contained in the Charities Act 2011.
- Charities should consider that their legal obligation to satisfy the public benefit requirement ought to include issues around equality. They should be one and the same.
- Charities should exercise caution when seeking to assess the significance of decided cases in relation to their own activities. Legal judgments are context specific and when deciding on proportionality, the highly specialised facts in each case are crucial. The high profile *Catholic Care* case, highlighting the tension between religion and sexual orientation, is a good example of a case that has caused a great deal of concern for charities.
- More charities should view the Equality Act more positively. The case study on challenges to public spending cuts is a good example of how the Act can assist charities in carrying out their charitable objectives (although there is some evidence that funders are getting wise as to how to make their decisions Equality Act compliant). Even where charities do not use the PSED to challenge local authorities and other funding bodies' decision making, its existence forces these bodies to talk to charities about important issues around service provision. This helps to ensure that policies put in place and services provided reflect the real needs and experiences of charities' beneficiaries.
- Charities should be aware that although regulatory interventions are rare, what is perceived as a general lack of enforcement should not make them complacent. It is anticipated that individual challenges by those who have been denied a service will increase as awareness of the Act grows.
- Charities should keep a watchful eye on the development of the Equality and Human Rights Framework for the Voluntary Sector.
- Higher education institutions (HEIs) and other education providers need to look carefully at the conditions attached to their various scholarships and bursaries to ensure compliance with the Act. Potential beneficiaries are becoming more willing to complain when unlawfully excluded.
- HEIs and other charities that are exercising public functions in public authorities (and therefore subject to the PSED) are advised to keep adequate records showing that they had actually considered the duty. Good record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake the duty properly. Without good records, the case law reveals that it may be more difficult, evidentially, for an entity that is subject to the PSED to persuade a court that it has fulfilled the duty.

- Charities in which control of activities is de-centralised may find themselves more at risk of breach of equality law. Such charities need to ensure that monitoring mechanisms are in place to ensure that non-discriminatory policy intention is translated into practice on the ground.
- Charities need to handle donations given for restricted (unlawful) purposes sensitively as there is a real risk that they will lose the donation completely.

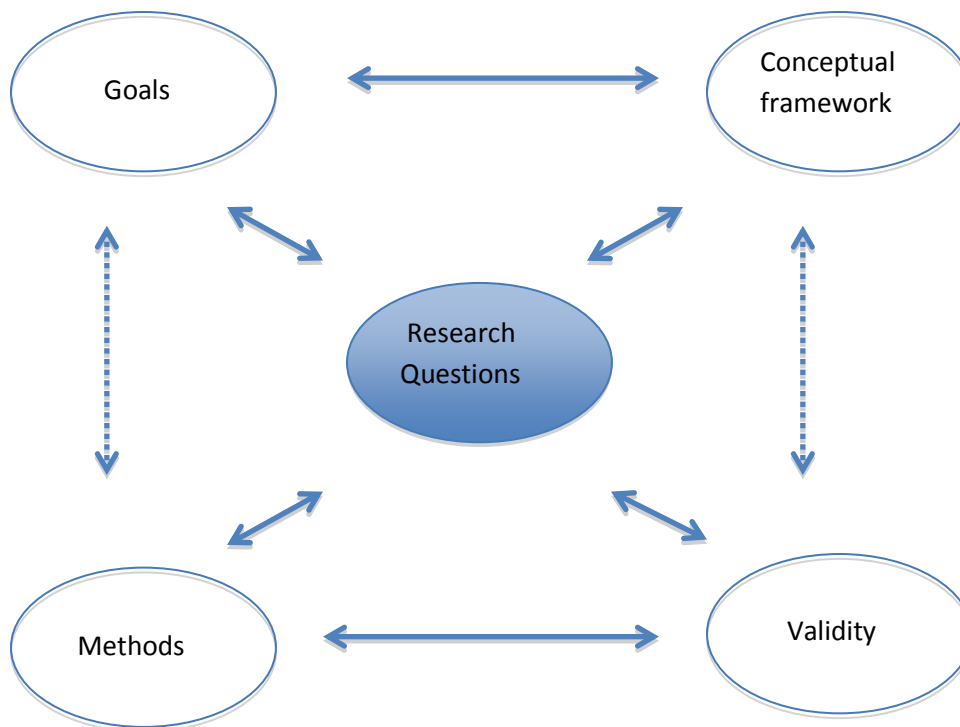
Future Research

Additional research should be carried out to explore the views of a larger number and wider range of charities to consider in further detail whether charities *should* comply with equality law or whether the public benefit requirement could be an adequate mechanism for ensuring that equality principles are complied with in the charitable sector.

Appendix: Research Design and Methods

This study uses a qualitative approach to address specific research questions. Qualitative research seeks to create understanding from data, rather than testing a pre-determined hypothesis. A qualitative approach can adapt as the project develops, and 'research design should be a reflexive process operating through every stage of a project'.⁴⁴⁷ The qualitative approach to this study enabled participants to identify, define and explain their complex influences and perceptions. This will generate detailed conclusions relating to the complex interaction between law and practice. The research design is interactive, in that the different parts of the research design are integrated and interact, rather than having a strictly linear relationship.⁴⁴⁸ This allows the design to adapt to best meet the study's goals.

Figure 2: Interactive Research Design Model



Source: J.A. Maxwell (2005), *Qualitative Research Design: An Interactive Approach*, Sage.

⁴⁴⁷ Martyn Hammersley and Paul Atkinson, *Ethnography: Principles in Practice* (Routledge 1995) 24.

⁴⁴⁸ Joseph A Maxwell, *Qualitative Research Design: An Interactive Approach* (Sage 2005).

Goals

As this is the first empirical study of this topic, the goals of the study are exploratory and related to how the Equality Act is impacting upon charities. There is a practical goal of formulating advice for the sector that is accessible and based upon evidence generated from the lived experience of charities. The project also has a goal to contribute practically through informing debate about legislation and official guidance. The study also has a number of intellectual goals. It seeks to contribute to knowledge generally through the production of research reports on various key points, including the appropriateness of equality legislation as applied to charities.

Study Goals:

- to draw conclusions on the impact of the Act on the charity sector in practice;
- to provide practical guidance for the sector which will supplement and expand upon official guidance by providing actual data, outcomes and examples drawn from practice;
- to provide recommendations for reform of relevant legislation and official guidance;
- to provide detailed research reports accessible by a range of stakeholders; and, more broadly, to contribute to knowledge and debate surrounding the aims of equality legislation, the nature of public benefit and the role of charities, and trends in service provision and employment within the sector.

Conceptual framework/ Paradigm

The nature of this study lends itself to the ‘grounded theory’ approach or research paradigm,⁴⁴⁹ a method of inductively generating theory based on empirical research that was pioneered by Glaser and Strauss.⁴⁵⁰ In this approach, theory is grounded in data that has been systematically gathered and analysed. It then evolves during the research process due to the interplay between data collection and analysis phases. Researchers often adopt a grounded theory approach when, as with the subject at hand, the research problem is completely novel and where no pre-existing analytical framework

⁴⁴⁹ Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago 1962).

⁴⁵⁰ Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory* (Aldine 1967).

exists.⁴⁵¹ This approach was selected for this project because it allows the direction of the research to develop in unanticipated directions.

The conceptual framework for this study is that the significant changes of the Equality Act, in particular the tightening of the exceptions for charities, should force charities to ensure that they are now compliant with equalities legislation.⁴⁵² However, gaps in knowledge and understanding, as well as practical constraints, may mean that charities do not or cannot change to reflect the current best practice. How far charities comply may be based upon their size, age or the particular issue area on which the charity focuses.

Research questions

The research questions were formulated at three different levels of focus, in order to gain the fullest perspective on the issue. The level of focus ranges from the most focused on the practical effects of the Equality Act, to the broader view at the level of legislative reform, to the broadest considerations of questions for wider debates.

⁴⁵¹ Christina Goulding, *Grounded Theory: A Practical Guide for Management, Business and Market Researchers* (Sage 2002).

⁴⁵² Debra Morris, 'Charities and the Modern Equality Framework - Heading for a Collision?' (2012) 65 *Current Legal Problems* 295.

Research Questions:

The narrow focus: Practical impacts of the Equality Act 2010

- Interpretation - What specific legal questions arise from attempts to interpret the Act? Can these legal questions be answered with enough clarity to enable charities to operate in a sufficiently predictable legal environment?
- Compliance - How far does the unique nature of charities make compliance with the Act difficult? What specific issues are they likely to face, and how can they be addressed?
- Perception - Do charities understand what the Act requires them to do?
- Change - Are charities likely to alter their practices in potentially detrimental ways in order to attempt to comply with the legislation? What positive opportunities for charities arise as a result of the legislation?

The broader view: Legislative reform

- In light of the conclusions drawn in the first area, should reform of the law be considered, and if so, what specific recommendations can be made?

The widest context: Implications for wider debates

- What do the insights gained in the above two areas add to perspectives on and evaluation of the fundamental aims of equality legislation, and to debates over the role of charities and the nature of public benefit?

Methods

45 interviews were conducted with lawyers, charity representatives and regulators. Charities were targeted across the equality strands. Analysis proceeded in stages. The project concluded with two interactive stakeholder workshops. 18 participants, some of whom had been interviewed at earlier stages, were informed of the preliminary conclusions from the earlier stages of the research and then participated in guided small group discussions to discuss the validity of the project findings and add further insight.

Interviews

Qualitative interviews were conducted with 45 different stakeholders in several stages. Throughout, the ‘constant comparative’ method of data collection and analysis was used to reach a grounded theory. This is a data coding process that takes place alongside sampling and interviewing. Newly collected data is compared and contrasted with previously collected data. In a continuous ongoing procedure, theories are formed, enhanced, confirmed, or even discounted as a result of emerging new data.⁴⁵³

The methods of sampling the participants and the approach for each stage were as follows:

Stage One: open sampling, semi-structured interviews and open coding

At the start of the research, participating charities and their legal advisors were selected through open sampling. As Denscombe explains, this means that ‘initial informants need only be likely to provide relevant information’.⁴⁵⁴ Invitations were sent to members of the Charity Law Association and the firms identified as the top charity law firms in the Legal 500. Charities with objects that are potentially problematic as a result of the Act were selected through analysis of their objects on the Charity Commission website. In addition, snowball sampling built upon the Charity Law & Policy Unit’s (CLPU) links with charities, lawyers, the Charity Commission and the Charity Tribunal. Appropriate umbrella bodies and regulators also were invited to participate in the research at this stage.

The data were collected through semi-structured interviews, using interview topic guides based around the research questions. Topic guides were developed for advisers and charities in order to retain interview focus and data comparability, whilst allowing enough freedom for unanticipated points of relevance to emerge. All participants were asked if there were additional issues that should be considered, in order to ensure that bias from the research questions and theoretical framework did not blind the study to important unanticipated issues.

⁴⁵³ Martyn Denscombe, *The Good Research Guide for Small-Scale Research Projects* (Open University Press 2003) 120.

⁴⁵⁴ *ibid.*

The data were analysed using line by line open coding on the basis of the main research questions contained in the interview guide, and according to emerging themes or common threads within responses. The data were first hand coded and then coded using the nVivo software package.

Stage Two: relational and variational sampling

The second and third stages of the sampling strategy involved theoretical sampling. This is a form of purposive sampling, where participants are selected in order to inform the researcher's developing understanding of the area of investigation. In this way, data collection is directed by the emerging theory.⁴⁵⁵

The second sampling stage used relational and variational sampling, whereby the researcher 'seeks out those cases or events that help to demonstrate properties and dimensions, and the connections between concepts'.⁴⁵⁶

Participants were selected at this stage to find those that have had to address the effects of the Equality Act, or those that should have done. Selection techniques included: charities identified in stage one, charities identified through research including media reports, and charities identified by checking the Charity Commission register. The cold contact approach was supplemented by a 'snowball' approach to potential informants: often, existing participants suggested potential participants for later stages of the research.

The data in this stage were collected through semi-structured interviews, but the interview structure was more specific than in stage one, as the information sought was clarified as a result of the data analysis carried out at the first stage open coding.

⁴⁵⁵ Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory* (Aldine 1967).

⁴⁵⁶ Geoff Payne and Judy Payne, *Key Concepts in Social Research* (Sage 2004).

Stage Three: discriminate sampling and case studies and selective coding

The final stage of sampling was discriminate sampling, which involves 'careful selection of items designed to fill gaps and make final internal comparative tests of the core category'.⁴⁵⁷ Case studies were focused on particular themes that emerged in the earlier stages of the project: higher education, charities using the Act as a 'sword' to challenge funding cuts, and religion and belief charities. These themes were selected for further exploration because the Act has had a significant impact on charities in these areas. Further participants were recruited in each area to enable a more detailed case study. Where possible, analysis of legal and other advice provided to the participant charities was included, enhancing the data with multiple perspectives on the issues.

The final stage of the constant comparative method of coding, undertaken in conjunction with discriminate sampling, is selective coding. This is the process of selecting and identifying the core codes that have emerged from the previous stages and then systematically relating all other categories to those codes. It involves validating those relationships, filling in, and refining and developing those categories.⁴⁵⁸

Focus groups

The final stage in the project involved two interactive workshops for stakeholders. These meetings served as focus groups for the projects preliminary results. A focus group is 'a group of individuals selected and assembled by researchers to discuss and comment on, from personal experience, the topic that is the subject of the research'.⁴⁵⁹ Focus groups explicitly use group interaction to help people explore a topic.⁴⁶⁰ They can be used to complement other methods after a project is completed, to assess impact, triangulate data or to check validity.⁴⁶¹

18 participants took part in two workshops, in Liverpool and London. All prior research participants were personally invited to take part. In addition, others who had been invited but were unable to participate

⁴⁵⁷ *ibid* 101.

⁴⁵⁸ *ibid*.

⁴⁵⁹ Richard A Powell, Helen M Single and Keith R Lloyd, 'Focus Groups in Mental Health Research: Enhancing the Validity of User and Provider Questionnaires' (1996) 42(3) *International Journal of Social Psychology* 193.

⁴⁶⁰ Jenny Kitzinger, 'Qualitative research; Introducing Focus Groups' (1995) 311 *BMJ* 299.

⁴⁶¹ David L Morgan, *Focus groups as qualitative research* (2nd edn, Sage 1997).

and other interested stakeholders were included. The focus groups were carefully structured and moderated to ensure their usefulness. Participants were placed in small groups based upon their expertise and issue areas. Care was taken to balance the small groups so that there would be diversity of opinion, and a researcher was positioned with each group. The preliminary findings from the interview were presented, with small group discussion on key issues moderated by a researcher following. The highlights of those small group discussions were summarised for the larger group by the researchers. The workshops concluded with discussion of the broader policy implications.

The focus groups provided validity checking and triangulation for the earlier research findings. In addition, the small group discussions provided additional details and insight to add understanding to the earlier results. A group can work together to find solutions to common problems.⁴⁶² Here, participants were given the opportunity to discuss the broader policy implications and desired changes.

The research methods were designed to ensure a wide-ranging investigation that is not limited by researcher preconceptions, whilst also providing a rigorous and clearly structured analytical framework. This is considered to be particularly important in an exploratory study such as this. This balance enables valid and practically useful conclusions to be drawn at all three levels of the study's analysis.

⁴⁶² Jenny Kitzinger, 'Qualitative research; Introducing Focus Groups' (1995) 311 BMJ 299.

Bibliography

Domestic Legislation

Charities (Accounts and Reports) Regulations 2008, SI 2008/629

Charities Act (Northern Ireland) 2008

Charities Act 1960

Charities Act 1993

Charities Act 2006 (Principal Regulators of Exempt Charities) Regulations 2010, SI 2010/501

Charities Act 2006 (Principal Regulators of Exempt Charities) Regulations 2011, SI 2011/1726

Charities Act 2011

Charities and Trustee Investment (Scotland) Act 2005

Disability Discrimination Act 1995

Disability Discrimination Act 2005

Disabled Persons (Employment) Act 1944

Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661

Employment Rights Act 1996

Enterprise and Regulatory Reform Act 2013

Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263

Equality Act 2006

Equality Act 2010

Equality Act 2010 (Commencement No 9) Order 2012, SI 2012/1569

Equality Act 2010 (Designation of Institutions with a Religious Ethos) (England and Wales) Order 2010, SI 2010/1915

Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, SSI 2012/162

Equality Act 2010 (Specific Duties) Regulations 2011, SI 2011/2260

Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, SI 2011/1064 (W 155)

Human Rights Act 1998

Income Tax Act 2007

Mortmain and Charitable Uses Act 1882

Public Services (Social Value) Act 2012

Race Relations (Amendment) Act 2000

Race Relations Act 1976

Senior Courts Act 1981

Sex Discrimination Act 1975

Sex Discrimination (Amendment of Legislation) Regulations 2008, SI 2008/963

Statute of Charitable Uses 1601

Transfer of Functions of the Charity Tribunal Order 2009, SI 2009/1834

Working Time Regulations 1998, SI 1998/1833

European/International Legislation

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Employment Equality Directive 2000/78/EC

European Convention on Fundamental Freedoms and Human Rights 1950

Gender Directive 2004/113/EC

Race Equality Directive 2000/43/EC

Recast Gender Directive 2006/54/EC

Cases

Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471

Amnesty International v Ahmed [2009] IRLR 884 (EAT)

Belgian Linguistic case (1968) 1 EHRR 252

Bilka-Kaufhaus v Weber von Hartz C-170/84 [1986] IRLR 317 (ECJ)

Breakell v Shropshire Army Cadet Force EAT, unreported, [2011] UKEAT 0372_10_1104

Bull v Hall and Preddy [2012] EWCA Civ 83, [2012] 2 All ER 1017

Carmichael v National Power plc [1999] ICR 1226 (HL)

Carson v UK (2010) 51 EHRR 369

Catholic Care (Diocese of Leeds) v Charity Commission [2009] UKFTT 376 (GRC)

Catholic Care (Diocese of Leeds) v Charity Commission [2012] UKUT 395 (TCC)

Catholic Care (Diocese of Leeds) v Charity Commission [2011] UKFTT B1 (GRC)

Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales [2010] EWHC 520 (Ch), [2010] 4 All ER 1041

Clyde & Co v Bates van Winkelhof [2012] EWCA Civ 1207

Commissioners for the Special Purposes of Income Tax v Pemsel [1891] AC 531 (HL)

Copsey v WBB Devon Clays Ltd [2005] EWCA Civ 932, [2005] ICR 1789

Dingle v Turner [1972] AC 601 (HL)

Eweida and Others v United Kingdom [2013] ECHR 37

Father Hudson's Society and another v Charity Commission (Equality and Human Rights Commission intervening) [2009] PTSR 1125

Gaygusuz v Austria (1997) 23 EHRR 364

General Nursing Council for England and Wales v St Marylebone Borough Council [1959] AC 540 (HL)

Gill and Coote v El Vinos Co Ltd [1983] IRLR 206 (CA)

Gilmour v Coats [1949] AC 426 (HL)

Grundy v British Airways plc [2007] EWCA Civ 1020, [2008] IRLR 74

Halpin v Seear (unreported) 27 February 1976

Hashwani v Jivraj [2011] UKSC 40

Hockenjos v Secretary of State for Social Security [2004] EWCA Civ 1749, [2005] EuLR 385

Humphreys v HM Revenue and Customs [2010] EWCA Civ 56, [2010] 1 FCR 630

Hoffmann v Austria (1994) 17 EHRR 293

Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15, [2012] 3 All ER 1287

Hugh-Jones v St John's College Cambridge [1979] ICR 848 (EAT)

Independent Schools Council v Charity Commission [2011] UKUT 421 (TCC), [2012] 2 WLR 100

James v Eastleigh Borough Council [1990] 2 AC 751 (HL)

James v Redcats (Brands) Ltd [2007] IRLR 296 (EAT)

Johnston v Chief Constable of the RUC C-222/84 [1987] QB 129 (ECJ)

Jones v University of Manchester [1993] IRLR 218 (CA)

Karner v Austria (40016/98) [2004] EHRR 24

Kozak v Poland [2010] ECHR 280

Ladele v London Borough of Islington [2009] EWCA Civ 1357, [2010] IRLR 211

Leahy v Att-Gen for New South Wales [1959] AC 457 (PC)

MacCulloch v Imperial Chemical Industries plc [2008] IRLR 846 (EAT)

Morice v Bishop of Durham (1805) 10 Ves 522, 32 ER 947

National Anti-Vivisection Society v Inland Revenue Commissioners [1948] AC 31

Neville Estates v Madden [1962] 1 Ch 832 (Ch)

Newham Citizens Advice Bureau v Murray [2003] ICR 643 (EAT)

Oppenheim v Tobacco Securities Trust Co Ltd [1951] AC 297 (HL)

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595, [2002] QB 48

R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform, Case C-388/07 [2009] ICR 1080 (ECJ)

R (Baker) v Secretary of State for Communities and Local Government [2009] PTSR 809

R (BAPIO Action) v Secretary of State for the Home Department [2007] EWCA Civ 1139, [2008] ICR 659

R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin)

R (E) v Governing Body of JFS [2009] UKSC 15, [2010] IRLR 136

R (Elias) v Secretary of State for Defence [2005] EWHC 1835 (Admin), [2006] EWCA 1293, [2006] 1 WLR 321

R (Hajrula) v London Councils [2011] EWHC 448 (Admin)

R (Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366, [2002] 2 All ER 936

R (Hooper) v Secretary of State for Work and Pensions [2005] UKHL 29, [2005] 1 WLR 1681

R (Hurley and Moore) v Secretary of State for Business Innovation & Skills [2012] EWHC 201 (Admin)

R (Kaur & Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin)

R (Luton Borough Council and others) v Secretary of State for Education [2011] EWHC 217 (Admin), [2011] Eq LR 481

R (on the application of Amicus) v Secretary of State for Trade and Industry [2004] IRLR 430 QB [2004] EWHC 860 (Admin)

R (Barrett) v Lambeth LBC [2012] EWHC 4557 (Admin), [2012] BLGR 299

R (Rahman) v Birmingham City Council [2011] EWHC 944 (Admin), [2011] Eq LR 705

R (Talawa) v Arts Council of England CO/775/2005

R (Watkins-Singh) v Aberdare Girls' High School [2008] EWHC 1865, [2008] 3 FCR 203

R (Williams) v Surrey County Council [2012] EWHC 867 (QB)

R (Fawcett Society) v Chancellor of the Exchequer [2010] EWHC 3522 (Admin)

Re Dominion Students' Hall Trust [1947] Ch 183

Re Harding, decd, Gibbs v Harding [2007] EWHC 3 (Ch), [2008] Ch 235

Re Hummeltenberg [1923] 1 Ch 237 (Ch)

Re Koepler's Will Trusts [1986] Ch 423 (CA)

Re Le Cren Clarke [1996] 1 WLR 288 (Ch)

Re Lysaght [1966] Ch 191

Re Resch [1969] 1 AC 514 (PC)

Re Strakosch [1949] 1 Ch 529 (Ch)

Reaney v Hereford Diocesan Board of Finance 2007 ET/1602844/06 EOR 168

Royal College of Nursing v St Marylebone Corporation [1959] 1 WLR 1077 (CA)

Rutherford v Secretary of State for Trade and Industry (No.2) [2006] UKHL 19 [2006] IRLR 551

Salgueiro Da Silva Mouta v Portugal (2001) 31 EHRR 47

Schmidt v Germany (1994) 18 EHRR 513

Seldon v Clarkson Wright and Jakes (A Partnership) [2012] UKSC 16, [2012] 3 All ER 1301

Shamoon v Chief Constable of Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285

Sheridan v Prospects and Hender v Prospects [2008] ET/2901366/06 and [2008] ET/2902090/06

Showboat Entertainment Centre Ltd v Owens [1984] IRLR 7 (EAT)

Somerset County Council v Pike [2009] EWCA Civ 808, [2009] IRLR 870

South East Sheffield Citizens Advice Bureau v Grayson [2004] IRLR 353 (EAT)

Stec v UK (2006) 43 EHRR 1017

Treasury Solicitors Department v Chenge [2007] IRLR 386 (EAT)

1)The British Humanist Association (2) Jeremy Rodell (a member of the Richmond Inclusive Schools Campaign) v London Borough of Richmond upon Thames and The Roman Catholic Diocese of Westminster and The Secretary of State for Education [2012] EWHC 3622 (Admin)

Vancouver Rape Relief Society v Kimberly Nixon 2005 BCCA 601, 262 DLR (4th) 360, [2006] 4 WWR 213

Verge v Somerville [1924] AC 496 (PC)

Weathersfield Ltd v Sargent [1999] IRLR 94 CA

X v Mid-Sussex Citizens Advice Bureau [2012] UKSC 59, [2013] IRLR 146

Decisions of the Charity Commission

Charity Commission, Decision of the Charity Commissioners for England and Wales made on 17 November 1999, Application for Registration as a Charity by the Church Of Scientology (England And Wales)

<http://www.charitycommission.gov.uk/media/100909/cosfulldoc.pdf>

Charity Commission for England and Wales, Decision on whether or not to grant section 64 consent for Catholic Care (Diocese of Leeds) and Father Hudson's Society to amend their objects, 24 November 2008 (unreported)

Charity Commission for England and Wales, Catholic Care (Diocese of Leeds), 21 July 2010, Application for consent to a change of objects under s.64 of the Charities Act 1993

http://www.civilsociety.co.uk/docs/Summary_of_final_decision_re_Catholic_Care.pdf (summary)

Books, Articles, Reports

Atiyah PS, 'Public Benefit in Charities' (1958) 21 *Modern Law Review* 138

Baker L, Harris M, Moran R, and Morgan G, 'The impact of the public benefit requirement in the Charities Act 2006: perceptions, knowledge and experience' (2012) *Institute for Voluntary Action Research Report*

BMA, Equality and Diversity in UK Medical Schools (2009)

Breen O, Ford P and Morgan G, 'Cross Border Issues in the Regulation of Charities: Experiences from the UK and Ireland' (2009) 11 *International Journal of Not for Profit Law* 5

Brindel D, 'Behind the Paralympics, the reality for disabled people in Britain 2012' *The Guardian*, 20 Aug 2012: <http://www.guardian.co.uk/society/2012/aug/20/paralympics-disabled-people-spending-cuts>

Broach S and Whittaker K, 'Using the Law to Fight Cuts to Disabled People's Services' (2012)

Bryant A and Charmaz K (eds) *The Sage Handbook of Grounded Theory* (Sage Publications 2010)

Cabinet Office, 'Community Life Survey: Q2 2012-13 (August-October 2012) Statistical Bulletin' (February 2013)

Cabinet Office, Strategy Unit, 'Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector' (2002)

Campbell B, 'The Fawcett Society takes the cuts to court' *The Guardian*, 22 October 2010

Chamberlain E, (*Public Benefit - hot potato or judicial blancmange?* NCVO Blog (2012) <http://www.ncvo-vol.org.uk/networking-discussions/blogs/63/12/07/16/public-benefit-hot-potato-or-judicial-blancmange>

Charity Commission, 'Equality and Diversity Strategy 2012' (2012)

Charity Commission, 'Promotion of Equality and Diversity for the Benefit of the Public' (2003)

Charity Commission, 'Strategic Plan 2012-2015' (2012)

Charity Commission, *The advancement of human rights:*

http://www.charitycommission.gov.uk/Charity_requirements_guidance/charity_essentials/public_benefit/Advancing_human_rights.aspx

Charity Law Association, 'EHRC Consultation on Equality Act 2010 non-statutory guidance Response from the Charity Law Association Working Party' (2010)

Charmaz K, *Constructing Grounded Theory* (Sage Publications 2006)

Charmaz K, *What is Grounded Theory?* PowerPoint presentation (2008) <http://eprints.ncrm.ac.uk/208/>

Committee on the Elimination of Discrimination against Women, 41st session (30 June-18 July 2008), *Part of A/63/38 1, Fifth and sixth periodic reports, United Kingdom of Great Britain and Northern Ireland*

de Schutter O, *The Prohibition of Discrimination under European Human Rights Law - Relevance for European Union non-discrimination directives'* (Office for Official Publications of the European communities 2009)

EHRC, 'Making fair Financial Decisions: An assessment of HM Treasury's 2010 Spending Review conducted under Section 31 of the 2006 Equality Act' (2012)

http://www.equalityhumanrights.com/uploaded_files/Inquiries/s31_final.pdf

Eikenberry AM and Bearman J, with Han H, Brown M and Jensen C, 'The Impact of Giving Together: Giving Circles' Influence on Members' Philanthropic and Civic Behaviors, Knowledge and Attitude' (Forum of Regional Associations of Grantmakers The Center on Philanthropy at Indiana University The University of Nebraska at Omaha, 2009)

Elston MA, 'Women and Medicine: the future', Royal College of Physicians (2009)

Employment equality rules: reasoned opinion to the UK, 2009, http://europa.eu/rapid/press-release_IP-09-1778_en.htm?locale=en

Equality and Diversity Forum, 'Piloting a Draft Equality and Human Rights Framework for the Voluntary Sector' <http://www.edf.org.uk/blog/?p=19647>

Equality Bill Deb, 2 July 2009, col 644

Equality Bill Deb, 23 June 2009, col 4

Equality Challenge Unit, 'The public sector equality duty: specific duties for Wales Implications for higher education institutions' (2011)

Equality Challenge Unit, 'Student pregnancy and maternity: implications for higher education institutions' (2010) <http://www.ecu.ac.uk/publications/files/student-pregnancy-and-maternity-implications-for-heis.pdf/view>

Evangelical Alliance, 'Clearing the Ground inquiry: preliminary report into the freedom of Christians in the UK (2012) <http://www.eauk.org/current-affairs/publications/upload/Clearing-the-ground.pdf>

Fredman S, 'The Public Sector Equality Duty' [2011] 40(4) *Industrial Law Journal* 40

Greater Manchester Centre for Voluntary Organisation, 'An Ounce of Prevention is Worth a Pound of Cuts' (2012) <http://www.gmcvo.org.uk/sites/gmcvo.org.uk/files/ImpactofCutsKnowledgeReport.pdf>

Hackney J, 'Charities and Public Benefit' (2008) 124 *Law Quarterly Review* 347

Halford J and Khan S, 'Equality Act will Pressure Authorities to Listen' *The Law Society Gazette*, 28 April 2011

HM Treasury, 'Plan for Growth' (2011) http://cdn.hm-treasury.gov.uk/2011budget_growth.pdf

HM Treasury, *Spending Round 2013*, (Cm 8639, 2013)

Hirst A and Rinn S, 'EHRC Research report 86: The impact of changes in commissioning and funding on women-only services' (2012)

Home Office, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, Cm 4262-I, February 1999

Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, (2008-9, HL 169, HC 736)

Joint Committee on the Draft Charities Bill, *The Draft Charities Bill* (2003-04 HL 167-III, HC 660-III) vol 3: Written Evidence, Memorandum from Peter Tatchell (DCH 92) Ev 377

Kitzinger J, 'Qualitative research; Introducing Focus Groups' (1995) 311 *BMJ* 299

Luxton P, 'A Three-Part Invention: Public Benefit under the Charity Commission' (2009) 11(2) *Charity Law & Practice Review* 19

Morris D, '*Re Le Cren Clarke* - Faith hope and charity in healing' (1996) 18(1) *Liverpool Law Review* 63

Morris D, 'Volunteering - The Long Arm of the Law' (1999) 4(4) *International Journal of Nonprofit and Voluntary Sector Marketing* 320

Morris D, 'Charities and the Modern Equality Framework - Heading for a Collision?' (2012) 65 *Current Legal Problems* 295

Morris, J, 'Rethinking Disability Policy' *Viewpoint* (Joseph Rowntree Foundation 2011) <http://www.jrf.org.uk/sites/files/jrf/disability-policy-equality-summary.pdf>

NAVCA and The Public Law Project, 'Empowering the voluntary sector to challenge unjust public body funding and consultation decisions: Evaluation report' (2009)

http://www.publiclawproject.org.uk/documents/Evaluation%20report_EVS.pdf

NUS, 'Meet the Parents: the Experiences of Students with Children in Further and Higher Education' (2009) http://www.nus.org.uk/Global/NUS_SP_report_web.pdf

O'Dempsey D and Dobbie O-F, 'Treated equally: Protecting all volunteers from discrimination' (2013) 157(5) *Solicitors Journal* 12

Office of the Scottish Charity Regulator (OSCR), 'Consultation on Equality Strategy 2012-15' (2012)

OSCR, 'Report under section 33 of the Charities and Trustee Investment (Scotland) Act 2005 St Margaret's Children and Family Care Society, Scottish charity number SC028551' (2013)

http://www.oscr.org.uk/media/386066/2013-02-12_st_margaret_s_s33_report_updated_pdf.pdf

Powell RA, Single HM and Lloyd KR, 'Focus Groups in Mental Health Research: Enhancing the Validity of User and Provider Questionnaires' (1996) 42(3) *International Journal of Social Psychology* 193

Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation - Progress Report, November 2012, <http://register.consilium.europa.eu/pdf/en/12/st16/st16063.en12.pdf>

Public Administration Select Committee, *Appointment of the Chair of the Charity Commission* (HC 2012-13, 315-II) Ev 1

Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (HC 2012-13, 76 incorporating HC 574-i-vi)

Public Accounts Committee, *Charity Commission: the Cup Trust and tax avoidance* (HC 2012-13, 138 incorporating HC 1027)

Royston T, 'Treating Volunteers as Members of an Association and the Implications for English Discrimination Law' (2012) 12(1) *International Journal of Discrimination Law* 5

Sandberg R and Doe N, 'Religious Exemptions in Discrimination Law' (2007) 66(2) *Cambridge Law Journal* 302

Schwabenland C and Tomlinson F, 'Managing Diversity or Diversifying Management?' (2008) 4 (2/3) *Critical Perspectives on International Business*, 320

Schwabenland C, *Metaphor and Dialectic in Managing Diversity*, (Palgrave 2012)

Teasdale S, McKay S, Phillimore J and Teasdale N, 'Exploring gender and social entrepreneurship: women's leadership, employment and participation in the third sector and social enterprises' (2011) 2(1) *Voluntary Sector Review*, 57

Tomlinson F and Schwabenland C, 'Reconciling Competing Discourses of Diversity? The UK Non-profit Sector Between Social Justice and the Business Case' (2010) 17 (1) *Organization*, 101

Turano T, 'Charitable Trusts and the Public Service: The Public Accountability of Private Care Providers' (2007) 18 *Kings Law Journal* 427

Volunteering England, 'Volunteer Rights Inquiry: Recommendations and call to action' (2011)

Wintemute R, 'Filling the Article 14 "Gap": Government Ratification and Judicial Control of Protocol No 12 ECHR: Part 2' [2004] *European Human Rights Law Review* 484, 492

Women's Resource Centre, *Why Women Only? The value and benefit of by women, for women services*, 2007

Women's Resource Centre, 'Women-only services: making the case' (2011)

Women's Resource Centre and NAVCA, 'Keeping it Legal; A guide for third sector organisations on public law and equality rights' (2010)

Women's Resource Centre and Rape Crisis (England and Wales), 'The Crisis in Rape Crisis' (2008)

Work and Pensions Committee, *The Equality Bill: How disability equality fits within a single Equality Act* (HC 2008-9,158-I)

Guidance

Charity Commission, 'Analysis of the law underpinning Charities and Public Benefit' (2008)

Charity Commission, 'Charities and Public Benefit. The Charity Commission's general guidance on public benefit' (2011)

Charity Commission, 'Equality Act guidance for charities: Restricting who can benefit from charities' (2011)

Charity Commission, 'Supporting specific beneficiary groups - Equality Act summary guidance' (2010)

Charity Commission, *Big Board Talk - 15 questions trustees need to ask*,
<http://www.charitycommission.gov.uk/media/91859/ccnews29check.pdf>

Charity Commission, 'It's your decision: charity trustees and decision making' (2013)

Commission for Racial Equality, 'Code of Practice on the duty to promote Race Equality' (2002)

Equality and Human Rights Commission, 'Equality Act 2010 Guidance: Your rights to equality from voluntary and community sector organisations (including charities and religion or belief organisations)' (2011)

EHRC, 'Statutory Code of Practice on Services, Public Functions and Associations' (2011)

EHRC, 'Equality Act 2010 Technical Guidance on Further and Higher Education' (2011)

Explanatory Notes to the Charities Act 2006

Explanatory Notes to the Equality Act 2010

EHRC, *What is the Equality Act?* <http://www.equalityhumanrights.com/legal-and-policy/equality-act/what-is-the-equality-act/>

Government Equalities Office and Equality and Diversity Forum, 'Equality Act 2010: What do I need to know? A quick start guide for voluntary and community sector associations' (2011)

GEO EDF, 'Equality Act 2010: What do I need to know? A quick start guide to gender reassignment for voluntary and community organisations in the provision of goods and services' (2011)

GEO EDF, 'Equality Act 2010: What do I need to know? A quick start guide to harassment in service provision for voluntary and community organisations' (2011)

GEO EDF, 'Equality Act 2010: What do I need to know? A quick start guide to positive action in service provision for voluntary and community organisations' (2011)

GEO EDF, 'Equality Act 2010: What do I need to know? A quick start guide to religion or belief discrimination in service provision for voluntary and community organisations' (2011)

GEO EDF, 'Equality Act 2010: What do I need to know? A summary guide for voluntary and community sector service providers' (2011)

GEO EDF, 'Equality Act 2010: What do I need to know? Quick start guide to discrimination by association and perception for voluntary and community organisations' (2011)

Office of the Scottish Charity Regulator, 'Meeting the Charity Test' (2010)

Published by:

Charity Law & Policy Unit

University of Liverpool

Liverpool L69 7ZA

© Charity Law & Policy Unit

August 2013