Equality Act 2010

Introduction

1. The Equality Act 2010 became law in October.[1] The Act had a lengthy gestation and an uncertain birth. The Discrimination Law and Equalities Reviews were announced in 2005 and reported in mid 2007, the former with the publication of a consultation paper *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*.[2] *A Framework for Fairness*, which proposed a consolidation of discrimination law together with an assortment of specific adjustments to the existing law, was criticised for its lack of ambition by trade unions, the equality commissions and NGOs. This criticism appeared to fall on deaf ears, the 600 page Equality Bill 2009 proposing relatively little in the way of substantive change to equality/ discrimination law but some potential hostages to fortune, among them the proposed extension of the equality duties to religion/ belief. That provision is not discussed here because much will depend, in connection with its impact in the field of employment, on the specific duties yet to be enacted.

The Equality Act 2010: general remarks

2. The Equality Act 2010 weighs in at some 239 pages, 105 of them devoted to the 28 Schedules to the Act. The body of the Act contains the basic structure of the streamlined discrimination law, the detail relegated to schedules. Thus, for example, ss.4-12 set out the "protected characteristics" (age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation); ss.13-27 definitions of discrimination, harassment etc.; and ss.39-83 (Part 5, Chapters 1-4) the prohibitions on employment-related discrimination, including the provisions on equal pay (Chapter 3) and pensions (Chapter 2)). Schedule 1 then sets out additional detail on the definition of disability; Schedule 8 disability-related reasonable adjustments in the employment context; Schedule 9 exceptions to prohibitions on discrimination in employment and Schedule 23 general exceptions.

3. The consolidating and rationalizing functions of the Act are certainly to be welcomed. However long the Act, it is easier to master than the current thicket of discrimination legislation. Valuable also is the elimination of unnecessary complexities such as the distinction which exists in the Race Relations Act 1976 and Disability Discrimination Act 1995 between those aspects of discrimination which are and are not covered by EU law, and which accordingly do or do not qualify for (for example) the modernized definitions of indirect discrimination and the reversed burden of proof (s.136). The definition of harassment is also harmonised across the protected

[1] According to the official press release: www.equalities.gov.uk/media/press_releases/equality _bill.aspx. Whether this will happen, and to what extent, may depend on the outcome of the general election.
[2] Department for Communities and Local Government, London), June 2007.

grounds as "unwanted conduct related to a relevant protected characteristic" (s.26), "relevant protected characteristics" being listed as (s.26(5)) age, disability, gender reassignment, race, religion or belief, sex and sexual orientation, though the material scope of the harassment provisions varies across the protected characteristics. Section 40 also brings the other grounds into line with the current provisions on harassment related to sex, not only prohibiting harassment by employers and their agents and employees but also (s.40(2)&(3)) ascribing liability to employers for harassment by third parties in the course of employment where the employer "knows that [the harassed person] has been harassed in the course of [his or her] employment on at least two other occasions by a third party … whether the third party is the same or a different person on each occasion" and "failed to take such steps as would have been reasonably practicable to prevent the third party from doing so".[3]

4. Oddities remain, such as the absence of any prohibition on indirect pregnancy discrimination (which may of course however also amount to indirect sex discrimination) and the retention of a provision to the effect that less favourable treatment because of periods of absence connected with gender reassignment is discriminatory only if unreasonable and involving less favourable treatment of the person than had s/he needed the period of absence in connection with sickness or injury (s.16). More fundamentally, the Act is a disappointment to those who hoped, however optimistically, for radical improvement to current, largely individually focused, domestic equality law. This is particularly apparent in the case of the equal pay provisions, considered further below.

5. I do not here claim comprehensively to discuss the employment-related provisions of the Act. Nor has sufficient time passed to allow mature reflection over the provisions here discussed. My aim is simply draw attention to a number of areas in which significant changes to equality/ discrimination law have (or have not) been made by the Act, and to make some comments thereon. Much of what is problematic has been drawn attention to by the Joint Committee on Human Rights in its analysis of the Equality Bill and its work is drawn heavily upon below.

"Discrimination"

Direct discrimination

6. Section 13(1) defines as "direct discrimination" less favourable treatment "because of a protected characteristic", s.13(3) providing that "the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat

[3] Note that harassment related to sexual orientation and religion/ belief are not regulated outside the broad area of employment.

disabled persons more favourably than A treats B" and 13(6)(b) that "in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth".

7. The replacement of the familiar "on the ground of" with "because of" was controversial because of concerns that it would result in the loss of the caselaw establishing the width of "on the ground of".[4] The Explanatory Notes to the Bill stated (para 73) that the use of the words "because of" "does not change the legal meaning of the definition, but rather is designed to make it more accessible to the ordinary user of the Bill", Solicitor-General Vera Baird resisting an attempted amendment to restore the "on grounds of" terminology on the basis that the terms were "synonymous" and that the use of "because of" would make the legislation more accessible to non-specialists.[5] In its report on the Bill the JCHR expressed concern (para 80) that, although "The Government is to be applauded for its concern for attempting to ensure the definition of direct discrimination is phrased in accessible terms" "the previously used test in direct discrimination … has acquired a clear and definite interpretation through case-law… [and] little is gained by replacing 'on grounds of' with 'because of'", the change creating the risk of "the emergence of alternative interpretations".[6]

8. One particular change which was required by EU developments was the extension of the prohibition on discrimination to cover that which resulted from the victim's association with someone having a protected characteristic. This as a result of the decision of the ECJ in *Coleman v Attridge Law & Anor*[7] that Directive 2000/78/EC prohibited discrimination against a woman because of her son's disability. The prohibition of discrimination "on the ground of" race, sexual orientation and religion or belief by the existing provisions was broad enough, on the caselaw which had developed under the Race Relations Act 1976,[8] to cover this as well as discrimination on grounds of *perceived* status, not expressly discussed in *Coleman* but clearly within the very broad approach to discrimination adopted by the ECJ in that case. Disability, age and sex discrimination, however, were prohibited only insofar as the characteristic relied on was related to the claimant him or herself. The EAT confirmed in *EBR Attridge LLP & Anor v Coleman*[9] that the Disability Discrimination Act 1995 was capable, post the decision of the ECJ, of interpretation to cover the facts alleged in that case but it was clear that legislative change was needed.

[4] See for example Michael Rubenstein in *Equal Opportunities Review*, June 2009, issue 189, p. 23.
[5] PBC Deb, 16 June 2009, col 242.
[6] Twenty-Sixth Report of 2008-09, "Legislative Scrutiny: Equality Bill", www.publications.Parliam ent .uk/pa/jt200809/jtselect/jtrights/169/169.pdf.
[7] Case 303/06 [2008] ICR 1128.
[8] In particular, *Race Relations Board v Applin* [1975] AC 259 at 289, *per* Lord Simon; *Mandla v Dowell Lee* [1983] 2 AC 548 at 563, *per* Lord Fraser; *Showboat Entertainment Centre Ltd v Owens* [1984] ICR 65.
[9] [2010] ICR 242.

9. The Explanatory Notes to the Equality Bill stated (para 71) that the new definition of direct discrimination was intended to be "broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic … or because the victim is wrongly thought to have it ...". The absence of any express provision covering discrimination by association or perception caused significant concern on the part of equality activists, the ECHR and ECNI,[10] but an amendment designed to meet these concerns which was tabled by Liberal Democrat Dr Evan Harris MP was resisted by the Solicitor-General on the basis that it could result in a narrower interpretation being given to the general prohibition on direct discrimination.[11] In her evidence to the JCHR Vera Baird MP stated that:

> It is well established and well understood that the definitions of direct discrimination in current legislation using the words "on grounds of" the relevant protected characteristic (i.e. race, religion or belief and sexual orientation) are broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic … or because the victim is wrongly thought to have it … As the words "because of" a protected characteristic used in clause 13 do not change the legal meaning of the definition, there is therefore no need to explicitly prohibit discrimination on the basis of association and perception on the face of the Bill. To do that would also run the risk of excluding other cases which the courts have held are covered by the words "on grounds of" (see, for example, *Showboat Entertainment Centre Ltd v Owens* [1984] ICR 65 and *English v Thomas Sanderson Ltd* [2009] ICR 543) and future cases which the Government would want the equally broad and flexible formulation 'because of' to extend to.[12]

10. The JCHR was not convinced, expressing concern (para 87) that the change from "on grounds of" to "because of" might jeopardize the approach taken in cases such as *Showboat*, and that:

> the lack of an explicit prohibition of discrimination based on association and perception on the face of the Bill makes the legislation less clear and, in the Government's own words, less "accessible to non-specialists" and less "accessible to the ordinary users of the Bill". While the current formulation in Clause 13 is elegant, the absence of such an explicit prohibition also risks leaving victims unaware of their legal rights and may generate uncertainty among employers and service providers. The insertion of express provisions prohibiting discrimination based on association and perception would clarify the legal position and make the Bill more comprehensible. This could be accompanied by guidance to make clear that the inclusion of this prohibition should not be interpreted as limiting the scope and range of the general prohibition of direct discrimination contained in Clause 13. This could meet the Government's concerns about inserting such an explicit provision into the Bill and contribute towards clarifying its scope and content. The extension of protection against association and perception marks a considerable expansion of human rights protection: in our view, it is important that its existence is clearly indicated on the face of the Bill...

"Dual discrimination"

11. In an addition to the Bill as it was originally published, section 14 of the 2010 Act, if and when it is implemented, will regulated less favourable treatment "because of a combination of two relevant protected characteristics", these characteristics excluding maternity, pregnancy,

[10] Fn 6 above, ev 107, 122 & 132.
[11] PBC Deb, 16 June 2009, col 254.
[12] Fn 6 above, ev 67 at Q 15.

marriage or civil partnership. The inclusion of this provision in the Act was a response to the growing call for legislation to accommodate multiple discrimination claims, that is, claims of discrimination arising from the combination of, or the intersection between, protected characteristics. The JCHR welcomed the Bill's recognition of dual discrimination but expressed concerns that (a) (by definition) it applied to only two grounds, (b) it did not cover indirect discrimination or harassment and (c) it did not extend to discrimination on all protected grounds. Referring to the Solicitor-General's statement that "The vast majority of cases of multiple discrimination would be addressed by allowing claims combining two protected characteristics and the benefit of extending protection to combinations of three or more protected characteristics would be marginal";[13] that increasing the number of grounds would make the law more complex and increase the burdens for employers and that there was no evidence of a need to prohibit indirect discrimination or harassment on multiple grounds, the JCHR urged the government to (para 98) "keep the situation actively under review, and to give serious consideration to extending protection to more than two grounds in the future" and (para 99) "to explain in detail why it is unwilling to extend combined discrimination to indirect discrimination and harassment and why maternity, pregnancy, marriage and civil partnership are excluded from this area".

Disability discrimination

12. The 2010 Act recognises four forms of disability discrimination: direct (s.13), indirect (s.19), discrimination arising from a failure to make a reasonable adjustment (s.21) and (in response to the decision of the House of Lords in *Lewisham LBC v Malcolm*[14]) "discrimination arising from disability". The last of these is found in s.15 which regulates unjustified unfavourable treatment "because of something arising in consequence of [a disabled person's] disability".

13. The JCHR suggested (para 135) that "a strong case exists for providing on the face of the Bill that the knowledge requirement will be deemed to be satisfied when an employer or service provider failed to ask a claimant whether they suffered from a disability when it was reasonable to do so. If supplemented by guidance from the EHRC, this could enhance protection against disability discrimination by ensuring that employers and service providers cannot rely upon deliberate ignorance or a 'don't ask, don't tell' policy to evade their obligations". The JCHR's recommendations on what became s.15 were not given effect to, but s.60 of the Act responds to the Committee's proposal, based on evidence from the National AIDS Trust, that the use of pre-employment health questionnaires before a job offer has been made be prohibited. The

[13] Fn 6 above, ev 67 at Q 16.
[14] [2008] 1 AC 1399.

Committee referred (para 136) to "evidence … that the use of such questionnaires has a powerful deterrent effect upon potential applicants who are disabled, often driving them towards specific disability-friendly environments or to hide their impairment" and (para 135) stated that "Serious consideration needs to be given to limiting the use of pre-employment questionnaires to circumstances which relate to the ability of the applicant to perform job-related functions". The Equality Act 2010 (s.60) now prohibits pre-offer questions about the health of applicants inasmuch as the employer's "reliance on information given in response may be a contravention of a relevant disability provision". Questions are permitted where necessary for the purposes of making reasonable adjustments in relation to any assessment of the applicant, "establishing whether [the applicant] will be able to carry out a function that is intrinsic to the work concerned", monitoring diversity or taking positive action. S.60(2) restricts the right to bring proceedings for breach of section 60 to the EHRC, but s.60(5) provides that an inference of discrimination may be made in an employment-related claim from such enquiries.

Positive action

14. Part 11 of the 2010 Act is entitled "Advancement of Equality". Chapter 2 "Positive Action" contains two provisions. S.158 applies to positive action other than in relation to recruitment and promotion. It is a broad provision designed to facilitate the taking of any proportionate positive measures where the person taking the measures "reasonably thinks" (s.158(1)) that—

> (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
> (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
> (c) participation in an activity by persons who share a protected characteristic is disproportionately low.

15. Section 159, which has yet to be brought into force, provides as follows:

> (1) This section applies if a person (P) reasonably thinks that—
> (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, or
> (b) participation in an activity by persons who share a protected characteristic is disproportionately low.
> (2) Part 5 (work) does not prohibit P from taking action within subsection (3) with the aim of enabling or encouraging persons who share the protected characteristic to—
> (a) overcome or minimise that disadvantage, or
> (b) participate in that activity.
> (3) That action is treating a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not.
> (4) But subsection (2) applies only if—
> (a) A is as qualified as B to be recruited or promoted,
> (b) P does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it, and
> (c) taking the action in question is a proportionate means of achieving the aim referred to in

subsection (2).
(5) "Recruitment" means a process for deciding whether to—
(a) offer employment to a person,
(b) make contract work available to a contract worker,
(c) offer a person a position as a partner in a firm or proposed firm,
(d) offer a person a position as a member of an LLP or proposed LLP,
(e) offer a person a pupillage or tenancy in barristers' chambers,
(f) take a person as an advocate's devil or offer a person membership of an advocate's stable,
(g) offer a person an appointment to a personal office,
(h) offer a person an appointment to a public office, recommend a person for such an appointment or approve a person's appointment to a public office, or
(i) offer a person a service for finding employment.
(6) This section does not enable P to do anything that is prohibited by or under an enactment other than this Act.

16. Section 158 is to be welcomed as a clear recognition that symmetry of approach is not an absolute. Section 158 is more problematic in that, as the JCHR pointed out in its first Report on the Bill, it appears to subject positive action to more stringent restrictions in some respects than EU law. According to the JCHR:

> 287. The case-law of the European Court of Justice (ECJ) has imposed restrictions on the extent to which positive action may be used in employment to benefit under-represented groups. In cases such as *Badeck* and *Abramhamsson v Fogelqvist*,[15] the ECJ has taken the view that giving automatic preference to female candidates without considering the merits of each individual application would constitute sex discrimination. However, the requirement in Clause 155(4) that employers may only use positive action where candidates are "equally qualified" appears to fall considerably short of the scope of positive action permitted by the ECJ in *Abramhamsson* and the other cases on positive action. The ECJ states that employers cannot give automatic preference to employees without assessing the comparative merits of each individual application: this is not the same as a requirement that employees must be "equally qualified", a requirement which may be impossible to prove in many cases and which will almost certainly deter employers from making use of the scope for positive action permitted by the legislation. Clause 155(4) appears to have been drafted on the basis of an excessively restrictive interpretation of European law. **We therefore recommend that the requirement that employees be "equally qualified" be deleted from Clause 155(4) and replaced by wording which more accurately reflects the approach adopted in the case-law of the European Court of Justice. If this requirement is retained, it may prove very difficult to comply with in practice and deter employers from making use of positive action measures.**[16]

17. S.159 replaces the words "equally qualified" with "as qualified" but it is not clear that this makes any difference to the problem pointed out by the JCHR. Unchanged in s.159 are the other problems identified by the Committee:

> 288. In addition, Clause 155(4)(b) states that employers must not have a "policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it". This would appear to prevent employers having any fixed policy of adopting positive action measures. As a result, it is very unclear as to when employers will ever be able to make use of positive action, given that such measures will only be fair, justifiable and effective if introduced as part of coherent recruitment or promotion policies rather than used in one-off individual *ad hoc* decisions. Again, this wording seems to be based

[15] [respectively *C*ase C-158/97 [2001] 2 C.M.L.R. 79, Case C-407/98 [2002] I.C.R. 932.
[16] Fn 6 above.

> upon a misunderstanding of the approach adopted by the ECJ, which prohibits a system of automatic preference that does not make room for an assessment of the merits of each individual candidate…

Exceptions

Religious organisations

18. Schedule 9 sets out the exceptions to the prohibitions on employment-related discrimination. The significant change which has been made to the GOQs in the course of the passage of the 2010 Act is found in para 2 (para 3 providing for a religion and belief GOR for religious organisations in materially identical form to the current Reg 7(3) of the R&B Regulatons):

> Religious requirements relating to sex, marriage etc., sexual orientation
> 2(1) A person (A) does not contravene a provision mentioned in sub-paragraph (2) [employment-related discrimination] by applying in relation to employment a requirement to which sub-paragraph (4) applies if A shows that—
> (a) the employment is for the purposes of an organised religion,
> (b) the application of the requirement engages the compliance or non- conflict principle, and
> (c) 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)…
> (4) This sub-paragraph applies to—
> (a) a requirement to be of a particular sex;
> (b) a requirement not to be a transsexual person;
> (c) a requirement not to be married or a civil partner;
> (d) a requirement not to be married to, or the civil partner of, a person who has a living former spouse or civil partner;
> (e) a requirement relating to circumstances in which a marriage or civil partnership came to an end;
> (f) a requirement related to sexual orientation.
> (5) The application of a requirement engages the compliance principle if the requirement is applied so as to comply with the doctrines of the religion.
> (6) 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…

19. Para 2(3) makes similar provision in relation to qualification for posts to which para 2(1) applies. The Equality Bill in its original form required that the GOR was a proportionate way of complying with the doctrines of the religion or of avoiding conflict with beliefs. In addition, the clause had provided that employment would only be classified as being for the purposes of an organised religion if it "wholly or mainly involves (a) leading or assisting in the observation of liturgical or ritualistic practices of the religion, or (b) promoting or explaining the doctrine of the religion (whether to followers of the religion or to others)". Solicitor-General Vera Baird expressed the view that these inclusions did no more than to codify the decision in *Amicus v Secretary of State for Trade and Industry* and did not narrow the scope of the defence.[17] Baroness Royall of Blaisdon suggested, for the Government, (25 Jan 2010: cols 1215-16) that:

[17] PBC Deb, 23 June 2009, cols 453-454. The *Amicus* decision is at [2004] EWHC 860 (Admin)

> The small number of posts outside the clergy to which paragraph 2 applies are those that exist to promote or represent an organised religion or to explain the doctrines of the religion … We therefore intend senior employees with representational roles, such as the secretary-general of the General Synod and the Archbishops' Council of the Church of England, to be within the definition. A further example is that of a senior lay post at the Catholic Bishops' Conference charged with acting on behalf of bishops when contributing to public policy developments. These are both roles where the emphasis is more representational than promotional. There will be similar such roles in other organised religions. An example of a post that exists more to promote the religion is that of a missionary working for a church in this country. A church youth worker who primarily organises sporting activities would be unlikely to be covered by the exception. However, a youth worker whose key function is to teach Bible classes probably would be covered, because explaining the doctrines of the religion would be intrinsic to the role.
>
> Because the exception applies only to a very narrow range of posts, all roles will need to be closely examined to determine whether or not they fall within the scope of the exception. An organised religion that applies in relation to a role a requirement related to sexual orientation, for example, must be prepared to justify this on a case-by-case basis. Whether or not a particular role exists to promote or represent the religion or explain its doctrines will depend on the purposes of the role and the nature of the work that it involves.
>
> It is certainly not our intention that the exception should apply to employees such as administrative staff, accountants, caretakers or cleaners. Whether or not an applicant for the job of church bookkeeper is, for instance, married to a divorcee should not be a reason not to employ the person. In addition, the exception would not apply to most staff working in press or communications offices, although senior and high-profile roles within such offices that exist to represent or promote the religion would probably be within its scope. The revised definition that we propose also covers a case where a post to which the exception applies has just been created and the first person to hold it has yet to be appointed…

20. In its first Report on the Bill the JCHR was broadly satisfied with the balance struck by what became Schedule 9 para 2. Subsequent to that Report, however, the provision was amended to remove the requirement for proportionality and the definition of employment for the purposes of an organized religion. The wording of paras 2(5) and (6) is the result of Lady O'Cathain late amendment which replaced the words "application is a proportionate means of avoiding" and "application is a proportionate means of complying", respectively, with "requirement is applied so as to comply" and "requirement is applied so as to avoid". Lady O'Cathain argued that the Bill in its original form would change the existing legal framework and make it more difficult for religious organisations to discriminate and Baroness Butler-Sloss (col 1220) suggested that the Bill's requirement for proportionality might threaten the Catholic Church's requirement that priests be celibate.

21. In its Fourteenth Report of 2009-10 the JCHR returned to the subject of exemptions for religious organisations subsequent to the amendments made by the House of Lords on 25 January 2010, which amendments the Government had by that stage declared that it would accept.[18] Having pointed out at paras 1.6-1.8 that the Lords' amendments would not alter the required legal interpretation of the provisions in line with EU law, the Committee lamented

[18] Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill
http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/73/73.pdf

(paras 1.7 and 1.8) the loss of clarity arising from the removal of the express proportionality requirement and definition of employment for the purposes of an organised religion:

> 1.9 In its reasoned opinion infringement No. 2006/2450, paragraphs 15-20, which is usually confidential but which has found its way into the public domain,[3] the European Commission takes the view that Article 4(1) of the 2000/78/EC Directive:
>
> > Contains a strict test which must be satisfied if a difference of treatment is to be considered non-discriminatory: there must be a genuine and determining occupational requirement, the objective must be legitimate and the requirement proportionate. No elements of this test appear in Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 ... [The] Commission maintains that the wording used in regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 is too broad, going beyond the definition of a genuine occupational requirement allowed under Article 4(1) of the Directive.
>
> 1.10 The Commission further stated that:
>
> > The wording of the 2003 Regulations contradicts the provision under Article 4(2) of the Directive which provides that permitted differences of treatment based on religion "should not justify discrimination on another ground".
>
> This is not reflected in Schedule 9(2)(8) of the Equality Bill.
> 1.11 **In the absence of any narrowing or clarification of either Schedule 9(2) or 9(3) we share the view of the European Commission that UK law does not comply with the Framework Equality Directive.**

22. Another significant concern raised by the JCHR in its first Report on the Bill and reiterated in its second concerned the exemption from the prohibition on employment-related religious discrimination that discrimination permitted under the School Standards and Framework Act 1998, which permits schools with a religious character to restrict employment of certain teachers to applicants sharing the same faith as the school, without any requirement that being of that religion or belief is a GOR. The 1998 Act (s.58) permits foundation or Voluntary Controlled schools with a religious character to select up to one-fifth of teachers, and Voluntary Aided schools having a religious character to select app of their teachers, on the basis of their competence to give religious education as required in accordance with the school's religious ethos. The Act further provides that that the continued employment of such "reserved teachers" may be made conditional upon the opinion of the governors as to whether they have delivered religious education in an appropriate manner. S.60 of the 1998 Act provides that reserved teachers' compliance with a school's ethos may be grounds for preference in selection for a reserved teaching post, and in relation to the remuneration and promotion of such teachers. In particular, s.60(5) specifically provides schools may take into account not only a person's faith and religious attendance, but also any conduct which is incompatible with the precepts or with the upholding of the tenets of the religion.

23. The JCHR's first report on the Equality Bill stated (para 33) that "These provisions give rise to a number of human rights issues", reserved teachers being "denied protection against religious discrimination" without any requirement on the schools to demonstrate that compliance with the religious ethos in question is necessary. "Article 4(2) of the Framework Equality Directive permits religious organisations to discriminate on the basis of religion to preserve their ethos, but also requires that any difference in treatment must be a genuine, legitimate and justified occupation requirement having regard to the specific organisation's ethos." In addition, because Article 4(2) applies only to religious discrimination (para 303), the JCHR suggested that the ability of schools to engage in "lifestyle" discrimination under the 1998 Act might be incompatible with the Directive, as well as (para 304) "with the principle of equality and non-discrimination". In its second report on the Bill the JCHR reiterated its concerns over the SSFA, further pointing out that the Education and Inspections Act 2006, had amended the 1998 Act to provide that "all headships in faith schools [may] be designed as Reserved Teacher posts, except where the current incumbent objects" (para 1.13). These concerns appear to have fallen on deaf ears.

Equal Pay

24. The Equal Pay Act 1970 will cease to exist with the implementation of the Equality Act 2010. The basic structure for euial pay claims remains (that is, a successful equal pay claim results in the inclusion of an equality clause in the Claimant's contract (ss.66-68), such a claim generally requiring that the Claimant establishes, as before, that she is employed on like work, work rated as equivalent or work of equal value with an actual male comparator employed by the same or an associated employer at the same establishment or at one in which common terms and conditions apply (ss.64-65, 79). The Act expressly applies (s.64) to those holding personal or private offices, as well as to employees,[19] and reduces to statutory form the caselaw on maternity pay (ss.72-76). S.70 provides that no sex discrimination claim is available where an equal pay claim would succeed, or would succeed in the absence of a GMF defence. In what may prove a significant change, however, s.71 states that:

> 71 Sex discrimination in relation to contractual pay
> (1) This section applies in relation to a term of a person's work—
> (a) that relates to pay, but
> (b) in relation to which a sex equality clause or rule has no effect.
> (2) The relevant sex discrimination provision (as defined by section 70) has no effect in relation to the term except in so far as treatment of the person amounts to a contravention of the provision by virtue of section 13 or 14.

[19] In which case the required comparator is adjusted (s.79).

25. The effect of this provision is to permit *direct* sex discrimination in pay to be challenged by reference to a hypothetical comparator, though *indirect* discrimination in pay, which is far more prevalent, may not be so challenged. For those cases which proceed by way of a real comparator, the genuine material factor defence (s.1(3) Equal Pay Act 1970) is now found in s.69 of the 2010 Act which provides a defence where the pay-determining factor does not involve direct discrimination *and*, if it involves indirect discrimination, "is a proportionate means of achieving a legitimate aim". Section 69(3) provides that "the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim."

26. The impact of the provision is, broadly, to clarify the existing position whereby direct sex discrimination in pay cannot be justified, whereas indirect discrimination can. There has been some uncertainty as to whether non-discriminatory differences require to be justified.[20] This is settled by s.69, subject to any questions of EU law.[21] In its original form the provision appeared to allow the defence to be made out if the employer could establish *either* that the difference was due to a material factor which was not the difference of sex, *or* that s/he could establish that the factor, if indirectly discriminatory, was nonetheless justifiable. The JCHR drew attention in its first Report on the Bill to this difficulty (para 198), suggesting that, although consistent with the decision of the Court of Appeal in *Armstrong v Newcastle upon Tyne NHS Hospitals Trust*,[22] the clause might be incompatible with EU law.[23] The provision was duly amended, as was (now) s.64 to allow for non-contemporaneous comparators,[24] although the Committee's recommendation that the GMF specify in terms that (para 199) "while the initial burden of proof may rest on the claimant challenging the application of the material factor defence to show that particular disadvantage exists (i.e. to show the existence of a disparate adverse impact on the relevant group of female or male employees), the burden if the claimant succeeds shifts to the respondent, who must then justify what would otherwise be unlawful direct sex discrimination" was not followed.

27. Also worthy of note are the much vaunted sections 77 and 78 which, respectively prohibit victimisation in relation to discussions of pay designed to ascertain whether pay differences linked with any protected characteristic exist. Section 78, which has not been implemented and whose implementation is doubtful, provides that:

[20] Most recently see the discussion in *Gibson & Ors v Sheffield CC* [2010] EWCA Civ 63, [2010] IRLR 311.
[21] *Brunnhofer v Bank der Österreichischen Postparkasse AG*, C-381/99 [2001] ECR I-4961, though see the decision of the EAT in *Villalba v Merrill Lynch & Co Inc & Ors* [2007] 1 ICR 469.
[22] [2006] IRLR 124.
[23] In particular, *Enderby v Frenchay Health Board Authority* Case C-127/92, [1993] ECR I-05535.
[24] See para 200 of the JCHR's Report, fn 6 above.

> (1) Regulations may require employers to publish information relating to the pay of employees for the purpose of showing whether, by reference to factors of such description as is prescribed, there are differences in the pay of male and female employees.
> (2) This section does not apply to—
> (a) an employer who has fewer than 250 employees;
> (b) a person specified in Schedule 19;
> (c) a government department or part of the armed forces not specified in that Schedule.
> (3) The regulations may prescribe—
> (a) descriptions of employer;
> (b) descriptions of employee;
> (c) how to calculate the number of employees that an employer has;
> (d) descriptions of information;
> (e) the time at which information is to be published;
> (f) the form and manner in which it is to be published.
> (4) Regulations under subsection (3)(e) may not require an employer, after the first publication of information, to publish information more frequently than at intervals of 12 months.
> (5) The regulations may make provision for a failure to comply with the regulations—
> (a) to be an offence punishable on summary conviction by a fine not exceeding level 5 on the standard scale;
> (b) to be enforced, otherwise than as an offence, by such means as are prescribed.
> (6) The reference to a failure to comply with the regulations includes a reference to a failure by a person acting on behalf of an employer.

28. The JCHR was critical of the failure of the Government to make significant changes to the existing provisions on equal pay, pointing out at para 186 that the Bill "does not establish new procedures for providing arbitration in equal pay disputes nor does it impose positive duties on employers to take steps to monitor and respond to patterns of pay inequality":

> 188. Combined with the absence of positive duties to monitor and act upon patterns of pay inequality, it is difficult to use equal pay legislation to challenge patterns of unequal pay linked to "occupational segregation", the clustering of women in particular categories of low-paid jobs, as finding male comparators in such circumstances often proves difficult. In July 2008, the UN Convention on the Elimination of Discrimination Against Women's (CEDAW) monitoring Committee published its most recent Report ("Concluding Observations") on the UK's compliance with CEDAW. The CEDAW Committee expressed particular concern about "the persistence of occupational segregation between women and men in the labour market and the continuing pay gap, one of the highest in Europe". It recommended that the UK "take proactive and concrete measures to eliminate occupational segregation and to close the pay gap between women and men, including through the introduction of mandatory pay audits".[25]
> 189 …in general, we consider that the equal pay provisions of the Bill represent a wasted opportunity to enhance protection against gender inequality by clarifying and improving a complex and increasingly outmoded area of law. The current structure of equal pay legislation, which the Bill re-enacts in a largely unchanged manner, appears increasingly unable to cope with the complexity of equal pay claims. The existing equal pay framework also struggles to address issues of occupational segregation, identified by the CEDAW Committee as a persistent problem which contributes greatly to the size of the pay gap between men and women in the UK.
> 190. In particular, we consider that the equal pay provisions would benefit from the establishment of new arbitration mechanisms, the introduction of positive duties upon employers in certain circumstances to take steps to monitor and respond to patterns of pay inequality, and the amendment of Clause 76 to permit the use of hypothetical comparators in all equal pay claims. These measures would constitute the type of "proactive and concrete" steps recommended by

[25] Concluding Observations of the Committee on the Elimination of Discrimination Against Women: United Kingdom of Great Britain and Northern Ireland, CEDAW/C/GBR/CO/6, July 2008, paras. 39-40.

> the CEDAW Committee as necessary to eliminate patterns of occupational segregation and to close the pay gap between men and women.

29. The Committee welcomed the provision permitting direct challenges to be brought to direct discrimination in pay but referred to the ECHR's call for this to apply in cases of indirect discrimination also (para 187). This was not heeded but the JCHR's recommendation that the protection afforded by clause 74 (subsequently s.77) should be extended to cover discussions about pay with persons other than colleagues (it being limited to discussions with colleagues in its original form) did result in the amendment of that provision. The Committee welcomed clause 75 (s.77) as (para 194) "an example of the type of 'proactive measure' identified by the CEDAW Committee as necessary to address the problems of occupational segregation and the considerable gender pay gap, even if such a requirement would fall short of a positive duty to take measures to address any gaps that are identified. Destined to fall on deaf ears, however, was the Committee's recommendation that the provision:

> should *require* the Minister to make regulations about mandatory pay audits [emphasis added]. As it stands, the power under Clause 75 will be exercised only if there has been insufficient voluntary publication by employers by 2013. This unnecessarily delays making the changes that are needed to address the gender pay gap. Furthermore, the Bill fails to indicate how much detail employers will be required to publish. Instead, this is to be decided after the publication by recommendations by the EHRC. Therefore the Bill provides no certainty that employers will be required to publish information in sufficient detail to address the gender pay gap. **We recommend that the Bill should include a wider power than in Clause 75(1) for Ministers to make regulations about mandatory pay audits.**

Finally

30. Miscellaneous other changes include (s.9(5)) the provision of a Ministerial power to include caste as an aspect of race and the widening of the powers of tribunals to make recommendations and the definition of gender reassignment. Thus s.124(2) permits tribunals, where a claim of discrimination is made out, to "make an appropriate recommendation", defined by s.124(3) as "a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate—(a) on the complainant; (b) on any other person". As before, failure to comply with a recommendation may result in an award (or an increased award) of compensation (s.124(7)), but recommendations are not enforceable. The list of capabilities previously included in the Disability Discrimination Act 1995 has disappeared from the legislation. And, whereas the Sex Discrimination Act 1975, as amended, protected against less favourable treatment "on the ground that [a person] intends to undergo, is undergoing or has undergone gender reassignment" (s.2A) and defined gender reassignment as "a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process" (s.82(1)), the 2010 Act prohibits less favourable treatment "because of", indirect discrimination in connection with, etc

the "relevant protected characteristic" of gender reassignment. Section 7 then provides that "A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex". The effect of this is to remove the requirement for medical involvement in the actual or planned process of reassignment.

31. In an attempt to avoid the difficulties posed by comparators in victimisation claims the Act redefines victimisation (s.27) as occurring where an individual is subjected to a "detriment because" he or she has done or is believed to have done a protected act, subject to the proviso that (s.27(3)) "Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith". The burden of proof is reversed in victimization as in other claims under the Act. It remains to be seen whether this new definition will avoid the conceptual difficulties which arose in *CC of West Yorkshire Police v Khan*,[26] where the detriment results from attempts by an employer to safeguard its legal position.

[26] [2001] ICR 1065.