House of Lords
House of Commons
Joint Committee on Human Rights

Legislative Scrutiny: Equality Bill

Twenty-sixth Report of Session 2008-09

Report, together with formal minutes and oral and written evidence

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Summary

The Equality Bill is one of the most significant human rights measures introduced into Parliament in recent years. It harmonises and simplifies discrimination law and also introduces a number of new measures, including a single equality duty on the public sector, extended protection from discrimination in a number of areas, and a new duty on certain public authorities to consider socio-economic disadvantage in their strategic decision making.

We welcome the introduction of the Equality Bill and wish it well in its passage through Parliament. Many of the measures it contains will enhance the protection of human rights in the UK. Our Report follows the layout of the Bill and raises a number of detailed issues, which are summarised thematically below.

**Socio-economic inequalities**

We consider that the new duty on certain public authorities to have due regard to the desirability of making strategic decisions in a way designed to reduce inequalities of socio-economic outcome has the power to enhance human rights for individuals. We are disappointed that the Government has chosen to exclude people subject to immigration control from the scope of the new duty. We recommend that public authorities should be required to explain what steps they have taken to comply with the duty, so that they can be effectively held to account.

**Age discrimination**

We welcome the extended protection against age discrimination proposed in the Bill but would prefer the exceptions to be set out in primary legislation, not left to secondary legislation. The Government proposes that the prohibition on age discrimination should apply only to those aged over 18: we do not agree and we also consider that the public sector equality duty should apply to how children are treated in schools and children’s homes.

**Disability**

There are strong arguments for adopting a definition of disability which is more in tune with the “social model” of disability set out in the UN Convention on the Rights of Persons with Disabilities, rather than one based on medical conditions. In our view there is little risk of this change leading to abuse or trivialisation of the status of being disabled. The reference to “long term” impairment should be omitted from the current definition of disability.

We welcome the provisions of the Bill which clarify and extend protection against discrimination related to disability in the light of the *Malcolm* decision and are also pleased to note the Government’s willingness to address detailed concerns about the wording of the relevant clauses.

It is not possible for a non-disabled person to bring an action challenging more favourable treatment of a disabled person and the Bill seeks to maintain this position. We are
concerned that the current wording of Clause 13 is unclear, however, and ask the Government to look again at this provision. We also draw attention to problems with the drafting of Clause 23, which relates to the “comparator requirement” which the courts use to decide if someone has been subjected to less favourable treatment.

The Bill includes a new statutory “knowledge requirement” which provides that discrimination arising from disability does not apply if the employer or service provider can show that they did not know, or could not reasonably have been expected to know, that the person concerned had a disability. A strong case exists for providing that this requirement will be deemed to be satisfied where the person was not asked by the employer or service provider if they suffered from a disability when it was reasonable to do so.

We also conclude that serious consideration should be given to limiting the use of pre-employment health questionnaires.

**Gender reassignment**

We consider that a strong case exists for the term “gender identity” to replace “gender reassignment” as a protected characteristic under the Bill, to offer wider protection for transsexual people.

**Marriage/civil partnership**

We consider that good arguments exist to prohibit discrimination against individuals on the basis that they are not married or in a civil partnership; and for the prohibition of discrimination against married people or people in civil partnerships to be extended to cover harassment, discrimination in the provision of goods and services, premises, education and membership of associations.

**Carers**

Whilst we welcome the protection for carers under the Bill we recommend that the Government should go further and, in particular, give serious consideration to introducing a form of reasonable accommodation duty on employers where appropriate.

**Combined discrimination**

Whilst we welcome the widening of protection from discrimination to a combination of two grounds we are concerned that this applies only to direct discrimination and excludes maternity, pregnancy, marriage and civil partnership.

**Harassment**

We consider that strong arguments exist for prohibiting harassment on the grounds of being married or in a civil partnership, as well as on the grounds of maternity or pregnancy. We are also concerned by the absence of explicit provisions on harassment on the basis of sexual orientation. In our view, a precise and narrow definition of harassment on the grounds of sexual orientation should be applied to reduce the risk of incompatibility with the rights to freedom of expression and freedom of religion and belief.
Services and public functions

Part 3 of the Bill relates to the supply of services and the performance of public functions. We again draw attention to the unclear and inadequate scope of the Human Rights Act 1998, following a number of recent legal decisions, which may have a limiting effect on the number of bodies subject to the positive equality duty.

There are various exceptions to the prohibition on discrimination in this area. We disagree with those relating to disability and ethnicity and nationality. We conclude that the exception which would enable someone to be refused entry to the UK on the basis of their religion or belief, if to do so would be conducive to the public good, is unnecessary and undesirable.

Public sector equality duty

We welcome the new public sector equality duty. The Government has stated that the duty is not designed to encourage the provision of separate services to different groups. We welcome this but remain concerned that the duty may be understood by public authorities as requiring separate provision to be made for the “needs” of faith communities. This should be dealt with by amending Clause 145 to clarify the nature of a public authority’s obligations in this area and by guidance.

We consider that the positive action provisions of the Bill conform to international human rights standards but we are concerned that Clause 155 imposes artificial and potentially unworkable pre-conditions which unduly limit the ability of employers to make use of positive action. We recommend a number of amendments.

Work

We welcome the clarification of the circumstances in which occupational requirements linked to a religious belief or ethos can be imposed by faith-based organisations or organised religious groups. We doubt whether this provision can be used to impose wide-ranging requirements on employees and also consider that the public sector equality duty can play a part in ensuring that organisations in receipt of public funds do not discriminate unduly on the grounds of religion or belief.

We reiterate an earlier recommendation that the exemption of the armed forces from the scope of the disability provisions in the Bill is unnecessary and incompatible with the UN Convention on the Rights of Persons with Disabilities.

We call for the abolition of the default retirement age in its current form.

Although we welcome clarification of equal pay law, we consider that more could be done to modernise an increasingly outmoded legal framework. Equal pay provisions could have benefited from the establishment of new arbitration mechanisms, the introduction of positive duties on employers in certain circumstances to monitor and respond to patterns of pay inequality, and the use of hypothetical comparators in all equal pay claims. We recommend that the protection against victimisation of employees who discuss their pay with colleagues should be extended and we also have detailed comments about Clauses 61 and 66.
**Education**

We are not persuaded that it is justifiable to exclude discrimination on the grounds of pregnancy and maternity from the scope of the Bill’s protections relating to education in schools. We draw attention to the issue of school admissions, which is currently the subject of a case before the Supreme Court. We have concerns about exceptions from discrimination provisions relating to the curriculum and school transport and again conclude that children of sufficient age and maturity should have the right to withdraw from collective worship and religious education classes.

**Associations**

We consider that provisions relating to membership of clubs and associations strike an appropriate balance between the right to freedom of association and the right to non-discrimination and equality. We welcome steps to enable political parties to undertake a wider range of positive action to address under-representation.

**General exceptions**

We consider that existing restrictions on the employment of non-UK nationals in the public service should be reviewed. We doubt whether sections of the School Standards and Framework Act 1998 relating to the appointment and dismissal of teachers in faith schools comply with EU law. We are concerned at the scope of the natural security exceptions and draw attention to complex issues relating to the position of charities.
Bill drawn to the special attention of both Houses: Equality Bill

Date introduced to first House: 27 April 09
Date introduced to second House: Bill 131
Current Bill Number: None
Previous Reports: None

1. Introduction

Background

1. This is a Government Bill introduced in the House of Commons on 27 April 2009. The Minister for Women and Equality, the Rt Hon Harriet Harman QC MP has made a statement of compatibility under section 19(1)(a) of the Human Rights Act 1998 (HRA). The Bill had its Second Reading on 11 May 2009. It completed its Committee stage on 7 July 2009.

Evidence and Acknowledgements

2. The Explanatory Notes did not set out the Government’s view of the Bill’s human rights compatibility. On 27 April 2009, we received a short summary from the Solicitor-General, Vera Baird QC MP, of the human rights implications of the Bill’s measures. Following our request, we received a fuller analysis of the human rights compatibility of the Bill on 5 May 2009. We wrote to the Solicitor-General, on 2 June 2009, seeking an explanation of the Government’s view of the human rights compatibility of a number of specific clauses of the Bill. We received the Solicitor-General’s response on 22 June 2009. On 24 June, we took oral evidence from the Solicitor-General on the Bill and from Maria Eagle MP, Minister of State, Government Equalities Office, on the UK’s compliance with the UN Convention for the Elimination of Discrimination Against Women (CEDAW). We followed up on points which arose during this evidence session in correspondence on 30 June and received the Solicitor-General’s reply on 16 July 2009. We welcome the full and prompt responses provided by the Solicitor-General.

3. Following our recent practice, we published our correspondence with the Solicitor-General on our website and invited further submissions on the human rights implications of the Bill. We publish the submissions received together with this Report, along with submissions on the Bill which we received in response to our call for evidence on the Government’s Draft Legislative Programme, in which the Equality Bill was announced. We
are grateful to all those who sent us evidence. **We welcome the engagement of the public and interested organisations in our legislative scrutiny work.**

4. We have been greatly aided in our scrutiny of this Bill by our Specialist Adviser Colm O’Cinneide, Reader in Laws at University College London, and wish to record our particular thanks to him for his assistance.

**Explanatory Notes**

5. The Bill adopts a novel format of interweaving the Clauses with the Explanatory Notes. The Notes provide examples of situations in which the Clauses might be applied. In our view, these are useful and make the Bill much more accessible than it might otherwise have been.

6. As stated above, unusually the Explanatory Notes contained no human rights analysis, beyond the standard section 19 compatibility statement. The summary of issues which we received from the Solicitor-General on 27 April 2009 was deficient in a number of respects. Firstly, given the length and complexity of the Bill, the analysis was surprisingly short. Secondly, it was phrased in very general terms: it contained no clause by clause analysis and instead included blanket assertions as to the legitimate aims pursued and the proportionality of the Bill. Thirdly, a narrow interpretation of human rights was given, limiting it only to consideration of compatibility with the European Convention on Human Rights (ECHR) rather than also including the International Covenant on Civil and Political Rights (ICCPR), the UN Convention on the Elimination of Racial Discrimination (CEDR), the UN Convention on the Elimination of Discrimination Against Women (CEDAW), the UN Convention on the Rights of the Child (UNCRC) and the UN Convention on the Rights of Persons with Disabilities (CRPD), amongst other human rights instruments. The Solicitor-General’s subsequent memorandum on the Bill of 5 May 2009, which we understand to be based on the ECHR memorandum prepared for the Legislation Committee, contains a much more detailed and helpful analysis of individual clauses in the Bill. **We welcome the Government’s provision of a detailed human rights memorandum based closely on the ECHR memorandum prepared for the Legislation Committee and we commend this precedent to other Departments as an example of best practice.**

7. Whilst we are disappointed that the Explanatory Notes to the Bill contained no human rights analysis, the subsequent submissions we have received from the Solicitor-General have, together, provided a relatively full account of the Government’s view on the Bill’s compatibility with the ECHR. Although we disagree with some aspects of the Government’s analysis, the Government’s submission to us generally identify relevant human rights issues, apply the correct tests, refer to relevant case-law and briefly present the Government’s reasons for concluding that the provisions in the Bill are human rights compatible. **We reiterate our view of the importance of detailed human rights analysis within the Explanatory Notes to Bills to assist all those scrutinising proposed legislation**
and urge the Government to ensure that such analysis is routinely contained within the Explanatory Notes accompanying Government Bills.

The Effect of the Bill

8. Commentators have expressed concern for some time that the complexity and patchwork nature of British discrimination legislation was hindering the effective protection of the right to equality and freedom from unjustified discrimination. In 2003, Lord Lester of Herne Hill QC introduced the Equality Bill 2003 into the House of Lords, which made provision for single, comprehensive and unified equality legislation. In 2004, strong support was expressed during the consultation on the establishment of the Commission for Equality and Human Rights (now the Equality and Human Rights Commission (EHRC)) for the introduction of a Single Equality Bill to provide a coherent legislative framework for the new Commission’s work.

9. In February 2005, the Government established the Discrimination Law Review (DLR) to consider “the opportunities for creating a clearer and more streamlined equality legislation framework which produces better outcomes for those who experience disadvantage ...while reflecting better regulation principles”. In parallel to the establishment of the DLR, in February 2005 the then Prime Minister commissioned an independent Equalities Review, chaired by Trevor Phillips (now Chair of the EHRC), to examine the causes for persisting inequalities in British society. The Equalities Review’s final report to the Prime Minister was published in February 2007. The DLR team undertook a programme of research and consultation with stakeholders from 2005 to early 2007, with A Framework for Fairness being published in June 2007. In February 2006, the Equality Act 2006, which established the EHRC amongst other things, came into force. In its 2005 general election manifesto, the Labour Party undertook to introduce a Single Equality Bill during the course of this Parliament.

10. The main purposes of the Bill, according to the Government, are:

- To harmonise and simplify the law on discrimination
- To extend coverage of the public sector duty across all the protected characteristics and unify them into one single equality duty
- To permit more measures which are designed to redress under-representation and disadvantage amongst those with protected characteristics i.e. more positive action

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13 The Bill passed successfully through the House of Lords and received considerable support via an Early Day Motion in the House of Commons, but did not receive time for a Second Reading. For the text of this Bill, see http://www.odysseustrust.org/equality.html.


• To reinstate protection along the lines of disability-related discrimination and extend indirect discrimination to disability

• To extend protection from discrimination against a person associated with someone who has a protected characteristic or against a person who is perceived to have a protected characteristic

• To prohibit unjustifiable age discrimination in the provision of goods, facilities and services for people aged 18 or over

• To impose a new duty on certain public authorities to consider socio-economic disadvantage in their strategic decision-making

• To increase the protection on grounds of gender reassignment so that it is on a par with other protected characteristics

• To provide consistent protection for all protected characteristics against harassment of an employee by a third party

• To prohibit discrimination and harassment in private clubs and associations.\textsuperscript{18}

11. During the Second Reading debate, the Minister for Women and Equality, the Rt Hon Harriet Harman QC MP stated:

For us, equality matters because it is right as a question of principle, and it is necessary as a matter of practice. It is essential for every individual. Everyone has the right to be treated fairly, and everyone should enjoy the opportunity to fulfil their potential. No one should suffer the indignity of discrimination.

Equality is not just the birthright of every individual; it is also necessary for the economy: a competitive economy is one that draws on everyone's talents and abilities and is not blinkered by prejudice. It is also necessary for society: a more equal society is more cohesive and at ease with itself than one marred by prejudice and discrimination.\textsuperscript{19}

12. The Government considers the Bill to be compatible with human rights.

**The Right to Equality**

13. Equality is a human right. It is set out in the Universal Declaration on Human Rights (UDHR) (Article 2), the International Covenant on Civil and Political Rights (ICCPR) (Article 26) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Article 2(2)). Similarly, Articles 2(e) and 3 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 2(2) of the Convention on the Elimination of Racial Discrimination (CERD), Article 2(1) of the Convention on the Rights of the Child (UNCRC) and Article 4 of the UN Convention on the Rights of Persons With Disabilities (CRPD) all impose a positive obligation upon signatory states to take active steps to secure equality and protect individuals against

\textsuperscript{18} Ev 22, para. 4
\textsuperscript{19} HC Deb, 11 May 2009, col 553.
discrimination. Article 14 of the ECHR provides that the enjoyment of the rights and freedoms in the Convention 'shall be secured' without discrimination. It has a narrower scope than the equality rights set out in the UN instruments and offers weaker protection, as the right applies only in relation to other rights in the ECHR, rather than freestanding, as with the UN instruments. Protocol 12, which the UK has not ratified, would remedy this failing as it would create a freestanding right not to be discriminated against. Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, recently stated that there should be a shift towards equality, including social justice as well as status-based equality. He endorsed the Equal Rights Trust’s Declaration on Principles on Equality.

14. In previous Reports, we have recommended that the Government should ratify Protocol 12 ECHR, and include it within the rights protected in the HRA, in order to provide protection in domestic law equivalent to the equality rights which bind the UK internationally. The rights enshrined in Protocol 12 are rights which the Government has accepted through its international commitments to human rights instruments. These commitments should in our view be given reality in national law through a free standing right of non-discrimination. In our view, the Government’s refusal to ratify Protocol 12 is unwarranted, and fails to give sufficient effect in national law to the UK’s international human rights obligations, especially under the ICCPR. We recommend that it reconsider its decision.

A Constitutional Guarantee or Purpose Clause

15. The Equality Bill contains neither a constitutional guarantee to equality nor a purpose clause, which some witnesses called for.

16. In our Report A Bill of Rights for the UK?, we welcomed the fact that the Government was considering including a right to equality in the Bill of Rights. We stated:

   In our view the UK’s statutory anti-discrimination laws are now sufficiently established to be regarded as the foundation, along with the common law’s regard for equality, for a general free-standing right…. A simply formulated, free-standing and overarching right to equality in a Bill of Rights would provide a secure underpinning for an Equality Act, which would contain the detail required in order to give effect to the underlying right in different contexts.

17. In its Green Paper on Rights and Responsibilities, the Government noted its aim to “set out in any Bill of Rights and Responsibilities an accessible and straightforward
statement of equality to embody its place in UK society” and sought views on how a statement of equality might be framed.24

18. In our letter to the Solicitor-General, we asked whether consideration had been given to conferring an equivalent level of constitutional protection to the “free-standing” right to equality and non-discrimination as is conferred on the rights contained in the ECHR by the Human Rights Act 1998 (HRA).25 The Solicitor-General replied that Ministers already have to make a statement of a Bill’s compatibility with Convention rights (section 19 HRA 1998). She referred to the Green Paper on Rights and Responsibilities and suggested that further consideration needs to be given to the issue as part of the Government’s broader work on developing the UK’s constitutional framework, but not as part of the Equality Bill. She noted that this was a complex area and that the Government wanted to avoid unintended consequences (especially for specific provisions in the discrimination legislation and to ensure compatibility with EU legislation).26

19. A number of organisations, including the EHRC, have suggested that the Bill should contain a constitutional guarantee of equality. The EHRC suggested that the Bill provides a unique opportunity to do so, noting that the Government has said that any Bill of Rights would not be brought forward until after the next election, no Bill of Rights may result, or its level of protection may be insufficient.27

20. In the PBC, Lynne Featherstone MP proposed a number of new clauses to “deliver an equality guarantee to ensure that the right to equality has the same status as other human rights”.28 She explained:

While the Bill addresses the harms that might be done by discriminating against specific groups or individuals belonging to those groups … it does not give an overarching guarantee to every individual to have freedom from discrimination.29

21. Describing them as a “polyfilla equality guarantee”,30 the Solicitor-General responded by stating:

The Government are considering a statement of equality as part of the consultation on the Green Paper [on a Bill of Rights and Responsibilities] … It would be [a] constitutional principle … This specific, strand-based, discrimination-oriented Bill is not the place to deal with constitutional principles of that kind.31

22. A linked issue of the possibility of including a purpose clause within the Equality Bill was discussed in the Discrimination Law Review (DLR).32 The consultation paper also noted that “purpose clauses are not common in British legislation and some argue that they

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24 Ministry of Justice, Rights and Responsibilities: Developing our Constitutional Framework, Cm 7577, March 2009, para. 3.38.
25 Ev 58
26 Ev 67 at Q 20
27 Ev 132; PBC Deb, 2 June 2009, col 13.
28 PBC Deb, 7 July 2009, col 708.
29 PBC Deb, 7 July 2009, col 708. See also amendments tabled for Report stage (NC 11 (right to equality), NC12 (interpretation of legislation), NC 13 (declaration of incompatibility), NC 14 (public authorities), NC 15 (statements of compatibility), NC 16 (proceedings) and NC 17 (power to take remedial action)).
30 PBC Deb, 7 July 2009, col 728.
31 PBC Deb, 7 July 2009, col 726.
risk causing confusion about the meaning of the substantive provisions setting out specific and carefully defined rights and obligations”. However, some respondents to the DLR, in particular the former equality commissions, strongly argued that the insertion of a purpose clause into single equality legislation could clarify the meaning of the legislation and give guidance about its underlying principles, aims and objectives. The Equality and Human Rights Commission has also pressed for the inclusion of a purpose clause within the Bill.

23. In her evidence to us, the Solicitor-General said:

[The Government] does not believe that a purpose clause in this Bill would make it clearer. In fact, it could quite easily have the opposite effect.

As a general rule, purpose clauses tend to be unwise. Statements of fundamental principle or purpose are necessarily imprecise and inflexible, and inevitably risk making the law uncertain and confusing. Users with competing views and aims will ask the courts to construe the principles in different ways, and there is no reliable way of predicting or controlling the construction or ensuring that it matches the original legislative intention...

The Bill is aimed at simplifying and clarifying the law. Whatever the good intentions of those who advocate a purpose clause, including one in the Bill would therefore run the risk of undercutting many of the Bill’s benefits by introducing uncertainty, and making it far more difficult to apply on the ground. That uncertainty would inevitably lead to litigation, which would be unlikely to be resolved at first instance and could well lead to unexpected or undesired results. This is because there would be an inevitable tension between the general propositions in the purpose clause and the specific provisions of the substantive parts of the Bill.

24. The Solicitor-General also noted that the Bill would need to be interpreted compatibly with ECHR rights and with European law and, in the Government’s view, it was “difficult to see what additional help a further layer of interpretative principles would give to the courts”.

25. We accept that the objectives of a constitutional guarantee to equality and a purpose clause are not identical, but they go to the same goal of ensuring respect for equality. We call on the Government to use the Equality Bill or the Constitutional Reform and Governance Bill to enshrine a freestanding constitutional right to equality, consistent with its international obligations under Article 26 of the ICCPR, amongst other human rights instruments. As we state on a number of occasions in specific sections of our Report, at the very least, problems of interpretation may arise which could be potentially alleviated by the inclusion within the Bill of a constitutional guarantee or purpose clause. On the level of the bigger picture, a purpose clause would allow the Bill to spell out the vision for equality which the Bill aspires to promote and protect. However, as we noted in our Bill of Rights Report, we also welcome the fact that

33 Ibid., para. 9.
34 The Equality Bill introduced by Lord Lester of Herne Hill QC in 2003 contained a purpose clause, as was also recommended by the Hepple Report in 2000.
35 PBC Deb, 2 June 2009, col 12.
36 Ev 67 at Q 73
37 Ev 67 at Q 73
the Government is considering the inclusion of a constitutional guarantee within its consultation on a Bill of Rights and Responsibilities and look forward to the outcome of its consultation with interest.

**Significant Human Rights Issues**

26. There are a number of significant human rights issues that arise in the context of this Bill. In addition, the Bill contains a number of measures which we highlight below and which potentially enhance human rights.
2. Socio-economic inequalities

27. Clause 1 of the Bill creates a new duty on certain listed public sector bodies, when making strategic decisions, “to have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage”. Witnesses to the Public Bill Committee (PBC) described the new duty as a “helpful but modest measure” with small cost implications. The EHRC told the PBC that the existing public sector equality duties provide good examples of how such duties can make a difference.

28. The human rights memorandum on this Part of the Bill is brief. It merely states that it is highly unlikely that a public body subject to the duty will enjoy Convention rights and “therefore no Convention rights are engaged”. No consideration is given to the implications of the proposed new duty for individuals. We therefore asked the Minister to explain how, in practice, the proposed new duty will enhance human rights for individuals. In reply, she told us that the new duty “should have a positive effect on the provision of education, housing, health, employment and other public services to those who are most disadvantaged.” Whilst we agree with the human rights memorandum that public authorities do not enjoy rights under the European Convention on Human Rights (ECHR), it is disappointing that the Government did not spell out in the memorandum how, if at all, the duty would affect the human rights of service users. In our view, the new duty has the potential power to enhance human rights for individuals receiving public services, including in particular their socio-economic rights. However, we are concerned that the Clause, as currently drafted, will not apply to all recipients of public services, as socio-economic inequalities experienced as a result of being subject to immigration control are specifically excluded from the duty in Clause 1. When we asked the Minister to explain why immigration measures are exempt from the Bill, she told us that the Bill did not alter existing statutory duties, nor prevent authorities from going further than they are legally obliged, but that it meant that public authorities would not be forced to go beyond their existing responsibilities. She said:

The Government is aware that there are people suffering socio-economic disadvantage who have no right to remain in this country. The Government’s position in regard to such people is clear: it wants to deter people from entering or remaining in the country illegally, and to remove them if they are not entitled to be here.

29. Of course, the definition of those subject to immigration control also includes those who are legally present in the UK who are pursuing asylum appeals. Whilst inquiring into

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38 PBC Deb, 2 June 2009, col 4.
39 PBC Deb, 2 June 2009, col 5.
40 PBC Deb, 2 June 2009, col 5.
41 Ev 22, para. 74
42 Ev 58
43 Ev 67
44 Defined in Section 115(9) Immigration and Asylum Act 1999 and includes people who do not have leave to enter or remain, people who have leave but no recourse to public funds, those who have given a maintenance undertaking and people who have leave whilst their appeals are being considered.
45 Clause 1(7).
46 Ev 67
the *Treatment of Asylum Seekers*, we noted many instances of asylum seekers who faced substantial difficulties and delays in obtaining even the most basic support whilst their claims for asylum were being processed. We concluded that a failure to protect asylum seekers from destitution amounts in many cases to a failure to protect them from inhuman and degrading treatment under Article 3 ECHR. We are disappointed that the Government has chosen to exclude from the remit of the new duty people who experience amongst the greatest socio-economic inequality and disadvantage in the UK. The Government is entitled to exercise control over its borders but, in our view, has failed to establish why it is necessary and proportionate to exclude those subject to immigration control from the operation of the new socio-economic duty in relation to all public services.

30. Individuals will not have a claim in private law (breach of statutory duty) for a failure by a public authority to comply with Clause 1. However, individuals will be able to bring a claim for judicial review “if they believe the public authority has not considered socio-economic disadvantage when taking decisions of a strategic nature”. When the Solicitor-General gave evidence to us on the Bill, we asked her to provide examples of the types of claims for judicial review which she envisaged. She provided the example of a local authority which, when formulating its transport strategy, failed to provide a bus service between an area of high unemployment and a major new employer. During the PBC debates, the Equality and Diversity Forum expressed concern that the new duty is not enforceable and questioned whether greater transparency could be encouraged by requiring authorities to say what they are doing to implement the provision. The Solicitor-General told the PBC that the new duty would be reported on by inspectorates, such as the National Audit Office and Ofsted. One of the problems with this argument is that inspectorates themselves would not be bound to have regard to socio-economic disadvantage when, for example, setting the targets or other performance indicators that they expect those who they inspect to meet, which could mean that they impose criteria which lead to public authorities producing policies to meet those criteria which work against the interests of the socio-economically disadvantaged. This would, at the very least, not represent a joined-up approach.

31. In our Report on a *Bill of Rights for the UK*, we concluded that the case was made out for including economic and social rights in a UK Bill of Rights and proposed a model of progressive realisation with a closely circumscribed judicial role. We recommended a scheme which would impose a duty on the Government to achieve the progressive realisation of the relevant rights, by legislative or other measures, within available resources, and to report to Parliament on the progress made; and to provide that the rights are not enforceable by individuals, but rather that the courts have a very closely circumscribed role in reviewing the measures taken by the Government. In its response to our Report, the Government expressed concerns at the possibility of any new

48 EN, para 46 and Clause 3.
49 EN, para. 46.
50 Q 21
51 PBC Deb, 2 June 2009, col 4-S.
52 PBC Deb, 9 June 2009, col 114.
constitutional document resulting in increased judicial intervention in areas involving resource allocation in the socio-economic sphere.54

32. Consistent with our approach in our Bill of Rights Report, we do not go so far as to suggest that the new socio-economic duty should be directly enforceable by individuals. However, as in the case of the existing equality duties, we do consider that there is a role for courts in reviewing whether public authorities have given effect to their procedural obligation to “have due regard” to the desirability of reducing inequality and are pleased to note that such decisions will be subject to judicial review on that ground. We recommend that guidance should specifically require public authorities to explain what steps they have taken to comply with their duty. Such transparency will allow the public to determine whether public authorities are meeting their new obligations and, where they feel that they are not, seek judicial review if they so wish. Without this requirement, the possibility of bringing judicial review proceedings will be rendered less effective.

3. Equality: Key Concepts

33. Part 2 of the Bill defines the key concepts of UK anti-discrimination law. Clauses 4 to 12 set out the “protected characteristics” which are protected by the subsequent anti-discrimination provisions of the Bill such as “age”, “race” and “sex”. Clauses 13 to 26 define the main types of discriminatory conduct which are to be prohibited such as “direct discrimination”, “indirect discrimination” and “harassment”. These key concepts are then applied in subsequent Parts of the Bill to form a unified framework of anti-discrimination law. Part 2 of the Bill is therefore of central importance. For the most part, it codifies existing legislation. However, it also extends and clarifies the scope of protection offered by discrimination law in some important respects.

Protected Characteristics

34. Clauses 4 to 12 list certain “protected characteristics”, which are different forms of individual status or identity protected by the legislation. They are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Each of these characteristics is currently protected under existing British anti-discrimination law. The Bill defines and provides protection for the characteristics of race, religion or belief, sex and sexual orientation in a more or less identical manner to existing law. However, how the characteristics of age, disability, gender reassignment, marriage and civil partnership and pregnancy and maternity are defined and protected in the Bill gives rise to several important human rights issues. The issue of pregnancy discrimination in the context of education is dealt with later: the other issues are dealt with immediately below.

Age Discrimination

35. Clause 5 provides that age is a protected characteristic. At present, age discrimination is only prohibited in the sphere of employment and occupation as a result of the Employment Equality (Age) Regulations 2006. However, the Bill greatly extends protection against age discrimination. Firstly, age is included as one of the protected characteristics covered by the public sector equality duty.\(^{55}\) Secondly, the Bill also prohibits age discrimination in the provision of goods and services and the performance of public functions, as well as in the area of association and membership of clubs. This extension of protection is however subject to a very wide-ranging power conferred upon Ministers by Clause 192 of the Bill to make orders providing for exceptions to the general prohibition on age discrimination outside of the area of employment and occupation.\(^{56}\)

36. In June 2009, the Government published a consultation paper, *Ending Age Discrimination in Services and Public Functions*, in which it sought views on what exceptions should be introduced to the general ban on age discrimination.\(^{57}\) The consultation concentrated in particular upon what exceptions may be necessary in the areas of health and social care, financial services and other areas such as travel concessions.

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\(^{55}\) Clause 145(6).

\(^{56}\) European law limits the scope for exceptions to be made in the sphere of employment and occupation.

and group holidays for particular ages. In her written evidence to us, the Solicitor-General indicated that a further consultation will take place on the draft orders that will be prepared setting out these exceptions if the Bill becomes law, with the aim of bringing into force the ban on age discrimination together with any orders providing for exceptions to this ban by 2012. She also attempted to justify the wide-ranging powers conferred on Ministers by Clause 192 as reflecting the fact that:

[F]raming the exceptions for age across all goods, facilities, services and public functions is challenging and complex. It is vital to get this right and to give service providers time to prepare to implement the ban.

37. We welcome the inclusion of age within the scope of the public sector equality duty, along with the general prohibition of age discrimination in the areas of association, the provision of services and the performance of public functions. Age discrimination constitutes an unjustified denial of the right to equality and remains a serious problem in British society. The prohibition of age discrimination in service provision and the performance of public functions will help ensure that all age groups enjoy equality of respect in how they are treated by service providers and those performing public functions.

38. We also recognise that there must be exceptions to the ban on age discrimination in certain areas, and in particular when it comes to the provision of special services and facilities to older and younger persons, such as travel concessions and group holidays. However, we are concerned that the Government has chosen to introduce these exceptions through secondary legislation and the use of the very wide-ranging powers conferred upon Ministers by Clause 192. The scope of these exceptions should be the subject of parliamentary debate and set out in primary legislation and should be carefully tailored and convincingly justified.

39. The Bill also provides more limited protection for age discrimination than for many of the other grounds in other areas. Clause 31 provides that age discrimination in the disposal and management of premises is not prohibited. Clause 81 provides that age discrimination in schools is also not prohibited. Schedule 9(8) provides that employers will still be able to maintain a mandatory retirement age. These limits on the scope of protection against age discrimination are examined in detail below.

40. Further, children receive limited protection against age discrimination under the Bill. Clause 27(1)(a) provides that protection against age discrimination in the provision of goods and services and in the performance of public functions does not apply to those under the age of 18. Children are also excluded in part from the scope of the public sector equality duty: Schedule 18(1) provides that the provision of education, accommodation, benefits, facilities and services in schools and children’s homes is not subject to the requirements of the positive duty. During the course of our inquiry into Children’s Rights, we received evidence from a number of witnesses who expressed concern that children and

58 Ev 67 at Q 24
59 Ev 67 at Q 24
young people would not be protected from age discrimination in the provision of goods, facilities and services.60

41. A number of organisations, including 11 Million (Children’s Commissioner),61 Young Equals,62 Children’s Rights Alliance for England,63 the Equality and Human Rights Commission,64 Liberty65 and Unison,66 have expressed concern in their evidence to us that the exclusion of children from the scope of the general prohibition on age discrimination in the provision of services and the performance of public functions constitutes a significant gap in protection against discrimination. Young Equals suggest that the combined effect of excluding children from full age discrimination protection67 and excluding schools and children’s homes from the public sector equality duty68 significantly weakens the legislation.

42. The Solicitor-General told us that the Government has given “careful thought” to age discrimination against children in the provision of services and the performance of public functions but has concluded that:

Discrimination law would not be an effective, appropriate or helpful way of tackling the problems experienced by children and supporting them in their upbringing, and could have significant negative consequences … the examples of such matters which have been provided to the Government are generally not issues which could be dealt with effectively through age discrimination law. The Government wants to protect special and tailored services for children. Extensions of the age discrimination ban outside the workplace to children could render any service aimed at children, or particular groups of children, vulnerable to challenge under discrimination law.69

43. Responding to an amendment on this issue in the PBC, the Solicitor-General highlighted the need to protect the provision of age-specific services for children from legal challenge. However, the EHRC has suggested that it would be possible to both prohibit discrimination against children in the provision of services and public functions and legitimately continue to provide child-specific services by including a justification limitation for discrimination.70 In Australia, the prohibition on age discrimination contained in the federal Age Discrimination Act 2004 applies to children under 18, subject to certain clearly defined exemptions relating to education and activities carried out in compliance with a prescribed list of statutes (for example, family law, employment programmes, electoral law and the classification of publications, films and computer

61 Ev 124
62 Ev 178
63 Ev 112
64 Ev 132
65 Ev 119
66 Ev 176
67 Clause 26.
68 Schedule 18(1).
69 Q 25. Emphasis added.
70 Ev 132
games). To our understanding, this law has generated little or no difficulty for service providers.\(^{71}\)

44. The total absence of protection against age discrimination for those under 18 in service provision and the limited protection in relation to the performance of public functions means that children who are subject to unjustified discrimination are left with little or no legal protection. This may prevent children enjoying full protection of their rights as set out in the UN Convention on the Rights of the Child (UNCRC).

45. In its most recent Concluding Observations on the UK’s compliance with the UNCRC, the UN Committee referred to the forthcoming Equality Bill and the opportunity it presented to mainstream children’s right to non-discrimination into UK anti-discrimination law. It recommended that the UK take all necessary measures to ensure that cases of discrimination against children in all sectors of society are addressed effectively.\(^{72}\) The Bill represents an opportunity to incorporate fully children’s protection from unjustified discrimination into UK law. In our view, the provisions of Clause 27, which have the effect of depriving children of any rights under the discrimination legislation in the fields of service provision and the performance of public functions, are unnecessarily sweeping and extensive. We accept there are many circumstances in which it is appropriate to treat adults and children differently and to provide special and tailored services directed at children of particular ages. We share the Government’s concern that the legislative prohibition of age discrimination should not call into question the legality of legitimate differences in treatment as between adults and children and between children of different ages. However, the use of age distinctions can be objectively justified in anti-discrimination law, as recognised both in current legislation and in the Bill. Most of the distinctions that exist between the treatment of adults and children, or between children of different ages, are clearly capable of satisfying this test of objective justification and are highly unlikely to attract frivolous legal challenges.

46. The Government has stated that it intends to use secondary legislation to define when it may be legitimate to treat persons over the age of 18 differently on the grounds of age. We consider that the situation of children is no different and that exceptions to the general prohibition on age discrimination could also be made as required to cover age distinctions where children are involved.

47. We also consider that the public sector equality duty should apply to how children are treated in schools and children’s homes. The current exclusion of the provision of education, accommodation, benefits, facilities and services in schools and children’s homes from the scope of the duty as set out in Schedule 18(1) is, in our view, unnecessary. It is important that the rights of children to be free from discrimination and unequal treatment, as recognised by the UNCRC, are protected and that public authorities give due regard as to how to exercise their public functions with this


objective in mind. However, the scheme of the public sector equality duty is sufficiently flexible to ensure that public authorities continue to be able to treat children differently or make special provision for children of particular ages when this is justified.

The Definition of Disability

48. Clause 6, taken together with Schedule 1, defines who is to be considered as having the protected characteristic of disability and is a disabled person for the purposes of the Bill, and proposes to replace similar provisions in the Disability Discrimination Act 1995 (‘DDA’). The definition of disability is an important “control device”: the Bill follows the approach adopted in the DDA in providing that only those who are disabled persons for the purposes of the legislation may bring a claim for disability discrimination. The Bill defines who is a disabled person by reference to whether they have a physical or mental impairment which “has a substantial and long-term adverse effect on [that person’s] ability to carry out normal day-to-day activities”. Schedule 1 clarifies this definition by providing that the effect of an impairment will be long-term if it has lasted or is likely to last “for at least 12 months” or “for the rest of the life of the person affected”, and that if an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, “it is to be treated as continuing to have that effect if that effect is likely to recur”.

49. These provisions of the Bill substantially re-enact the definition of disability contained in the DDA. However, the Bill clarifies the definition and extends protection against discrimination by removing the restrictive list of “capacities” currently set out in Schedule 1 of the DDA, which serves as an aid in defining what are “normal day-to-day activities”. The Government has taken the view that this list constituted an “unnecessary extra barrier to disabled people taking cases in courts and tribunals”. We welcome the deletion of the list of “capacities” from the definition of disability, which will clarify the law and make it easier for claimants to demonstrate that they are “disabled” for the purposes of the legislation.

50. The revised definition of disability set out in Clause 6 has nevertheless attracted some criticism from the EHRC, Mind, the Disability Charities Consortium and other groups for adhering to the “medical model” of disability. The definition focuses upon the “medical” nature of the impairment in question and the extent to which it affects a person’s ability to perform certain functions. Satisfying this test can be difficult and can prove a major obstacle to potential claimants. Both the Disability Rights Commission (prior to its dissolution) and the Royal College of Psychiatrists have noted that persons with mental health problems who wish to bring claims of disability discrimination are particularly adversely affected by a medicalised definition. Similar concerns were expressed by the Disability Charities Consortium and Mind in their written evidence to us. The Royal College of Psychiatrists has highlighted the particular problems faced by individuals suffering from depression, a typically severe mental impairment which nevertheless is often

73 Schedule 1, para. 2(1).
74 Schedule 1, para. 2(2).
75 The Equality Bill: Government Response to the Consultation, July 2008, Cm 7454, para. 11.53.
76 Ev 168; A study has shown that only 15.3% of disability discrimination claims involving mental impairment between 1996 and 2000 were treated as satisfying the definition of disability. Institute of Employment Studies, Leverton 2002.
77 Ev 120 & 154
of relatively short duration. The requirement in the DDA\textsuperscript{78} that a disability be “long-term” denies protection against unjustified discrimination on the basis of their disability to people suffering from depression. Mind note that they regularly have to advise employees dismissed because of “mental breakdowns” but who are well enough to return to work after a few months that they have no case under the DDA on account of the “long-term” requirement in the definition of disability.\textsuperscript{79}

51. During our inquiry into the human rights of adults with learning disabilities, \textit{A Life Like Any Other?}, some witnesses recommended that a social model of disability be adopted.\textsuperscript{80} Individuals can be caught in the trap of being “socially” classified as disabled without meeting the “medical” definition of disability. In their evidence to us on the Bill, the EHRC suggested that the definition of disability, and in particular the requirement that an impairment must have both a substantial and long-term adverse effect on day-to-day functioning, is unduly limited and generates “fruitless litigation and legal uncertainty”. In addition, it noted that the definition of disability set out in Clause 6 is “significantly narrower” than the “social model” of disability set out in the UNCRPD, which defines disability in terms of whether the person with an impairment experiences external “social” environmental or attitudinal barriers which “hinder” their full and effective participation in society on an equal basis with others.\textsuperscript{81} Other witnesses agreed.\textsuperscript{82} Mind suggested that the “medical” definition gives rise to unjustifiable hierarchies between different persons with disabilities, while a “social model” definition of disability would shift the “focus of attention from the severity of the medical condition to whether discrimination had occurred”, providing more effective protection for the human rights of persons with disabilities.\textsuperscript{83}

52. In her written evidence, the Solicitor-General set out the views of the Government on the definition of disability and the issue of the “social model”:

The Government considers that the starting point for protection from disability discrimination must be an acknowledgment that the disabled person has an impairment of some kind. Consequently, it has ensured that the Bill has a hybrid approach which takes account of the social model. The duty to make reasonable adjustments is specifically aimed at overcoming the disabling barriers that people with impairments face in society.

In developing proposals for the Equality Bill, the Government did consider the merits of a social model approach, but it concluded that it would be contrary to the aim of the legislation, which is to protect those people who have a disability in the generally accepted sense, that is to say, people who have a long-term or permanent condition.\textsuperscript{84}

53. Amendments were tabled in the PBC to delete the requirement that a disability be “long term”, clarify the definition of disability and to bring individuals who had suffered

\textsuperscript{78} Also contained in the current wording of Clause 6.
\textsuperscript{81} UN Convention on the Rights of Persons with Disabilities, Article 2.
\textsuperscript{82} Ev 120 & 154
\textsuperscript{83} Ev 154
\textsuperscript{84} Ev 68 at Q 4
serious depression of 6 months duration within the last 5 years within this definition. In response, the Solicitor-General stated that there was no real need to change the existing legislative definition, on the basis that the current wording adopted a consistent approach in respect of different types of impairments and struck the right balance between protecting the human rights of persons with disabilities and ensuring that excessive obligations were not imposed upon employers to accommodate individuals with short-term impairments.85

54. We consider that it is important to have a clear and workable definition of disability in the Bill, which protects those who are genuinely disabled without extending the definition of disability too far. We concur with the view previously expressed by the House of Commons Work and Pensions Committee that there are strong arguments for adopting a definition of disability in the Bill which is more in tune with the “social model” of disability set out in the UN Convention on the Rights of Persons with Disabilities,86 which the UK Government recently ratified. It would also reflect the real life experiences of many disabled people, who may face discrimination from employers and service providers on account of their impairments even when they are insufficiently “disabled” to satisfy the medical-centred tests set out in existing UK legislation.

55. In July 2006, the Disability Rights Commission proposed that the existing definition of disability set out in the DDA should be altered to give protection from discrimination to everyone who has (or has had or is perceived to have) an impairment, without requiring the effects of that impairment to be substantial or long-term. It suggested that this new definition would bring clear benefits, including producing a simpler, more certain approach for identifying who has protection, providing better access to justice and ensuring that the focus was placed upon the fairness and reasonableness of employers and service providers rather than on the medical condition of the individual. In order to bring the UK definition closer to the “social model” of disability as reflected in the UN standard, both the EHRC and the Disability Charities Consortium recommend the deletion of the requirement that a disability be “long-term” in nature.87 These arguments have considerable force. We recommend that the Government give serious consideration to this proposal. At a minimum, we recommend that the requirement contained in the current definition of disability that the effects of an impairment be “long term” in nature should be removed. There is little risk that the adoption of a definition of disability that is closer to the “social model” will result in abuse and the trivialisation of the status of being disabled. The justification defence to disability discrimination claims, the “substantial disadvantage” threshold which must be crossed before a claim for reasonable adjustment can be made, and the “reasonableness” requirement itself all provide protection against the potential for abuse and will protect employers against a wide expansion of liability.

85 PBC Deb, 16 June 2009, col 194.
87 Ev 120 & 132
Gender Reassignment

56. Clause 7 defines who is considered to have the protected characteristic of undergoing a process of gender reassignment. It will replace similar provisions in the Sex Discrimination Act 1975 (SDA). However, the Bill extends protection against discrimination by no longer requiring a person to be undergoing a process of gender reassignment under medical supervision in order to come within the scope of protection, as is currently the case under the SDA. Clause 7 now provides that if the person “is proposing to undergo, is undergoing or has undergone a process (or part of a process)” of gender reassignment that will be sufficient. This extends protection to individuals who may have commenced the process of gender reassignment, or who have indicated an intention to undergo this process, but who have not yet come under medical supervision.

57. Press for Change (PFC) and the Equality Network have nevertheless expressed concern that Clause 7 is unclear and will leave many transsexual people unprotected.88 In particular, both organisations argue that Clause 7 will exclude transsexual people who do not display any intention to undergo a medical process of gender reassignment, but who nevertheless choose to adopt a different gender identity. In addition, children under 16 who display gender variance may also be left unprotected, as may inter-sex persons. Both Press for Change and the Equality Network suggest that the concept of “gender reassignment” should be replaced by “gender identity”, a term used in official statements produced under the auspices of the United Nations and Council of Europe. The Equality and Diversity Forum (EDF) has given evidence to similar effect.89

58. In the PBC, the Solicitor-General responded to concerns about the proposed definition by noting that discrimination which was based upon acts or behaviour by the transsexual person in question which might “be a precursor to an individual proposing to undergo gender reassignment” would be covered by the prohibition on discrimination based on perception implicitly set out in Clause 13.90 She also suggested that there was a need for a “definite decision point, at which the person’s protected characteristic would immediately come into being”.91 In addition, in her written evidence, the Solicitor-General emphasised that the process of gender reassignment covered by the Bill:

… need not involve any form of medical intervention; rather it is a personal process and can involve changes in dress and mode of living. The definition will cover those who are proposing to reassign their sex but have not taken any steps, medical or otherwise, to do so.92

59. In our view, protection currently offered by existing legislation is unduly restrictive as it denies protection to those not subject to medical supervision. We therefore welcome the expanded human rights protection offered to persons undergoing a process of gender reassignment. However, we are concerned that the new definition may be interpreted in an unduly restrictive manner, as a transsexual person will only be protected from discrimination if he or she can demonstrate an intention to

88 Ev 140 & 162; Memorandum and Oral Evidence submitted by Press for Change to the Equality Bill Committee (Ev 11)
2 June 2009.
89 Ev 128
90 PBC Deb, 16 June 2009, col 206.
91 PBC Deb, 16 June 2009, col 204.
92 Ev 68 at Q 3
undergo a process of gender reassignment. This may leave individuals who cannot yet undergo a process of reassignment, such as children under the age of 16, or those for whom such a process would be of little or no relevance, such as inter-sex persons or those living in a state of gender variance, without protection. Reliance upon the prohibition of discrimination on the basis of perception to close these gaps is unsatisfactory, as this offers at best an indirect and less than clear level of protection. We recommend that the term “gender identity” replace “gender reassignment” as the relevant protected characteristic. This would offer wider protection against the prejudice and stereotyping which continue to affect many transsexual people adversely. There is little risk that protecting ‘gender identity’ will result in abuses, frivolous cases or the trivialisation of discrimination law, as protection will still be linked to transsexual status, rather than to appearance or conduct.

60. Amendments NC12(3) to (5), tabled by Lynne Featherstone MP and Dr Evan Harris MP, would replace the definition of the protected characteristic of gender reassignment with an expanded definition of “gender identity”. We consider that these amendments deserve serious consideration.

Marriage/Civil Partnership

61. Clause 8 defines the protected characteristic of marriage and civil partnership replacing very similar provisions in the Sex Discrimination Act which currently provides that a person has the protected characteristic of marriage and civil partnership only if she or he is actually married or in a civil partnership. Discrimination legislation will not protect people who are in, or have been in, significant and enduring personal cohabiting relationships other than marriage or civil partnership who suffer discrimination or harassment as a result.

62. Nor will the legislation cover people who are discriminated against or harassed by reason of not being in a marriage or civil partnership. Such people are protected under discrimination law in Ireland, certain states in Australia and elsewhere. In addition, Clause 13(4) provides that direct discrimination against those who are not actually married or in a civil partnership is not prohibited under the Bill. Therefore, discrimination on the basis of association with married persons or those in a civil partnership, or on the basis of perceived marital or partnership status, is not prohibited.

63. Liberty and the EHRC suggest that it would be more compatible with human rights principles not to deny protection against discrimination on the basis of marital status to those who cohabit, those who are divorced or widowed. Liberty cites the decision of the House of Lords in Re P as evidence that discrimination based on marital status may not comply with the human right to equality, an argument echoed by the EHRC.

93 See e.g. sections 4 and 6 of the Equal Opportunity Act 1995 (Victoria).
94 Ev 132 & 149
95 In Re P (Adoption: Unmarried Couple) [2008] UKHL 38 (a provision referring to a “married couple” should include an unmarried couple in order to comply with human rights law).
96 Ev 149
97 Ev 132
64. In the PBC, Lynne Featherstone MP moved an amendment to Clause 8 which would have extended protection against discrimination to single and co-habiting people. Responding, the Solicitor-General highlighted the difficulty of defining when persons could be said to be a co-habiting couple and also noted the lack of evidence that existed as to whether discrimination on the basis of marital status constituted a significant social problem. In her written evidence to us, the Solicitor-General made a similar point:

While responses to the 2007 consultation paper on the Bill suggested that there may be some discrimination on the grounds of marriage and civil partnership, they did not provide any evidence that unmarried people and those in other forms of relationships are discriminated against… The Government therefore considers that extension of protection beyond marriage and civil partnership is not warranted on current evidence.  

65. We consider that good arguments exist to prohibit discrimination against individuals on the basis that they are not married or in a civil partnership, including cohabiting couples in enduring relationships. This would ensure symmetry of protection for those within or outside such relationships, and protect individuals against forms of discrimination on the grounds of marital status which have existed in the past and may re-emerge again, such as the practice of discriminating against unmarried persons in promotion processes and pay awards.

66. A separate issue that arises in respect of this protected characteristic is that the degree of protection conferred by the Bill upon couples in a marriage or civil partnership is very limited, being largely confined to protection against direct and indirect discrimination in the sphere of employment and occupation. Various provisions of the Bill provide that marital/civil partnership status is excluded from protection against harassment, discrimination in the provision of goods and services, discrimination in the disposal, management and occupation of premises, discrimination in education, and discrimination in membership of associations. Liberty told us that this omission means that it will be lawful to discriminate against a person on the basis that they are married or in a civil partnership in many different fields of social activity and suggest that there is no reason why the Bill cannot prohibit discrimination against married couples or those in civil partnerships in these areas.

67. In her written evidence, the Solicitor-General set out the reasoning of the Government as to why it is appropriate to confine protection to married couples and those in a civil partnership to certain areas only:

In the 2007 consultation paper on proposals for the Bill, ‘A Framework for Fairness’, the Government proposed to remove protection for married persons and civil partners as it was no longer required for its original purpose, which was to protect women who were required to resign from employment on marriage.

98 Ev 67
99 Clause 25.
100 Clause 27(1)(b).
101 Clause 31.
102 Including in school as a result of Clause 81, in further education by virtue of Clause 87 and by qualifications bodies through Clause 92.
103 Ev 149
Responses to the consultation were equivocal on whether to keep or remove the protection. However, some responses did suggest that there were still work-related instances of discrimination on the basis of marriage or civil partnership. Some tribunal cases also support this view as they show that there are instances of discrimination where employers have a blanket policy of not allowing married people to work together and these need to be challenged. Hence, the Government considers that removing this protection may run the risk of discrimination against married people re-emerging.

Responses to the consultation did not provide any evidence to show that extension of protection was warranted beyond the current range of protection. As one of the principles in the development of the Equality Bill was not to legislate where there is no evidence of need, the Government decided not to expand protection further than the current provision. While the original reasons for introducing marriage protection in employment may no longer exist, we consider continued protection in this discrete area is warranted.104

68. We recommend that the prohibition of discrimination against married persons or persons in a civil partnership should be extended to cover harassment, discrimination in the provision of goods and services, premises, education and membership of associations. This would ensure comprehensive protection against forms of discrimination on the basis of marital status that may not have been highlighted by the parties who responded to the consultation exercise but may nevertheless exist, or which may be easier to challenge using the prohibition on discrimination based upon the protected characteristic of being married or in a civil partnership, rather than other characteristics such as sex or sexual orientation.

Other Protected Characteristics

69. Legislation in Northern Ireland prohibits discrimination based on political opinion: legislation in some other Commonwealth and European states protects individuals against discrimination based on characteristics such as genetic predisposition, spent criminal convictions, or on socio-economic status, or on caste status. The Bill does not cover these forms of discrimination. We therefore asked the Minister whether the Government had considered extending protection against discrimination to cover discrimination based on such characteristics and, if so, why it had rejected their inclusion. The Solicitor-General provided a detailed response to our question. In summary, she told us that:

- The Government had consulted on whether to include genetic predisposition in the Bill, that there was no clear evidence to suggest that discrimination was occurring in this area, but that it would keep the situation under review;

- Domestic law is already clear on when spent convictions can and cannot be disclosed and there is no need for specific provision within the Bill;

- The Government considered extending protection to include socio-economic status but concluded that “it would be very hard to define socio-economic disadvantage in a way that could be used to give individual rights”, that this would not be the
best way to address the problem and that the Bill introduced a measure designed to address the underlying socio-economic disadvantage (the socio-economic duty);

- Excluding protection on the basis of political opinion has not, in the Government’s view, caused problems in Great Britain, unlike in Northern Ireland;

- There is insufficient evidence of a problem of caste discrimination in the UK which could be resolved by legislation in the fields that anti-discrimination law covers, although the Government is monitoring the situation.105

70. Some witnesses have suggested to us that, contrary to the Government’s assertion, caste discrimination is a problem in the UK which legislation should prohibit.106 We therefore asked the Solicitor-General about this in oral evidence. She reiterated that the Government had taken “significant steps” to look for caste discrimination, but that there is “no inherent problem” which could be dealt with within the categories covered by the Bill.107 However, it is strongly arguable that caste discrimination is akin to racial discrimination, and we are concerned that this is a problem which may be hidden but real within some ethnic minority groups.

71. In their evidence to the PBC, the EHRC noted that it has a statutory duty to monitor the law and that, in its view, the vast majority of situations of discrimination would be captured by the nine existing protected characteristics of the Bill. However, it suggested that one area of potential difficulty for the future was around genetics and discrimination.108

72. We welcome the Government’s commitment to monitoring the position of genetic predisposition and caste to see whether there is a need in the future to specify them as protected characteristics. We urge the Government proactively and regularly to review the situation and to bring forward legislation should there be evidence that further protection in these areas is required. This is an area to which we may wish to return at a later date.

The Different Forms of Discriminatory Behaviour

73. Chapter 2 of Part 2 defines the main forms of conduct that are prohibited by subsequent provisions of the Bill, namely direct and indirect discrimination, harassment and victimisation. At present, different definitions of these forms of conduct are applied in different circumstances. This makes existing discrimination law unnecessarily complex. However, the Bill now sets out standardised and clarified definitions of these different forms of discriminatory conduct, ensuring in particular that the higher level of protection currently offered against indirect discrimination and harassment in those areas of law where EU standards are relevant will apply across the full ambit of anti-discrimination law.

105 Ev 67
106 E.g. Ev 100 (Bhagwan Valmiki Trust); Ev 110 (Central Valmik Sabha)
107 NC10 proposes to include the protected characteristic of caste within the Bill.
108 PBC Deb, 2 June 2009, col 12.
This will remove many of the artificial distinctions that currently exist in the UK’s anti-discrimination legislation.109

74. The Bill also strengthens protection against discrimination by removing certain technical barriers to recovery that exist in the current legislative framework. In particular, Clause 25 extends protection against victimisation by removing the requirement that a claimant show that they were treated in a less favourable manner than another person would have been in a similar situation – the “comparator” requirement. Amendments made to the Bill during PBC have clarified its provisions in respect of pregnancy discrimination and cured the serious defects contained in the original text of the Bill, in particular the apparent introduction of a defence of “reasonableness”.110

75. We welcome the provisions of the Bill which standardise and clarify the definitions of direct discrimination, indirect discrimination, harassment and victimisation and harmonisation. This should make discrimination law more accessible and easier to understand and apply. We also welcome the levelling up of protection against indirect discrimination and harassment and the removal of the “comparator requirement” in victimisation cases. We are pleased to note the amendments made to the Bill during PBC which remedied the defective provisions relating to pregnancy discrimination which were contained in its original text.

76. However, a number of human rights issues arise in respect of certain aspects of how the different forms of discrimination are defined and are discussed below.

**The Definition of Direct Discrimination**

77. The standard definition of direct discrimination set out in Clause 13 states that “person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”. The definition in Clause 13 replaces the phrase “on grounds of” used in previous definitions of direct discrimination with the phrase “because of”. The Explanatory Notes explain the rationale for this change:

> This clause uses the words 'because of' where the current legislation contains various definitions using the words 'on grounds of'. This change in wording 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.111

78. Direct discrimination is a key concept in discrimination law, but some concern has been expressed as to the use of the phrase “because of” in this definition. Discrimination law experts such as Michael Rubenstein have suggested that replacement of the phrase “on grounds of” with the new phrase “because of” may cause confusion and undermine the existing well-established case-law on the definition of direct discrimination.112 The Equality and Diversity Forum (EDF) have also raised similar concerns.113 The House of Lords in the

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109 Such as the different test of indirect discrimination that is applied depending on whether a case involves allegations of discrimination based on skin colour or discrimination based on race, ethnicity or national origin.

110 As reflected in the current wording of Clauses 17 and 18.

111 EN, para. 73.


113 Ev 130
Legislative Scrutiny: Equality Bill

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cases of James v Eastleigh Borough Council\textsuperscript{114} and Shamoon v Chief Constable of the RUC\textsuperscript{115} interpreted the phrase “on grounds of” as covering situations where a discriminator would not have subjected an individual to less favourable treatment “but for” the protected characteristic in question, and also where a characteristic was the “reason why” the less favourable treatment took place. In other words, the phrase “on grounds of” has been interpreted as covering not just situations where a discriminator deliberately treated a person in a less favourable manner because of their gender, race or another protected characteristic, but also situations where criteria based upon protected characteristics formed the basis or part of the basis of the decision to treat an individual in a less favourable manner. As Lord Goff noted in James v Eastleigh Borough Council, this has the advantage of avoiding “complicated questions relating to concepts such as intention, motive, reason or purpose…”\textsuperscript{116} However, Michael Rubenstein suggests that the replacement of “on grounds of” with the phrase “because of” may encourage courts and tribunals to place undue emphasis on the subjective intent, purpose or motive of the alleged discriminator rather than focusing on the objective rationale for the actions in question, as required by the existing case-law.\textsuperscript{117} The new phrasing may also confuse the question of causation.\textsuperscript{118}

79. In the PBC, an amendment was tabled by Mark Harper MP to replace “because of” with “on grounds of”.\textsuperscript{119} In response, the Solicitor-General stated that both phrases were “synonymous” and equally indicative of causation, but the use of “because of” would make the legislation more accessible to non-specialists.\textsuperscript{120} She stated “there is no change in the meaning from the change of words”.\textsuperscript{121}

80. We consider that the previously used test in direct discrimination of “on the grounds of” has acquired a clear and definite interpretation through case-law. The Government is to be applauded for its concern for attempting to ensure the definition of direct discrimination is phrased in accessible terms. However, little is gained by replacing “on grounds of” with “because of”. “On grounds of” is both readily comprehensible and has the advantage of being a well-established term of art. Replacing this phrase with “because of” risks the emergence of alternative interpretations and may undermine a clear and well-established legal position which ensures rigorous and clear protection against direct discrimination. We consider that it is strongly arguable that the definition should be amended accordingly.

\textit{Discrimination on the Basis of Association and Perception}

81. The Explanatory Notes explain that the new definition of direct discrimination in Clause 13 is intended to be “broad enough to cover cases where the less favourable

\begin{footnotesize}
\begin{enumerate}
\item \[1990\] 2 All ER 206.
\item [2003] IRLR 285.
\item [1990] 2 A.C. 751, 774.
\item Equal Opportunities Review, June 2009, issue 189, p. 23.
\item In Nagarajan v London Regional Transport [1999] 4 All ER 65, HL, Lord Neill interpreted the ‘on grounds of’ test as providing that if a protected characteristic ‘had a significant influence on the outcome, discrimination is made out’. Michael Rubenstein suggests that there could be a danger that the ‘because of’ test might be interpreted as requiring the characteristic to be the predominant factor in causing the less favourable treatment, not just a ‘significant’ one. Equal Opportunities Review, June 2009, issue 189, p. 23.
\item PBC Deb, 16 June 2009, col 240.
\item PBC Deb, 16 June 2009, col 242-3.
\item PBC Deb, 16 June 2009, col 242.
\end{enumerate}
\end{footnotesize}
treatment is because of the victim’s association with someone who has that characteristic (for example, is disabled), or because the victim is wrongly thought to have it (for example, a particular religious belief).”\textsuperscript{122} These forms of discrimination are often referred to as discrimination based on association and perception.

82. Previously, discrimination based on association with someone of a particular age or having a particular disability was not explicitly prohibited by UK discrimination law. Discrimination on the basis that someone was perceived to be disabled was also not prohibited.\textsuperscript{123} However, in the recent case of Coleman v Attridge Law,\textsuperscript{124} the European Court of Justice interpreted Directive 2000/78/EC as meaning that the prohibition of direct discrimination laid down by the Directive “is not limited only to persons who are themselves disabled” and also requires member states to prohibit discrimination in the field of employment and occupation which is based on association with a person with a disability.

83. The Minister for Equality, the Rt Hon Harriet Harman QC MP, announced on 2\textsuperscript{nd} April 2009 that the Equality Bill would prohibit discrimination which is based upon association with a person who has any of the protected characteristics set out in the Bill, or on the basis that a person is perceived to possess any such characteristics.\textsuperscript{125} As the Explanatory Notes make clear, Clause 13 is drafted so as to give effect to this goal. However, Clause 13 does not expressly prohibit discrimination based on association or perception: instead, it contains a general prohibition of less favourable treatment inflicted by A on B “because of” a protected characteristic. The Government considers that this wording is sufficient to cover discrimination based on association and perception, as the prohibition of direct discrimination in Clause 13 is not just confined to situations where individuals themselves possess a protected characteristic (except in the case of the characteristic of marriage and civil partnership), but also covers situations where discrimination against an individual takes place “because of” a protected characteristic.\textsuperscript{126}

84. However, the Discrimination Law Association, Carers UK, the Equality Commission for Northern Ireland and the EHRC have all expressed support for the inclusion of an express prohibition on discrimination on the basis of association and perception.\textsuperscript{127} In the PBC, an amendment to this effect was tabled by Dr Evan Harris MP. In response, the Solicitor-General highlighted the concern that specifying that discrimination on the basis of association and perception was banned could result in a narrower interpretation being given to the general prohibition on direct discrimination:

\[ T \text{he danger is that, if we name something in a section of a statute, by implication we exclude or devalue things that are not named.}\textsuperscript{128}

\textsuperscript{122} EN, para. 71.
\textsuperscript{123} In contrast, UK law prohibiting direct discrimination on grounds of gender, race and ethnic or national origins, religion or belief and sexual orientation has been interpreted as also prohibiting discrimination based on perception or association which is linked to these characteristics.
\textsuperscript{125} Written Ministerial Statement, 2 April 2009.
\textsuperscript{126} See the comments of the Solicitor-General at PBC stage: PBC Deb, 16 June 2009, col 254.
\textsuperscript{127} Ev 107, 122 & 132
\textsuperscript{128} PBC Deb, 16 June 2009, col 254.
85. In her written evidence to us, the Solicitor-General set out the Government’s reasoning in detail:

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 (as said by Lord Simon in Race Relations Board v Applin [1975] AC 259, at 289), or because the victim is wrongly thought to have it (as said by Lord Fraser in Mandla v Dowell Lee [1983] 2 AC 548, at 563). 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.129

86. In our view, the extension of protection against discrimination based on association and perception across all the protected characteristics will further the protection of human rights. In particular, it will ensure greater protection against discrimination for individuals with caring responsibilities for disabled persons, children and older persons. It will also provide important protection for individuals who might be perceived to be involved in a process of gender reassignment, or to be of a different gender, sexual orientation, age, religion or ethnicity than their own, or who associate with friends and acquaintances who possess a protected characteristic.

87. However, we are concerned as to how the text of the Bill makes provision for this extension of protection. If the interpretation given by the UK courts to the phrase “on grounds of” in cases such as Showboat is carried across and applied to the new phrase “because of” in the definition of direct discrimination in Clause 13, as the Government has suggested will happen, then the Bill will achieve the Government’s goal of prohibiting discrimination based on association and perception. However, 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. We would support an amendment that would have this effect.

**Discrimination Against Carers**

88. By extending protection against discrimination based upon association, the Bill will ensure greater protection for individuals with caring responsibilities for disabled persons, children and older persons. However, discrimination law expert Michael Rubenstein has suggested that such an extension will only enable a carer to bring a discrimination claim where an employer or service provider treats the carer less favourably on the basis of a protected characteristic of the person being cared for, such as if a carer is subject to less favourable treatment on the grounds that the person being cared for is disabled, as in the *Coleman* case, or of a particular age. In contrast, if an employer subjects all employees taking time off for caring reasons to less favourable treatment, regardless of the characteristics of the person being cared for, this would appear not to give rise to a claim, as the discrimination will not be based upon association with a person possessing a protected characteristic. In the Republic of Ireland, discrimination legislation includes carer status as a protected characteristic and prohibits direct and indirect discrimination, harassment and victimisation of carers.

89. The Bill also does not require employers to make reasonable adjustments in favour of carers. The House of Commons Work and Pensions Committee has recommended that carers should be given a legal right to request reasonable accommodation, to ensure their effective participation in the workplace, having previously suggested that the Bill should give carers the protection they currently lack in employment, the provision of goods, facilities and services and through public sector equality duties.

90. In her written evidence, the Solicitor-General explained that the Government had not been persuaded of the need to provide additional protection for carers:

> The consultation paper on proposals for the Bill indicated that the Government was not persuaded of the need to create broad-based freestanding discrimination legislation for carers; and that it was considered to be more appropriate to continue with targeted provisions and specific measures instead. The Government asked for comments on this approach and, after considering the responses received, decided not to extend protection against discrimination specifically because of parenting or caring responsibilities. The main reason is that, unlike the other protected characteristics, the role of a carer primarily concerns what a person does, rather than who they are. The Government continues to believe that measures such as the right to request flexible working are better suited to supporting carers than the provision of an additional protected characteristic in discrimination law.

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Under the Bill, carers are protected if they suffer direct discrimination or harassment because of their association with a disabled person or person of a certain age. This protection extends to carers under the age of 18 who are discriminated against because of their association with an older person they care for. The protection for associates of disabled people does not extend to requiring reasonable adjustments, such as flexible working. Such a provision is not necessary. This is because, in recognition of the valuable role carers play and the additional responsibilities and challenges they face, the Government has already extended employment legislation to include the right for carers to request flexible working.134

91. Carers perform crucial work, shouldering the burden of providing support and care for many of society’s most vulnerable individuals. Their work and commitment plays a crucial role in ensuring respect for the right to human dignity of those they care for. In so doing, they often pay a price in their working lives and chosen careers and may at times face arbitrary and unfair discrimination. However, whilst carers have the right in certain circumstances to request flexible working, at present they have very limited legal protection. We therefore welcome the extension of protection for carers that the Bill provides through the prohibition of discrimination by association. This will ensure greater protection for individuals with caring responsibilities for disabled persons, children and older persons. However, the protection offered is limited. In particular, a carer may face serious difficulties in showing that an employer or service provider discriminated on the basis of his or her association with a person with a protected characteristic. In addition, the Bill appears to leave those with caring responsibilities exposed to the threat of discriminatory treatment which is based on their status as carers, as distinct from discrimination based on the characteristics of those they care for.

92. Carers UK have highlighted the ongoing difficulties faced by many carers in their working life and in their interaction with public authorities.135 In our view, carers should be provided with greater protection against discrimination and other forms of unfair treatment. The right to request flexible working that carers currently enjoy is important and provides some opportunity for carers to seek adjustments in their workplace, but more comprehensive and far-reaching protection appears to be necessary. In addition, we are not persuaded by the Government’s argument that carers choose their status and therefore anti-discrimination law is not a suitable tool for protecting them against unfair treatment. This does not reflect the position of many carers, in particular younger persons with caring responsibilities and those from less well-off socio-economic backgrounds, who often have little real choice when they assume caring responsibilities. In our view, the crucial social role performed by carers justifies enhanced legal protection. As a result, we recommend that the Government extend the Bill to provide greater protection to carers and give serious consideration to introducing a form of reasonable accommodation duty upon employers where appropriate.

134 Ev 67
135 Ev 107
Combined Discrimination: Dual Characteristics

93. After the Bill was published, the Government consulted on the possibility of extending protection from discrimination to a combination of two protected characteristics.\footnote{Government Equalities Office, Equality Bill: Assessing the impact of a multiple discrimination provision – a discussion document, April 2009.} Following the conclusion of the consultation, the Government introduced a new clause in the PBC which protects from discrimination due to a combination of two protected characteristics.\footnote{Clause 14.} When introducing the new clause, the Solicitor-General provided an example of the type of situation in which combined discrimination may arise:

… a black woman or man of a particular religion may face discrimination because of stereotyped attitudes to that combination. It is difficult, complicated and sometimes impossible to get a legal remedy in those cases, because the law requires them to separate out their different characteristics and bring separate claims. That means, for example, a black woman who is discriminated against having to pick what she thinks is the likelier reason. Should she bring a claim for race discrimination and then one for sex discrimination? She might not succeed in either if the employer can show that black men and white women are not treated the same.\footnote{PBC Deb, 2 July 2009, cols 681-686.}

94. Giving evidence to the PBC, Maleiha Malik from the Muslim Women’s Network and Reader in Law at King’s College London explained the advantages of multiple discrimination protection:

… you capture certain types of harms that otherwise slip through the cracks. It also allows a greater degree of flexibility for courts in terms of remedies. The most important area in which it is useful is, for example, when an individual falls within race, gender and sexual orientation. That must be the area at which the discrimination law is targeted because they are the most vulnerable people whom the discrimination law wants to protect.\footnote{PBC Deb, 9 June 2009, cols 80-81.}

95. Whilst welcoming the extension of protection to a combination of two grounds, some witnesses have suggested that multiple discrimination should not be limited to two grounds alone but should relate to an unlimited number of grounds.\footnote{Ev 156} Witnesses also suggested that protection should be extended to encompass indirect discrimination and harassment as well as direct discrimination.\footnote{Ev 130 & 156} Race on the Agenda and the National Aids Trust recommended that if the Government restricts the protection to two grounds, it should review the legislation after two years to ascertain whether it remains appropriate to limit it in this way.\footnote{Ev 156 & 165}

96. We asked the Solicitor-General whether restriction to two grounds would mean that individuals subject to other forms of multiple discrimination might be denied legal protection against unfair and unequal treatment, why indirect discrimination or
harassment on multiple grounds will not be prohibited and why the consultation could not be concluded before the Bill was published. In her reply, the Solicitor-General relied on evidence from Citizen’s Advice that the large majority of cases of discrimination concern one or two protected characteristics. She stated:

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.144

97. She also suggested that increasing the number of grounds would make the law more complex and increase the burdens for employers. The Solicitor-General stated that there is no evidence of a need to prohibit indirect discrimination or harassment on multiple grounds. In the PBC, she elaborated on this, noting that, although the Government’s view was that harassment claims were not being prevented from succeeding under existing law by their limitation to one ground, the extension to the definition of harassment widened the provision and would provide greater protection.146 She suggested that extending protection to indirect discrimination would be a disproportionate burden on businesses and employers, given the lack of evidence of need.147 In her oral evidence to us, the Solicitor-General agreed, however, that if in due course it becomes clear that it is necessary to widen the number of grounds, or to extend coverage to indirect discrimination and harassment, the Government would consider doing so.148

98. We welcome the widening of protection from discrimination to a combination of two grounds. We consider that this will enhance the human rights of individuals who have been discriminated against. Whilst, in our view, combined discrimination on two grounds should not be an excessive burden to businesses and employers, clear and accessible guidance is required in order to ensure that those who are required to comply fully understand their legal obligations. We urge the Government to keep the situation actively under review, and to give serious consideration to extending protection to more than two grounds in the future.

99. However, we are concerned that combined discrimination will apply only to direct discrimination and not to other forms of discrimination, such as indirect discrimination and harassment, which, in our view, could benefit from the additional protection that extension beyond a single ground would provide. We also note, with disappointment, that maternity, pregnancy, marriage and civil partnership are excluded from the scope of the new clause. We call on the Government 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.

143 Ev 58
144 Ev 67 at Q 16
145 Ev 67 at Q 16
146 PBC Deb, 2 July 2009, col 683.
147 PBC Deb, 2 July 2009, col 683.
148 Q 40


**Harassment**

**The Definition of Harassment**

100. Clause 25 defines harassment as follows:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect mentioned in subsection (2),

(b) A engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has that purpose or effect, or

(c) because of B’s rejection of or submission to conduct (whether or not of A), A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(2) The purpose or effect is—

(a) violating B’s dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(3) In deciding whether conduct has that effect, each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(4) For the purposes of subsection (1)(c), the conduct is—

(a) conduct mentioned in subsection (1)(a), if the relevant protected characteristic is gender reassignment or sex;

(b) conduct mentioned in subsection (1)(b).

101. This clause provides a single, uniform definition of harassment. This new definition will extend protection against discrimination and clarify the scope of existing discrimination law by providing that the unwanted conduct in question may constitute harassment if it is “related to” a protected characteristic. Existing legislation requires unwanted conduct to be “on the grounds of” a characteristic, which is a more restrictive definition: the new definition contained in Clause 25 is wider in scope and should ensure that harassment which is not directed specifically at a claimant or which is based on association with a protected characteristic is prohibited. This new definition also better reflects the requirements of the relevant European legislation.

102. The new definition retains the “disjunctive” approach adopted in existing UK legislation, whereby a person needs to show either that their dignity was violated by the
unwanted conduct, or that an intimidating, hostile, degrading or offensive environment was created as a result of it. In contrast, the definition contained in the relevant European Directives requires both of these conditions to be satisfied, a requirement referred to as the “conjunctive” approach.\textsuperscript{149} The disjunctive approach reflects existing case-law and has been adopted in successive anti-discrimination legislation since 2003.\textsuperscript{150} It also offers more extensive protection against discrimination than the conjunctive approach: while at times the difference between both approaches may be marginal, given that conduct which violates a person’s dignity will often also create an intimidating or offensive environment for that person, there may be circumstances in which one but not the other condition would be satisfied, which would satisfy the disjunctive test but not the conjunctive. The Solicitor-General suggested that to adopt the conjunctive approach in domestic discrimination law now would risk breaching the principle of non-regression\textsuperscript{151} in European law.\textsuperscript{152}

103. Clause 25(3) introduces a new test for determining when conduct violates a complainant’s dignity or has created an intimidating or hostile environment. It requires both the claimant’s subjective perception and the objective circumstances of the case to be taken into account. In her written evidence to us, the Solicitor-General explained:

> In determining whether conduct can be regarded as constituting harassment, account must be taken of the complainant’s perception of the conduct, the other circumstances of the case, and whether it is reasonable that the conduct should be regarded as having the effect of harassment. This safeguard is to ensure that unreasonable allegations of harassment are not caught. This objective element is not found explicitly in the Directives, but it codifies domestic case law in a way which in the context of the definition as a whole is compatible with them.\textsuperscript{153}

104. The Explanatory Notes to the Bill state that when applying this test, “courts and tribunals will continue to be required to balance competing rights on the facts of a particular case; this would include consideration of the value of freedom of expression (as set out in Article 10 of the ECHR) and of academic freedom”.\textsuperscript{154}

105. In our view, the definition of harassment set out in Clause 25 clarifies and extends existing protection against harassment while striking an appropriate balance between protecting the right to freedom of expression (in Article 10 ECHR and other international instruments) and the right to equality (in Article 14 ECHR, Article 26 ICCPR and other international treaties). This definition of harassment should be applied by courts and tribunals in the light of the relevant ECHR case-law on the Article 10 right to freedom of expression. However, a more restrictive definition of harassment on the basis of sexual orientation may be appropriate in the context of service provision and the performance of public functions.

\footnotesize{\textsuperscript{149} See Article 2(3) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.}
\footnotesize{\textsuperscript{150} See e.g. Reg. 5 of the Employment Equality (Sexual Orientation) Regulations 2003; Reg. 5 of the Employment Equality (Religion or Belief) Regulations 2003; Reg. 6 of the Employment Equality (Age) Regulations 2003.}
\footnotesize{\textsuperscript{151} The principle of non-regression in EU law as set out in Article 8(2) of Council Directive 2000/78/EC and other provisions of European law requires that measures intended to give effect to the right to non-discrimination should not reduce the level of protection already afforded against discrimination in national law.}
\footnotesize{\textsuperscript{152} Ev 71 at Q 10}
\footnotesize{\textsuperscript{153} Ev 71 at Q 10}
\footnotesize{\textsuperscript{154} EN, para. 101.}
Harassment on the Grounds of Marriage/Civil Partnership and Pregnancy

106. Clause 25(5) provides that behaviour that satisfies the definition of harassment is prohibited in respect of all the protected characteristics, except for marriage and civil partnership, and pregnancy or maternity. Individuals who are subject to harassment on the grounds of pregnancy or their marriage/partnership status are therefore not protected. The EHRC has criticised this omission, on the basis that "these are some of the most distressing forms of behaviour to people who may be acutely vulnerable". The Commission also notes that:

Harassment on grounds of pregnancy and maternity or marriage or civil partnership is behaviour which would fall within the ambit of Article 8 ECHR, or even – in certain circumstances – within the ambit of Article 3. However, it is far from clear that positive obligations under Article 14 would stretch to rendering such behaviour unlawful if performed by a private individual, not himself or itself susceptible to direct challenge under the HRA. It does not, therefore, seem likely that this lacuna would be filled by recourse to a remedy under the HRA. The Government’s reasons for excluding pregnancy and maternity, marriage and civil partnership from the “relevant protected characteristics” under clause 24(5) remain opaque.

107. In her written evidence to us, the Solicitor-General outlined the Government’s reasoning in respect of the omission of protection against harassment related to pregnancy or marriage/partnership status:

Discrimination because of marriage and civil partnership is prohibited in order to address very narrow circumstances in which some employers still adopt policies which may discriminate against married people or civil partners: for example, where employers do not allow married people to work together. However, the Government is not aware of any evidence that people are harassed in the workplace because they are married or a civil partner. It does not therefore consider there is a need for such protection. If a civil partner is harassed because of their sexual orientation, protection is already provided.

With regard to pregnancy and maternity, any harassment that a woman is subjected to will be covered by the protection against harassment related to sex. The Government therefore considers that specific protection against harassment because of pregnancy or maternity is unnecessary and would add no value.

In the consultation paper on proposals for the Bill, the Government made clear that it would only legislate if there was evidence of a real problem. No such evidence was forthcoming in these cases.

108. We consider that strong arguments exist for prohibiting harassment on the grounds of being married or in a civil partnership, and harassment on the grounds of pregnancy or maternity. It would ensure comprehensive protection against forms of discrimination on the basis of marital status, pregnancy or maternity which may not have been highlighted by the parties who responded to the consultation but may

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155 Ev 132
156 Ev 132; similar concerns have been expressed by Liberty, Ev 149
157 Ev 70 at Q 8
nevertheless exist. It would also eliminate confusing distinctions between the different characteristics, thereby improving the clarity of the legislation. In addition, it may make it easier to challenge harassment based on these characteristics rather than having to rely on the roundabout route of attempting to make out a case based on the characteristics of sex or sexual orientation.

109. Clause 28(8) substantially re-enacts existing legislation and exempts harassment related to religion or belief or sexual orientation in the provision of services or the exercise of public functions from the general prohibition on harassment. Similar exemptions exist in the field of the disposal, management and occupation of premises, and in education in schools. The absence of a prohibition of these forms of harassment reflects concerns expressed during parliamentary debates in the course of the passage of the Equality Act 2006 that prohibiting harassment based on religion or belief or sexual orientation might have a disproportionate impact upon the Article 10 ECHR right to freedom of expression.

110. In its written evidence to us, the Church of England suggested that prohibiting harassment in the provision of goods and services on the grounds of religion or belief or sexual orientation may open the door to legal challenges to religious practices or symbols, such as grace before meals, or the preaching of religious doctrine on issues such as homosexual behaviour, on the basis that they might create an “offensive” environment for non-believers or members of other religions. The Church of England also highlighted the breadth of the definition of harassment contained in Clause 25, in particular the reference to the creation of an “intimidating, hostile, degrading, humiliating or offensive environment”, and the provisions of Clause 25(3) which provide that the subjective perspective of the claimant and the effect of the conduct in question should be taken into account in assessing whether discrimination took place. It suggested that any prohibition on harassment in the field of service provision related to religion or belief or sexual orientation that retained these elements would be excessively wide and far-reaching, potentially threatening the rights of religious believers to exercise their Article 10 ECHR right to freedom of expression and Article 9 ECHR right to freedom of religious belief.

111. In contrast, other groups have expressed concerns about the lack of protection against harassment related to religion or belief or sexual orientation outside the sphere of employment and occupation. In his written evidence, the discrimination law expert Barry Fitzpatrick referred to the Preamble of the Yogyakarta Principles which highlighted the role played by harassment on the grounds of sexual orientation in undermining the integrity and dignity of those subject to it, and suggested that there are no particularly serious reasons for failing to prohibit such harassment in the fields of service provision and the performance of public functions.

112. In our Report on the Sexual Orientation Regulations we acknowledged that prohibiting harassment on grounds of religion or belief gives rise to concerns about the
impact on freedom of speech, but we considered harassment on grounds of sexual orientation to be different because, like sex and race, sexual orientation is an inherent characteristic.\textsuperscript{165} We concluded that harassment related to sexual orientation should be prohibited in the fields of service provision and the performance of public functions, but that a more precise and narrower definition of harassment should be applied in this context in the interests of reducing the risk of incompatibility with the rights of freedom of expression and freedom of religion and belief.\textsuperscript{166} Barry Fitzpatrick suggested that such a narrower definition of harassment could be achieved in several different ways, for example by deleting the adjective “offensive” from that part of the definition of harassment set out in Clause 25 which refers to the creation of an “intimidating, hostile, degrading, humiliating or offensive environment”.\textsuperscript{167} An alternative could be to apply varying definitions of harassment in different circumstances. A very narrow and limited definition of harassment, perhaps framed just in terms of creating a “degrading environment”, could be applied in “open” environments where individuals were free to come and go, while a much narrower definition could be applied to acts which took place in a “closed” environment where individuals are under the sustained supervision and direction of those who direct or control the environment, such as a prison. Mr Fitzpatrick also suggested that specific exceptions could be introduced to protect the expression of religious belief: these could presumably for example include “preaching” or “affirmation of belief” exceptions.\textsuperscript{168} However, the Church of England suggested that as long as consideration is given to the effect of harassment on the claimant, a narrower definition of harassment could still endanger freedom of expression and freedom of religion and belief.\textsuperscript{169}

113. In her written evidence to us, the Solicitor-General explained the Government’s position:

The Government has ruled out using a narrower definition of harassment where European law does not apply, because one of the key aims of the Bill is to simplify and harmonise the law. Introducing a two-tier approach to harassment would introduce new and, in the Government’s view, unnecessary legal complexity.

As regards the provision of goods, facilities and services and the performance of public functions in relation to religion or belief or sexual orientation, the Government has not been provided with evidence of a compelling case to provide protection from harassment. So it does not consider there is a basis for legislating nor that there is any need to consider whether a narrower definition would be warranted (with the complexities it would introduce) in these areas.\textsuperscript{170}

114. We consider that the absence of an explicit prohibition on harassment related to sexual orientation in the areas of service provision, the performance of public functions, and disposal, management and occupation of premises represents a significant gap in the protection against discrimination offered by the Bill. It leaves individuals without clear protection against demeaning and degrading harassment in

\textsuperscript{166} \textit{Ibid.}, para. 56.
\textsuperscript{167} E\textsuperscript{v} 97
\textsuperscript{168} E\textsuperscript{v} 97
\textsuperscript{169} E\textsuperscript{v} 114
\textsuperscript{170} E\textsuperscript{v} 67
important areas of their life. This may give rise to issues under the prohibition of
discrimination (Article 14 ECHR) read in conjunction with the right to respect for
private and family life (Article 8 ECHR), to freedom of thought, conscience and
religion (Article 9 ECHR) or the prohibition on inhuman or degrading treatment
(Article 3 ECHR).\footnote{See the discussion of the scope of the (subsequently deleted) harassment provisions contained in the Bill that
subsequently became the Equality Act 2006 by our predecessor Committee. Sixteenth Report of Session 2004-05,
Equality Bill, HL Paper 98, HC 497, paras. 41-42.}

115. As currently framed, the Bill may offer some protection against harassment as a
result of the general prohibition against direct and indirect discrimination on the
grounds of sexual orientation: case-law has established that harassment that constitutes
“less favourable treatment” may in certain circumstances constitute direct
discrimination. However, the extent to which this is the case remains unclear. As a
result, the absence of explicit provisions on harassment relating to sexual orientation
that takes place in the course of service provision or the performance of public
functions leaves the legal position unclear and ambiguous, to the benefit of neither
service users nor service providers.

116. The Northern Ireland High Court in its judgment in the \textit{Christian Institute} judicial
review of the harassment provisions of the Equality Act (Sexual Orientation) Regulations
(NI) 2006, which prohibit harassment, even under the wide definition, on the grounds of
sexual orientation in service provision and the performance of public functions, concluded
that these provisions could be interpreted and applied in a manner which respected the
Article 10 ECHR right to freedom of expression and the Article 9 ECHR right to freedom
of religion and belief.\footnote{[2007] NIQB 66.} Mr Justice Weatherup in his judgment gave guidance as to how the
definition of harassment in the 2006 Regulations (which is very similar to the definition set
out in Clause 25 of the Bill) could be applied in a manner compatible with these rights.

117. Given the guidance provided by the Northern Ireland High Court in the \textit{Christian
Institute} judicial review, it would appear that a prohibition on harassment related to
sexual orientation can be applied in a manner compatible with the ECHR Article 9 and
10 rights (right to freedom of religion and freedom of expression) in the areas of service
provision and the performance of public functions.

118. A narrower definition of harassment would however provide a more precise level
of protection while giving clear protection to Article 9 and 10 ECHR rights. As we have
previously noted, “[c]onduct which has the purpose or effect of ‘violating dignity’ or
creating an ‘offensive environment’ potentially covers a very wide category of conduct
given the inherent vagueness of the terms ‘dignity’ and ‘offensive’”.\footnote{Sixth Report of Session 2006–07, Legislative Scrutiny: Sexual Orientation Regulations, HL Paper 58, HC 350, paras 57–8.} This inherent
vagueness may have a potentially greater “chilling effect” on freedom of expression if
applied in the context of service provision and the performance of public functions
than it does in the context of employment and occupation, where the “closed”
environment of a workplace requires greater consideration to protecting the Articles
14, 8 and 3 ECHR rights of employees who face harassment. We reiterate our previous
conclusion that a more precise and narrow definition of harassment should be applied
in this context in the interests of reducing the risk of incompatibility with the rights to
freedom of expression and freedom of religion and belief.\textsuperscript{174} We are of the view that language or behaviour that in respect of sexual orientation or gender identity violates someone’s dignity or creates an environment that is “humiliating, threatening, degrading or offensive” is not justified in schools or in the provision of public services. We therefore recommend that protection from harassment be available on the grounds of sexual orientation and gender identity in schools using the narrower conjunctive definition as there is a “captive population” and vulnerable population at risk and there is an established problem of bullying and harassment in this area. We also recommend that protection from harassment be available on the grounds of sexual orientation using the narrower conjunctive definition in the provision of public services as those who use public services may also be “captive populations” and vulnerable.

119. Clause 38 makes an employer liable for failing to take steps to prevent harassment by third parties against employees, where the employer “failed to take such steps as would have been reasonably practicable” to prevent the third party carrying out the harassment. However, Clause 38(3) provides that this only applies where the employer knows that the same employee has been harassed on two prior occasions. This could be seen as permitting employers excessive leeway before they are required to respond to third-party harassment. We consider that the threshold requirement should be reduced to one previous incident, or that this requirement should be replaced with a provision that an employer will be liable when they ought reasonably to have been aware of the risk of third-party harassment.

**Discrimination Related to Disability**

120. The Bill substantially re-entacts existing legislation in prohibiting direct discrimination on the grounds of disability and requiring employers and service providers to make reasonable accommodation for persons with disabilities. Clause 20 of the Bill taken with Schedules 2 and 8 strengthen and standardise the reasonable accommodation duty, in particular by providing for the duty to be triggered when disabled persons are put at a “substantial disadvantage”. This single threshold replaces the two separate thresholds set out at present in the DDA and extends protection against discrimination by replacing the previous threshold requirement that reasonable accommodation could only be triggered in the context of the provision of goods and services when a disabled person found access to be “impossible or unreasonably difficult”.

121. The Bill also attempts to redress some of the consequences of the House of Lords’ judgment in *London Borough of Lewisham v Malcolm*, which made it more difficult to establish the existence of less favourable treatment related to disability, an important form of prohibited discrimination under the DDA.\textsuperscript{175} The Bill prohibits indirect discrimination

\textsuperscript{174} See paragraph 117 above. A number of new clauses have been tabled for Report stage of the Bill. Amendments NC7-9, tabled by Lynne Featherstone MP and Dr Evan Harris MP, would extend the legislative prohibition on harassment. Amendment NC7 would apply the standard definition of harassment set out in Clause 25 in prohibiting harassment on the grounds of sexual orientation and gender reassignment in the field of education and in the area of service provision and the performance of public functions, where “the service or public function is carried out by a public authority, or on behalf of a public authority, under the terms of a contract with a public authority, or is otherwise a function of a public nature”. In contrast, Amendment NC9 would apply a narrower definition of harassment, lacking any reference to an ‘offensive’ environment, in prohibiting harassment on the basis of religion or belief in the same areas. Amendment NC8 would apply the standard definition in prohibiting harassment on the grounds of gender reassignment in the area of education.

\textsuperscript{175} [2008] UKHL 43.
on the grounds of disability, which represents a considerable extension of protection for
the rights to equal treatment and respect of disabled persons.

122. Clause 15 of the Bill also provides that it is discrimination to treat a disabled person
in a particular way which, because of his or her disability, amounts to treating him or her
badly and cannot be shown to be objectively justified. This appears to be an attempt to re-
establish the protection against disability discrimination which had been eroded by the
Malcolm decision, and to clarify elements of the law in this complex area. In her written
evidence to us, the Solicitor-General set out what the Government intended to accomplish
by the insertion of Clause 15:

Clause [15] is aimed at providing protection, as disability-related discrimination does
at present, from discrimination that arises not simply because a person is disabled,
but because of an effect of, or something arising from, that person’s disability. The
new provision will provide protection for a disabled individual from a disadvantage
which would be a detriment for any person. This may be illustrated by an example in
the Explanatory Note to the provision in the Bill. A visually-impaired man is
dismissed because he can only continue to carry out his job if he has access to
assistive technology, and such technology is not compatible with the employer’s
Information Technology system. Dismissal would be a detriment for any individual
but, in this case, the detriment only arises because of the impact of the person’s
disability. He would not have been dismissed if he did not have a visual impairment
that meant he required assistive technology to enable him to perform his job.

The Government considers that the removal of the need to establish a comparator,
which is currently required by the disability-related discrimination provisions in the
DDA, will strengthen the legislation by making it easier for a disabled person to show
that he or she has been subject to detrimental treatment. The application of indirect
discrimination provisions to disability will further strengthen protection from
discrimination for disabled people because it will assist in tackling and preventing
systemic forms of discrimination that would have detrimental effects on particular
groups of disabled people.

As a consequence, the Government is satisfied that the replacement of protection
from disability-related discrimination by protection from discrimination arising
from disability, and from indirect discrimination will not violate the ‘non-regression
principle’ set out in Article 8.2 of Directive 2000/78/EC.176

123. However, the EHRC has questioned whether the prohibition of “discrimination
arising from disability” in Clause 15 as currently worded accomplishes what the
Government intends to bring about.177 The prohibition of less favourable treatment that
arises “because of” a person’s disability may not cover treatment which would constitute a
detriment for anyone, or which is not detrimental “because of” a specific disability per se. If
this is the case, this would mean that the Bill would provide less protection against
discrimination on the grounds of disability, or at least more uncertain protection, than was

176 Ev 67
177 Ev 132
provided by the DDA prior to the decision in Malcolm. In the PBC, the Government undertook to re-examine these provisions.178

124. We welcome the provisions of the Bill which clarify and extend protection against discrimination related to disability, in particular the strengthening and clarification of the threshold or trigger point of the duty to make reasonable accommodation set out in Clause 20, and the extension of protection against indirect discrimination that relates to a person’s disability provided for in Clause 18. However, the provisions of Clause 15 providing for the prohibition of “discrimination arising from disability” as currently worded appear excessively narrow in scope and do not adequately redress the gaps in protection left by the Malcolm decision. We welcome the Government’s readiness to re-examine these provisions and look forward to the outcome of its deliberations.

The Asymmetrical Nature of Disability Discrimination

125. Clause 13(3) provides that it is not discrimination to treat a disabled person differently from someone who does not have that particular disability “in a way which is permitted by or under this Act”. This clause appears to have been inserted to retain the “asymmetrical” nature of UK anti-discrimination legislation, whereby non-disabled persons may not bring an action challenging more favourable treatment of disabled persons. It also appears to be designed to ensure that providing more favourable treatment to particular categories of disabled persons will not be open to challenge. In the PBC, the Government also undertook to re-examine this provision.179

126. We consider it to be important for the “asymmetrical” nature of UK disability discrimination law to be retained and to ensure that the provision of special assistance to particular categories of disabled persons is not inadvertently exposed to legal attack. The UN Convention on the Rights of Persons with Disabilities makes clear that states must take action to accommodate the special needs of disabled persons in order to secure their rights to equality and human dignity. To ensure the substantive equality of disabled persons, it will often be necessary to treat them differently from others. The “asymmetrical” nature of UK disability discrimination law currently reflects this requirement and in so doing gives effect to international human rights standards.

127. However, as currently worded, the provisions of Clause 13(3), which state that it is not discrimination to treat a disabled person differently from a non-disabled person “in a way which is permitted by or under this Act” are uncertain and ambiguous. Many forms of “asymmetrical” treatment of disabled persons are not specifically “permitted by or under this Act”. At present, the Bill does not clearly establish the “asymmetrical” nature of protection against disability discrimination. We welcome the undertaking given by the Government at Committee stage to revisit the wording of this provision.180

179 PBC Deb, 16 June 2009, col 258.
180 Amendment NC15, tabled by Lynne Featherstone MP and Dr Evan Harris MP, states that “nothing in this Act shall be taken to prohibit more favourable treatment of a disabled person on the grounds of a disabled person’s disability”. Amendment NC16, also tabled by Lynne Featherstone MP and Dr Evan Harris MP, provides that disability will not be classed as a protected characteristic for the purposes of the provisions of the Bill that regulate positive action.
The Comparator Requirement

128. The specific nature of disability discrimination may also not be adequately reflected in the current provisions of Clause 23 of the Bill, which define who is to be considered an appropriate comparator when determining whether someone has been subject to less favourable treatment. Clause 23(1) provides that when comparing the treatment of different individuals or groups, there “must be no material difference between the circumstances relating to each case”. This standard approach to defining the “comparator requirement” must be modified when it comes to cases of disability discrimination, as disabled persons often face discrimination precisely as a result of a failure by employers or service providers to make accommodation to reflect the different circumstances in which they find themselves when compared to non-disabled persons who have similar abilities and qualifications.

129. Clause 23(2) attempts to reflect this by providing that in disability discrimination claims, “the circumstances relating to a case include a person’s abilities”. However, the EHRC suggests that this wording does not appear sufficiently clear and risks causing confusion. It has highlighted the potential for Clause 23 as currently worded to introduce a more exacting “trigger” into the duty to make reasonable adjustments than exists at present, which would result in a retrogressive lowering of protection.181 In the PBC, the Government appeared to agree to re-examine and if necessary to re-draft Clause 23 to remedy this problem. We welcome this apparent commitment.

130. The comparator requirement has consistently generated problems in anti-discrimination law, as illustrated by the House of Lords’ decision in Malcolm and the difficulties faced by the English courts in addressing the issue of pregnancy discrimination in the case-law of the 1970s and the 1980s.182

131. The comparator requirement in UK disability discrimination law has often generated unforeseen difficulties and complexities which have restricted the effective protection of the right to equality. The unsatisfactory wording of Clause 23 as currently drafted is an example of this. We welcome the Government’s undertaking to re-examine this wording. We consider that there is a need for clear statutory language outlining how courts and tribunals are to apply the comparator requirement.

The Knowledge Requirement

132. Clause 15(2) provides that the proposed prohibition of “discrimination arising from disability” does not apply if the employer or service provider shows that they “did not know, and could not reasonably have been expected to know, that B had the disability” in question. This “knowledge requirement” is a new statutory provision, which was not contained in the DDA. However, it reflects the interpretation of the equivalent provisions of the DDA adopted by the House of Lords in the Malcolm case.

133. The insertion of this knowledge requirement has been criticised by the Disability Charities Consortium, Mind and the Leonard Cheshire Trust on the basis that an employer or service provider who adopted a hostile stance towards persons suffering from illness or

181 See also, Rubenstein, M., Equal Opportunities Review 190, July 2009, 31.
182 See e.g. Webb v EMO Air Cargo (UK) Ltd. (No. 2) [1995] IRLR 645, HL.
other impairments can now avoid liability unless a clear indication existed that the person concerned had a disability.\textsuperscript{183} Disabled persons, and in particular those with mental disabilities, are often slow to advertise their existence. The Leonard Cheshire Trust describe it as “one of the most damaging aspects of the judgment reached in \textit{Malcolm}”.\textsuperscript{184}

134. The EHRC have suggested that the inclusion of this knowledge requirement could be balanced by the insertion of an amendment to the effect that “the circumstances in which A shall be taken to be reasonably expected to know about B’s disability include where A has failed to ask B if he has a disability”. The Commission suggests that this would ensure that “those with responsibilities under the Bill take a pro-active approach to ensure that they are aware – or as reasonably aware as they could be – of whether an individual has a disability, and to prevent ‘deliberate ignorance’ being employed to justify discrimination”.\textsuperscript{185}

135. \textbf{We consider 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.

\textbf{Pre-Employment Health Questionnaires}

136. The National AIDS Trust suggests that a prohibition on the use of pre-employment health questionnaires before a job offer has been made would enhance protection against disability discrimination.\textsuperscript{186} At present, evidence exists 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.\textsuperscript{187} Limiting the use of such questionnaires was a key objective of the US Americans With Disabilities Act 1990, which has considerably restricted their use to simply assessing whether an applicant can perform the job in question. However, at present, unless the use of such questionnaires can clearly be linked to less favourable treatment on the grounds of disability, UK discrimination law does little, if anything, to regulate their use.

137. In response to amendments tabled in the PBC, the Solicitor-General indicated that this could generate difficulties for employers when it comes to obtaining information on the need for reasonable accommodation and might also generate new complexities. However, the Government has undertaken to re-consider the matter and table amendments at Report stage in the House of Commons.\textsuperscript{188}

\begin{itemize}
\item \textsuperscript{183} Ev 120, 147 & 154
\item \textsuperscript{184} Ev 147
\item \textsuperscript{185} Ev 132
\item \textsuperscript{186} Ev 160
\item \textsuperscript{188} PBC Deb, 7 July 2009, col 744. Amendment NC10(2), tabled by Lynne Featherstone MP and Dr Evan Harris MP, would require employers to take reasonable steps to ensure that selection for interview is done on an anonymous basis and the person selecting for interview does not know the gender, race, sexual orientation, age or marital status of the applicant, or that the applicant has a disability.
\end{itemize}
138. 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, as is the position in the USA as a result of the Americans with Disabilities Act.\footnote{We are supported in our views by the conclusion of the House of Commons Work and Pensions Committee that “disability related enquiries before a job offer should be permitted only in very limited circumstances”: see Third Report of Session 2008-09, \textit{The Equality Bill: How disability equality fits within a single Equality Act}, HC 158-I, para. 156.} We welcome the Government’s commitment to reconsidering the matter and look forward to scrutinising its amendments.
4. Services and Public Functions

139. The provisions of Part 3 of the Bill prohibit discrimination, harassment and victimisation in the supply of services (which include goods and facilities) and the performance of public functions. In the main, this Part codifies existing anti-discrimination legislation. However, the provisions of the Bill taken as a whole have the effect of extending and harmonising protection against discrimination in the provision of goods and services and in the performance of public functions in several important areas. For example, Clause 28(7) of the Bill taken with Schedule 2 strengthens and clarifies the duty to make reasonable accommodation for disabled persons imposed upon service providers, while Clause 28 taken together with the provisions of Part 2 of the Bill extends protection against age discrimination to the provision of services and the performance of public functions. Part 6 of Schedule 3 of the Bill permits the provision of separate or single-sex services by public and private bodies in certain circumstances, including the provision of religious services, and also permits the provision of services provided generally only for persons sharing a personal characteristic. The Equality Network has expressed concern about the provisions of Schedule 3(25) which provide that transsexual persons can be excluded from separate or single-sex services where this is a proportionate means of achieving a legitimate aim.

140. We welcome the clarification and extension of protection against discrimination in the area of service delivery and the performance of public functions. We also welcome the provisions of the Bill that permit separate or single-sex services in certain carefully delineated circumstances. We consider that separate provision is not incompatible with human rights standards and may indeed be necessary to ensure compliance with these standards in certain circumstances. For example, the provision of separate services for women may be necessary to ensure respect for the human dignity of older persons and victims of domestic violence. However, we also note the importance of the conditions imposed by Part 6 of Schedule 3 as to when such separate service provision will be lawful. These conditions are an important safeguard against abuse of the possibility of separate service provision and in particular the unjustified exclusion of transsexual persons from single-sex services directed at persons who share their acquired gender.

The Definition of Public Authorities

141. Clause 28(6) provides that a person “must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation”. The provision of services by public authorities which do not constitute the performance of public functions as such must also be free from discrimination, harassment and victimisation: a complex case-law exists setting out the distinction between the provision of services by public authorities and the performance of public functions, but as discrimination is now prohibited in both areas, the significance of this distinction is greatly diluted.
142. Clause 30(4) provides that the definition of a public function to be applied in this Part of the Act is the “definition of a public function … which applies for the purposes of the Human Rights Act 1998”. In written evidence, several groups have criticised the use of the HRA definition of “public functions” in the Bill, suggesting that an alternative definition could be used to provide greater clarity as to what constitutes a “public function”.

143. We reiterate our view that the development of the case-law concerning the interpretation of section 6 of the HRA has left real gaps and inadequacies in human rights protection in the UK. The use of the HRA definition in this Bill to define the scope of public functions ensures that these gaps are carried across into the definition of public functions set out in Clause 30(4). These gaps pose less of a problem in the context of anti-discrimination law than they do under the HRA, as protection against discrimination extends to the provision of goods and services and is not confined to the performance of public functions as defined by section 6 of the HRA. However, the Bill once again draws attention to the definitional problems within the HRA. The inadequate section 6 HRA definition may have a limiting effect on the number of bodies subject to the positive equality duty.

Immigration Exceptions

Disability

144. Schedule 3(16) provides that the prohibition on discrimination in the provision of services and in the exercise of public functions does not apply to immigration decisions to refuse entry clearance, or to refuse, cancel or vary leave to enter or remain in the UK, if “necessary for the public good”.

145. Liberty and the National Aids Trust have expressed concern about this exception, on the basis that it appears to give immigration authorities wide-ranging powers to discriminate on the basis of disability in denying entry into the UK or denying leave to remain to persons already on national territory. Both organisations argue that this exception is excessively broad and would permit the exclusion of disabled people simply on the grounds of cost or on the basis of general public health considerations, rather than on the basis of a serious threat to public health or safety. Liberty also suggests that this exception is retrogressive as its scope is much wider than the limited exception to the general prohibition on disability discrimination that exists at present in the DDA. Both Liberty and the National AIDS Trust suggest that the exception should either be removed or be considerably narrowed in scope, by confining its applicability to situations where a threat exists to public health or safety (as distinct from a threat to the “public good”) and
the discriminatory act in question pursued a legitimate aim and could be objectively justified under the standard proportionality test.198

146. The Government says that the exception is “not about allowing the immigration authorities to exclude a person simply because they have a physical or mental impairment” but is “aimed primarily at excluding people who present a risk to public health because they are carrying an infectious disease”.199 In oral evidence, the Solicitor-General also indicated that the Government considers that the exception is necessary to ensure that immigration authorities can give effect to immigration policies with sufficient flexibility to enable them to respond to constantly changing situations.200 In addition, in the PBC, the Solicitor-General suggested that a proportionality test would be applied by the courts in assessing whether an exclusion was justified as necessary “for the public good”, despite the lack of an explicit proportionality requirement on the face of the Bill.201

147. In our Report on the UN Convention on the Rights of Persons with Disabilities, we drew attention to the Government’s proposed reservation on immigration control and recommended that it was unnecessary, inconsistent with the object and purpose of the Convention and appeared not to constitute a valid reservation.202 We consider that the immigration exception as set out in Schedule 3(16) is also inconsistent with the object and purpose of the UN Convention. This exception could permit treatment of disabled persons which could violate their right to equal treatment, as well as potentially threatening other rights such as the right to life protected under Article 2 ECHR and the Article 3 ECHR right to freedom from inhuman and degrading treatment if disabled persons with serious illnesses are denied entry to or leave to remain in the UK and deported back to countries where they may be subject to life-threatening conditions in the absence of a reason to do so under immigration law.

148. Further, the scope of this exception is excessively wide, in particular in how it exempts all acts done “if necessary for the public good”. There is no explicit requirement that any discriminatory acts must be done for a legitimate aim and be objectively justified. The Government’s suggestion that a proportionality requirement will be automatically applied by courts in assessing the legality of acts done under the exception appears to be very optimistic: Schedule 3(16) does not make provision for such a test and not every case involving this exception will result in the application of the proportionality requirements applied under the HRA. We accept that the immigration authorities may legitimately wish to exclude people from entering or remaining in the UK in certain specific and limited circumstances, for example if they have certain highly contagious diseases. However, any such decisions must be necessary to protect public health or public safety, must achieve a legitimate aim and be objectively justified in line with the standard proportionality analysis. Consistent with the Solicitor-General’s indication in the PBC, we recommend that the Government amend the Bill to make this explicit.

198 Ev 159 & 160
199 Ev 67 at Q 21
200 Q 48
201 PBC Deb, 18 June 2009, cols 360-361.
Ethnicity and Nationality

149. Schedule 3(17) provides an exception to the duty not to discriminate in the provision of services or the exercise of a public function on the grounds of a person’s ethnic or national origins or nationality, in relation to the exercise of immigration functions. It replicates section 19D Race Relations Act 1976, which allows a Minister to make a specific authorisation covering a particular case or class of case to which this exception will apply.

150. Liberty have criticised the scope of this exception and the manner in which it permits discrimination on the basis of ethnicity and national origin.\(^{203}\) The Government has justified the retention of this exception on the basis that:

\[
\text{[E]ffective casework management may require prioritising claims by reference to nationality or ethnic origin when, for example, it is known that claims from one particular group are relatively straightforward. The race exception allows the immigration authorities to carry out these policies with sufficient flexibility to enable them to respond to constantly changing situations.}\]

151. At present, no authorisation under the existing exception set out in the Race Relations Act is in place.

152. We do not consider that the Government has established a case for retaining the ethnicity and nationality immigration exception in its current form. Discrimination on the basis of nationality is an unavoidable feature of immigration control. However, the case-law of the European Court of Human Rights, the House of Lords and other courts have established that pressing justification must be shown for the use of distinctions based on race, ethnicity or associated concepts such as national origin.\(^{205}\) The provisions of the UN Convention on the Elimination of Racial Discrimination also require states to take steps to avoid the use of race-based distinctions. In our view, the Government has not established the existence of a pressing justification for the continuation in force of this exception insofar as it extends to distinctions based on ethnicity and national origin. The Government has given few examples where the use of ethnicity or national origin would be justified to deal with a pressing problem.\(^{206}\) Given the range of immigration powers available and the ability of the Government to authorise the use of distinctions based on nationality, we consider that there is insufficient justification for including an exception that permits discrimination based on ethnicity and national origins in the Bill.

Religion and Immigration

153. Schedule 3(18) provides that the prohibition on discrimination on the grounds of religion or belief in the provision of services and in the exercise of a public function does not apply to immigration decisions to refuse entry clearance or to refuse or cancel leave to

\(^{203}\) Ev 159
\(^{204}\) Ev 67 at Q 21
\(^{205}\) See e.g. D.H. v Czech Republic (App. No. 57325/00, 13 November 2007); R v Secretary of State for the Home Department, ex p. Carson [2005] UKHL 37 per Lord Hoffmann.
\(^{206}\) Some examples were given as to where the use of such distinctions might be necessary in the course of the debates on the provisions of the Race Relations (Amendment) Act 2000: see for example the views expressed by Lord Bassam of Brighton on behalf of the Government, HL Deb., 11 January 2000, cols 580-587.
enter or remain in the UK, if the person’s exclusion is conducive to the public good or to vary such leave if it is undesirable to permit the person to remain in the UK. This means that a person can be refused entry or expelled from the UK on the basis of their religion or belief if to do so is conducive to the public good.

154. Liberty questions whether this provision is necessary as the Government may currently exclude people from the UK on the grounds that their presence is not conducive to the public good, for example because their views will stir up hatred which might lead to inter-community violence.\(^{207}\) In such cases the reason for exclusion is not a person’s religion or belief \textit{per se} but the violence which might result from its expression. In contrast, the exception contained in Schedule 3(18) would permit the Home Office to exclude people from the UK \textit{purely} on the grounds of their religion or belief.

155. The Government considers that the exception is necessary:

\begin{quote}
\ldots to ensure a proper balance is achieved between the rights of individuals not to be discriminated against and the wider interests of the community such as public safety and national security. This exception would therefore ensure that immigration authorities excluding so-called “preachers of hate” where to do so is conducive to the public good could not be challenged for discrimination because of religion or belief.\(^{208}\)
\end{quote}

156. We have previously recognised the basis for the religion and immigration exception. However, we have emphasised that the exception should not affect the duty of public authorities exercising immigration functions to comply with the duty of non-discrimination under Article 14 ECHR, where these functions engage the right to manifest religion under Article 9 ECHR, or rights to respect for private or family life under Article 8 ECHR.\(^{209}\) We also consider that the wide scope of the existing power to exclude persons whose presence in the UK would not be conducive to the public good means that the exception set out in Schedule 3(18) is unnecessary. The case-law of the European Court of Human Rights, the House of Lords and other courts have established that strong justification must be shown for the use of distinctions based on religion or belief.\(^{210}\) Applying this approach to the Bill, the wide scope of the existing power to exclude persons on the basis of the public good appears to make the inclusion of an exception permitting exclusion solely on the grounds of possession of a religion or belief unnecessary and undesirable. This provision should be removed.

\textit{Insurance Exception}

157. Paragraph 20 of Part 5 of Schedule 3 provides an exception from the prohibition of discrimination against disabled people in the provision of services connected with insurance business, where the decision in question is based on relevant and reliable information. This enables insurance providers to offer differential premiums and benefits to disabled people in circumstances where these conditions are satisfied. This re-enacts

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\(^{207}\) Ev 159
\(^{208}\) Ev 67 at Q 21
\(^{210}\) See e.g. \textit{D.H. v Czech Republic} (App. No. 57325/00, 13 November 2007; \textit{R v Secretary of State for the Home Department, ex p. Carson} [2005] UKHL 37 per Lord Hoffmann.
existing legislation. Paragraph 21 of Part 5 of Schedule 3 also provides for exceptions which allow insurers in certain circumstances and in respect of certain types of insurance product to calculate different premiums and benefits for men and women, or on the basis of factors linked to pregnancy and maternity, or on the basis of gender reassignment, when these premiums and benefits are based upon reasonable actuarial data. These provisions re-enact existing legislation. Paragraph 22 provides for another exception to the effect that insurers will not be considered to have discriminated in relation to any of the protected characteristics listed in paragraph 22(2) if they continue to apply terms of insurance policies which were entered into by the parties concerned before the date on which this paragraph comes into force. Where pre-existing policies are renewed, or have their terms reviewed, on or after the date this paragraph comes into force, this exception will no longer apply. The Explanatory Notes explain that this exception will ensure that existing insurance policies will continue to have “continuing protection for their pricing structure and other aspects of insurance policy which may not meet subsequently altered discrimination law”.211

158. We welcome the protection offered by Part 5 of Schedule 3 against discrimination in the provision of insurance services. We consider that the distinction in Schedule 3(21) between the characteristics of sex, pregnancy and maternity and gender reassignment, where the use of reasonable actuarial data is permitted to justify direct discrimination in certain circumstances, and other protected characteristics, where the use of such data cannot justify direct discrimination, is justifiable on the basis that it reflects a genuine social need for gender-aggregated data to be available to insurance providers.

159. However, we are concerned that the exception set out in Schedule 3(22) in respect of existing insurance policies appears to permit ongoing discrimination on the basis of protected characteristics. No equivalent provision appears to exist in current anti-discrimination legislation, which raises concerns that the principle of non-regression has not been respected. The rationale behind the width of this exception also appears to be unclear, as little or no justification has been offered by the Government as to why such a wide exception is considered to be necessary for existing insurance policies. As a consequence, we consider that the scope of this exception as currently framed raises serious concerns.

211 EN, para. 682.
5. Premises

160. Part 4 prohibits discrimination, harassment and victimisation in relation to the disposal, management and occupation of premises. Certain exceptions exist to this general prohibition. Clause 31 provides that discrimination on the basis of marriage/partnership and age in this area is not prohibited. We have received little written evidence on the exclusion of protection against age discrimination in this context. The absence of protection against discrimination on the grounds of marriage/partnership outside the areas of employment and occupation is discussed above, as is the absence of protection against harassment related to religion or belief or sexual orientation in the disposal, management and occupation of premises.212

161. Schedule 5 makes provision for additional exceptions in relation to premises. This includes an exception for premises which are 'privately sold', except for race discrimination in the disposal of such properties, which is prohibited.213 Another exception exists for permission to dispose of premises privately, where discrimination on the basis of religion or belief or sexual orientation is permitted.214 A “small premises” exception also exists, with race discrimination again prohibited in this context.215 We consider that these exceptions strike an appropriate balance between protecting the right to equality and the rights to privacy and freedom of association.

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212 See paragraphs 61-68 & 106-118 above.
213 Schedule 5(1).
214 Schedule 5(1)(4).
215 Schedule 5(3).
6. Work

162. Part 5 prohibits discrimination, harassment and victimisation in the field of employment, occupation and appointment to public bodies. This Part predominantly re-enacts existing law, harmonising and clarifying the legislation where appropriate. Clause 37 extends the provisions of existing law in respect of sex discrimination and makes an employer liable for harassment of its employees by third parties, such as customers or clients, over whom the employer does not have direct control. Liability in relation to third party harassment will however only arise when (i) harassment has occurred on at least two occasions, (ii) the employer is aware that it has taken place, and (iii) the employer has not taken reasonable steps to prevent it from happening again.216

Occupational Requirements

163. Schedule 9 re-enacts and clarifies existing legislation which sets out exceptions to the prohibition on direct discrimination. In particular, it defines when an employer may impose “genuine occupational requirements” in respect of specific posts (i.e. requirements that an employee possess or not possess a particular protected characteristic), which are required to be genuine and a proportionate method of achieving a legitimate aim. The exceptions set out in Schedule 9 are for the most part well-established in existing law and the Bill simply clarifies and harmonises their scope. However, important human rights issues nevertheless arise in respect of several of these exceptions.

Employment by Organisations Based Upon Religion or Belief

164. Where employment is “for the purposes of an organised religion”, Schedule 9(2) allows an employer to apply a requirement to be of a particular sex, not to be a transsexual person or to make a requirement related to the employee's marriage, civil partnership or sexual orientation, but only if appointing a person who meets the requirement in question is a proportionate way of complying with the doctrines of the religion; or, because of the nature or context of the employment, employing a person who does not meet the requirement would conflict with the religious beliefs of a significant number of the religion's followers. This requirement must again be genuine, and constitute a proportionate way of complying with the doctrines of the religion or of avoiding conflict with beliefs. In addition, employment can only be classified as for the purposes of an organised religion if the employment wholly or mainly involves promoting or explaining the doctrines of the religion or leading or assisting in the observation of religious practices or ceremonies. This enables for example the Catholic Church to require that its priests be men.

165. In the PBC, the Solicitor-General indicated that Schedule 9(2) re-enacted the existing legislative position and that there is no narrowing in the definition of the circumstances when this genuine occupational requirement may be imposed.217 However, an express

216  See paragraph 100 above.
217  PBC Deb, 23 June 2009, cols 453-454.
proportionality requirement is inserted into the text of this exception, reflecting the approach adopted in Amicus v Secretary of State for Trade and Industry.  

166. Schedule 9(2)(8) for the first time inserts a definition of when employment is “for the purposes of an organised religion”, namely when employment “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)”. In their evidence to the PBC, the Catholic Bishops’ Conference of England and Wales expressed strong concern that this would unduly narrow the scope of this exception and limit the “essential” ability of the Church in filling posts with a pastoral role “to prefer a candidate whose life is in accordance with its ethos”.

167. A wider exception is set out in Schedule 9(3), which again re-enacts existing legislation in permitting an employer with an ethos based on religion or belief to discriminate in relation to work by applying a requirement to be of a particular religion or belief, but only if, having regard to that ethos, being of that religion or belief is a genuine requirement for the work and applying the requirement is proportionate so as to achieve a legitimate aim.

168. In written evidence, the Government set out the justification for the inclusion of this occupational requirement exception:

> Paragraph 3 of Schedule 9 sets out an occupational requirement test which covers organisations with an ethos based on religion or belief: for example, an organisation run by a religious group, such as a hospice. This provides an additional exception that organisations with a religious ethos may rely on. The reason for this additional exception is that it recognises that religious organisations need to be able to preserve their religious ethos, and that is why it covers only the religion or belief strand. This exception is derived from Article 4.2 of the Equal Treatment Directive [2000/78/EC], which allows a difference of treatment with regard to employment based on a person’s religion or belief in certain limited circumstances having regard to the employer’s ethos. However, this exception does not apply in relation to other protected characteristics such as sexual orientation. Similarly Paragraph 3 covers only religion or belief and not the other grounds, including sexual orientation.

169. However, this is a limited reading of the Directive which states that a difference of treatment on the grounds of religion or belief is only justified 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”.

170. We asked the Government whether this genuine occupational requirement exception could permit employers in certain circumstances to require employees to adhere to religious doctrine in their lifestyles and personal relationships. The Government replied:

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218 [2004] EWHC 860 (Admin), Richards J.
219 PBC, Memorandum submitted by the Catholic Bishops’ Conference of England and Wales (E14).
220 Ev 67 at Q 38
221 Our emphasis.
It is very difficult to see how in practice beliefs in lifestyles or personal relationships could constitute a religious belief which is a requirement for a job, other than for ministers of religion (and this is covered in paragraph 2 of Schedule 9). It is perhaps worth noting, however, that if an employee has been employed on the basis of an occupational requirement to be of a particular religion or belief and the employee can no longer be considered to be of that religion or belief e.g. an employee who has lost faith, then the employer would be able to terminate employment as the employee would no longer meet the occupational requirement.222

171. The Church of England has suggested that it is “both logical and necessary” that it should be possible to impose a requirement that a holder of a post that comes within the scope of Schedule 9(3) “should not engage in conduct contrary to the tenets” of the religion in question.223 However, the Church considered that the text of Schedule 9(3) as currently formulated was not “apt” to cover such a requirement as to personal conduct. However, it remains uncertain as to whether a requirement to manifest one’s religious belief by avoiding certain forms of behaviour such as homosexual acts can come within the scope of this exception.

172. The Government in the PBC agreed with the proposition that discrimination against an employee on the basis of their sexual orientation was just that and would have to be justified in those terms and not as a proxy for adherence to religious belief under a religious exemption.224 The Government also agreed with the opinion expressed by the judge in the Amicus case that sexual orientation includes manifestations of sexual orientation.225

173. A second set of issues in respect of this exception is raised by the British Humanist Association (BHA). The BHA supports the clarification of the scope of the two exceptions set out in Schedule 9(2) and 9(3), and in particular welcomes the explicit requirement contained in the text of the Bill that these occupational requirements must only be imposed in circumstances where they are a proportionate means of achieving a legitimate aim. However, the BHA expresses concern about the extent to which certain organisations reserve posts for those who can satisfy “religious ethos” requirements. The BHA also argues that an organisation based on religion or belief should not be able to impose “religious ethos” requirements as defined in Schedule 9(3) in respect of posts which relate to activities which the organisation is performing a) on behalf of a public authority, and b) under the terms of a contract between the organisation and the public authority.226

174. We welcome the clarification in Schedule 9(2) and 9(3) of the circumstances in which occupational requirements linked to a religious belief or ethos can be imposed by faith-based organisations and organised religious groups. We accept that some limitations on non-discrimination on grounds of religion or belief may be justified and appropriate in relation to religious organisations and that the exemption in Schedule 9(2) fulfils that role. We also consider that in general the provisions of Schedule 9(2) and 9(3) strike the correct balance between the right to equality and non-discrimination and the rights to freedom of religion or belief and association, especially

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222 Ev 67 at Q 37
223 Ev 180, para. 31
224 PBC Deb, 16 June 2009, cols 230-231
225 PBC Deb, 16 June 2009, col 239
226 Ev 99
if interpreted in line with the approach set out in *Amicus v Secretary of State for Trade and Industry*, which emphasised the need for such exceptions to the general prohibition on direct discrimination to be “construed strictly” on the basis that they are “a derogation from the principle of equal treatment”.

175. We consider that substantial grounds exist for doubting whether the “religious ethos” exception provided for in Schedule 9(3) permits organisations with a religious ethos to impose wide-ranging requirements on employees to adhere to religious doctrine in their lifestyles and personal relationships, by for example requiring employees to manifest their religious beliefs by refraining from homosexual acts. We agree with the Government that it is “very difficult to see how in practice beliefs in lifestyles or personal relationships could constitute a religious belief which is a requirement for a job, other than ministers of religion” (which is covered by a different exception). This should put beyond doubt the position that the exemption in Schedule 9(3) cannot be used to discriminate on the basis of sexual conduct linked to sexual orientation. We support this view and recommend that this be made clear in the Bill.

176. We are concerned about the status of employees of organisations delivering public services who find themselves as employees of organisations with a religious ethos who have been contracted to provide the public service. They have a right not to be subjected to religious discrimination on the basis of the ethos of the contracting organisation if they are otherwise performing their job satisfactorily. We are concerned that the widespread use of the “religious ethos” exception set out in Schedule 9(3) by organisations based on a particular religion or belief who are contracted to deliver services on behalf of public authorities could result in public functions being discharged by organisations in receipt of public funds who are nevertheless perceived to discriminate on the basis of religion or belief.

**Armed Forces Exemption**

177. Schedule 9(4) allows women and transsexual persons to be excluded from service in the armed forces if this is a proportionate way to ensure the combat effectiveness of the armed forces. It also exempts the armed forces from the work provisions of the Bill relating to disability and age. This re-enacts existing legislation, while narrowing the scope of the existing combat effectiveness exception.

178. The non-applicability of protection against disability discrimination represents perhaps the most significant human rights issue here. In our Report on the reservations and declarations to the UN Convention on the Rights of Persons with Disabilities, we noted the Government’s proposed reservation in respect of service in the armed forces. The UK’s reservation provides:

> The United Kingdom ratification is without prejudice to provisions in Community law that Member States may provide that the principle of equal treatment in employment and occupation, in so far as it relates to discrimination on the grounds of disability, shall not apply to the armed forces. The United Kingdom accepts the provisions of the Convention, subject to the understanding that its obligations

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relating to employment and occupation, shall not apply to the admission into or
service in any of the naval, military or air forces of the Crown.

179. We concluded that the Government should consider removing the existing exemption for service in the armed forces from the DDA in the Equality Bill and stressed that evidence should be provided to support any justification provided by the Ministry of Defence that the existing exemption is necessary. We stated that we had seen no evidence to support the Government’s position that this exemption is justified and appropriate, other than the desire expressed by the Ministry of Defence to retain control over the assessment of fitness for service. We concluded:

In our view, the existing exemption is inconsistent with the requirements of the Convention and would be subject to challenge without a reservation. We reiterate our recommendation that the existing exemption should be reconsidered in the Equality Bill.

… Given the breadth of the proposed reservation in respect of service in the armed forces … we consider that it is open to challenge as being incompatible with the object and purpose of the Convention.

… If the Government decides to lodge a reservation in the terms it proposes, or any alternative based on the principle of combat effectiveness, we recommend that the Government should commit to keep the reservation under review and undertake to reconsider the necessity for the reservation within 6 months of Royal Assent being granted in respect of the forthcoming Equality Bill.228

180. On 13 May 2009, the Minister Jonathan Shaw MP, announced that the Government proposed to ratify the Convention on 8 June 2009, with the substance of the reservation remaining the same.229 The provisions of Schedule 9(4) re-enact the exemption of the armed forces from legislative protection against disability discrimination.

181. In its written evidence, the Government has justified this exemption as follows:

The Armed Forces are called on to perform a wide range of different tasks and great damage would be done if the base requirement for physical fitness was abandoned. Personnel have to meet fitness standards to ensure that they have the fitness attributes to cope with the physical demands of service in the Armed Forces such as prolonged working, stressful situations and arduous environments and that they do not become a liability or danger to others in an operational environment.230

182. We reiterate that the exemption of the armed forces from the scope of the disability provisions of the Bill is unnecessary and incompatible with the UN Convention on the Rights of Persons with Disabilities. It also may give rise to issues of incompatibility with the ECHR, in particular with the Article 8 ECHR right to respect for private life combined with the Article 14 ECHR right to equality and non-discrimination. We repeat our recommendation that the Government should at least

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229 13 May 2009, col 58WS.
230 Ev 67 at Q 39
reconsider the necessity for the reservation within 6 months of Royal Assent being signified to the Equality Bill.

**Default Retirement Age**

183. Schedule 9(8) to 9(16) re-enact existing provisions which set out certain circumstances when particular forms of age discrimination will be deemed to be objectively justifiable. In particular, Schedule 9(8) and 9(9) allow employers to dismiss on the grounds of retirement employees at the age of 65 or over without this being regarded as age discrimination and/or unfair dismissal. This permits employers to impose a “default retirement age” of 65 or above without having to demonstrate that this is proportionate and necessary to achieve a legitimate aim, as originally provided for in the Employment Equality (Age) Regulations 2006.

184. The Confederation of British Industry (CBI) has consistently expressed support for the default retirement age as necessary to enable businesses to conduct effective workforce planning.\(^{231}\) In contrast, Age Concern, Help the Aged, the EHRC and other groups have criticised the default retirement age provisions as an unnecessary and unjustified derogation from the principle of age equality.\(^{232}\) These provisions were the subject of an unsuccessful judicial review in the recent case of *R (Age UK) v Secretary of State for Business, Innovation and Skills*,\(^{233}\) which applied the approach adopted by the European Court of Justice in *R (Age Concern) v Secretary of State for Trade and Industry*\(^{234}\) that national legislation permitting default retirement ages can be lawful under European law but must be shown to be objectively justified. A review of the default retirement age provisions was initially scheduled for 2011: however, the Government recently announced in its strategy document *Building a Society for all Ages*\(^{235}\) that it will bring forward the review to 2010. In his judgment in the *Age UK* case, Blake J. expressed serious doubts as to whether the retention of 65 as a default retirement age would continue to be justifiable in the future and suggested that the outcome of the case “might have been different if the Government had not announced its timely review”.\(^{236}\)

185. In our view, there are strong arguments to suggest that the current statutory provisions governing the default retirement age unduly restrict the rights of older workers to equal treatment and non-discrimination. We recognise that employers have a legitimate interest in workforce planning. However, alternative methods of workforce planning exist that avoid the age discrimination inherent in the operation of a default retirement age, such as the use of performance management techniques and clear job evaluation and assessment mechanisms. The default retirement age can close off opportunities for individual self-realisation and is often perceived by those affected as a denial of their right to equality which is based on age stereotyping. We welcome the decision of the Government to bring forward its review of the mandatory retirement

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231 For a detailed statement of the CBI’s concerns about the potential consequences of employers no longer being able to fix normal retirement ages, see the *CBI Response to Equality and Diversity: Age Matters*, October 2003, paras. 8-32.

232 See e.g. EHRC, Submission to the Equality Bill Committee (E18), para. 24.


234 Case C-388/07, [2009] IRLR 373.

235 *Building a Society for All Ages*, Cm 7655, July 2009.

age provisions to 2010 and support the abolition of the default retirement age in its current form. We strongly urge the Government to complete its further consultative process with sufficient speed to enable the default age of retirement at 65 to be removed during the lifetime of this Parliament.

Equal Pay

186. Chapter 3 of Part 5 essentially re-enacts and clarifies the existing provisions of discrimination law which provide for equal pay as between men and women. Despite widely-expressed concerns about the complexity, adequacy and effectiveness of the existing equal pay legislation, this legislation introduces very few substantial reforms in this area. For example, it 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.

187. In a potentially significant extension of protection, Clause 68 makes it possible for claimants who are paid less because of their sex to bring a claim for direct discrimination. This also appears for the first time to permit hypothetical comparators to be used to establish the existence of direct sex discrimination in the area of pay. Michael Rubenstein has argued, this could make it easier to found a claim of discriminatory undervaluation of pay or work, which may represent a “major breakthrough in equal pay law”. However, hypothetical comparators cannot be used to establish equal pay claims that do not involve claims of direct sex discrimination: the definition of “colleagues” in Clause 76, which establishes the relevant comparators for equal pay claims which do not involve direct discrimination, do not permit their use. The EHRC has called for the use of hypothetical comparators to also be permitted in indirect discrimination claims.

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”.

189. We welcome the clarification of equal pay law and the provisions of Clause 68, which for the first time make it possible to bring a claim for direct sex discrimination when a person is paid less because of their sex. However, in general, we consider that the equal pay provisions of the Bill represent a wasted opportunity to enhance

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237 Previously, claimants in this position could only bring a claim under the more restrictive equal pay legislation.
238 Equal Opportunities Review 190, July 2009, p. 34.
239 EHRC, Submission to the Equality Bill Committee (E18), para. 29.
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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 the CEDAW Committee as necessary to eliminate patterns of occupational segregation and to close the pay gap between men and women.

191. Some changes to existing legislation introduced by the Bill are intended to ensure greater transparency about pay. Clause 74 protects people who discuss their pay with colleagues or former colleagues with a view to finding out if differences exist that are related to a protected characteristic, by providing that any action taken against them by the employer as a result of doing so will be treated as victimisation. In addition, terms of employment or appointment that prevent or restrict people from disclosing their pay to their colleagues are made unenforceable to the extent that they would prevent or restrict such a discussion.

192. We welcome the protection provided by Clause 74 of the Bill against victimisation of employees who discuss their pay with colleagues with a view to finding out if differences exist that are related to a protected characteristic. This should help ensure greater transparency about pay and protect employees who choose to investigate whether they are discriminated against in their work remuneration. However, this protection is confined to discussions with colleagues and former colleagues, and does not appear to extend to cover discussions with trade union officials who are not work colleagues, journalists or others whom an employee might wish to approach to discuss issues of pay equality. We consider that in the interests both of securing greater transparency about pay and to protect freedom of expression, the protection provided by Clause 74 should be extended to all discussions about pay that are directed towards finding out whether differences exist that are related to a protected characteristic. Amendment NC17, tabled by Lynne Featherstone MP and Dr Evan Harris MP, extends protection against victimisation for discussions about equal pay with third parties. We consider that this amendment deserves serious consideration.

193. Clause 75 enables a Minister of the Crown to make Regulations requiring private sector employers with at least 250 employees in Great Britain to publish information about the differences in pay between their male and female employees. The Regulations may specify, among other things, the form and timing of the publication (which must be no more frequently than annually), as well as penalties for non-compliance. Employers who do not comply with the publication requirements could face civil enforcement procedures or be liable for a criminal offence, punishable by a fine of up to £5,000. The Explanatory
Notes state that the Government does not intend to make Regulations under this power before April 2013.\(^\text{241}\)

194. **We welcome Clause 75, which enables Ministers to require employers with large workforces to publish information on gender pay gaps that may exist. This is 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.** For Clause 75 to be effective, it should require the Minister to make regulations about mandatory pay audits. 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.**

195. Amendment NC3, tabled by Lynne Featherstone MP, Dr Evan Harris MP and John McDonnell MP for Report Stage, makes provision for the Secretary of State to make regulations requiring employers with a workforce of more than 100 employees to conduct a pay audit and to publish information relating to the pay of its employees for the purpose of showing whether there are differences in the pay of male and female employees. The amendment also makes provision for the Secretary of State to adopt international best practice as set out by the International Labour Organisation (ILO) and to consult with the EHRC in framing these regulations. Amendment NC5, tabled by Lynne Featherstone MP and Dr Evan Harris MP for Report Stage, makes provision for hypothetical comparisons to be made in equal pay cases. **We consider that both amendments deserve serious consideration.**

196. Clause 66 clarifies the defence of “material factor” that employers can avail themselves of under existing anti-discrimination law. This defence applies where two colleagues of the opposite sex perform work of equal value but receive different rates of remuneration. An employer can escape liability if they can show that “the difference in terms is due to a material factor which is relevant and significant and not simply because one is male and the other female”.\(^\text{242}\) The Explanatory Notes explain that if there is evidence that the “factor that explains the difference in terms is indirectly discriminatory on grounds of sex, then the employer must show that this factor is applied as a proportionate means of meeting a legitimate aim”.\(^\text{243}\) Clause 66(3) specifies that the “long-term objective of reducing inequality between men and women’s terms of work is always to be regarded as a legitimate aim”, a provision inserted in response to recent case-law controversies about the discriminatory impact of pay agreements designed to establish a gradual transition to equal pay conditions.

\(^{241}\) EN, para. 263.

\(^{242}\) EN, para. 225.

\(^{243}\) EN, para. 226.
197. The Explanatory Notes set out the scope of this important defence as it is widely understood to have been developed in the relevant case-law. However, the statutory wording of Clause 66(1)(a) appears to suggest that an employer will not have to show that the application of the factor in question was objectively justified even if there is evidence that it is causing disadvantage to women as a group if it can be shown that the difference in treatment is not based on a “difference of sex”, a phrase which appears to be understood as only covering direct sex discrimination. This is the interpretation of the defence adopted by the Court of Appeal in Armstrong v Newcastle upon Tyne NHS Hospitals Trust. However, the interpretation has been criticised by some discrimination law experts as incompatible with the decision of the European Court of Justice in Enderby v Frenchay Health Board Authority and as weakening protection against discrimination in pay. Michael Rubenstein, for example, argues that the better view of the defence is that an employer can escape liability for unequal pay for equal work only a) if it can be shown that no direct discrimination is involved and b) any disparate adverse impact can be shown to be objectively justified in line with the standard proportionality test: in contrast, the test set out in Clause 66(1)(a) appears to suggest that an employer can escape liability if either of these tests are satisfied.

198. In response to an amendment seeking to clarify this issue in the PBC, the Solicitor-General suggested that there was little difference between the two interpretations. In contrast, Michael Rubenstein suggests that the difference is potentially of considerable significance, given that the “great majority of current equal pay claims are based on indirectly discriminatory aspects of the pay system”, including many claims that arise as a result of occupational segregation such as Enderby v Frenchay Health Board Authority itself.

199. We welcome the clarification of the “material factor” defence in Clause 66 and the provision 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”. However, we consider that further clarification of the scope of this defence is necessary. In particular, we consider that Clause 66 should be amended to make clear that the phrase “difference of sex” includes both direct discrimination and indirect discrimination which is not objectively justified. In addition, Clause 66 should be amended to clarify that 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. This will ensure that UK law complies with the case-law of the ECJ in this area and remains capable of addressing equal pay claims that arise out of patterns of occupational segregation. Amendment NC6, tabled by Lynne Featherstone MP and Dr Evan Harris MP

244 EN, paras 225-230.
246 Case C-127/92, [1993] IRLR 591 ECJ.
249 PBC Deb, 23 June 2009, cols 394-5.
for Report Stage, would clarify the scope of the defence of material factor to this effect. We consider that this amendment deserves serious consideration.

200. Concerns also exist that Clause 61 of the Bill fails to reflect existing equal pay law by using the term “colleague” to describe persons with whom an equal pay comparison may be made. Case-law such as the decision of the ECJ in *Macarthy's Limited v Smith*\(^{251}\) makes it clear that comparisons may also be made with persons who previously held the claimant’s post and that a comparison may be made with persons who are contemporaneously employed by the same employer as the claimant. We consider that Clause 61 should be clarified to make it explicit on the face of the Bill that equal pay comparisons can be made with persons who are not contemporaneously employed by the same employer as the claimant.

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7. Education

201. Part 6 of the Bill makes it unlawful for education bodies to discriminate against, harass or victimise a school pupil or student or applicant for a place, subject to a number of exceptions which we consider in this Chapter. Much of this Part is designed to replicate the effect of provisions in current legislation. However, in a number of previous reports we have raised questions about the human rights compatibility of some of the existing provisions being replicated in this part of the Bill, including in our ongoing work on Schools and Religion, in which we have considered the Equality Act Guidance for Schools on Discrimination on Grounds of Religion or Belief, school admissions, the curriculum, collective worship, school transport and school uniform.

202. In July 2008, we issued a call for further evidence on the issues we had been considering in this area of our work, including from faith schools or faith organisations. Five further submissions were received, from the Christian Schools’ Trust, Christian Education Europe, the United Synagogue Agency for Jewish Education, the Catholic Education Service for England and Wales, and the Archbishops’ Council Board of Education and the National Society. Evidence was also sought from Muslim and Hindu organisations, but none was received.

The Scope of Protection

203. The Bill prohibits discrimination, harassment and victimisation in the field of education in schools. It makes it unlawful for the responsible body of a school to discriminate against, harass or victimise a pupil or prospective pupil in relation to the terms on which it offers him or her admission, by not admitting him or her, or in the way it treats the pupil once admitted. We welcome the extension of the scope of protection from discrimination to transsexual pupils.

204. However, the protection against discrimination, harassment or victimisation in education in schools does not apply to those discriminated against, harassed or victimised on grounds of age, marriage and civil partnership, or pregnancy and maternity. We asked the Government why it is justifiable to exclude discrimination on these grounds from the scope of the Bill’s protections in the field of education in schools.

205. The Minister replied that it would be both inappropriate and unnecessary to extend the marriage and civil partnership discrimination provisions to education, but provided no further justification in support of this assertion. As far as the pregnancy and maternity discrimination provisions are concerned, the Government considers that the current system – where schools are encouraged to work with any pupils who become pregnant,
and those pupils are encouraged to seek help and support inside and outside school, including to help them get back into education – is the best way of ensuring that very young mothers and their children receive the best support. The Explanatory Notes to the Bill similarly state that the non-applicability of the pregnancy and maternity provisions means that it is not unlawful discrimination for a school to organise a different timetable for a pupil who has a baby, to help her fit her education with her parenting responsibilities.261

206. In the PBC, the Minister mainly relied on the fact that there is an absolute bar on pregnancy being a ground for exclusion.262 The exclusion of pregnancy or maternity from the scope of Part 6 of the Bill, however, means that it would not be unlawful for a school to refuse to admit a girl pupil who was pregnant or already had a baby. The Minister said that this would be facilitated by reintegration officers and referred to there being “plenty of law that covers this matter, as well as policies and guidance”, without specifying any. In the absence of a more detailed justification from the Government, we cannot be so sanguine about the possible dangers involved in excluding from the scope of the Bill’s protection such a vulnerable group as those school-age children who are pregnant or already have children. In view of the relatively high rate of teenage pregnancies in the UK, we are not persuaded that it is justifiable to exclude discrimination on grounds of pregnancy and maternity from the scope of the Bill’s protections in the field of education in schools.

207. A further limitation on the scope of the Bill’s protection against discrimination in schools is the exemption of harassment relating to gender reassignment, religion or belief and sexual orientation.263 We asked the Government for its justification for not including in the Bill protection against harassment in schools relating to those three protected characteristics, and it replied that it does not consider that a real need for such protection has been demonstrated in education.264 In relation to harassment relating to religion or belief, the Government has two main concerns: first, that schools might find it difficult to operate effectively in the interests of all their children if claims could be made by people of certain faiths that the mere existence of certain practices, such as sex education, co-educational classes or the use of IT constitutes a hostile or offensive environment; and, second, that academic freedom and freedom of expression and debate could be undermined by such claims. In relation to sexual orientation and gender reassignment, the Government considers that the evidence suggests that bullying and harassment in relation to these characteristics comes from pupils rather than teachers and that any behaviour by school staff amounting to harassment on those grounds would be caught by the provisions prohibiting discrimination by schools against pupils.

208. We remain of the view we expressed in our Report on the Sexual Orientation Regulations: that while harassment on grounds of religion or belief raises concerns about the impact on freedom of speech, including academic freedom, for the reasons the Government gives, we consider sexual orientation to be different, because, like race and sex and unlike religion or belief, it is an inherent characteristic. We believe that the same applies to gender reassignment, which is really concerned with protecting gender identity.

261 EN, para. 280.
262 PBC Deb, 23 June 2009, cols 466-7.
263 Clause 82(10).
264 Ev 63; Ev 81 at Q 44
We therefore consider that harassment on grounds of sexual orientation and gender reassignment should be included in the forms of discrimination prohibited by the Bill in education in schools, albeit with a narrower definition of harassment as explained earlier in this Report.\textsuperscript{265}

**School Admissions**

209. The Bill makes it unlawful for the responsible body of a school to discriminate against a person in its admission arrangements, in the terms on which it offers to admit the person as a pupil, or by not admitting them.\textsuperscript{266} However, the Bill also provides for some exceptions to the prohibition on discrimination on grounds of religion or belief, allowing schools which have a religious character or ethos (“faith schools”) to discriminate on grounds of religion or belief in relation to admissions.\textsuperscript{267} The Bill also provides an exception from the prohibition on religious or belief-related discrimination in the provision of services\textsuperscript{268} in relation to anything done in connection with admission to a school which has a religious ethos.\textsuperscript{269} These exceptions mean that a faith school may have admissions criteria which give preference to members of its own religion when it is oversubscribed. A Church of England school with more applicants than places, for example, can give priority to Church of England pupils when choosing between applicants for admission.

210. This exception to the prohibition on discrimination on grounds of religion or belief is designed to replicate the effect of existing provisions in Part 2 of the Equality Act 2006.\textsuperscript{270} We have been considering for some time the difficult question of whether the provisions of the Equality Act 2006 and the School Admissions Code which permit schools to prefer one applicant for admission over another on grounds of their religion are compatible with the right not to be discriminated against in the enjoyment of the right of access to education (Article 14 ECHR in conjunction with Article 2 of Protocol 1).

211. In our view, the law’s permission for publicly funded maintained schools to use faith-based admissions criteria amounts to differential treatment on grounds of religion in the sphere of education, which requires an objective and reasonable justification in order to be lawful under the Human Rights Act.\textsuperscript{271} The question we have been considering is whether we are satisfied that the Government has shown such a justification to exist and to this end we have corresponded with the Secretary of State a number of times\textsuperscript{272} and also sought evidence from faith schools themselves and other interested organisations.

212. This is an issue on which there is, to the best of our knowledge, no directly relevant case-law of the European Court of Human Rights. There is a decision of the Privy Council

\begin{itemize}
\item[265] See paragraphs 109-118 above.
\item[266] Clause 82(1).
\item[267] Schedule 11, para. 5, disapplying Clause 82(1), so far as it relates to religion or belief, in relation to schools with a religious character or ethos.
\item[268] Clause 28.
\item[269] Schedule 3, para. 11(b).
\item[270] EN, para. 825.
\item[271] Article 14 ECHR in conjunction with Article 2 of Protocol 1.
\item[272] See e.g. Letter from Chair to the Secretary of State, 29 July 2007; Letter from the Secretary of State, 5 August 2007.
\end{itemize}
in a case from Mauritius, in which the Privy Council held that the admissions policy of the publicly funded “Catholic colleges” of Mauritius, which was to ensure that 50% of their intake every year was always Roman Catholic, was in breach of the provision of the Constitution of Mauritius guaranteeing protection from discrimination. There is, also, one relevant decision of the UK courts, the JFS case, in which judgment is pending from the Supreme Court. In the JFS case, the Court of Appeal held that the admissions policy of the JFS, a maintained Jewish school in London, was unlawful because the requirement that to qualify for admission a pupil’s mother must be Jewish, whether by descent or by conversion, is a test of ethnicity which contravenes the Race Relations Act 1976. One of the issues in that appeal is whether the decision of the Court of Appeal results in discrimination against Jews compared to other groups, contrary to Article 14 ECHR in conjunction with Article 2 Protocol 1 and Article 9 ECHR, because it prevents them from giving preference in admissions to those they regard as members of their faith while the religious schools of other faiths can. In view of that pending appeal, it would not be appropriate for us in this Report to comment on the issues which arise for decision in that case. We may return to this matter in the light of that judgment.

Curriculum

213. The Bill provides that the responsible body of a school must not discriminate against a pupil in the way it provides education for the pupil. However, it also provides that none of the prohibitions apply to anything done in connection with the content of the curriculum. According to the Explanatory Notes, “this ensures that the Bill does not inhibit the ability of schools to include a full range of issues, ideas and materials in their syllabus and to expose pupils to thoughts and ideas of all kinds”. The Bill also provides an exemption from the prohibition on religious or belief-related discrimination in the provision of services in relation to anything done in connection with the curriculum of a school.

214. The current law already provides a broad exemption for the content of the curriculum from the prohibition on discrimination on grounds of religion or belief, in the Equality Act 2006. The exemption covers the National Curriculum. It also covers Religious Education (“RE”) which is not part of the National Curriculum but which is required by law to be taught in maintained schools. The Guidance for Schools on Part 2 of the Equality Act explains that the purpose of the exemption is “to ensure that all schools can continue to deliver the broad-based and inclusive curriculum to which children are entitled without fear of challenge based on the religious views of particular parents or children”. One of the examples given by the Guidance is that parents of pupils whose

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273 Bishop of Roman Catholic Diocese of Port Louis v Tengur Privy Council Appeal No. 21 of 2003 (3 February 2004). The Judicial Committee comprised Lords Bingham, Slynn, Lloyd, Steyn and Hope.

274 Section 16(2), which provides “... no person shall be treated in a discriminatory manner by any person acting in the performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public authority”.

275 R (on the application of E) v The Governing Body of JFS [2009] EWCA Civ 626. The appeal to the Supreme Court was heard by a panel of 9 Supreme Court Justices on 26, 27 and 28 October 2009.

276 Clause 82(2)(a).

277 Clause 86(2).

278 EN, para. 291.

279 Schedule 3, para. 11(a).

280 Equality Act 2006, s. 50(2)(b).
religion discounts evolution cannot claim that their child is being discriminated against on grounds of their religion or belief because theories which are not in accordance with their religion are being taught, or because alternative views such as creationism are not given equal weight. The Guidance urges that schools should therefore continue to teach evolution theories in science classes.281

215. The new curriculum exemption contained in this Bill is much wider than the current exemption, however, because it extends the exemption to other protected characteristics. All of the faith organisations which responded to our call for evidence supported the current exemption of the curriculum from the prohibition on discrimination on grounds of religion and belief, on the basis that this is necessary in order to enable schools of a religious character to maintain their distinctive ethos. Others, such as the National Secular Society, argue that the prohibitions on discrimination should apply to the curriculum, on the basis that this is a justifiable limitation on the right to manifest religious belief in Article 9 ECHR, justified by the need to protect the rights of others not to be discriminated against.

216. In our Report on the Sexual Orientation Regulations, we were of the view that the prohibition on sexual orientation discrimination should clearly apply to the content of the curriculum.282 We were particularly concerned by the risk that, if the prohibition on discrimination did not apply to the curriculum, homosexual pupils would be subjected to teaching, as part of the religious education or other curriculum, that their sexual orientation is sinful or morally wrong. We pointed out that applying the prohibition on sexual orientation discrimination to the curriculum would not prevent pupils from being taught as part of their religious education the fact that certain religions view homosexuality as sinful:

In our view there is an important difference between this factual information being imparted in a descriptive way as part of a wide-ranging syllabus about different religions, and a curriculum which teaches a particular religion’s doctrinal beliefs as if they were objectively true. The latter is likely to lead to unjustifiable discrimination against homosexual pupils.283

217. We are concerned that the risk of the exemption for the content of the curriculum leading to unjustifiable discrimination is even greater under the broader exemption contained in the Bill. The Explanatory Notes to the Bill respond to such concerns by pointing out that “the way in which the curriculum is taught is … covered by the reference to education in clause 80(2)(a) [prohibiting discrimination against a pupil in the way it provides education for the pupil], so as to ensure issues are taught in a way which does not subject pupils to discrimination”.284 However, the breadth of the exemption for the content of the curriculum in Clause 86(2) of the Bill (“Nothing in this Chapter applies to anything done in connection with the content of the curriculum”) calls this assertion into question. It is difficult to see how a gay pupil, for example, who felt that they were being taught that

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283 Ibid.
284 EN, para. 291.
they are of less moral worth because of an inherent characteristic, could invoke any of the protections in the Bill in the face of such a wide exemption.

218. We asked the Government for a further explanation of why it considers such a wide exemption for the content of the curriculum is really necessary in order for religious schools to maintain their distinctive ethos, and to explain the reasons why our preferred approach in our Report on the Sexual Orientation Regulations (that the duty not to discriminate on grounds of sexual orientation should apply to the curriculum) should not be followed.

219. The Government replied that the purpose of the exemption is not to enable religious schools to maintain their ethos, but to ensure that all schools cannot be challenged over curriculum matters. In the words of the Minister to the PBC, the purpose of extending the exemption for the curriculum to other protected characteristics, as well as religion and belief, is to clarify the full educational freedoms of schools to decide what resources to use so that they will not have to justify or defend themselves from accusations of discrimination when they are following a reasonable and balanced approach to the curriculum.285

220. We understand and are sympathetic to the Government’s reasons for exempting the content of the curriculum from the duty not to discriminate. We agree that schools ought not to be distracted by having to justify in legal proceedings the inclusion in the curriculum of particular works of literature, for example. However, we continue to have the concerns we expressed in our report on the Sexual Orientation Regulations, that exempting the content of the curriculum from the duty not to discriminate means, for example, that gay pupils will be subjected to teaching that their sexual orientation is sinful or morally wrong. The Government’s response to our questions has not reassured us on this score. It says that in Personal, Social and Health Education (PSHE), faith schools will be able to teach the tenets of their faith including the views of that faith on sexual orientation and same-sex relationships. What they cannot do, it says, is present these views in a hectoring or harassing or bullying way which may be offensive to individual pupils or single out individual pupils for criticism. As we said in our report on the Sexual Orientation Regulations, however, there is an important difference between a curriculum which imparts to pupils in a descriptive way the fact that certain religions view homosexuality as sinful and morally wrong, and a curriculum which teaches a particular religion’s doctrinal beliefs as if they were objectively true.286 We remain of the view that this is likely to lead to unjustifiable discrimination against gay pupils, even if it is not presented in a hectoring, harassing or bullying way. It is the content of the curriculum (the teaching that homosexuality is wrong), not its presentation, that is discriminatory. We therefore recommend that the exemption for the content of the curriculum be confined to the scope of the existing exemption, and not extended to other protected characteristics.

221. We also see the force of the argument that there should be no exemption for the content of the curriculum from the obligation not to discriminate on grounds of religion or belief. A religious education syllabus which teaches a particular faith as truth is likely to lead to unjustifiable discrimination against pupils of other faiths. Indeed, this is already

285 PBC Deb, 23 June 2009, col 469.
286 Above, note 282, at para. 67.
acknowledged in the existing statutory right to withdraw. A religious education syllabus which teaches about religions and faiths in an objective, critical and pluralistic manner, rather than instructs in one particular religion as the true faith, is unlikely to discriminate against pupils who are not of the particular faith of the school. We note that the UN Special Rapporteur recommended that the UK should pay specific attention to the contents of RE syllabuses in publicly funded schools and that a non-discriminatory membership of the relevant local authority committee preparing such syllabuses is vital to ensure that the various theistic, non-theistic and atheistic approaches are presented.287

222. However, we recognise that if the duty not to discriminate on grounds of religion or belief were to apply to the content of the religious education curriculum, a number of further difficult questions would arise. For example, would it be justifiable for faith schools to offer religious instruction on an opt-in basis? Would there still be a justification for a right to withdraw from this part of the curriculum? **We therefore draw this issue to the attention of both Houses.**

**Collective Worship**

223. The Bill disapplies the prohibition on religious or belief-related discrimination288 from anything done in relation to acts of worship or other religious observance organised by or on behalf of a school, whether or not it is part of the curriculum.289 This provision in the Bill is designed to replicate the current exemption in the Equality Act 2006.290 The exemption applies to any school, not just faith schools.

224. The purpose of the exemption in the Bill, according to the Explanatory Notes, is to avoid any conflict with the existing legislative framework in respect of religious worship.291 Existing education legislation requires that pupils in maintained schools participate in a daily act of collective worship, the majority of which in any term must be wholly or mainly of a broadly Christian character. Parents have the right to withdraw their children from collective worship and, since the Education and Inspections Act 2006, sixth-form students also have the right to withdraw themselves. However, schools are under no obligation to provide opportunities for separate worship for the different religions and beliefs represented among their pupils. The provision in the Bill is designed to maintain the position of the current law.

225. The full range of possible views on this question were represented in the evidence we received. The Church of England’s evidence to us supported the current law on collective worship. The United Synagogue Agency for Jewish Education was more ambivalent, referring to collective worship as “an area where there could be more difficulties”. It said “whether it is appropriate now, in the multi-cultural Britain of the 21st century, to require the daily act of collective worship to be ‘mainly of a broadly Christian character’ is not one on which I would wish to comment”, observing that it is impossible for non-Christian faith schools to adhere to this requirement, but that in practice it has never caused any difficulty

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288 In Clause 82(2)(a)-(d).

289 Schedule 11, para. 6. Schedule 3, para. 11(c) provides a similar exemption from the prohibition on religious or belief-related discrimination in the provision of services.

290 Equality Act 2006, s. 50(2)(d).

291 EN, para. 828.
because schools can obtain permission to modify their worship arrangements from their local Standing Advisory Committee on Religious Education (“SACRE”). The National Secular Society argued for an amendment to the Education and Skills Bill removing the requirement on pupils to take part in collective worship at any age.\textsuperscript{292} The British Humanist Association goes further and argues for the abolition of collective worship and its replacement with inclusive assemblies.\textsuperscript{293}

226. We asked the Government to explain how maintaining the legal requirement that collective worship in schools must be of a broadly Christian character is consistent with the Government’s commitment to “a plurality of provision” and whether it is justifiable to do so in view of the religious diversity of the UK today. The Government replied that the law on collective worship reflects the fact that the religious traditions in Great Britain are, in the main, Christian, citing in support the evidence from the 2003 Census that 73% of the population identify themselves as “Christian”. The Government also points to a number of ways in which the rigour of the legal requirement that collective worship in schools be “broadly Christian” is mitigated. First, the law allows schools to provide an experience of collective worship that is relevant to all pupils, no matter what their background or beliefs, so that collective worship is presented in an inclusive and positive way that benefits the spiritual, moral and cultural development of children and young people. Second, if the head teacher feels it is inappropriate to have Christian collective worship, the school can apply for a determination from the local authority to have the requirement lifted. Third, parents can withdraw their child from collective worship and pupils in the sixth form can withdraw themselves, if they choose.

227. We also asked the Government to provide a more detailed explanation of why collective worship should continue to be exempt from the duty not to discriminate on grounds of religion or belief. The Government’s response is that the exemption is necessary in order to make clear that the Bill is not intended to require schools to provide equivalent worship for children of other faiths. Although schools are free to do so as resources permit, they are not legally required to, and the Bill is not intended to change that. Without the exemption, the Government says, schools may be forced to answer in the courts claims by some parents that being subjected to the teachings of another religion is discrimination or that the failure to provide equivalent collective worship for other faiths is discrimination.

228. We understand and sympathise with the Government’s concern that schools should not be at risk of legal challenge for failing to provide collective worship for other, non-Christian faiths. That risk is created, however, not by the existence of the legal duty not to discriminate on grounds of religion or belief, but by the legal duty on schools to ensure that pupils participate in a daily act of collective worship of a broadly Christian character. As the United Synagogue Agency for Jewish Education pointed out, it is simply impossible for non-Christian faith schools to comply with that legal requirement. So long as that legal duty remains, schools are vulnerable to legal challenge under the HRA, by children for failing to secure the enjoyment of their right to freedom of thought, conscience and religion without discrimination,\textsuperscript{294} and by parents for failing to secure their right to respect for their religious and philosophical convictions in their children’s education.\textsuperscript{295} Exempting

\textsuperscript{293} Ev 201
\textsuperscript{294} Articles 9 and 14 ECHR.
\textsuperscript{295} Article 2 Protocol 1 ECHR.
collective worship from the duty in the Equality Act does not remove that underlying problem of vulnerability to a HRA challenge. **We therefore recommend that, instead of exempting collective worship from the duty not to discriminate on grounds of religion or belief in this Bill, the Government revisit the justification for legally requiring all maintained schools to ensure that pupils participate in a daily act of Christian worship.**

229. The UN Special Rapporteur on freedom of religion or belief, in her recent report on the UK, welcomed the extension of the right to opt-out from collective worship to sixth-formers, pointing out that the right to freedom of religion or belief also includes the right not to manifest a religious belief, and that as well as parents and guardians having the right to organise the life within the family in accordance with their religion or belief, children themselves also enjoy in their own right the freedom of religion or belief. She recommended that the children’s views should be given due weight in accordance with their age and maturity, in line with Article 12(1) of the UN Convention on the Rights of the Child (UNCRC).

230. We have consistently recommended that children of sufficient age and maturity should have the right to withdraw from collective worship. We recently recommended such an amendment to the Education and Skills Bill, for example. The Government remains opposed, mainly on the ground that such a provision would be too administratively burdensome because it would require schools to make a judgment in relation to each child who sought to withdraw. In the Government’s human rights memorandum accompanying the Bill, however, it acknowledges that “administrative difficulties would not normally suffice as a justification” for differential treatment under Article 14 ECHR. In view of this acknowledgment, and the UN Special Rapporteur’s recent recommendation, we asked the Government why children who are not in the sixth form, but are of sufficient age and maturity, are not permitted to withdraw themselves from collective worship and RE classes.

231. The Government’s response is that there is sufficient provision to allow for the enjoyment of Convention rights by all pupils, but it considers it appropriate for parents to exercise these rights on behalf of their children, as their legal guardians and the rightful guardians of their well-being, in this case below the age of 16. The choice of 16 as the relevant age is defended on the basis that this is the age when young people are deemed to have the maturity to assume a number of responsibilities, for example, to determine their own career path in the world of work or further education.

232. The Government’s response proceeds on the mistaken premise that children over the age of 16 are entitled to withdraw themselves from collective worship. In fact, it is only sixth form pupils who have that right. All sixth form pupils will have reached the age of 16 in the year before they start in the sixth form. This means that the right to withdraw from collective worship is not available to most children until they are over the age of 16, and for a significant number of children (the older ones in their year group) it will not be available.

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296 Above, note 287.
297 Above, note 287, para. 70.
299 Ev 29, para. 66
300 Ev 58
301 Ev 67
until they are nearly 17 years of age. **We cannot see a justification for the current position that young people who are almost 17, who are recognised to be of sufficient age and maturity to be entitled to access sexual health services without their parents’ knowledge, are not entitled to withdraw themselves from compulsory collective worship.** Although in the PBC the Minister correctly identified the dividing line as being in the sixth form, not aged 16, she merely expressed the Government’s view that “we do not have a problem with that boundary.”\(^{302}\) She did not provide any reason for distinguishing between a young person’s competence to consent to medical treatment on their own behalf and their competence to consent to compulsory worship.

233. We welcome the Government’s acknowledgment, in its response to our letter, that “modern RE should be taught in an objective and pluralistic manner, and not as indoctrination into a particular faith or belief”\(^{303}\). We agree with the Government that it is important that pupils learn about the concept of religion and belief and the part it plays in the spiritual, moral and cultural lives of people in a diverse society. If the legal framework were in place to ensure that RE is always taught in an objective and pluralistic manner, the argument that human rights law requires children of sufficient age and maturity to have the right to opt out would be much weaker. We are not confident, however, that the legal framework is in place to ensure that compulsory participation in daily acts of collective worship and attendance at religious education classes, subject only to limited rights to opt out, does not amount to indoctrination into a particular faith or belief. **Until such time as sufficiently robust legal safeguards are in place to ensure that religious education and collective worship in schools are approached in the objective and pluralistic spirit required by human rights law, as opportunities to reflect on moral and ethical issues and to explore the concept of belief, we remain of the view that we have consistently taken in previous reports, that children of sufficient age and maturity should have the right to withdraw from collective worship and from religious education classes.**

**School Transport**

234. Under the current law, the provision of free or subsidised home to school transport by local authorities is exempted from the duty not to discriminate on grounds of religion or belief.\(^{304}\) This is continued in the Bill.\(^{305}\) The Guidance to Part 2 of the Equality Act explains that the purpose of exempting local authority functions in relation to school transport was “to prevent local authorities from being inundated with claims of discrimination as a result of their decisions in relation to individual requests for free or subsidised home to school transport”.

235. We have reported a number of times on the question of the discriminatory provision of school transport to faith or non-faith schools.\(^{306}\) Our concern has been that the exemptions from the Equality Act duty would permit local authorities to discriminate by providing transport to faith schools for children of parents with a particular religious conviction which is not catered for at a local school, but refusing transport to children of

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\(^{302}\) PBC Deb, 23. June 2009, col 474.

\(^{303}\) Ev 84 at Q 52

\(^{304}\) Equality Act 2006, s. 51.

\(^{305}\) Schedule 3, para. 11(e).

parents with non-religious or atheist convictions where their local school had a religious character. Given that in practice it appeared that some local authorities had failed to make equal transport provision for children of parents with non-religious convictions, we emphasised the need for guidance to clarify the duty under the HRA to make equal provision for school transport for those with both religious and non-religious beliefs.

236. Both the Guidance for Schools on Part 2 of the Equality Act and the recent School Transport Guidance now make this clear. The Equality Act Guidance, for example, states that:

The Act neither creates any new law in the area of free home-to-school transport nor exempts local authorities or any other public authority from their obligations under the Human Rights Act. It merely allows local authorities to make decisions based on individual cases – as is the position now. … The exemption in relation to school transport is not intended to operate to excuse or encourage anything less than even-handed treatment by local authorities of parents with non-religious, as distinct from religious convictions.307

237. Although the Guidance is very clear, the question remains whether the continued existence of the exemptions will encourage authorities to treat the religious and the non-religious differently.

238. We therefore asked the Government whether, given the clarity of the legal position, as correctly reflected in the Guidance, the continued exemption for the provision of school transport is justified, and if so why. The Government replied that it believes the exemption to be still justified because it ensures that local authority policies on providing transport are not challenged on religious grounds simply because they decide that it is necessary to provide transport to faith schools. It is concerned that, without the exemption, local authorities could be challenged on discrimination grounds if they provided transport to a particular faith school but failed to provide transport for pupils at a non-denominational school. Removing the exemption, the Government fears, may make local authorities play safe by not putting on any buses to faith schools, for fear of a discrimination challenge.

239. In our view, the Government has not demonstrated the necessity for this exception from the prohibition on discrimination on grounds of religion or belief for school transport. The possibility of challenging local authority policies on providing school transport on the ground that they are discriminatory already exists under the HRA (Article 14 in conjunction with Article 2 Protocol 1). The Government has not referred to any evidence that spurious discrimination claims have been brought against local authority transport policies under the HRA, or that the possibility of such claims has made local authorities unduly cautious in providing transport to faith schools. In our previous Reports on this subject, we were concerned by the evidence that the opposite was the case: that, notwithstanding the HRA, some authorities had failed to make equal transport provision for children of parents with non-religious convictions. Given this background, we therefore remain concerned that maintaining this exemption from the Equality Act duty may encourage local authorities to continue to treat those with religious and those with non-religious beliefs differently in the provision of school transport.

307 Above, note 281.
8. Associations

240. Part 7 makes it unlawful for an association to discriminate against, harass or victimise an existing or potential member, or an associate, or a guest. Clause 103 provides that these non-discrimination requirements apply to associations with at least 25 members, where access to membership is controlled by rules and involves a genuine selection process based on personal criteria. These provisions harmonise and extend existing protection, and establish that an association cannot refuse membership to a potential member or grant it on less favourable terms because of a protected characteristic. In addition, an association is prohibited from refusing an existing member or associate access to a benefit, or depriving him or her of membership or rights as an associate, because of a protected characteristic. This would mean, for example, that female members of a club could not be denied equal access to club facilities. However, as clarified by Schedule 16, this does not prevent associations restricting their membership or guest invitations to people who share a protected characteristic. This permits for example men-only clubs, or clubs whose membership is restricted to members of a particular religion, but Schedule 16(1)(4) prohibits clubs confining their membership or guest invitations to persons of a particular skin colour.

241. This Part also prohibits private associations from discriminating against members of an association, associates or guests except in certain limited circumstances, thereby impacting upon the right to freedom of association protected by Article 11 ECHR. However, this interference with freedom of association can be seen as objectively justified under Article 11(2) by the need to eliminate discrimination. **We consider that an appropriate balance has been struck in these provisions between the right to freedom of association and the right to non-discrimination and equality.**

Political Parties

242. Clause 101 allows registered political parties to make arrangements in relation to the selection of election candidates to contest Westminster, European, devolved and local elections in order to address the under-representation of people with protected characteristics in elected bodies. For example, this will allow political parties to reserve places on relevant selection shortlists for people with a specific protected characteristic such as a particular ethnic origin, race or disability. However, Clause 101(6) and (7) restricts the use of “closed” shortlists: only single-sex closed shortlists for election candidates are permitted, in line with existing legislation.\(^{308}\) Clause 102 extends the expiry date for the provisions permitting single-sex shortlists until 2030, but also permits a Minister of the Crown to extend their use beyond that date.

243. In general, international human rights law appears to view this type of positive action as permissible if the measures introduced are necessary, proportionate and time-limited. For example, in its General Comment 18, the Human Rights Committee (HRC) charged with interpreting the International Covenant on Civil and Political Rights (ICCPR) has stated that “[n]ot every differentiation of treatment will constitute discrimination, if the

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criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.” Article 4(1) CEDAW provides that:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality for men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

244. Article 7 CEDAW makes clear that such “temporary special measures” may be used to secure equality of representation in elected bodies:

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right ... to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies.

245. The ECHR has been interpreted as similarly recognising the legitimacy of positive action in redressing patterns of discrimination, with the European Court of Human Rights in the enjoyment of the rights protected by the ECHR, stating in the Belgian Linguistics Case that “certain legal inequalities tend only to correct factual inequalities”.

246. In 2002, we concluded that the provisions of the Sex Discrimination (Elected Candidates) Bill were compatible with international human rights standards, on the basis that its provisions permitting closed single-sex shortlists to combat disadvantage were subject to a sunset clause, permissive in nature, designed to be a proportionate means of addressing a legitimate aim. We concluded that “the differential treatment of men and women which the Bill envisages would be capable of being justified under Article 14 ECHR, and would be unlikely to be held to be incompatible with Article 14 ECHR taken together with Article 3 of Protocol No. 1”. We reaffirm our previous conclusion and welcome both the retention of the same-sex ‘shortlist’ exception and the more limited powers conferred upon political parties to take measures to address other forms of disadvantage. They should have the effect of encouraging and enabling political parties to undertake a wider range of positive action to address under-representation.

309 General Comment 18, para 13 at 28 (1994). Article 4(1) of CEDAW and Article 1(4) of CERD make provision for the use of measures to address continuing disadvantage in similar terms. The European Court of Human Rights in the Belgian Linguistics case has adopted a similar approach to Article 14 ECHR ((1979-80) 1 EHRR 252 at para. 3).
310 (1968) 1 EHRR 252, 284, at para 10.
9. Prohibited Conduct: Ancillary

247. The provisions in Part 8 in general re-enact and clarify existing legislative provisions. Clause 107 clarifies and partially amends the existing law by expressly allowing both persons instructed to discriminate and/or the intended victim of such instructions to bring proceedings, even where the instruction is not carried out. This is designed to ensure greater clarity about the level of protection under current legislation.

248. In this context, it should be noted that the decision of the European Court of Justice in _Firma Feryn_ established that discriminatory statements or discriminatory job vacancy announcements should be prohibited as constituting direct discrimination in national law.\textsuperscript{313} Paragraph 13 of Schedule 26 responds to this by extending the power of the EHRC to bring enforcement proceedings in respect of discriminatory advertisements and practices.

249. We welcome the strengthening of protection against discrimination in advertising and against instructions to discrimination.

\textsuperscript{313} Case C-54/07, _Centrum voor gelijkheid van kansen v Firma Feryn NV_ [2008] IRLR 732.
10. Enforcement

National Security

250. Part 9 of the Bill covers how and where to bring proceedings. Clause 113 provides a rule making power for the Civil Procedure Rule (CPR) Committee in relation to national security cases. Under these rules, the CPR Committee may empower courts to exclude claimants, their representatives or assessors from all or part of the proceedings and/or keep secret all or part of a court’s reasons for its decision where “the court thinks it is expedient to do so in the interests of national security”. In our correspondence with the Solicitor-General, we asked for an explanation of the safeguards which will be in place to ensure that those who are excluded from proceedings or not provided with reasons have access to a court and to a fair hearing. In her reply, the Solicitor-General noted that the rights of claimants had to be balanced against national security interests. Those excluded may make a statement before the proceedings and have his or her interests represented by a special advocate during the closed part of the proceedings. She also stated that the clause does not provide a blanket power, but limits the exercise of the power to situations where the court consider it to be “expedient to do so in the interests of national security”.

251. Exclusion from proceedings determining a civil right, such as an individual’s employment, engages the right to a fair hearing under Article 6 ECHR. We recommend that the Bill be amended to make clear that an individual is entitled to make a statement before the proceedings, including on whether or not it is compatible with his Article 6 ECHR rights to exclude him from all or part of the proceedings.

Power to Make Recommendations

252. Employment Tribunals are given a wider power to make recommendations than they currently have, although there is no sanction for non-compliance. We welcome the extended powers of Employment Tribunals to make recommendations, as this should ensure a more widespread respect for the right to equality. However, we note with concern that there is no sanction for non-compliance, which may make the provision toothless in practice if employers are able to ignore a Tribunal’s recommendations without the possibility of any action being taken against them.

253. However, this enhanced power will not apply to equal pay cases. Responding to our request for an explanation, the Solicitor-General replied that permitting recommendations in equal pay cases would be a significant change in equal pay law, it is necessary to be clear what the effects of any change would be, and there is currently no evidence on how they could be used in equal pay cases (unlike discrimination cases). She

314 Ev 67
315 See Clause 113(1).
316 See e.g. A v United Kingdom (App. No. 3455/05, 19 February 2009, Grand Chamber); Secretary of State for the Home Department v AF [2009] UKHL 28; K Tariq v Home Office (2009), EAT 16 October 2009 (in which the appellant appealed against an Employment Tribunal’s decisions concerning the conduct of proceedings to be held in private on national security grounds).
317 Clause 120.
318 Clause 120(7).
319 Ev 58
stated “the Government therefore needs to assess in more detail the additional value that allowing tribunals to make recommendations in this area would add”.320

254. We are concerned by the exclusion of equal pay cases from the enhanced power to make recommendations. Equal pay cases are a source of much complex and lengthy litigation, which currently overburdens Employment Tribunals: in our view, some of this burden could be alleviated if Tribunals were able to be more prescriptive about the steps which employers should take, which would benefit not only the litigants in a case, but the wider workforce more generally. The Government states that extending the power to equal pay cases at this stage would be imprudent as there is currently no evidence of the effect that allowing such recommendations would have in practice. We therefore recommend that the Government should actively seek and publish evidence of the anticipated effects of an extension of the power to make recommendations to equal pay cases, with a view to determining whether or not future legislation is required.

Representative Actions

255. The Bill makes no provision for the possibility of representative actions being pursued.321 We asked the Solicitor-General whether the Government considered that the “group” nature of many discrimination claims make it appropriate for the Bill to provide for the possibility of representative actions to be brought on behalf of claimants who allege that they have been subject to discrimination.322 The Solicitor-General replied that the Government recognises that there are situations in which a number of individuals may wish to bring broadly similar discrimination claims against a similar party. However:

The Government considers it important that the possible impact be fully explored, before deciding whether or not to legislate.323

256. The Solicitor-General referred to current work of the Ministry of Justice and the Civil Justice Council on the general case for introducing representative actions and on research commissioned by the Government Equalities Office on whether representative actions are applicable to discrimination and equal pay cases in Employment Tribunals.324 Responding to a new clause to permit representative actions, tabled in the PBC, she referred to the Civil Justice Council’s proposals as a “muddle” as they are based on what happens in civil courts generally (i.e. that the winner recovers his or her costs), rather than within Tribunals specifically (where the costs rules are different). She raised a number of practical problems such as who would be a representative body, how would costs be dealt with, whether there would be an opt-in or an opt-out mechanism for people to be represented and how disputes would be resolved between a claimant and a representative.325 She referred to a consultation before the summer, if the Government decided that it wished to proceed with the possibility of representative actions, with a view

320  Ev 67 at Q 59
321  According to a Written Answer, however, s.7 Employment Tribunals Act 1996 contains the power to make regulations or procedure rules to enable equal pay claims to be made in representative proceedings in Employment Tribunals (HL, 29 June 2009, col WA11).
322  Ev 58
323  Ev 67
324  Ev 67
325  PBC Deb, 25 June 2009, cols 504-505.
to a new provision being tabled in the House of Lords.\textsuperscript{326} In July 2009, the Ministry of Justice published its response to the Civil Justice Council’s report and suggested that representative actions could be introduced on a sector by sector basis.\textsuperscript{327}

257. In the PBC, the Trades Union Congress (TUC) and the Confederation of British Industry (CBI) disagreed as to the benefits of representative actions.\textsuperscript{328} The TUC suggested that representative actions would “enormously expedite litigation”, but that the power should be curtailed so as not to expose employers to “wildcat litigation”.\textsuperscript{329} The CBI, on the other hand, considered that it was a “myth” that representative actions would streamline and facilitate the progress of claims, as a Tribunal had to consider the individuals merits of claims at some stage.\textsuperscript{330} They suggested:

There is a real risk that representative action would lead to a more litigious society and greater pressure on employers to settle cases even where they are pretty sure that they would win.\textsuperscript{331}

258. We are pleased that the Government is considering whether to permit representative actions. We believe that this has the possibility of ensuring swifter justice for litigants and employers alike. We note that the Government intended to consult on the possibility before the summer recess but that no such consultation has been published. We recommend that the Government give urgent consideration to this issue and consult on it as a priority, with a view to amending the Bill in the House of Lords.

\textsuperscript{326} PBC Deb, 25 June 2009, col 506 & 509.
\textsuperscript{328} PBC Deb, 9 June 2009, col 90-91.
\textsuperscript{329} PBC Deb, 9 June 2009, col 90.
\textsuperscript{330} PBC Deb, 9 June 2009, col 90.
\textsuperscript{331} PBC Deb, 9 June 2009, col 91.
11. Advancement of Equality

Public Sector Equality Duty

General Provisions

259. Clause 145(1) imposes a single public sector equality duty upon public authorities and those performing public functions. It requires public authorities in the exercise of their functions to have “due regard” to the need to (i) eliminate discrimination, harassment, victimisation and other prohibited conduct; (ii) advance equality of opportunity between persons who “share a relevant protected characteristic and persons who do not share it”, and (iii) foster good relations between persons who share a relevant protected characteristic and persons who do not.

260. Clause 145(3) provides that in giving effect to this duty, public authorities must give due regard to the need to:

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

261. Clause 145(4) provides that promoting good relations involves having due regard to tackling prejudice and “promot[ing] understanding”.

262. This duty replaces the existing single-ground positive equality duties for race, disability and gender, and imposes a similar combined duty which also covers age, gender reassignment, pregnancy and maternity, marriage and civil partnership, religion or belief and sexual orientation. It is intended to ensure that those performing public functions adopt a proactive approach to eliminating discrimination and promoting equality of opportunity and good relations between different groups.

263. We welcome the new public sector equality duty and consider it to be an important vehicle for protecting the rights of individuals to equal treatment. We also welcome the clarification in Clause 145(3) of the concept of “due regard”, while noting that the duty could have been strengthened and clarified by the replacement of “due regard” with an obligation to take “such steps as are necessary and proportionate for the progressive realisation of equality.”

264. There has been considerable support for the introduction of the new public sector equality duty from across the political spectrum, as well as from the EHRC, the Equality and Diversity Forum, the TUC and other non-governmental organisations.333 However,
strong concerns have been expressed by Southall Black Sisters, Women Against Fundamentalism, the British Humanist Association and other organisations about the extension of the positive duty to also include religion or belief. The focus of this concern is on the second limb of the duty (the requirement to give due regard to the need to “advance equality of opportunity”), and how it might be applied and interpreted in the context of religion and belief, given that Clause 145(3)(b) requires those subject to the duty to give due regard to meeting the “needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it”. This could potentially be interpreted by public authorities and those performing public functions as requiring them to make special and separate provision for religious groups, to meet their specific “needs”. It could therefore open the door for particular religious organisations to put sustained pressure on public authorities to provide faith-specific services and result in a “balkanisation” of public service provision on religious or belief lines. The fear has also been expressed that public authorities will interpret the duty as requiring them to maintain close links with the leadership of faith-based communities, while the needs of those within those communities that have no religion, or who face discrimination because of prejudice linked to religious belief (in particular women, transsexual persons and individuals with a non-heterosexual sexual orientation), or who are part of a minority within wider faith communities may be ignored or overlooked.

265. In their written evidence to the PBC, the EHRC stated that this fear is:

… unfounded, as the duty is designed to protect people from discrimination on the grounds of religion and belief. There is no requirement on public sector organisations to promote particular religions or belief systems and in fact doing so may run counter to the duty.

266. In their written evidence to us, the Government have adopted a similar view:

The duty is aimed at helping individuals, not groups or organisations – so there will be no requirement for public authorities to advance equality for religious organisations. Public authorities should consider whether adherents of particular religions have different needs when it comes to accessing public services that could be contributing to adverse outcomes, for instance in health or education. They should think about whether individuals are experiencing disadvantage linked to their religious beliefs; and they should think about whether adherents of particular religions are underrepresented in particular spheres, including in public life. If there is evidence of need, then it is right that public authorities should think about whether there is any action they could or should take to tackle that.

… the Duty is not designed to encourage the provision of separate services to different groups, unless the evidence points to a particular need in that area. The Government expects it to result in more inclusive services which meet the needs of all.

334 See e.g. Ev 100 (British Humanist Association)
335 See the comments by Dr Evan Harris MP, citing views expressed by Women Against Fundamentalism and Southall Black Sisters, PBC Deb, 30 June 2009, cols 567-568.
336 EHRC, Submission to the Equality Bill Committee (E18), May 2009, para. 8.
... the Government discussed further, and with religion or belief groups in particular, but also women’s groups, other stakeholders, and public authorities, whether to apply the “advancing equality of opportunity” limb to religion or belief. The Government believes it is right to extend the Duty in this way, to help address the adverse outcomes some people experience as a result of their religious beliefs; and because a failure to extend the Duty would have resulted in a hierarchy of inequality in the Duty.337

267. In our view, the High Court in *R (on the application of Kaur and Shah) v London Borough of Ealing* provided an authoritative interpretation of the existing race equality duty that should be regarded as applicable to the new wider public sector equality duty.338 Its focus should be on protecting individuals against discrimination, promoting good relations between different groups and ensuring that the needs of individuals and groups who face disadvantage are taken into account, with a view to ensuring that all individuals enjoy the right to equality and human dignity and are afforded equality of opportunity as full members of society.

268. We consider that the Government is correct when it suggests that the duty imposes no requirement “for public authorities to advance equality for religious organisations” and is “not designed to encourage the provision of separate services to different groups”. The positive duty as set out in Clause 145 is clearly focused on the elimination of disadvantage and advancing equality of opportunity for all people as full equals within society. The separate provision of public services to particular groups may result in differential levels of service provision which could discriminate against individuals and minority groups contrary to Article 14 ECHR, Article 26 ICCPR and other human rights instruments. International human rights law treats segregation as an unjustified form of discrimination.339 In addition, the duty extends to other protected characteristics apart from religion and belief and also requires public authorities to promote good relations between groups, which separate provision may endanger. As a result, we consider that the duty as set out in Clause 145 should only require separate provision when it can be objectively justified as proportionate and necessary to eliminate disadvantage or to advance equal opportunity.340

269. However, we remain concerned that the duty may be understood by public authorities as requiring separate provision to be made for the “needs” of faith communities, even in the absence of a pressing justification for such separate provision. The absence of a purpose clause means that the main thrust of the Bill taken as a whole and of the positive duty in particular may be misunderstood or misinterpreted. We recommend that Clause 145 be amended to clarify the nature of a public authority’s obligations under the duty with regards to religion or belief. Clear guidance from the

337 Ev 67 at Q 64
339 See, for example, Article 3 CERD and the judgment of the European Court of Human Rights in *DH v Czech Republic* [2007] ECHR 922.
340 Separate provision should be distinguished from positive action or other special measures designed to help individuals and groups overcome disadvantage and participate as full equals with others in society as a whole. It should also be distinguished from reasonable accommodation and other measures designed to enable disabled persons to enjoy full and equal access to employment, education and other areas of social participation, or special measures designed to help other disadvantaged groups. Separate provision entails maintaining different and distinct forms of service provision for different groups: the other types of measures assist individuals to overcome obstacles that prevent them participating as equals in society.
EHRC should also emphasise that public authorities may be required under the duty to give due regard to ensuring that individuals from different faith communities have equal access to common public services, but not to provide separate services for each different faith group. For example, a local authority might make provision for limited women-only visiting hours in its swimming pools, to ensure that women from certain faith communities have an opportunity to access a public service open to all that would otherwise be inaccessible to them. Alternatively, a local authority might provide support to a community group working mainly within particular faith communities to assist individuals to overcome disadvantage and participate as equals within society: the authoritative interpretation of the race duty given in Kaur v London Borough of Ealing is relevant here. However, the provision of separate schooling or other public services for different faith communities would not be required under the duty and could be seen as incompatible with its requirements.341

270. Guidance should also emphasise that the religion or belief component of the duty is only one element of the positive duty taken as a whole: measures taken to promote equality of opportunity for individuals who face disadvantages linked to their religion or belief should be linked to measures linked to the elimination of any disadvantages that they face that are related to their gender, sexual orientation, gender reassignment, ethnicity and other protected characteristics.

271. Clause 145(5) makes clear that complying with the duty might mean treating some people more favourably than others, where doing so is allowed by the Bill. As the Explanatory Notes make clear, this can include treating disabled people more favourably than non-disabled people and making reasonable adjustments for them, making use of exceptions which permit different treatment, and using the positive action provisions.342 However, the Disability Charities Consortium suggest that this clause needs to be strengthened to make it clear that giving effect to the duty may require public authorities to treat disabled persons more favourably.343 We consider that Clause 145 should be amended to make express reference to the “need to take steps to take account of disabled persons’ disabilities, even where that involves treating disabled persons more favourably than other persons”, as is currently required by section 49A of the Disability Discrimination Act. The specific nature of disability as a protected characteristic should be recognised in this context.

272. The “advancing equality of opportunity” and “promoting good relations” limbs of the duty do not apply to the protected characteristic of marriage and civil partnership. The Government told us that there was a lack of:

… evidence of disadvantage suffered by married people/people in civil partnerships
… any such disadvantage that may exist could be better dealt with through the other

341 Amendment NC13, tabled by Lynne Featherstone MP and Dr Evan Harris MP, would limit the scope of the public sector equality duty by providing that a) nothing in the duty requires a public authority in exercising its functions to restrict lawful free expression, b) requiring public authorities in applying the duty to have regard to the ‘principle of inclusiveness’ as defined, and c) in relation to religion or belief, in applying a duty a public authority shall have regard only to those needs which are reasonable.

342 EN, para. 470.

343 Ev 120
strands... it could unhelpfully distract public authorities from tackling other, long-standing, inequalities.\textsuperscript{344}

273. Schedule 18 to the Bill sets out further exceptions to the duty. Schedule 18(1) provides that the duty does not apply in relation to age in respect of functions relating to school education and children’s homes. As discussed above, we consider that this exception should be deleted.\textsuperscript{345} It is important that the rights of children to be free from discrimination and unequal treatment, as recognised by the UN Convention on the Rights of the Child, are protected and that public authorities give due regard as to how to exercise their public functions with this objective in mind. The scheme of the public sector equality duty is, in our view, sufficiently flexible to ensure that public authorities will still be able to treat children differently or make special provision for children of particular ages when this is justified.

274. Schedule 18(2) provides that the promotion of equality of opportunity limb of the duty does not apply to immigration functions in respect of the protected characteristics of age, race, religion or belief. The Government suggested to us that this exception existed on the basis that the nature of immigration controls precludes the promotion of equality of opportunity on these grounds.\textsuperscript{346} We are concerned by the width of this exemption and consider that a strong case exists for its deletion, given that the duty will not preclude immigration authorities applying the immigration controls set out in law.

275. Schedule 18(5) permits a Minister of the Crown by order to add, vary or omit an exception to section 145. We are concerned by the breadth of this power to alter the scope of the duty. Given that the positive duty is an important vehicle for promoting human rights, we consider that any alterations to its scope should be made via primary legislation.

\textbf{The Definition of Public Authorities & Bodies Performing a Public Function}

276. By virtue of Clause 145(2), the public sector equality duty applies to public authorities and to bodies which are not public authorities but which exercise public functions.\textsuperscript{347} Clause 146 provides that the bodies that are defined as “public authorities” for the purposes of the duty are those listed in Schedule 19 of the Bill: additional bodies can be added to the list in Schedule 19 by Ministerial order (including Scottish and Welsh Ministers as appropriate) by virtue of Clause 147. These listed bodies are subject to the duty in respect of all of their functions, except where the Schedule provides that they are only subject to the duty in respect of certain of their functions. The extent to which bodies which are not listed public authorities will be subject to the duty depends on whether they are performing public functions. “Public function” is defined by reference to the HRA.\textsuperscript{348}

277. In other words, the duty will apply to bodies listed in Schedule 19 of the Bill and to any other bodies which satisfy the section 6 HRA “public function” test. We consider that

\textsuperscript{344} Ev 67 at Q 61
\textsuperscript{345} See paragraph 47 above.
\textsuperscript{346} Ev 67 at Q 31
\textsuperscript{347} Exceptions exist that cover the performance of legislative, judicial and prosecutorial functions. The devolved legislative bodies, the security services and the General Synod of the Church of England are also exempted from the duty.
\textsuperscript{348} Clause 146(5).
the “belt and braces” approach to specifying which bodies are subject to the duty provides more clarity than would reliance upon the section 6 HRA test alone. However, Schedule 19 contains some important omissions and it is likely that it will often be necessary to fall back on the HRA test to determine who is subject to the duty. In our view, the section 6 HRA test lacks sufficient clarity. Given the importance of the duty, it is unsatisfactory that the HRA test as currently interpreted by the courts will be used to define what bodies are subject to the duty.\textsuperscript{349} At the very least, revising and regularly updating the Schedule 19 list of public authorities would provide greater clarity than the approach currently adopted in the Bill.

\textbf{Specific Duties and Public Procurement}

278. Clause 151(2) permits Ministers (including Scottish and Welsh Ministers as appropriate) to impose specific duties on public authorities as listed in Schedule 19 after consultation with the EHRC, for the purpose of enabling better performance of the general duty. The Government is currently consulting on the scope and content of these duties.\textsuperscript{350} We consider that the specific duties that are imposed should be outcome-orientated in focus and oblige public authorities to provide clear, measurable benchmarks which will make it possible to assess their compliance with its requirements.

279. Clause 151(2) provides that a Minister of the Crown may impose specific duties on public authorities that are also “contracting authorities” in relation to their public procurement functions. The Government has set out how it intends to ensure the duty is applied in the context of public procurement as follows:

One specific duty being considered is whether, as part of a contracting authority’s process of setting its equality objectives and plans for achieving them, the authority will be required to set out in detail how it will ensure that equality factors are considered in its procurement activities. The Government is also considering two further specific duties that will require contracting authorities to consider the use of equality-related criteria at award stage, where it is relevant to the subject matter of the contract; and to consider incorporating equality-related contract conditions where they relate to the performance of a contract and are proportionate. The extent to which equality considerations can be included in the process will depend upon the nature of the contract, but the duty will ensure it is considered in the first place.\textsuperscript{351}

280. The promotion of equality of opportunity though public procurement processes has considerable potential to bring about real change in both the public and private sectors. We consider that it is important that clear and comprehensive duties are imposed upon public authorities to build equality of opportunity considerations into their procurement processes and to ensure that equality-related contractual terms are inserted where possible when procurement contracts are concluded.


\textsuperscript{351} Ev 67 at Q 65
Positive Action Measures

281. Clause 154 provides that the Bill does not prohibit the use of positive action measures to alleviate disadvantage experienced by people who share a protected characteristic, reduce their under-representation in relation to particular activities, or to meet their particular needs. However, any such positive action measures must be a proportionate way of achieving the relevant aim. In addition, Clause 154(3) provides that regulations may provide that specific types of measures are not proportionate.

282. Clause 155 permits an employer to take a protected characteristic into consideration when deciding who to recruit or promote, where people having the protected characteristic are at a disadvantage or are under-represented. Clause 155(4) states that this can be done only a) where the candidates are equally qualified to be recruited or promoted and b) if the employer does not have a “policy” of treating people who share a protected characteristic more favourably than those who do not.

283. These provisions are new, and are intended to give employers and service providers greater leeway to adopt positive action measures, if they choose to do so: these provisions are permissive, not prescriptive. They are also designed to clarify a very uncertain and confusing area of the law: academic research has indicated that many private and public sector bodies have adopted diversity-based recruitment and promotion policies which may, without conscious intent, contravene the current strict limits on the use of positive action imposed by existing legislation. It is planned that comprehensive guidance will be issued by the EHRC covering use of these positive action provisions if the Bill becomes law.

284. International human rights standards appear to view these type of positive action as permissible if the measures introduced are necessary, proportionate and time-limited. For example, in its General Comment 18, the Human Rights Committee (HRC) stated that “[not] every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”. Article 4(1) of CEDAW and Article 1(4) of CERD make provision for the use of measures to address continuing disadvantage in similar terms. The European Court of Human Rights in the Belgian Linguistics case has adopted a similar interpretation of Article 14 ECHR.

285. We therefore consider that the positive action provisions of the Bill conform to international human rights standards. We welcome the provisions as enabling employers and service providers to make greater use of positive action if they choose to do so. Well-designed and proportionate positive action measures can be an effective mechanism for redressing disadvantage, but existing anti-discrimination law imposes excessive restrictive constraints on its use.

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353 PBC Deb, 30 June 2009, col 601.
354 General Comment 18, para. 13 at 28 (1994). Article 4(1) of CEDAW and Article 1(4) of CERD make provision for the use of measures to address continuing disadvantage in similar terms. The European Court of Human Rights in the Belgian Linguistics case has adopted a similar approach to Article 14 ECHR ((1979-80) 1 EHRR 252 at para. 3).
355 (1979-80) 1 EHRR 252.
286. However, we are concerned that the provisions of Clause 155 impose artificial and potentially unworkable pre-conditions which unduly limit the ability of employers to make use of positive action. Clauses 154 and 155 extend the permissible scope of positive action “to the extent permitted by European law”. However, Clause 155 appears in some respects to impose restrictions on the use of positive action which are stricter and more uncertain than the restrictions imposed under European law, which may have the effect of generating legal uncertainty and deterring employers making use of any form of positive action. Clause 155 also appears more permissive in some respects than European law, compounding the uncertainty of this provision.

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, 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.

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 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. We therefore recommend that the requirement that employers must not have a “policy of

356 EN, para. 505.
359 Professor Barmes has described this requirement that employers cannot have a ‘policy’ of giving preferential treatment in some circumstances as ‘bizarre’. Ibid.
360 Barmes, op. cit.
treating persons who share a protected characteristic more favourably ... than persons who do not share it” should also be deleted, and replaced with statutory wording that more closely reflects the case-law of the ECJ.

289. The test set out in Clause 155 is also problematic, in that it does not contain a requirement that the use of positive action has to be a proportionate measure to achieve the legitimate aim of redressing disadvantage. In its case-law, the ECJ has required positive action measures to satisfy the proportionality test, an approach reflected in international human rights law.361 The current wording of Clause 155 does not reflect this requirement, which may generate uncertainty for both employers and courts and tribunals. We recommend that a proportionality test be inserted into Clause 155 to better reflect the current case-law of the ECJ.

290. Provisions of recent EC legislation may adopt a more permissive approach to the use of positive action than thus far adopted by the ECJ in its case-law: for example, the Framework Equality Directive provides that “with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1”.362 There is no explicit requirement for a proportionality test set out here. However, it is in our view sensible for the Bill to track the current case-law of the ECJ: at present, the wording of Clause 155, while intended to reflect the position under European law, does not achieve this aim. Guidance from the EHRC on the scope of positive action that is permissible under the legislation may assist employers to make sense of the positive action provisions of the Bill, but guidance cannot substitute for precise and clear statutory language, which is our preferred option.

362 2000/78/EC, Article 7(1).
12. General Exceptions

291. Part 14 and Schedules 22 and 23 make provision for certain exceptions to the general prohibition of differential treatment on the basis of protected characteristics. Some are not controversial in that they are designed to provide special protection for vulnerable groups and thereby enhance human rights protection, such as the provisions of Schedule 22(2) that permit differential treatment based on sex or pregnancy and maternity in the workplace in order to protect the health and safety of women who are pregnant, who have recently given birth or against risks specific to women. Others give rise to more complex human rights issues.

Statutory Exceptions

292. Schedule 22(1) provides that forms of discrimination which would be prohibited by the Bill will not be unlawful if permitted or required by other statutory enactments, while Schedule 23(1) also exempts acts done under statutory or regulatory authority. This gives rise to the issue raised above as to whether discrimination law or the right to equality should be given an extra quasi-constitutional level of protection. The effect of the provisions is to ensure that the protection against discrimination provided by the Bill can be overridden or limited by specific statutory provisions, ensuring that it lacks the “constitutional” status of the HRA.363

Restrictions on Foreign Nationals in Crown Employment

293. Schedule 22(5) re-enacts existing restrictions on the employment of foreign nationals in the civil, diplomatic, armed or security and intelligence services and by certain public bodies. It also allows restrictions on foreign nationals holding public offices. The Government justified the scope of these restrictions as follows:

…there still remains a need which is recognised in existing legislation and which the Equality Bill replicates, to reserve certain particularly sensitive posts in the civil, diplomatic, armed or security and intelligence services and by certain public bodies, to persons of particular birth, nationality, descent or residence. This is because the posts are assumed to be of a nature - for example; security and intelligence services - that requires a loyalty or allegiance to the Crown that is presumed to be greater in the case of a person who is a UK national.364

294. The Government also noted that it had taken “a positive step through the European Communities (Employment in the Civil Service) Order 2007, which set out the criteria by which posts can be reserved for UK nationals, to open as many posts to all eligible nationals as was operationally possible rather than maintaining quite as many for UK nationals only”.365 However, the 2007 Order only applied to EU nationals and the extent of the restrictions imposed on non-nationals in general remains controversial.
295. As the law currently stands, 95% of civil service posts in the UK are available to Commonwealth, Irish or EEA nationals but other non-UK nationals are almost entirely excluded from those posts, even if there is no good operational reason for that. As a result, many members of long-standing minority communities in the UK are entirely banned from Government employment, no matter how well qualified they are, and even if they are married to a UK national. The issue is the subject of a Private Members Bill, the Crown Employment (Nationality) Bill, promoted by Andrew Dismore MP, designed to remove this nationality discrimination to the extent that it cannot be justified by the nature of the post, but a Bill to similar effect has failed to reach the statute book on six previous occasions.

296. Such nationality discrimination in access to government employment engages a number of the UK’s human rights obligations. By Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), for example, the UK recognises the right to work, including the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and by Article 2 ICESCR the UK has undertaken to guarantee the rights in the Covenant without discrimination of any kind as to national origin. The UN Committee on Economic and Social Rights and the UN Committee for the Elimination of Racial Discrimination have both commented on the continuing discrimination faced by ethnic minorities in employment in the UK.

297. The UK is also a party to an ILO Convention, the Discrimination (Employment and Occupation) Convention 1958, which defines discrimination to include exclusion based on nationality, and by which the UK has undertaken to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof, and in particular has undertaken to pursue that policy in respect of employment under the direct control of a national authority.

298. We consider that the re-enactment of existing restrictions on the employment of non-UK nationals in the public services represents a missed opportunity to review these restrictions (in particular those that relate to non-EU nationals), to remove those that are no longer justified and to minimise the scope of those that remain, on the basis that derogations from the general principle of equality of treatment should be applied narrowly and clearly shown to be proportionate means of achieving a legitimate aim. Amendments NC27 to 29 and NS1, tabled by Andrew Dismore MP for Report Stage, would amend or remove many of the existing national requirements in Crown employment. We consider that these amendments deserve serious consideration.

366 HC Deb, 12 June 2009, col 1067-1070.
367 HC Bill 141, Session 2008-09.
368 See e.g. Concluding Observations of the Committee on Economic, Social and Cultural Rights, E/C.12/GBR/CO/5, 22 May 2009, para. 16.
369 See e.g. Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland, CERD/63/CO/11, para. 23.
371 Article 1(1)(a).
372 Article 2.
373 Article 3.
Religious Organisations

299. The Bill exempts from the prohibition on religious discrimination in employment the discrimination related to employment in faith schools which is permitted by the School Standards and Framework Act 1998. The Explanatory Notes explain that this means, for example, that schools with a religious ethos can restrict employment of certain teachers to applicants that share the same faith. Elsewhere in the Bill, however, an employer with an ethos based on religion or belief is allowed to discriminate in relation to work by applying a requirement to be of a particular religion or belief, but only if, having regard to that ethos, being of that religion or belief is a requirement for the work and applying the requirement is proportionate to achieve a legitimate aim.

300. Schedule 22(4) re-enacts existing legislation by replicating for the most part the effect of Regulation 39 of the Employment Equality (Religion or Belief) Regulations 2003, which exempts Sections 58-60 of the School Standards and Framework Act 1998 (SSFA) as extended by Section 37 of the Education and Inspection Act 2006 from the anti-discrimination provisions of the Regulations.

301. Sections 58-60 SSFA deal with the appointment and dismissal of teachers in schools with a religious character and permit schools with a religious ethos to restrict employment of certain teachers to applicants that share the same faith. Under Section 58 SSFA, foundation or Voluntary Controlled (“VC”) schools with a religious character are able to select up to one-fifth of teachers on the basis of their competence to give religious education as required in accordance with the school’s religious ethos. These teachers are called ‘reserved teachers’ and their security of employment is dependant upon the opinion of the governors as whether they have delivered religious education in manner that reflects that ethos. All other staff and teachers that are not reserved teachers are protected by the prohibition on discrimination on the grounds of religion or belief. However, all teachers in Voluntary Aided (“VA”) schools, who are generally schools of a religious character who obtain their funding directly from government and not from a local education authority (LEA), may be treated as reserved teachers.

302. Section 60 provides that compliance by a reserved teacher with a school’s ethos may be grounds for preference in selection for a reserved teaching post, in addition to the appointment, remuneration or promotion of such teachers. In addition, Section 60(5) provides that not only may the school have regard to a person’s faith and worship attendance, but also by virtue of Section 60(5)(b), regard may be had to act by the teacher which is incompatible with the precepts or with the upholding of the tenets of the religion. In this way a school is able to discriminate not only on the basis of a person’s beliefs but also on their conduct and lifestyle.

303. These provisions give rise to a number of human rights issues. ‘Reserved’ teachers are denied protection against religious discrimination by virtue of Schedule 22(4). This constitutes a sweeping denial of protection against discrimination, while in contrast VC

374 Schedule 22(4), which is designed to replicate the effect of regulation 39 of the Employment Equality (Religion or Belief) Regulations 2003.
375 EN, para. 939.
376 Schedule 9, para. 3.
377 Section 37 of the Education and Inspections Act 2006 has made it possible for a reserved teacher to become a head teacher.
and VA schools are not under any obligation to demonstrate that compliance with the religious ethos in question is necessary on the part of the 'reserved' teachers. 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. VCs and VAs are not required under the SSFA to demonstrate that requiring individuals filling 'reserved' posts satisfies this requirement.

304. In addition, Article 4(2) provides that discrimination to preserve an organisation’s ethos must be based on a person’s religion or belief and no other protected ground. As a result, there is no exemption in the Employment Equality (Sexual Orientation) Regulations 2003 or in Schedule 22(4) that exempts VCs and VAs from the requirement not to discriminate on the grounds of sexual orientation. However, the provisions of section 60(5) SSFA, in permitting discrimination based on conduct which is incompatible with the precepts or with the upholding of the tenets of the religion, appear to permit VCs and VAs to discriminate not just on the basis of religious faith or belief but also on the basis of conduct. This may go further than is permitted by Article 4(2), although in the absence of case-law on this point, the interpretation of Article 4(2) remains uncertain at the present time.

305. In addition to the issue of the compatibility of section 60(5) with EU law, serious questions can be asked as to whether discrimination on the basis of conduct or lifestyle, as distinct from a person’s religious views, is compatible with the principle of equality and non-discrimination.

306. We consider that substantial grounds exist for doubting whether sections 58-60 of the School Standards and Framework Act 1998 (SSFA) as currently framed are compatible with the requirements of Article 4(2) of the Framework Equality Directive 2000/78/EC. We also consider that the provisions of section 60(5) SSFA permit Voluntary Controlled and Voluntary Aided Schools to impose wide-ranging requirements upon employees to adhere to religious doctrine in their lifestyles and personal relationships which may go beyond what is permitted under Article 4(2).

307. Schedule 23(2) re-enacts and clarifies existing legislation which provides an exception for religious or belief organisations with regard to the provisions in the Bill that relate to services and public functions, premises and associations. The types of organisations that can use this exception are those that exist to practice, advance or teach a religion or belief; allow people of a religion or belief to participate in any activity or receive any benefit related to that religion or belief; or promote good relations between people of different religions or beliefs. Such organisations can impose restrictions on the basis of religion or belief or sexual orientation. In contrast, organisations whose main purpose is commercial cannot use this exception.

308. However, where discrimination in the provision of services, premises and associations is concerned, a significant difference exists between the circumstances in which discrimination is permitted on the basis of religion or belief and when it is permitted on the grounds of sexual orientation. In relation to religion or belief, the exception can only apply 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. However, in relation to sexual orientation, the exception can only apply 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 belief that the organisation represents. In contrast, if an organisation contracts with a public body to carry out an activity on that body’s behalf then it cannot discriminate in any way on grounds of *sexual orientation* in relation to that activity, while it may do so on grounds of *religion or belief*. This distinction exists in the current legislation, but is clarified in the Bill.

309. The Government explained the reasoning behind the inclusion of Schedule 23(2) and the distinctions it makes between the ability of religious organisations to discriminate on the basis of religion or belief and sexual orientation in the following way:

Religious organisations providing public services are subject to the requirements of discrimination law in the same way as other organisations, save for the limited exceptions designed to ensure that a person’s right to hold and manifest a religious belief is not interfered with. These exceptions in the Equality Bill replicate the effect of provisions in Part 2 of the Equality Act 2006 and the Equality Act (Sexual Orientation) Regulations 2007.

The 2007 Regulations contain a ‘carve-out’ from the religious organisations exception for any organisation acting on behalf of a public authority. This is because, while the Government is sensitive to people’s religious beliefs, in circumstances where public money is being used to fund a service the Government takes the view that the service should be provided to people irrespective of their sexual orientation.

On the other hand, it is recognised that there are organisations whose purpose is to provide benefits to people of particular religions. These can provide valuable services to particular sections of the community. Accordingly, the Government does not consider that a similar provision is necessary in relation to religion or belief. This does not affect the general position that public authorities should not discriminate in relation to any of the protected characteristics in the services they provide or the functions they exercise.\(^{379}\)

310. The British Humanist Association (BHA), however, criticises the scope for discrimination on the basis of religion or belief permitted under Schedule 23(2). It argues that religious organisations should not be permitted to discriminate on the basis of sexual orientation or religion belief when providing services a) on behalf of a public authority, and b) under the terms of a contract between the organisation and the public authority.\(^{380}\)

311. **We accept that some exemption from the Regulations is necessary in order to protect the right to freedom of conscience, religion and belief in Article 9 ECHR. However, as we have previously indicated, we consider that there is nothing in Article 9 ECHR, or any other human rights standards, that requires an exemption to be provided to permit religious organisations to discriminate on grounds of sexual orientation when delivering services on behalf of a public authority. Such an exemption would provide protection not for the holding of a religious belief but for the**

\(^{379}\) Ev 67 at Q 72

\(^{380}\) Ev 99
manifestation of that belief: where such manifestation of a belief conflicts with the right of gay people not to be discriminated against in their access to public services, it is necessary and justifiable to limit the right to manifest the belief.\textsuperscript{381} Therefore, we welcome the re-enactment and clarification of the existing provisions in Schedule 23(2) that concern discrimination on the basis of sexual orientation.

312. The position in respect of discrimination on grounds of religion or belief is more complex. As the Government suggests, there are organisations whose purpose is to provide benefits to people of particular religions who play an important role in delivering public services, such as the delivery of kosher meals by Jewish charities or the provision of certain forms of pastoral and care services by religious organisations to prisoners, older people and others of their faith. The delivery of such public services is often dependant on religious organisations being able to confine delivery of these specialist services to those of a particular faith or belief. Schedule 3(27) sets out an exception for services which are “generally provided only for persons who share a protected characteristic”, which permits those who deliver the service to refuse to provide it to people who do not share this characteristic. This would appear to cover many but perhaps not all of the instances which the exception set out in Schedule 23(2) is designed to cover.

313. The exception permitting discrimination on the basis of religion or belief in the delivery of public services by religious organisations must be objectively justified as necessary to ensure the effective delivery of these services in certain circumstances. However, to be compatible with human rights standards, this exception must be given a restricted interpretation and applied with reference to Article 14 ECHR and the rights of users of public services to access them without being subject to unjustified discrimination. We can think of few instances where the exception will apply in practice.

314. In addition, we highlight the importance of the public sector equality duty in this context, which requires public authorities and those performing public functions to advance equality of opportunity for all. The Government has also drawn attention to the role the public duty will play in this context:

   The point remains, however, that the public authority (on whom the Duty falls) will need to ensure that it does not discriminate in carrying out its functions and will need to have due regard to the need to advance equality of opportunity for all the protected groups; so if it uses a religious organisation to provide services as a means of performing its functions, that organisation must either do so even-handedly or, if the organisation chooses to make use of exceptions, the public authority must ensure that it provides equivalent services to people of other religions and none.\textsuperscript{382}

315. We agree with the Government’s analysis of the impact of the public sector equality duty on the exception for religious or belief organisations with regard to the provision of services and public functions, premises and associations. However, clarification of the requirements of the positive duty in respect of religion and belief is necessary.

\textsuperscript{382} Ev 67 at Q 63
Separate and Single-Sex Provision

316. Less controversially, Schedule 23 also makes provision for exceptions related to communal accommodation in respect of the protected characteristics of sex and gender reassignment. It should also be noted that Part 6 of Schedule 3 permits the provision of separate and single-sex services by public and private bodies in certain circumstances, including the provision of religious services, and also permits the provision of services provided generally only for persons sharing a personal characteristic.\(^{383}\) Other exceptions to the prohibition of differential treatment on the basis of protected characteristics deserve comment.

National Security

317. Clause 187 makes provision for a wide-ranging exemption from the scope of protection against discrimination for “anything that it is proportionate to do” for the purpose of safeguarding national security. Schedule 3(4) re-enacts existing legislation in making provision for a wide-ranging exemption from the scope of protection against age, sex, disability and gender reassignment discrimination for anything done to safeguard the operational effectiveness of the armed forces, while Schedule 3(5) exempts the intelligence services from the scope of the prohibition on discrimination in the performance of public functions. Clause 113 also provides that individuals (including the claimant) can be excluded from proceedings in relation to a discrimination claim if it is expedient to do so in the interests of national security.

318. Liberty has criticised these exceptions, suggesting that they are disproportionately wide in scope.\(^{384}\) In her written evidence to us, the Solicitor-General has justified the scope of the exception set out in Clause 187 (previously Clause 185 and so described in the Government’s evidence):

   The Government believes that this exception is necessary to ensure that national security is not compromised. However, the Government accepts that national security cannot provide a blanket excuse for discrimination or other prohibited conduct. Consequently, the exception in clause 185 is worded so that an act done to protect national security is not automatically exempt. The action taken must be proportionate to that purpose.

   In addition, if an individual believes that any of the intelligence and security agencies has discriminated against him/her in the exercise of its functions, he/she may make a complaint to the Investigatory Powers Tribunal (established under the Regulation of Investigatory Powers Act).\(^{385}\)

319. **We are concerned as to the scope of the national security exceptions contained in the legislation and in particular the complete exclusion of the intelligence services from the prohibition of discrimination in the performance of public functions. We consider that serious consideration should be given to replacing the general exemption with a specific set of provisions applicable to the intelligence services.**

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\(^{383}\) See paragraphs 139-140 above.

\(^{384}\) Ev 149

\(^{385}\) Ev 67 at Q 69
Charities

320. Clause 188 provides that charities are allowed to provide benefits only to people who share a protected characteristic (for example who are of the same sex, sexual orientation or disability), if this is a) in accordance with their charitable instrument and b) if it is objectively justified or to prevent or compensate for disadvantage. It also makes ancillary and associated provisions, including permitting charities to provide activities restricted to a single sex and to require members or participants in certain activities to accept a particular religion or belief in certain specific and limited circumstances. Clause 190 makes similar exceptions in respect of sporting activities.

321. The Government explained why the provisions of Clause 188 constitute a narrowing of the previous scope available to charities to discriminate:

The Government has given consideration to restricting the circumstances in which charities will be able to discriminate on the basis of protected characteristics. These circumstances are being restricted further through the Equality Bill. At the moment, most of the exceptions for charities mean that they can discriminate simply if their charitable instrument allows this. The Bill’s proposals mean that a charity would also need to show that it was justified in discriminating. This is currently the case only for single-sex charities.386

322. Under Clause 188, any charities benefiting only people who share a protected characteristic, such as people of the same religion or belief, will not be able to discriminate on the basis of that protected characteristic when delivering public or any other services just because their charitable instrument provides for this. They will also need to show that such discrimination is objectively justified or intended to prevent or compensate for disadvantage linked to the protected characteristic in question. It will ultimately be for the courts to decide whether one of those additional tests is met.

323. The Bill also narrows the existing exceptions for single-sex charities and charities benefitting only people of a racial group so that these no longer apply to discrimination on the basis of sex or nationality, respectively, in relation to employment or vocational training. It retains the bar on charities defining beneficiaries by reference to the colour of their skin.

324. The EHRC has nevertheless argued that charities are still given excessive room to discriminate:

Conferment of ‘charitable status’, with its attendant tax and other benefits, is a public function…exercised, in England and Wales, by the Charity Commission. A charity is defined, in clause 187 of the Equality Bill, as having the meaning given by the Charity Act 2006 (that is, a body which has a potentially charitable purpose which is also of sufficient ‘public benefit’ to be regarded as a charity). In the Commission’s view, 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 fall within Article 14 – as all

386 Ev 67 at Q 70
the protected grounds will – (in a context which falls within the ambit of another Convention right) must be objectively justified on the Strasbourg standard.\textsuperscript{387}

325. It suggests that the proposed charitable exception permitting charities to discriminate in certain circumstances as set out in Clause 188 remains excessively wide in scope, as it appears to a) class all charitable activities as intrinsically “legitimate aims” and b) would permit charities to justify discrimination on the basis that it was designed to “prevent or compensate for disadvantage”, when any discrimination in charitable activities should be required to satisfy the full ECHR objective justification test (i.e. be a proportionate means of meeting special needs of a particular disadvantaged group).\textsuperscript{388}

326. We welcome the clarification of the existing legal position in respect of the ability of charities to provide benefits only to people who share a protected characteristic and the strengthening of protection against discrimination achieved by the current wording of Clause 188. However, we consider that there are complex issues as to the extent to which charitable objects must comply with the ECHR. A strong argument can be made that the grant of charitable status must comply with ECHR requirements and this may require the test as to when charities may discriminate set out in Clause 188(2) to be tightened by the inclusion of a full proportionality requirement.
Conclusions and recommendations

Evidence and Acknowledgements

1. We welcome the full and prompt responses provided by the Solicitor-General. (Paragraph 2)

2. We welcome the engagement of the public and interested organisations in our legislative scrutiny work. (Paragraph 3)

Explanatory Notes

3. In our view, these are useful and make the Bill much more accessible than it might otherwise have been. (Paragraph 5)

4. We welcome the Government’s provision of a detailed human rights memorandum based closely on the ECHR memorandum prepared for the Legislation Committee and we commend this precedent to other Departments as an example of best practice. (Paragraph 6)

5. We reiterate our view of the importance of detailed human rights analysis within the Explanatory Notes to Bills to assist all those scrutinising proposed legislation and urge the Government to ensure that such analysis is routinely contained within the Explanatory Notes accompanying Government Bills. (Paragraph 7)

The Right to Equality

6. In our view, the Government’s refusal to ratify Protocol 12 is unwarranted, and fails to give sufficient effect in national law to the UK’s international human rights obligations, especially under the ICCPR. We recommend that it reconsider its decision. (Paragraph 14)

A Constitutional Guarantee or Purpose Clause

7. We accept that the objectives of a constitutional guarantee to equality and a purpose clause are not identical, but they go to the same goal of ensuring respect for equality. We call on the Government to use the Bill or the Constitutional Reform and Governance Bill to enshrine a freestanding constitutional right to equality, consistent with its international obligations under Article 26 of the ICCPR, amongst other human rights instruments. As we state on a number of occasions in specific sections of our Report, at the very least, problems of interpretation may arise which could be potentially alleviated by the inclusion within the Bill of a constitutional guarantee or purpose clause. On the level of the bigger picture, a purpose clause would allow the Bill to spell out the vision for equality which the Bill aspires to promote and protect. However, as we noted in our Bill of Rights Report, we also welcome the fact that the Government is considering the inclusion of a constitutional guarantee within its consultation on a Bill of Rights and Responsibilities and look forward to the outcome of its consultation with interest. (Paragraph 25)
Socio-economic inequalities

8. Whilst we agree with the human rights memorandum that public authorities do not enjoy rights under the European Convention on Human Rights (ECHR), it is disappointing that the Government did not spell out in the memorandum how, if at all, the duty would affect the human rights of service users. In our view, the new duty has the potential power to enhance human rights for individuals receiving public services, including in particular their socio-economic rights. (Paragraph 28)

9. We are disappointed that the Government has chosen to exclude from the remit of the new duty people who experience amongst the greatest socio-economic inequality and disadvantage in the UK. The Government is entitled to exercise control over its borders but, in our view, has failed to establish why it is necessary and proportionate to exclude those subject to immigration control from the operation of the new socio-economic duty in relation to all public services. (Paragraph 29)

10. Consistent with our approach in our Bill of Rights Report, we do not go so far as to suggest that the new socio-economic duty should be directly enforceable by individuals. However, as in the case of the existing equality duties, we do consider that there is a role for courts in reviewing whether public authorities have given effect to their procedural obligation to “have due regard” to the desirability of reducing inequality and are pleased to note that such decisions will be subject to judicial review on that ground. We recommend that guidance should specifically require public authorities to explain what steps they have taken to comply with their duty. Such transparency will allow the public to determine whether public authorities are meeting their new obligations and, where they feel that they are not, seek judicial review if they so wish. Without this requirement, the possibility of bringing judicial review proceedings will be rendered less effective. (Paragraph 32)

Protected Characteristics: Age Discrimination

11. We welcome the inclusion of age within the scope of the public sector equality duty, along with the general prohibition of age discrimination in the areas of association, the provision of services and the performance of public functions. Age discrimination constitutes an unjustified denial of the right to equality and remains a serious problem in British society. The prohibition of age discrimination in service provision and the performance of public functions will help ensure that all age groups enjoy equality of respect in how they are treated by service providers and those performing public functions. (Paragraph 37)

12. We also recognise that there must be exceptions to the ban on age discrimination in certain areas, and in particular when it comes to the provision of special services and facilities to older and younger persons, such as travel concessions and group holidays. However, we are concerned that the Government has chosen to introduce these exceptions through secondary legislation and the use of the very wide-ranging powers conferred upon Ministers by Clause 192. The scope of these exceptions should be the subject of parliamentary debate and set out in primary legislation and should be carefully tailored and convincingly justified. (Paragraph 38)
13. The total absence of protection against age discrimination for those under 18 in service provision and the limited protection in relation to the performance of public functions means that children who are subject to unjustified discrimination are left with little or no legal protection. This may prevent children enjoying full protection of their rights as set out in the UN Convention on the Rights of the Child (UNCRC). (Paragraph 44)

14. The Bill represents an opportunity to incorporate fully children’s protection from unjustified discrimination into UK law. In our view, the provisions of Clause 27, which have the effect of depriving children of any rights under the discrimination legislation in the fields of service provision and the performance of public functions, are unnecessarily sweeping and extensive. We accept there are many circumstances in which it is appropriate to treat adults and children differently and to provide special and tailored services directed at children of particular ages. We share the Government’s concern that the legislative prohibition of age discrimination should not call into question the legality of legitimate differences in treatment as between adults and children and between children of different ages. However, the use of age distinctions can be objectively justified in anti-discrimination law, as recognised both in current legislation and in the Bill. Most of the distinctions that exist between the treatment of adults and children, or between children of different ages, are clearly capable of satisfying this test of objective justification and are highly unlikely to attract frivolous legal challenges. (Paragraph 45)

15. We consider that the situation of children is no different and that exceptions to the general prohibition on age discrimination could also be made as required to cover age distinctions where children are involved. (Paragraph 46)

16. We also consider that the public sector equality duty should apply to how children are treated in schools and children’s homes. The current exclusion of the provision of education, accommodation, benefits, facilities and services in schools and children’s homes from the scope of the duty as set out in Schedule 18(1) is, in our view, unnecessary. It is important that the rights of children to be free from discrimination and unequal treatment, as recognised by the UNCRC, are protected and that public authorities give due regard as to how to exercise their public functions with this objective in mind. However, the scheme of the public sector equality duty is sufficiently flexible to ensure that public authorities continue to be able to treat children differently or make special provision for children of particular ages when this is justified. (Paragraph 47)

Protected Characteristics: The Definition of Disability

17. We welcome the deletion of the list of “capacities” from the definition of disability, which will clarify the law and make it easier for claimants to demonstrate that they are “disabled” for the purposes of the legislation. (Paragraph 49)

18. We consider that it is important to have a clear and workable definition of disability in the Bill, which protects those who are genuinely disabled without extending the definition of disability too far. We concur with the view previously expressed by the House of Commons Work and Pensions Committee that there are strong arguments
for adopting a definition of disability in the Bill which is more in tune with the “social model” of disability set out in the UN Convention on the Rights of Persons with Disabilities, which the UK Government recently ratified. It would also reflect the real life experiences of many disabled people, who may face discrimination from employers and service providers on account of their impairments even when they are insufficiently “disabled” to satisfy the medical-centred tests set out in existing UK legislation. (Paragraph 54)

19. We recommend that the Government give serious consideration to [the] proposal [that the existing definition of disability set out in the DDA should be altered to give protection from discrimination to everyone who has (or has had or is perceived to have) an impairment, without requiring the effects of that impairment to be substantial or long-term]. At a minimum, we recommend that the requirement contained in the current definition of disability that the effects of an impairment be “long term” in nature should be removed. There is little risk that the adoption of a definition of disability that is closer to the “social model” will result in abuse and the trivialisation of the status of being disabled. The justification defence to disability discrimination claims, the “substantial disadvantage” threshold which must be crossed before a claim for reasonable adjustment can be made, and the “reasonableness” requirement itself all provide protection against the potential for abuse and will protect employers against a wide expansion of liability. (Paragraph 55)

Protected Characteristics: Gender Reassignment

20. In our view, protection currently offered by existing legislation is unduly restrictive as it denies protection to those not subject to medical supervision. We therefore welcome the expanded human rights protection offered to persons undergoing a process of gender reassignment. However, we are concerned that the new definition may be interpreted in an unduly restrictive manner, as a transsexual person will only be protected from discrimination if he or she can demonstrate an intention to undergo a process of gender reassignment. This may leave individuals who cannot yet undergo a process of reassignment, such as children under the age of 16, or those for whom such a process would be of little or no relevance, such as inter-sex persons or those living in a state of gender variance, without protection. Reliance upon the prohibition of discrimination on the basis of perception to close these gaps is unsatisfactory, as this offers at best an indirect and less than clear level of protection. We recommend that the term “gender identity” replace “gender reassignment” as the relevant protected characteristic. This would offer wider protection against the prejudice and stereotyping which continue to affect many transsexual people adversely. There is little risk that protecting ‘gender identity’ will result in abuses, frivolous cases or the trivialisation of discrimination law, as protection will still be linked to transsexual status, rather than to appearance or conduct. (Paragraph 59)

21. We consider that these amendments [amendments NC12(3) to (5) tabled by Lynne Featherstone MP and Dr Evan Harris MP, for Report Stage] deserve serious consideration. (Paragraph 60)
22. We consider that good arguments exist to prohibit discrimination against individuals on the basis that they are not married or in a civil partnership, including cohabiting couples in enduring relationships. This would ensure symmetry of protection for those within or outside such relationships, and protect individuals against forms of discrimination on the grounds of marital status which have existed in the past and may re-emerge again, such as the practice of discriminating against unmarried persons in promotion processes and pay awards. (Paragraph 65)

23. We recommend that the prohibition of discrimination against married persons or persons in a civil partnership should be extended to cover harassment, discrimination in the provision of goods and services, premises, education and membership of associations. This would ensure comprehensive protection against forms of discrimination on the basis of marital status that may not have been highlighted by the parties who responded to the consultation exercise but may nevertheless exist, or which may be easier to challenge using the prohibition on discrimination based upon the protected characteristic of being married or in a civil partnership, rather than other characteristics such as sex or sexual orientation. (Paragraph 68)

24. We are pleased to note that the Government has committed to monitoring the position of genetic predisposition and caste to see whether there is a need in the future to specify them as protected characteristics. We urge the Government proactively and regularly to review the situation and to bring forward legislation should there be evidence that further protection in these areas is required. (Paragraph 72)

25. We welcome the provisions of the Bill which standardise and clarify the definitions of direct discrimination, indirect discrimination, harassment and victimisation and harmonisation. This should make discrimination law more accessible and easier to understand and apply. We also welcome the levelling up of protection against indirect discrimination and harassment and the removal of the “comparator requirement” in victimisation cases. We are pleased to note the amendments made to the Bill during PBC which remedied the defective provisions relating to pregnancy discrimination which were contained in its original text. (Paragraph 75)

26. We consider that the previously used test in direct discrimination of “on the grounds of” has acquired a clear and definite interpretation through case-law. The Government is to be applauded for its concern for attempting to ensure the definition of direct discrimination is phrased in accessible terms. However, little is gained by replacing “on grounds of” with “because of”. “On grounds of” is both readily comprehensible and has the advantage of being a well-established term of art. Replacing this phrase with “because of” risks the emergence of alternative interpretations and may undermine a clear and well-established legal position which
ensures rigorous and clear protection against direct discrimination. We consider that it is strongly arguable that the definition should be amended accordingly. (Paragraph 80)

27. In our view, the extension of protection against discrimination based on association and perception across all the protected characteristics will further the protection of human rights. In particular, it will ensure greater protection against discrimination for individuals with caring responsibilities for disabled persons, children and older persons. It will also provide important protection for individuals who might be perceived to be involved in a process of gender reassignment, or to be of a different gender, sexual orientation, age, religion or ethnicity than their own, or who associate with friends and acquaintances who possess a protected characteristic. (Paragraph 86)

28. However, we are concerned as to how the text of the Bill makes provision for this extension of protection. If the interpretation given by the UK courts to the phrase “on grounds of” in cases such as Showboat is carried across and applied to the new phrase “because of” in the definition of direct discrimination in Clause 13, as the Government has suggested will happen, then the Bill will achieve the Government’s goal of prohibiting discrimination based on association and perception. However, 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. We would support an amendment that would have this effect. (Paragraph 87)

Discrimination Against Carers

29. Carers perform crucial work, shoudering the burden of providing support and care for many of society’s most vulnerable individuals. Their work and commitment plays a crucial role in ensuring respect for the right to human dignity of those they care for. In so doing, they often pay a price in their working lives and chosen careers and may at times face arbitrary and unfair discrimination. However, whilst carers have the right in certain circumstances to request flexible working, at present they have very limited legal protection. We therefore welcome the extension of protection for carers that the Bill provides through the prohibition of discrimination by association. This
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will ensure greater protection for individuals with caring responsibilities for disabled persons, children and older persons. However, the protection offered is limited. In particular, a carer may face serious difficulties in showing that an employer or service provider discriminated on the basis of his or her association with a person with a protected characteristic. In addition, the Bill appears to leave those with caring responsibilities exposed to the threat of discriminatory treatment which is based on their status as carers, as distinct from discrimination based on the characteristics of those they care for. (Paragraph 91)

30. In our view, carers should be provided with greater protection against discrimination and other forms of unfair treatment. The right to request flexible working that carers currently enjoy is important and provides some opportunity for carers to seek adjustments in their workplace, but more comprehensive and far-reaching protection appears to be necessary. In addition, we are not persuaded by the Government’s argument that carers choose their status and therefore anti-discrimination law is not a suitable tool for protecting them against unfair treatment. This does not reflect the position of many carers, in particular younger persons with caring responsibilities and those from less well-off socio-economic backgrounds, who often have little real choice when they assume caring responsibilities. In our view, the crucial social role performed by carers justifies enhanced legal protection. As a result, we recommend that the Government extend the Bill to provide greater protection to carers and give serious consideration to introducing a form of reasonable accommodation duty upon employers where appropriate. (Paragraph 92)

Combined Discrimination: Dual Characteristics

31. We welcome the widening of protection from discrimination to a combination of two grounds. We consider that this will enhance the human rights of individuals who have been discriminated against. Whilst, in our view, combined discrimination on two grounds should not be an excessive burden to businesses and employers, clear and accessible guidance is required in order to ensure that those who are required to comply fully understand their legal obligations. We urge the Government to keep the situation actively under review, and to give serious consideration to extending protection to more than two grounds in the future. (Paragraph 98)

32. However, we are concerned that combined discrimination will apply only to direct discrimination and not to other forms of discrimination, such as indirect discrimination and harassment, which, in our view, could benefit from the additional protection that extension beyond a single ground would provide. We also note, with disappointment, that maternity, pregnancy, marriage and civil partnership are excluded from the scope of the new clause. We call on the Government 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. (Paragraph 99)

Harassment

33. In our view, the definition of harassment set out in Clause 25 clarifies and extends existing protection against harassment while striking an appropriate balance between
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protecting the right to freedom of expression (in Article 10 ECHR and other international instruments) and the right to equality (in Article 14 ECHR, Article 26 ICCPR and other international treaties). This definition of harassment should be applied by courts and tribunals in the light of the relevant ECHR case-law on the Article 10 right to freedom of expression. However, a more restrictive definition of harassment on the basis of sexual orientation may be appropriate in the context of service provision and the performance of public functions. (Paragraph 105)

34. We consider that strong arguments exist for prohibiting harassment on the grounds of being married or in a civil partnership, and harassment on the grounds of pregnancy or maternity. It would ensure comprehensive protection against forms of discrimination on the basis of marital status, pregnancy or maternity which may not have been highlighted by the parties who responded to the consultation but may nevertheless exist. It would also eliminate confusing distinctions between the different characteristics, thereby improving the clarity of the legislation. In addition, it may make it easier to challenge harassment based on these characteristics rather than having to rely on the roundabout route of attempting to make out a case based on the characteristics of sex or sexual orientation. (Paragraph 108)

35. We consider that the absence of an explicit prohibition on harassment related to sexual orientation in the areas of service provision, the performance of public functions, and disposal, management and occupation of premises represents a significant gap in the protection against discrimination offered by the Bill. It leaves individuals without clear protection against demeaning and degrading harassment in important areas of their life. This may give rise to issues under the prohibition of discrimination (Article 14 ECHR) read in conjunction with the right to respect for private and family life (Article 8 ECHR), to freedom of thought, conscience and religion (Article 9 ECHR) or the prohibition on inhuman or degrading treatment (Article 3 ECHR). (Paragraph 114)

36. As currently framed, the Bill may offer some protection against harassment as a result of the general prohibition against direct and indirect discrimination on the grounds of sexual orientation: case-law has established that harassment that constitutes “less favourable treatment” may in certain circumstances constitute direct discrimination. However, the extent to which this is the case remains unclear. As a result, the absence of explicit provisions on harassment relating to sexual orientation that takes place in the course of service provision or the performance of public functions leaves the legal position unclear and ambiguous, to the benefit of neither service users nor service providers. (Paragraph 115)

37. Given the guidance provided by the Northern Ireland High Court in the Christian Institute judicial review, it would appear that a prohibition on harassment related to sexual orientation can be applied in a manner compatible with the ECHR Article 9 and 10 rights (right to freedom of religion and freedom of expression) in the areas of service provision and the performance of public functions. (Paragraph 117)

38. A narrower definition of harassment would however provide a more precise level of protection while giving clear protection to Article 9 and 10 ECHR rights. As we have previously noted, “[c]onduct which has the purpose or effect of ‘violating dignity’ or
creating an ‘offensive environment’ potentially covers a very wide category of conduct given the inherent vagueness of the terms ‘dignity’ and ‘offensive’’. This inherent vagueness may have a potentially greater “chilling effect” on freedom of expression if applied in the context of service provision and the performance of public functions than it does in the context of employment and occupation, where the “closed” environment of a workplace requires greater consideration to protecting the Articles 14, 8 and 3 ECHR rights of employees who face harassment. We reiterate our previous conclusion that a more precise and narrow definition of harassment should be applied in this context in the interests of reducing the risk of incompatibility with the rights to freedom of expression and freedom of religion and belief. We are of the view that language or behaviour that in respect of sexual orientation or gender identity violates someone’s dignity or creates an environment that is humiliating, threatening, degrading or offensive” is not justified in schools or in the provision of public services. We therefore recommend that protection from harassment be available on the grounds of sexual orientation and gender identity in schools using the narrower conjunctive definition as there is a “captive population” and vulnerable population at risk and there is an established problem of bullying and harassment in this area. We also recommend that protection from harassment be available on the grounds of sexual orientation using the narrower conjunctive definition in the provision of public services as those who use public services may also be “captive populations” and vulnerable. (Paragraph 118)

39. We consider that the threshold requirement [in Clause 38(3), which provides that employer liability only applies where the employer knows that the same employee has been harassed on two prior occasions] should be reduced to one previous incident, or that this requirement should be replaced with a provision that an employer will be liable when they ought reasonably to have been aware of the risk of third-party harassment. (Paragraph 119)

**Discrimination Related to Disability**

40. We welcome the provisions of the Bill which clarify and extend protection against discrimination related to disability, in particular the strengthening and clarification of the threshold or trigger point of the duty to make reasonable accommodation set out in Clause 20, and the extension of protection against indirect discrimination that relates to a person’s disability provided for in Clause 18. However, the provisions of Clause 15 providing for the prohibition of “discrimination arising from disability” as currently worded appear excessively narrow in scope and do not adequately redress the gaps in protection left by the Malcolm decision. We welcome the Government’s readiness to re-examine these provisions and look forward to the outcome of its deliberations. (Paragraph 124)

41. We consider it to be important for the “asymmetrical” nature of UK disability discrimination law to be retained and to ensure that the provision of special assistance to particular categories of disabled persons is not inadvertently exposed to legal attack. The UN Convention on the Rights of Persons with Disabilities makes clear that states must take action to accommodate the special needs of disabled persons in order to secure their rights to equality and human dignity. To ensure the
substantive equality of disabled persons, it will often be necessary to treat them differently from others. The “asymmetrical” nature of UK disability discrimination law currently reflects this requirement and in so doing gives effect to international human rights standards. (Paragraph 126)

42. However, as currently worded, the provisions of Clause 13(3), which state that it is not discrimination to treat a disabled person differently from a non-disabled person “in a way which is permitted by or under this Act” are uncertain and ambiguous. Many forms of “asymmetrical” treatment of disabled persons are not specifically “permitted by or under this Act”. At present, the Bill does not clearly establish the “asymmetrical” nature of protection against disability discrimination. We welcome the undertaking given by the Government at Committee stage to revisit the wording of this provision. (Paragraph 127)

43. We welcome this apparent commitment [to redraft clause 23]. (Paragraph 129)

44. The comparator requirement in UK disability discrimination law has often generated unforeseen difficulties and complexities which have restricted the effective protection of the right to equality. The unsatisfactory wording of Clause 23 as currently drafted is an example of this. We welcome the Government’s undertaking to re-examine this wording. We consider that there is a need for clear statutory language outlining how courts and tribunals are to apply the comparator requirement. (Paragraph 131)

45. We consider 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. (Paragraph 135)

46. 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, as is the position in the USA as a result of the Americans with Disabilities Act. We welcome the Government’s commitment to reconsidering the matter and look forward to scrutinising its amendments. (Paragraph 138)

**Services and Public Functions**

47. We welcome the clarification and extension of protection against discrimination in the area of service delivery and the performance of public functions. We also welcome the provisions of the Bill that permit separate or single-sex services in certain carefully delineated circumstances. We consider that separate provision is not incompatible with human rights standards and may indeed be necessary to ensure compliance with these standards in certain circumstances. For example, the provision of separate services for women may be necessary to ensure respect for the human dignity of older persons and victims of domestic violence. However, we also
note the importance of the conditions imposed by Part 6 of Schedule 3 as to when such separate service provision will be lawful. These conditions are an important safeguard against abuse of the possibility of separate service provision and in particular the unjustified exclusion of transsexual persons from single-sex services directed at persons who share their acquired gender. (Paragraph 140)

The Definition of Public Authorities

48. We reiterate our view that the development of the case-law concerning the interpretation of section 6 HRA has left real gaps and inadequacies in human rights protection in the UK. The use of the HRA definition in this Bill to define the scope of public functions ensures that these gaps are carried across into the definition of public functions set out in Clause 30(4). These gaps pose less of a problem in the context of anti-discrimination law than they do under the HRA, as protection against discrimination extends to the provision of goods and services and is not confined to the performance of public functions as defined by section 6 of the HRA. However, the Bill once again draws attention to the definitional problems within the HRA. The inadequate section 6 HRA definition may have a limiting effect on the number of bodies subject to the positive equality duty. (Paragraph 143)

Immigration Exceptions

49. In our Report on the UN Convention on the Rights of Persons with Disabilities, we drew attention to the Government’s proposed reservation on immigration control and recommended that it was unnecessary, inconsistent with the object and purpose of the Convention and appeared not to constitute a valid reservation. We consider that the immigration exception as set out in Schedule 3(16) is also inconsistent with the object and purpose of the UN Convention. This exception could permit treatment of disabled persons which could violate their right to equal treatment, as well as potentially threatening other rights such as the right to life protected under Article 2 ECHR and the Article 3 ECHR right to freedom from inhuman and degrading treatment if disabled persons with serious illnesses are denied entry to or leave to remain in the UK and deported back to countries where they may be subject to life-threatening conditions in the absence of a reason to do so under immigration law. (Paragraph 147)

50. Further, the scope of this exception is excessively wide, in particular in how it exempts all acts done “if necessary for the public good”. There is no explicit requirement that any discriminatory acts must be done for a legitimate aim and be objectively justified. The Government’s suggestion that a proportionality requirement will be automatically applied by courts in assessing the legality of acts done under the exception appears to be very optimistic: Schedule 3(16) does not make provision for such a test and not every case involving this exception will result in the application of the proportionality requirements applied under the HRA. We accept that the immigration authorities may legitimately wish to exclude people from entering or remaining in the UK in certain specific and limited circumstances, for example if they have certain highly contagious diseases. However, any such decisions must be necessary to protect public health or public safety, must achieve a legitimate
aim and be objectively justified in line with the standard proportionality analysis. Consistent with the Solicitor-General’s indication in the PBC, we recommend that the Government amend the Bill to make this explicit. (Paragraph 148)

51. We do not consider that the Government has established a case for retaining the ethnicity and nationality immigration exception in its current form. Discrimination on the basis of nationality is an unavoidable feature of immigration control. However, the case-law of the European Court of Human Rights, the House of Lords and other courts have established that pressing justification must be shown for the use of distinctions based on race, ethnicity or associated concepts such as national origin. The provisions of the UN Convention on the Elimination of Racial Discrimination also require states to take steps to avoid the use of race-based distinctions. In our view, the Government has not established the existence of a pressing justification for the continuation in force of this exception insofar as it extends to distinctions based on ethnicity and national origin. The Government has given few examples where the use of ethnicity or national origin would be justified to deal with a pressing problem. Given the range of immigration powers available and the ability of the Government to authorise the use of distinctions based on nationality, we consider that there is insufficient justification for including an exception that permits discrimination based on ethnicity and national origins in the Bill. (Paragraph 152)

52. We have previously recognised the basis for the religion and immigration exception. However, we have emphasised that the exception should not affect the duty of public authorities exercising immigration functions to comply with the duty of non-discrimination under Article 14 ECHR, where these functions engage the right to manifest religion under Article 9 ECHR, or rights to respect for private or family life under Article 8 ECHR. We also consider that the wide scope of the existing power to exclude persons whose presence in the UK would not be conducive to the public good means that the exception set out in Schedule 3(18) is unnecessary. The case-law of the European Court of Human Rights, the House of Lords and other courts have established that strong justification must be shown for the use of distinctions based on religion or belief. Applying this approach to the Bill, the wide scope of the existing power to exclude persons on the basis of the public good appears to make the inclusion of an exception permitting exclusion solely on the grounds of possession of a religion or belief unnecessary and undesirable. This provision should be removed. (Paragraph 156)

53. We welcome the protection offered by Part 5 of Schedule 3 against discrimination in the provision of insurance services. We consider that the distinction in Schedule 3(21) between the characteristics of sex, pregnancy and maternity and gender reassignment, where the use of reasonable actuarial data is permitted to justify direct discrimination in certain circumstances, and other protected characteristics, where the use of such data cannot justify direct discrimination, is justifiable on the basis that it reflects a genuine social need for gender-aggregated data to be available to insurance providers. (Paragraph 158)

54. However, we are concerned that the exception set out in Schedule 3(22) in respect of existing insurance policies appears to permit ongoing discrimination on the basis of
protected characteristics. No equivalent provision appears to exist in current anti-discrimination legislation, which raises concerns that the principle of non-regression has not been respected. The rationale behind the width of this exception also appears to be unclear, as little or no justification has been offered by the Government as to why such a wide exception is considered to be necessary for existing insurance policies. As a consequence, we consider that the scope of this exception as currently framed raises serious concerns. (Paragraph 159)

Premises

55. We consider that these exceptions strike an appropriate balance between protecting the right to equality and the rights to privacy and freedom of association. (Paragraph 161)

Occupational Requirements

56. We welcome the clarification in Schedule 9(2) and 9(3) of the circumstances in which occupational requirements linked to a religious belief or ethos can be imposed by faith-based organisations and organised religious groups. We accept that some limitations on non-discrimination on grounds of religion or belief may be justified and appropriate in relation to religious organisations and that the exemption in Schedule 9(2) fulfils that role. We also consider that in general the provisions of Schedule 9(2) and 9(3) strike the correct balance between the right to equality and non-discrimination and the rights to freedom of religion or belief and association, especially if interpreted in line with the approach set out in Amicus v Secretary of State for Trade and Industry, which emphasised the need for such exceptions to the general prohibition on direct discrimination to be “construed strictly” on the basis that they are “a derogation from the principle of equal treatment”. (Paragraph 174)

57. We consider that substantial grounds exist for doubting whether the “religious ethos” exception provided for in Schedule 9(3) permits organisations with a religious ethos to impose wide-ranging requirements on employees to adhere to religious doctrine in their lifestyles and personal relationships, by for example requiring employees to manifest their religious beliefs by refraining from homosexual acts. We agree with the Government that it is “very difficult to see how in practice beliefs in lifestyles or personal relationships could constitute a religious belief which is a requirement for a job, other than ministers of religion” (which is covered by a different exception). This should put beyond doubt the position that the exemption in Schedule 9(3) cannot be used to discriminate on the basis of sexual conduct linked to sexual orientation. We support this view and recommend that this be made clear in the Bill. (Paragraph 175)

58. We are concerned about the status of employees of organisations delivering public services who find themselves as employees of organisations with a religious ethos who have been contracted to provide the public service. They have a right not to be subjected to religious discrimination on the basis of the ethos of the contracting organisation if they are otherwise performing their job satisfactorily. We are concerned that the widespread use of the “religious ethos” exception set out in Schedule 9(3) by organisations based on a particular religion or belief who are...
contracted to deliver services on behalf of public authorities could result in public functions being discharged by organisations in receipt of public funds who are nevertheless perceived to discriminate on the basis of religion or belief. (Paragraph 176)

59. We reiterate that the exemption of the armed forces from the scope of the disability provisions of the Bill is unnecessary and incompatible with the UN Convention on the Rights of Persons with Disabilities. It also may give rise to issues of incompatibility with the ECHR, in particular with the Article 8 ECHR right to respect for private life combined with the Article 14 ECHR right to equality and non-discrimination. We repeat our recommendation that the Government should at least reconsider the necessity for the reservation within 6 months of Royal Assent being signified to the Equality Bill. (Paragraph 182)

60. In our view, there are strong arguments to suggest that the current statutory provisions governing the default retirement age unduly restrict the rights of older workers to equal treatment and non-discrimination. We recognise that employers have a legitimate interest in workforce planning. However, alternative methods of workforce planning exist that avoid the age discrimination inherent in the operation of a default retirement age, such as the use of performance management techniques and clear job evaluation and assessment mechanisms. The default retirement age can close off opportunities for individual self-realisation and is often perceived by those affected as a denial of their right to equality which is based on age stereotyping. We welcome the decision of the Government to bring forward its review of the mandatory retirement age provisions to 2010 and support the abolition of the default retirement age in its current form. We strongly urge the Government to complete its further consultative process with sufficient speed to enable the default age of retirement at 65 to be removed during the lifetime of this Parliament. (Paragraph 185)

Equal Pay

61. We welcome the clarification of equal pay law and the provisions of Clause 68, which for the first time make it possible to bring a claim for direct sex discrimination when a person is paid less because of their sex. However, 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. (Paragraph 189)

62. 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 the CEDAW Committee as necessary to eliminate patterns of occupational segregation and to close the pay gap between men and women. (Paragraph 190)

63. We welcome the protection provided by Clause 74 of the Bill against victimisation of employees who discuss their pay with colleagues with a view to finding out if differences exist that are related to a protected characteristic. This should help ensure greater transparency about pay and protect employees who choose to investigate whether they are discriminated against in their work remuneration. However, this protection is confined to discussions with colleagues and former colleagues, and does not appear to extend to cover discussions with trade union officials who are not work colleagues, journalists or others whom an employee might wish to approach to discuss issues of pay equality. We consider that in the interests both of securing greater transparency about pay and to protect freedom of expression, the protection provided by Clause 74 should be extended to all discussions about pay that are directed towards finding out whether differences exist that are related to a protected characteristic. (Paragraph 192)

64. We consider that this amendment [amendment NC17, tabled by Lynne Featherstone MP and Dr Evan Harris MP, for Report Stage] deserves serious consideration. (Paragraph 192)

65. We welcome Clause 75, which enables Ministers to require employers with large workforces to publish information on gender pay gaps that may exist. This is 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. (Paragraph 194)

66. We recommend that the Bill should include a wider power than in Clause 75(1) for Ministers to make regulations about mandatory pay audits. (Paragraph 194)

67. We consider that both amendments [amendment NC3 tabled by Lynne Featherstone MP, Dr Evan Harris MP and John McDonnell MP and amendment NC5 tabled by Lynne Featherstone MP and Dr Evan Harris MP, for Report Stage] deserve serious consideration. (Paragraph 195)

68. We welcome the clarification of the “material factor” defence in Clause 66 and the provision 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”. However, we consider that further clarification of the scope of this defence is necessary. In particular, we consider that Clause 66 should be amended to make clear that the phrase “difference of sex” includes both direct discrimination and indirect discrimination which is not objectively justified. In addition, Clause 66 should be amended to clarify that 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. This will ensure that UK law complies with the case-law of the ECJ in this area and remains capable of addressing equal pay claims that arise out of patterns of occupational segregation. (Paragraph 199)

69. We consider that this amendment [amendment NC6 tabled by Lynne Featherstone MP and Dr Evan Harris MP, for Report Stage] deserves serious consideration. (Paragraph 199)

70. We consider that Clause 61 should be clarified to make it explicit on the face of the Bill that equal pay comparisons can be made with persons who are not contemporaneously employed by the same employer as the claimant. (Paragraph 200)

The Scope of Protection

71. We welcome the extension of the scope of protection from discrimination to transsexual pupils. (Paragraph 203)

72. In view of the relatively high rate of teenage pregnancies in the UK, we are not persuaded that it is justifiable to exclude discrimination on grounds of pregnancy and maternity from the scope of the Bill’s protections in the field of education in schools. (Paragraph 206)

73. We therefore consider that harassment on grounds of sexual orientation and gender reassignment should be included in the forms of discrimination prohibited by the Bill in education in schools, albeit with a narrower definition of harassment as explained earlier in this Report. (Paragraph 208)

School Admissions

74. We may return to this matter in the light of that judgment [JFS case]. (Paragraph 212)

Curriculum

75. We recommend that the exemption for the content of the curriculum be confined to the scope of the existing exemption, and not extended to other protected characteristics. (Paragraph 220)

76. We draw this issue [the difficulties for faith schools if the duty not to discriminate were to apply to content of the religious education curriculum] to the attention of both Houses. (Paragraph 222)

Collective Worship

77. We therefore recommend that, instead of exempting collective worship from the duty not to discriminate on grounds of religion or belief in this Bill, the Government revisit the justification for legally requiring all maintained schools to ensure that pupils participate in a daily act of Christian worship. (Paragraph 228)
78. We cannot see a justification for the current position that young people who are almost 17, who are recognised to be of sufficient age and maturity to be entitled to access sexual health services without their parents’ knowledge, are not entitled to withdraw themselves from compulsory collective worship. (Paragraph 232)

79. Until such time as sufficiently robust legal safeguards are in place to ensure that religious education and collective worship in schools are approached in the objective and pluralistic spirit required by human rights law, as opportunities to reflect on moral and ethical issues and to explore the concept of belief, we remain of the view that we have consistently taken in previous reports, that children of sufficient age and maturity should have the right to withdraw from collective worship and from religious education classes. (Paragraph 233)

School Transport

80. In our view, the Government has not demonstrated the necessity for this exception from the prohibition on discrimination on grounds of religion or belief for school transport. Given this background, we therefore remain concerned that maintaining this exemption from the Equality Act duty may encourage local authorities to continue to treat those with religious and those with non-religious beliefs differently in the provision of school transport. (Paragraph 239)

Associations

81. We consider that an appropriate balance has been struck in these provisions between the right to freedom of association and the right to non-discrimination and equality. (Paragraph 241)

Political Parties

82. We reaffirm our previous conclusion and welcome both the retention of the same-sex ‘shortlist’ exception and the more limited powers conferred upon political parties to take measures to address other forms of disadvantage. They should have the effect of encouraging and enabling political parties to undertake a wider range of positive action to address under-representation. (Paragraph 246)

Prohibited Conduct: Ancillary

83. We welcome the strengthening of protection against discrimination in advertising and against instructions to discrimination. (Paragraph 249)

National Security

84. We recommend that the Bill be amended to make clear that an individual is entitled to make a statement before the proceedings, including on whether or not it is compatible with his Article 6 ECHR rights to exclude him from all or part of the proceedings. (Paragraph 251)
85. We welcome the extended powers of Employment Tribunals to make recommendations, as this should ensure a more widespread respect for the right to equality. However, we note with concern that there is no sanction for non-compliance, which may make the provision toothless in practice if employers are able to ignore a Tribunal’s recommendations without the possibility of any action being taken against them. (Paragraph 252)

86. We are concerned by the exclusion of equal pay cases from the enhanced power to make recommendations. Equal pay cases are a source of much complex and lengthy litigation, which currently overburdens Employment Tribunals: in our view, some of this burden could be alleviated if Tribunals were able to be more prescriptive about the steps which employers should take, which would benefit not only the litigants in a case, but the wider workforce more generally. The Government states that extending the power to equal pay cases at this stage would be imprudent as there is currently no evidence of the effect that allowing such recommendations would have in practice. We therefore recommend that the Government should actively seek and publish evidence of the anticipated effects of an extension of the power to make recommendations to equal pay cases, with a view to determining whether or not future legislation is required. (Paragraph 254)

Representative Actions

87. We are pleased that the Government is considering whether to permit representative actions. We believe that this has the possibility of ensuring swifter justice for litigants and employers alike. We note that the Government intended to consult on the possibility before the summer recess but that no such consultation has been published. We recommend that the Government give urgent consideration to this issue and consult on it as a priority, with a view to amending the Bill in the House of Lords. (Paragraph 258)

Public Sector Equality Duty

88. We welcome the new public sector equality duty and consider it to be an important vehicle for protecting the rights of individuals to equal treatment. We also welcome the clarification in Clause 145(3) of the concept of “due regard”, while noting that the duty could have been strengthened and clarified by the replacement of “due regard” with an obligation to take “such steps as are necessary and proportionate for the progressive realisation of equality.” (Paragraph 263)

89. In our view, the High Court in R (on the application of Kaur and Shah) v London Borough of Ealing provided an authoritative interpretation of the existing race equality duty that should be regarded as applicable to the new wider public sector equality duty. Its focus should be on protecting individuals against discrimination, promoting good relations between different groups and ensuring that the needs of individuals and groups who face disadvantage are taken into account, with a view to ensuring that all individuals enjoy the right to equality and human dignity and are afforded equality of opportunity as full members of society. (Paragraph 267)
90. We consider that the Government is correct when it suggests that the duty imposes no requirement “for public authorities to advance equality for religious organisations” and is “not designed to encourage the provision of separate services to different groups”. The positive duty as set out in Clause 145 is clearly focused on the elimination of disadvantage and advancing equality of opportunity for all people as full equals within society. The separate provision of public services to particular groups may result in differential levels of service provision which could discriminate against individuals and minority groups contrary to Article 14 ECHR, Article 26 ICCPR and other human rights instruments. International human rights law treats segregation as an unjustified form of discrimination. In addition, the duty extends to other protected characteristics apart from religion and belief and also requires public authorities to promote good relations between groups, which separate provision may endanger. As a result, we consider that the duty as set out in Clause 145 should only require separate provision when it can be objectively justified as proportionate and necessary to eliminate disadvantage or to advance equal opportunity. (Paragraph 268)

91. However, we remain concerned that the duty may be understood by public authorities as requiring separate provision to be made for the “needs” of faith communities, even in the absence of a pressing justification for such separate provision. The absence of a purpose clause means that the main thrust of the Bill taken as a whole and of the positive duty in particular may be misunderstood or misinterpreted. We recommend that Clause 145 be amended to clarify the nature of a public authority’s obligations under the duty with regards to religion or belief. Clear guidance from the EHRC should also emphasise that public authorities may be required under the duty to give due regard to ensuring that individuals from different faith communities have equal access to common public services, but not to provide separate services for each different faith group. (Paragraph 269)

92. Guidance should also emphasise that the religion or belief component of the duty is only one element of the positive duty taken as a whole: measures taken to promote equality of opportunity for individuals who face disadvantages linked to their religion or belief should be linked to measures linked to the elimination of any disadvantages that they face that are related to their gender, sexual orientation, gender reassignment, ethnicity and other protected characteristics. (Paragraph 270)

93. We consider that Clause 145 should be amended to make express reference to the “need to take steps to take account of disabled persons’ disabilities, even where that involves treating disabled persons more favourably than other persons”, as is currently required by section 49A of the Disability Discrimination Act. The specific nature of disability as a protected characteristic should be recognised in this context. (Paragraph 271)

94. It is important that the rights of children to be free from discrimination and unequal treatment, as recognised by the UN Convention on the Rights of the Child, are protected and that public authorities give due regard as to how to exercise their public functions with this objective in mind. The scheme of the public sector equality duty is, in our view, sufficiently flexible to ensure that public authorities will still be
able to treat children differently or make special provision for children of particular ages when this is justified. (Paragraph 273)

95. We are concerned by the width of this exemption and consider that a strong case exists for its deletion, given that the duty will not preclude immigration authorities applying the immigration controls set out in law. (Paragraph 274)

96. We are concerned by the breadth of this power to alter the scope of the duty. Given that the positive duty is an important vehicle for promoting human rights, we consider that any alterations to its scope should be made via primary legislation. (Paragraph 275)

The Definition of Public Authorities & Bodies Performing a Public Function

97. We consider that the “belt and braces” approach to specifying which bodies are subject to the duty provides more clarity than would reliance upon the section 6 HRA test alone. However, Schedule 19 contains some important omissions and it is likely that it will often be necessary to fall back on the HRA test to determine who is subject to the duty. In our view, the section 6 HRA test lacks sufficient clarity. Given the importance of the duty, it is unsatisfactory that the HRA test as currently interpreted by the courts will be used to define what bodies are subject to the duty. At the very least, revising and regularly updating the Schedule 19 list of public authorities would provide greater clarity than the approach currently adopted in the Bill. (Paragraph 277)

98. We consider that the specific duties that are imposed should be outcome-orientated in focus and oblige public authorities to provide clear, measurable benchmarks which will make it possible to assess their compliance with its requirements. (Paragraph 278)

99. The promotion of equality of opportunity though public procurement processes has considerable potential to bring about real change in both the public and private sectors. We consider that it is important that clear and comprehensive duties are imposed upon public authorities to build equality of opportunity considerations into their procurement processes and to ensure that equality-related contractual terms are inserted where possible when procurement contracts are concluded. (Paragraph 280)

Positive Action Measures

100. International human rights standards appear to view these types of positive action as permissible if the measures introduced are necessary, proportionate and time-limited. (Paragraph 284)

101. We therefore consider that the positive action provisions of the Bill conform to international human rights standards. We welcome the provisions as enabling employers and service providers to make greater use of positive action if they choose to do so. Well-designed and proportionate positive action measures can be an
effective mechanism for redressing disadvantage, but existing anti-discrimination law imposes excessive restrictive constraints on its use. (Paragraph 285)

102. However, we are concerned that the provisions of Clause 155 impose artificial and potentially unworkable pre-conditions which unduly limit the ability of employers to make use of positive action. (Paragraph 286)

103. 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. (Paragraph 287)

104. We therefore recommend that the requirement that employers must not have a “policy of treating persons who share a protected characteristic more favourably … than persons who do not share it” should also be deleted, and replaced with statutory wording that more closely reflects the case-law of the ECJ. (Paragraph 289)

105. We recommend that a proportionality test be inserted into Clause 155 to better reflect the current case-law of the ECJ. (Paragraph 289)

106. Guidance from the EHRC on the scope of positive action that is permissible under the legislation may assist employers to make sense of the positive action provisions of the Bill, but guidance cannot substitute for precise and clear statutory language, which is our preferred option. (Paragraph 290)

Statutory Exceptions

107. We consider that the re-enactment of existing restrictions on the employment of non-UK nationals in the public services represents a missed opportunity to review these restrictions (in particular those that relate to non-EU nationals), to remove those that are no longer justified and to minimise the scope of those that remain, on the basis that derogations from the general principle of equality of treatment should be applied narrowly and clearly shown to be proportionate means of achieving a legitimate aim. (Paragraph 298)

108. We consider that these amendments [amendments NC27 to 29, tabled by Andrew Dismore MP, for Report Stage] deserve serious consideration. (Paragraph 298)

109. We consider that substantial grounds exist for doubting whether sections 58-60 of the School Standards and Framework Act 1998 (SSFA) as currently framed are compatible with the requirements of Article 4(2) of the Framework Equality Directive 2000/78/EC. We also consider that the provisions of section 60(5) SSFA permit Voluntary Controlled and Voluntary Aided Schools to impose wide-ranging requirements upon employees to adhere to religious doctrine in their lifestyles and personal relationships which may go beyond what is permitted under Article 4(2). (Paragraph 306)

110. We accept that some exemption from the Regulations is necessary in order to protect the right to freedom of conscience, religion and belief in Article 9 ECHR. However,
as we have previously indicated, we consider that there is nothing in Article 9 ECHR, or any other human rights standards, that requires an exemption to be provided to permit religious organisations to discriminate on grounds of sexual orientation when delivering services on behalf of a public authority. Such an exemption would provide protection not for the holding of a religious belief but for the manifestation of that belief: where such manifestation of a belief conflicts with the right of gay people not to be discriminated against in their access to public services, it is necessary and justifiable to limit the right to manifest the belief. Therefore, we welcome the re-enactment and clarification of the existing provisions in Schedule 23(2) that concern discrimination on the basis of sexual orientation. (Paragraph 311)

111. The exception permitting discrimination on the basis of religion or belief in the delivery of public services by religious organisations must be objectively justified as necessary to ensure the effective delivery of these services in certain circumstances. However, to be compatible with human rights standards, this exception must be given a restricted interpretation and applied with reference to Article 14 ECHR and the rights of users of public services to access them without being subject to unjustified discrimination. We can think of few instances where the exception will apply in practice. (Paragraph 313)

112. We agree with the Government’s analysis of the impact of the public sector equality duty on the exception for religious or belief organisations with regard to the provision of services and public functions, premises and associations. However, clarification of the requirements of the positive duty in respect of religion and belief is necessary. (Paragraph 315)

113. We are concerned as to the scope of the national security exceptions contained in the legislation and in particular the complete exclusion of the intelligence services from the prohibition of discrimination in the performance of public functions. We consider that serious consideration should be given to replacing the general exemption with a specific set of provisions applicable to the intelligence services. (Paragraph 319)

114. We welcome the clarification of the existing legal position in respect of the ability of charities to provide benefits only to people who share a protected characteristic and the strengthening of protection against discrimination achieved by the current wording of Clause 188. However, we consider that there are complex issues as to the extent to which charitable objects must comply with the ECHR. A strong argument can be made that the grant of charitable status must comply with ECHR requirements and this may require the test as to when charities may discriminate set out in Clause 188(2) to be tightened by the inclusion of a full proportionality requirement. (Paragraph 326)
Formal Minutes

Tuesday 27 October 2009

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness
Lord Dubs
Lord Lester of Herne Hill
Lord Morris of Handsworth
The Earl of Onslow
Baroness Prashar

John Austin MP
Dr Evan Harris MP
Mr Richard Shepherd MP

Draft Report (Legislative Scrutiny: Equality Bill), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 326 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Twenty-sixth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 16 December 2008, 3 March, 28 April, 5 and 19 May, 2, 23 and 30 June, and 14 and 21 July.

[Adjourned till Tuesday 10 November at 1.30pm.]
Witnesses

Wednesday 24 June 2009

Vera Baird QC MP, Solicitor General, Maria Eagle MP, Minister of State, Government Equalities Office and Mr James Maskell, Treasury Solicitors.

List of written evidence

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2  Memoranda submitted by the Government Equalities Office  Ev 21; 22
3  Letter from the Chair of the Committee to Vera Baird QC MP, Solicitor General dated 2 June 2009  Ev 58
4  Letter to the Chair from Vera Baird QC MP, Solicitor General, dated 19 June 2009  Ev 67
5  Letter from the Chair to Vera Baird QC MP, Solicitor General, dated 30 June 2009  Ev 92
6  Letter to the Chair from Vera Baird QC MP, Solicitor General, dated 16 July 2009  Ev 93
7  Memorandum submitted by Age Concern England  Ev 95
8  Memorandum submitted by Barry Fitzpatrick  Ev 97
9  Memorandum submitted by the Bhagwan Valmiki Trust  Ev 99
10 Memorandum submitted by British Naturism  Ev 106
11 Memorandum submitted by Carers UK  Ev 108
12 Memorandum submitted by Central Valmiki Sabha International  Ev 110
13 Memorandum submitted by the Children’s Rights Alliance for England  Ev 112
14 Memoranda submitted by the Church of England Archbishops Council  Ev 114; 118
15 Memorandum submitted by the Committee on the Administration of Justice  Ev 119
16 Memorandum submitted by the Disability Charities Consortium  Ev 120
17 Memorandum submitted by the Discrimination Law Association  Ev 122
18 Memorandum submitted by 11 Million  Ev 124
19 Memoranda submitted by the Equality and Diversity Forum  Ev 128; 130
20 Memorandum submitted by the Equality and Human Rights Commission  Ev 132
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23 Memorandum submitted by Kailash Kaler  Ev 147
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Second Report  Counter-Terrorism Policy and Human Rights: 42 days

Third Report  Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills


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Witnesses: Vera Baird QC MP, Solicitor General, Maria Eagle MP, Minister of State, Government Equalities Office and Mr James Maskell, Treasury Solicitors lawyer in charge of the Equality Bill, gave evidence.

Chairman: Good afternoon everybody and welcome to an oral evidence session of the Joint Committee on Human Rights. We are doing a scrutiny session on the Equality Bill and we have been joined by Maria Eagle—Vera Baird I hope is on her way. But as Maria is here and her business is virtually self-contained we thought we might as well start with Maria and Baroness Prashar is going to ask the first questions.

Q1 Baroness Prashar: Thank you, Chairman. The CEDAW Committee published its observations on the UK in July 2008. I want to know what steps you have taken to date to ensure that the CEDAW Committee’s most recent recommendations are fully understood and acted upon throughout government. Maria Eagle: Having read the recommendations it seemed to me that there was at least one for every government department and every devolved department in the devolved administrations, so that does present a coordination difficulty for government generally to deal with that spread of departments. So we in Government Equalities Office, which takes the lead on this, have been very mindful of the fact that there is this big spread across everybody else’s responsibilities in every other government department. The first thing we did was to make sure that everybody had got it, so to circulate it and try and get it high upon the agenda for ministers and policy officials to notice.

Q2 Baroness Prashar: You mean for each department?
Maria Eagle: Yes. Not only for each department but also across the devolved administration, the Overseas Territories and the Crown Dependencies as well to make sure they all had it. That sounds like a simple first step but it is actually an essential one as well, to make sure they all have it. That is one of the things that we have done. There is also an officials group which is aimed at coordinating that effort and so obviously the push that ministers across departments can give to this is important, and whilst gender is a big part of my role in Government Equalities Office it tends to be a smaller part of other ministers’ jobs in other departments—they will do gender equality along with whatever their main policy leads are in other departments. So I think that the trick is to try and make sure that it is actually on their list of things to do instead of at the bottom of their “to note” lists. We did that by not only keeping in constant touch at an official level at the Government Equalities Office with policy leads at an official level across government departments, but also I as minister give it a ministerial push by engaging with ministers in other government departments, which we have done. Also I will occasionally—and the last time in January—send letters to all my ministerial colleagues to re-emphasise the bits of the recommendations and the observations that were relevant to their ministerial responsibilities and to their department and tried to push the awareness and effort to respond and to make sure that we do what they have suggested in that way.

Chairman: Just to add to that, it seems to me that there was at least one for every department. I think there are more...

Q3 Baroness Prashar: What you have given me is this kind of process by which you have made sure that they are high on the agenda, but I really want to understand what action has been taken. Have any of these been acted upon?
Maria Eagle: I do not think we have time today to go through every recommendation or observation and give you a list of what has been done in response to it since the observation was made. We are perfectly happy to do that in writing, if that would be helpful to the Committee?

Q4 Baroness Prashar: I think it would be extremely helpful to have in writing what action has been taken. Maria Eagle: Of course there has been more progress in some areas than others it would be fair to say.
Q5 Baroness Prashar: My next question really is about the incorporation of CEDAW into the UK law. Why does the government not propose to use the Equality Bill to incorporate all the provisions into the UK law as recommended by the Committee?

Maria Eagle: We do not actually think that that is necessarily an appropriate way forward in respect of all of the observations and recommendations. You have to remember that the purpose of the Equality Bill is to prohibit discrimination and to promote equality of opportunity and it provides protection against discrimination in certain fields, in specific fields only, particularly work of course—provision of goods facilities and services, the exercise of public functions, premises, education in schools and higher education, and some interventions in private clubs. But CEDAW covers a wider range than that, particularly, for example, in social and cultural fields. So there is not a fit between the extent of the recommendations and the extent of our anti-discrimination legislation. There are some aspects and some recommendations where it is possible for us to have made provision in the Equality Bill: for example, the extension of women only shortlist to try and increase levels of participation of women in public life would be an example of that. But we did not feel that it would be possible to implement all of the recommendations on the basis of the observations that were made by the use of this statute. It is already a complex piece of legislation as I am sure Vera will be telling you when you are dealing with the Bill itself. Not only is it consolidating a lot of existing law but it is extending the law. But it is not extending it across all fields. What we did not want to do was to cause confusion in a piece of legislation that is meant to be consolidating and simplifying by importing measures in respect of some fields that actually are not covered in our domestic law. That is the explanation. But we are taking the opportunities that have presented themselves to incorporate some of the suggestions and recommendations using the Equality Bill, but not all of it.

Maria Eagle: You mean the Optional Protocol?

Q6 Baroness Prashar: My final question in this area is about the individual complaints mechanism. What specific steps are you taking to ensure that women have sufficient knowledge about this mechanism?

Maria Eagle: You mean the Optional Protocol?

Q7 Baroness Prashar: That is right.

Maria Eagle: It has not been well used thus far I think it would be fair to say. What we have done is we have started to try and raise the awareness of women about this option, but we are starting from there being no awareness, I think it is fair to say.

Q8 Baroness Prashar: That would be true.

Maria Eagle: It would not be going too far to say that there is no awareness of the Optional Protocol and included breakout sessions where there was more detailed discussion. They seem to have gone down well and we have had positive feedback and that is what we have done so far, to try to raise awareness of this route. But, as I say, we are starting from a low base.

Baroness Prashar: Yes, indeed. Thank you.

Q9 Chairman: Before I bring in Lord Morris, as you see Vera has now joined us. As Maria was here we started on some questions for her and we will come back to you in a minute.

Vera Baird: I thought I was not late but I appreciated that I looked it when I walked in; but one minute to three is early in my book.

Q10 Lord Morris of Handsworth: Can you help us, please, by saying what will the Equality Bill do to alleviate the convention and the elimination of discrimination against women. There are obviously concerns about persistent occupational segregation between men and women in the labour market and the continuing pay gap is an issue that needs to be addressed. Can you share with us what the Bill does in that respect?

Vera Baird: Yes. You know, Chair, that the Bill will streamline all that has gone before and extend the reach to three further strands—gender is already in there. Of course what firstly it will do is to put a single duty on all public authorities which will encompass gender and all the other strands, requiring the public authority to what I would describe as engineer out equality in all of its functions, so that it has a duty to reduce discrimination, to promote good relations and to promote equality in all its public functions. So that everything I say specifically about gender has to be pinned to that backdrop, that there is a gender component in that single equality duty. There is a whole raft of things we are doing about equal pay. We discussed equal pay yesterday in committee—and we are well on the way in committee now, we are on about clause 98 in committee—and one of the material things we are going to try to do about that is that we have put into clause 73 an ability for ministers to direct that private businesses with 250 or more employees must disclose provisions about their pay structure. That is a power we have undertaken not to introduce until 2013 because we want to try to do it voluntarily in advance of that. The way that that will progress is that the EHRC will set up—indeed has set up—a group with employers and trade union representatives to work out the right things to measure—we call them metrics—about gender, pay and equality, so that we hope we can get by consensus material made available that will at the same time not impose an undue burden on businesses who are actually at the level of 250...
employees anyway and so are likely to have all this information available, and we will put it into a digestible and accessible form so that we will be able to compare business with business, sector by sector as to where their pay structures are. By that mechanism we hope—and it is interesting that in the evidence sessions before the Committee the CBI representative undertook to do no less than drive the impetus through its membership to implement this transparency, I was impressed by that; and of course the TUC will do it by getting employees to drive it too—to expose where the pay inequalities are, to drive them out and, by step one, requiring transparency in this way that I have indicated, to make it clear that if A business and C business are disclosing—and lots of businesses do now disclose their pay structures—what they are doing in this accessible, digestible form and B does not, then the pressures on B will be that ethical investors will not look at them and no woman in her right mind will go and apply for a job with them because it would be self-evident that the reason they are not transparent is because they have something to hide. And customers who now shop on an ethical basis will also be less likely to favour them, and of course trade unions would move in, if indeed the trade unions were applicable; and we believe that that kind of pressure is eventually going to make—and we hope eventually is short-term—transparency lead to equality. So that is something by which we put a good deal of store. However, if it does not work by 2013 we will compel it—and there is no mistake about that—and we will compel it backed by the sanction we need to do so. In addition to that—but I do think that that is very key on equal pay—we are going to abolish secrecy clauses. At the moment there is no problem if a boss wants to say to workers, “You cannot tell the person sitting next to you what you are earning,” so my right to equal pay is somewhat undermined by the fact that I do not know whether I am being paid unequally, and you will get rid of that. Those, I think, are our main provisions on unequal pay. As far as further advancing gender equality, there is what Maria has already alluded to, which is in public office, retaining the positive action provision, and also extending positive action to a situation in which an appointment or a job is available and the workforce has an under-represented sector within it. So, for instance—this is the perhaps counter intuitive example it is good to use—most primary school teachers are women, so if I as a primary head want to employ a new teacher and I have a choice between a well qualified man and a well qualified woman I can now positively take action to recruit the man in order to redress the under representation of men within primary school teaching, and in particular in my community of course that will have more impact for women because there are more areas in which they are the minority. There is also the public procurement provision which we hope will drive the public sector duty on all public authorities through the private sector because it will be possible now to put provision on public sector contracts and one-third of businesses approximately bid for public sector contracts every year, to a value, I think, of £175 billion. So that ability to drive the public sector duty through the private sector will have important impacts for women. For instance, you can countenance a situation where if you are regenerating a bit of Redcar, my constituency, by building a new estate you can put provision in the contract that there should be a certain number of apprenticeships and training contracts as part and parcel of the contract, and you will be able, with the positive action provisions buttressed to the procurement ones, to say that 10 per cent of those apprenticeships should be reserved for women, or five per cent of them should be reserved for BME people—whatever the under representation is—and buttressing their procurement power with a positive action will open up possibilities like that, which we do think can have quite a significant impact. They are the headlines and I will remember later ten things that I wanted to tell you as well, but they are the topics.

Q11 Lord Morris of Handsworth: You will know that one of the biggest blockages in respect of equal pay for women is gender segregation. Would it not be desirable to amend the Bill to permit hypothetical comparisons in equal pay cases to enable people employed in highly gender segregated workplaces to pursue equal pay claims?

Vera Baird: What we are going to try to do about non-discriminatory aspects of unequal pay and things like gender segregation is to publish a document presently which will review what we have done to try to drive the equality agenda through the employment field. It will buttress on the work of the Women and Work Commission, which is being, as you know, resumed, and will report in July on what it finds; and then seek ways forward to try to improve the labour position for women. I think gender segregation is very important and I will refer to hypothetical comparators in a minute, but there is also a huge problem about low quality part time work, that it is not currently practical to have wider application—women who have children, who I do not think in these days should be required to pick up the labour market dregs left over from a 40-hour week, 40 weeks a year, 40 years’ pattern of work, that it is not currently practical to have significant amounts of high quality work on a part time basis, and we need to drive the agenda. I am looking for a strategy specifically directed at—it will have wider application—women who have children, who I do not think in these days should be required to pick up the labour market dregs left over from a 40-hour week. Women and Work Commission, which is being, as you know, resumed, and will report in July on what it finds; and then seek ways forward to try to improve the labour position for women. I think gender segregation is very important and I will refer to hypothetical comparators in a minute, but there is also a huge problem about low quality part time work, that it is not currently practical to have significant amounts of high quality work on a part time basis, and we need to drive the agenda. I am looking for a strategy specifically directed at—it will have wider application—women who have children, who I do not think in these days should be required to pick up the labour market dregs left over from a 40-hour week.
employer—so you would be looking at another employer and seeing it like that. The other thing is that there are all sorts of foibles in it, such as if you had a caretaker who was a man and another worker in a school of a similar level who was a man, in order to see whether they should have equal pay your hypothetical comparator would be that the caretaker was a woman, and that would be the way you could drive A trying to up his pay with B, both of whom were men, which is not, in my view, what equal pay law is for. We do not think that hypothetical comparators are the key; we think there are lots more.

Q12 Lord Lester of Herne Hill: The 35 years that I have been involved with equal pay—and I am sure it is common ground—the principle of equal pay has not yet been translated properly into practice. The problems are partly to do, I think—and I wonder whether you would agree—with the fact that there is no very strong incentive for employers to carry out job evaluation, and the gender pay gap information that is to be published only for employers or more than 205 people, and only in 2013, that information is only about the size of the difference between men’s and women’s pay expressed as a percentage. I wonder whether you would agree with me that there is a legal obligation to get equal pay for equal work at each particular grade; that that requires proper job evaluation in terms of the jobs make under various headings, and then a pay system that gives effect to the job evaluation and, above all then, collective remedies for the systemic problems that all that shows up. If you do agree that that is broadly speaking what is needed is it not really correct to say that the Bill does not yet deal with that because clause 73 does not provide sufficient information to enable job evaluation to take place because there are no collective mechanisms, like the one that Mrs Thatcher abolished when she wound-up the Central Arbitration Committee, and that it is only going to deal with 250 employee establishments and only in 2013. So if what I have just said is correct—I know that this is not the Solicitor General’s responsibility alone—could be conveyed to the business ministers so that they can convey to employers that this is not good enough.

Vera Baird: Let me just say that it is not about 2013, this is about now. This group set up with the Commission is working now to sort out what should be the metrics made available by clause 73, which I personally think has been cast wide enough to include a considerable amount of extremely valuable information. What we expect to follow is that if people do start to comply with this, by the mechanisms I have already set out, then we will be able to see in each case whether there is a gender pay gap and where it is and how it is. Thereafter, what is the business going to do now that that is subject to scrutiny? Clearly they are going to have to take steps to try to close it or they are going to be pursued, either if it is a union shop by the union or they are going to be pursued by the Commission, without the slightest doubt, because they have the powers to make such pursuit. So they are going to make moves to close it. How will they do that? There is a very good tool that the EOC set up, which can first of all concern where the gender pay gap is and what its nature is; and then if there is a real problem and it is not just an ostensible one there is a deeper tool that the EOC have—and the Commission will refine these—which can be used to put it right, and that is the process we expect to take place. 250 employee plus businesses is 40 per cent of the workforce, which we think is a very reasonable place to start. I bear in mind that it is the case that already a lot of businesses do disclose information of this kind—a lot—some do—and they do not necessarily disclose it in a digestible way or in a way that you can compare like by like with, but they have none the less taken the initiative to do this and they are likely to carry on doing it, and we do not expect the impact to stop at 250 employee plus businesses. For two reasons: one is that there are now businesses which do put a premium on equality, equal pay and transparency, who have better procurement policies than the government has, and who drive their own equalities through the smaller businesses who contract with them, and we want that process to carry on, and we expect that it will as we spread the transparency provisions to make sure that more businesses comply with them. Did I say there were two ways? I will come back if there is a second way. So I think that what we have here is a provision that will open up what it is there and it will thereafter require a proper investigation into how it has come to be there and how to get rid of it. I accept that unequal pay is systemic and you were talking about things like some way of piecing this in a systemic way. We are going to look at the question of whether representative actions will fit in here and help. As you know, the Civil Justice Council has done a major piece of work about the appropriateness of representative action across the civil courts, and that work in the MoJ is now being looked at. The GEO is putting together a paper about the applicability of representative actions in discrimination cases and in particular in equal pay cases and on the face of it there are pros and cons, not least of all I suppose the costs in the ET is potentially a difficulty and the trade unions are in two minds about it. But for myself I think that there is a lot of promise in representative actions. What we hope to do is to finalise our thinking about this, hopefully in time to catch this Bill, but if it is not in time to catch this Bill to put it into the next Justice Bill that follows. Representative actions, if it is possible to model a scheme of them, that will fit the ET, I think should hold a good deal of promise for driving more speedily and more systematically unequal pay out of the system.

Q13 Lord Lester of Herne Hill: Might I just ask one supplementary? I quite understand what you said about representative actions and I think you probably have the power to bring them in just for employment but so as to be pursued, either if it is a union shop by the union or they are going to be pursued by the Commission, without the slightest doubt, because they have the powers to make such pursuit. So they are going to make moves
representative action or not is irrelevant to my question—and somehow there must be an orderly way of securing equal pay for all the men and women at the right grades in both pay systems. Is it not essential that some piece of collective statutory machinery be set up to enable women and men, trade unions and any other interested parties to sort it out, whether it is the Central Arbitration Committee or some other body, because otherwise lawyers like me will do no service to women if we simply break individual pay systems—and the Tribunal is not competent, it is a court—and the Tribunal cannot remake collective agreements, if it could make wide recommendations, and do you not need to think about something in the interests of employers, trade unions and women to sort out what you rightly describe as the systemic problem?

Vera Baird: If Mary has bust the pay system and it is transparent therefore that there is systemic unequal pay what will follow for the employer is likely to be many, many more Employment Tribunal actions on exactly the same basis, is it not?

Q14 Lord Lester of Herne Hill: Quite.

Vera Baird: So will not the employer and the employees then negotiate a way out of it and the Commission would have a power to help there. I think what you are looking for is an alternative but what seems to me to be a reasonably workable system is something like the Central Arbitration Committee, which would have been able to come into a situation where the pay agreements had been busted and say, “What must follow is this.” That is less a sort of policing and more an arbitration role, is it not, and the Commission is perfectly capable of taking that role, I think. But I completely agree with you that it is not a bad idea for that situation not to have to be one in which all you can do is take action after action after action in the ET or you will get bogged down exactly where we have in the public sector. So I see the need for broader action but whether we need more than the Commission and the availability of the powers here I do not know. Can I just add that I did not mention the public sector when I answered Lord Morris’ question? We will under the public sector duty introduce specific duties, one of which will be reporting about pay inequality in the public sector immediately, by requirement—public sector bodies with 150 or more employees. So, as it were, similar provision but now immediately for the public sector. And, again, the procurement thing is intended to drive that through into the private sector too, but that is immediate.

Q15 Baroness Prashar: Can I ask one question about the regulations to impose mandatory pay audits. Does the Bill authorise the regulation to do pay audits on gender pay?

Vera Baird: It does not provide for pay audits; it does not require them.

Q16 Baroness Prashar: But can you meet regulations under the clause 73?
Q21 Chairman: Can I go on then, Vera, to talk about the duty to deal with inequalities in socio-economic disadvantage. Clause 3 makes it clear that the new duty is not in itself directed to judicial review but it is also clear in the explanatory notes that individuals would be able to bring a judicial review if they thought a public authority covered by the duty was not actually acting on it and has not considered socio-economic disadvantage when devising the policy. Can you give us some examples of the cases you have in mind for which a judicial review could be used?

Vera Baird: I thought you were going to ask me that. I have been trying to consider when this might not be a situation. Supposing in Redcar there is—as there is—a deprived area with high levels of unemployment and there is either a new—because we are confecting a new situation—employer or a new boost to try to get the unemployed from the estate into work over the foreseeable years. If the local authority on putting together its transport strategy did not put a bus on that links the two together I wonder if that might not be an example in which they would probably not have had due regard to the inequalities of the outcome that would follow from cutting off the deprived estate with the new employer. That is my best attempt so far at confining up a consideration of where judicial review might lie. My own best guess is that this duty is more likely to be a component of judicial review than a self-standing ground for it, but we shall see.
serve, and they fear that there will not be enough specificity in religion to deliver them and indeed that some religious doctrines might undermine the need for them. If they deliver services which are about violence against women they may think that certain religions, doctrines may undervalue the impact of violence against women and so seek instead to deliver more generic services that do not give the focus that they think is required. My own view is that the reverse is the case; that this duty is to ensure that within a protected characteristic a proper delivery of fairness is going to help to ensure that exactly the services they need for black and minority ethnic women who are suffering violence are going to be delivered because the local authority is going to have an extra duty. It will not be sufficient to say that there are generic services over here; they will have to make very clear that they are promoting the interests of that sector, and if that requires the delivery of these services then it will have to be so. So I think it is a positive not a negative. The imposition on free speech, we are talking really in public sector delivery. In public sector I think about delivery and it is not about promoting religions one with another, so that one of them will have a local authority promoted platform to criticise another; that is not what it is about.

Q24 Lord Lester of Herne Hill: I did not mean that in the question; I am sorry. I have probably expressed it badly and I apologise.

Vera Baird: I may not have taken it on board.

Q25 Lord Lester of Herne Hill: What I really mean is this: if you have a duty to advance equality of opportunity between people belonging to different religious groups or a non-religious group, many of these groups have very strong opposition to others of these groups. As you know, religion is like politics—not something where there is just one happy family. So if you have a duty to promote equal opportunity among people in all these groups and you are the local authority is it not going to be very divisive because each of these groups will assert its own interests and the local authority then has competing interests that it has somehow to reconcile, whereas the message ought to be stop thinking about groups and think about individuals and the services to them? That is really the case against you, which I would be grateful if you could deal with.

Vera Baird: We are talking about people. What this facilitates is that if a Muslim woman will not be examined by a male gynaecologist then that means you will have to make available a female gynaecologist so that she does not suffer inequality of access to health services. That is the drive.

Q26 Lord Lester of Herne Hill: That is problem is covered by religious discrimination, is it not?

Vera Baird: We are talking about a duty to provide services here, not after the event and it has gone wrong, so taking an action in discrimination; this is about the duty to engineer out equality. As I have said, that is a good example of how this will work and at what it is directed; this is not about having to fund a religion which criticises another, it is about people and ensuring that the possession of a particular faith does not disadvantage people in the community at large.

Q27 Dr Harris: Can I raise an aspect of this? We are both on the Public Bill Committee and I will try and avoid déjà vu because we have not reached this bit, though we will then have déjà vu in the Committee, I suppose. One of the issues is the fact that religious organisations are allowed in Schedule 23 of the Bill to discriminate in the delivery of services on religious grounds, for obvious reasons one might think. But they are also allowed to do that in the delivery of public services. The problem then comes, if you look at the public sector equality duty the worry is that if you have one religious organisation delivering a public service under contract to the local authority for a group of its adherence in line with this exemption, which is lawful, then every other group of people might say, “We should have equal access to public funds to deliver that service to our people,” and once you have started that process it is very difficult to see the public sector equality duty I this respect, and it is now in respect of 143 (1)(b) and what follows, the equality opportunity angle, and just promoting that. How can you reassure us that that would not be a pressure on a local authority, for example?

Vera Baird: It depends on need, does it not? The alternative that you would posit is that you should not be allowed to make decisions on the basis of religion in the delivery of public functions and that would leave, for instance, a local authority which had an older Jewish community that wanted to fund a Jewish care home to ensure that they were properly looked after, if you did not have the religious exception to allow the Jewish care home to carry on then you would not be able to cater to that community—the only way you could deliver the public function is through the Jewish care home to require it to stop being Jewish, which would not look after your Jewish community in the first place. So it is not about bidding for resources on the basis of religion, it is about need; and if there is a need then it will have to be fulfilled.

Q28 Dr Harris: But by definition there might be a need because every other group does not have access to that care home. Let us take adoption. The Bill makes very clear that a Catholic adoption agency is entitled to say no Jews or Protestants or Muslims need apply in accessing this public service, which one might consider to be surprising in itself, but there we are. What is to stop those parents who cannot access this adoption agency saying, “We want our own because if the Catholics have their own why should you not fund another agency or allow another agency to have Jewish parents only, Muslim parents only, Protestant parents only” and the local authority faced with the equality opportunity duty cannot really say no. It might be able to say no but it is under pressure to say yes because they have already allowed
one section of the population to have an advantage— that is an exclusive service, therefore everyone should have it.

Vera Baird: No, there would have to be an availability of adoption services for non-Catholics that ensured that they could, if they chose, adopt a child; that is what they would have to do. There is no competition to make sure that they are equal services. This is about promotion; it is not about in some mathematical way requiring that every service has equality, every religion has equality.

Q29 Dr Harris: You could avoid that problem by taking out the provision in the clause, just that that talks about advancing equality opportunity between people who share relevant, protective characteristic abilities who do not share it, in respect of religion. Then you do not have the prospect of judicial reviews against local authorities—

Vera Baird: That would be to the detriment, for instance, of Southall Black Sisters.

Q30 Lord Lester of Herne Hill: No, they do not think so, and they have said so.

Vera Baird: They are wrong; it would. We have had this argument with Southall Black Sisters for a while and we are very confident that the way it will work is to their advantage and not to their disadvantage. That is the way that it is intended to work, and this too will be buttressed by guidance and by specific duties as well. It is very easy to get bogged down on and in fine slices of what can be conjured up as situations that are not likely to arise and, in a sense, defy gravity because we have to rely on people of goodwill, good nature and a sizeable quality of commonsense delivering our public funding.

Q31 Dr Harris: I will let the Southall Black Sisters speak for themselves about whether they can deal with discrimination that their members face under the race agenda strands and not rely on the religious strand. But let us take schooling, for example—

Vera Baird: They would not; they would need the religious strand.

Q32 Dr Harris: Let us take schooling, for example; this is a very clear example where there is pressure, whether it is government policy to meet it or not, from minority religions, whether that be Muslims, Hindus, Jews, smaller religions or indeed sects to have “their own schools”. If there are existing, as there are in almost every case, specific schools that give preference to Christian children, as there are all over the place—for better or for worse and we have a difference of opinion on that—then this gives an extra argument for organised religions to argue for their own religion and one less argument for a local authority to resist that in the interests of fairness to those organisations that even do not want their own school or do not approve of segregation in this way. Can you see how that might operate in that way?

Vera Baird: Are you talking about a situation in which an organised religion decides, as earlier organised religions have done, to set up their own schools and then ask for them to be maintained? There is a whole raft of education law that would take place there which may or may not influence the outcome about which you are talking.

Q33 Dr Harris: It may or not but this duty gives an extra basis for people to claim and threaten to take legal action if they do not get this equality of opportunity to have their own school and one less argument for local authorities under huge pressure when it comes to schooling to be able to resist that.

Vera Baird: I do not think so. It may add an argument but I do not think it is an irresistible argument. We are talking about educational need here and the local authority have a duty to ensure that there is provision of appropriate educational resources and any factual situation that you conjure up will have to be met as it goes along. But, no, I do not accept that there is anything absolutely unlimited or driving about what you have said. You can put a massive focus on religion and distort the role that it is capable of playing in the whole matrix of public service delivery.

Q34 Lord Dubs: Can I stay with religion but move on to religious harassment. You will be aware as anyone of the criticisms that have been made by clause 24 that it has been criticised it is a bit vague as regards the term “dignity” and there is a danger that there could be too many unfounded claims not filtered out and that the religion or belief could possibly impact on free speech and conscious and so on. What is the government’s approach to religious harassment outside the field of employment?

Vera Baird: Sorry?

Q35 Lord Dubs: What is the government’s approach to religious harassment apart from in the field of employment?

Vera Baird: That is no evidence that there is any need to protect against it. There is no evidence. We consulted and we found no need for it.

Q36 Lord Lester of Herne Hill: Can I just say that I think that that is excellent news.

Vera Baird: Said he sceptically!

Q37 Lord Lester of Herne Hill: No, no, not sceptically; there is no “but”. But going back to what you were saying before, when I think you said that we can all act fairly reasonably, is there not a general problem—you have dealt with it by leaving religious harassment out, about which I am delighted—that people of faith or lack of faith are not all reasonable people? If you allow a mechanism in place where you can go to a judicial review court, although you will lose in the process of going there you bring the legislation into disrepute because tabloid newspapers and others can say, “Good heavens! Here is an unreasonable demand being made under this unreasonable act.” Should you not therefore be really careful when it comes to religion to make sure that
Vera Baird: We do think that that is the balance that we have struck in the Bill. You may think that the Bill is not striking the balance in the right place but we think that the provisions that we have put in do that. Religion is a protected characteristic—that is a given—whatever people might or might not wish the situation to be and therefore it is important that it is given some protection and of course it will conflict with other protective strands as well as perhaps with other religions, as you very aptly demonstrated. But, none the less, it has to be protected and it is a question of trying to get a balance and we have sought to do our best.

Chairman: We have a lot of ground to cover, I remind colleagues; so short questions please.

Q38 Lord Lester of Herne Hill: Multiple discrimination. A black woman who is a lesbian, a black woman who is a disabled lesbian does not know which of those or if all of them are responsible for what she regards as discriminatory treatment. Can you please make sure that the Bill allows that person not to have to segment her complaints into lots of separate ones but is able to present the whole picture to the court or tribunal and say, “We are not sure which of these it really is but we say that it is one or all of these”? 

Vera Baird: As you know, we have consulted on multiple discrimination and specifically, on a clause to put into the Bill which would provide for actions in multiple discrimination limited to two characteristics. That is because the evidence we picked up, particularly from the Citizens Advice Bureau is that that would cover most of the cases that they had brought to them, and that consultation process has produced a considerable feedback which is not entirely negative at all and we are working out now our way through it with the intention if there is to be a clause in the Bill in putting it in before the Committee is over—and the Committee finishes on 7 July.

Q39 Lord Lester of Herne Hill: Am I right in thinking that if you were to stick to only two grounds then the claimant would have to bring one lot of proceedings saying two and another two and some other had to be joined together, which does not seem to me to be very efficient.

Vera Baird: It would just be the same as one in the sense that you had to try to bring them all together.

Q40 Lord Lester of Herne Hill: Is it not a procedure which is user friendly and gets on with it rather than technical and procedurally complicated?

Vera Baird: If you had an ability to bring a multiple discrimination action across all the strands I think mathematically you would be able to bring 511 actions in the Tribunal, which seems a bit over the top. What we thought we ought to do is meet the need now that we can see coming from the case loads of those who advise on these issues and it looked as if most of that will be met by two characteristics. If in due course, if this comes in and it gets on its feet and there is evidence that you need more, and for instance need to extend it indirect discrimination or harassment as well—because at the moment it is confined—then of course we look again because we are, I am sure you realise, by going through this consultation process and saying what I have said, indicating a willingness to look at this. I do not think it is compatible with somebody’s dignity when they have been discriminated against to have to decide on what basis it is—is it because I am a woman or is it because I am over 50? And that is not down to me to decide. There are some categories of people who do not fit happily into it—the discrimination fits across two strands anyway. So there is the political will to tackle this problem and that is where we start.

Q41 Dr Harris: I just want to raise the question of exemptions available for religious organisations. They are allowed to discriminate more widely in employment, as you know, under Schedule 9. I think it is, and they can discriminate in employment if they have a religious ethos and they say that there is an occupational requirement.

Vera Baird: But it is not if they say it is an occupational requirement—it is if there is an occupational requirement.

Q42 Dr Harris: Is it possible for an occupational requirement merely to be the fulfilling of the maintenance of the religious ethos of the organisation? In other words, if an organisation with a religious ethos is employed by the public sector to deliver a service and they say, “We have to have enough of our staff of our religion in order to maintain our ethos” would that qualify as an occupational requirement in your view under the Bill, in and of itself?

Vera Baird: For the purposes of an organised religion the exemption narrows—

Q43 Dr Harris: I do not mean an organised religion, I mean a religious ethos discriminating on the grounds of religion—Schedule 9, sub-paragraph 3.

Vera Baird: Do you mind if Melanie Field comes to sit beside me to help me find the right places in some of the schedules?

Q44 Dr Harris: Page 182.

Vera Baird: Are you saying is the existence of an ethos sufficient to justify requiring all the employees of the organisation to be affiliates to that ethos; is that your question? Because the answer is no.

Q45 Dr Harris: It is a version of my question and I will leave it at that. Nevertheless, you make no distinction in the ability to discriminate in employment on the basis of an occupational requirement between delivering a commercial service and delivering a public service. In addition, you allow organisations delivering a public service to discriminate—like
adoption agencies—on the ground of religion and indeed schools. Furthermore, there is no provision, as we have just discussed, for there to be protection of individuals against harassment who are receiving public services on the grounds of religion.

**Vera Baird:** That is because there is not any evidence of a need for it.

**Q46 Dr Harris:** The result of that is that actually welfare based public services could in theory see a public function discriminating against employees and against recipients and proselytising to the extent that that would otherwise be harassment but not discrimination in respect of recipients of those services, which is three out of three; and you are aware that there are concerns that you should not have public services delivered by organisations that discriminate against recipient employees and proselytise.

**Vera Baird:** This is a particular specific and narrow exemption and the best example of why it is important is the one that I have given already. If you have an elderly Jewish community which needs care services and the public authority picks a Jewish care home to provide that service, unless you allow it to have its ethos then it will not provide the care that the local authority perceives that the community needs. So you need to have religious exemption in that context.

**Q47 Dr Harris:** So you say; but it is wider than that example, is it not? It is any public service. There is nothing to stop those exemptions being sought in the delivery of any public service. So if a government was to roll out welfare services, as has been proposed, to organisations and chooses not to stop religious organisations delivering them—because that would be unfair—then actually welfare services currently delivered exclusively by the public sector could be delivered by religious organisations discriminating under the exemptions with respect to their staff and their recipients.

**Vera Baird:** So you would only get the benefit if you were a Catholic. I really do not think so. There has to be diversity of supply; that is implicit in the organisation society has, historically, whether you like it or you do not. That is the position. Obviously delivery of benefits, welfare, all public services would have to meet the need of the demand on those public services. Segmentation of delivery may at some point and at some place and in some situation be a positive benefit, but it cannot be exclusive. I am not sure what point you are trying to make. But maybe I am.

**Q48 Lord Dubs:** Can I move to disability and immigration, please? Let me put it simply: how will the government ensure that the disability exception in Schedule 3, paragraph 16 will not be interpreted so widely that it will have the effect of excluding people from the UK simply because of a disability which is not a contagious disease? In other words, an example is: will the exception permit the exclusion of people who are HIV Positive or living with AIDS from the UK on cost or public health grounds?

**Vera Baird:** This is a very difficult exemption which is not an attractive exemption. We couched it as narrowly as I think it is realistic to do by requiring it to be necessary—not proportionate, not justifiable, not available except in a situation where it is necessary for the public good; so that test I think is as narrow as we could draw it.

**Q49 Lord Dubs:** Can I move on to Schedule 17? Why does the government consider it necessary to retain the ability to discriminate on racial grounds—that is under Schedule 3, paragraph 17—when it has chosen to make no or limited use of this power to date?

**Vera Baird:** You are talking about the immigration exemption that you raised so far?

**Q50 Lord Dubs:** Yes.

**Vera Baird:** I think it is just an inherent part of the ability of the Borders Agency to put visa requirements on people from particular areas and so on, and it is part and parcel of the power that they need to have in order to function properly.

**Q51 Lord Dubs:** It will not work simply on racial grounds then?

**Vera Baird:** We do not think so. No, we think we need what we have put in the Bill.

**Q52 Lord Dubs:** I have got one more question and that is to do with religion and immigration. What is the justification for an exempting exclusion decision from the prohibition against discrimination on the grounds of religion or belief—that is Schedule B, paragraph 18—which on the face of it would enable the Home Office to exclude people from the UK purely on the grounds, for example, of their Islamic beliefs?

**Vera Baird:** I think the real point is that if we wanted to exclude what have been called “hate preachers” that would be excluding them on the basis of religion, they would argue, that would be discriminatory if we did not have this exemption. There is no evidence that sort of power has been abused or is likely to be abused. It is not there to do what you have suggested; it is there for that particular purpose.

**Q53 Lord Dubs:** I think there is a danger that it might be used more widely. I understand the reason why you are saying that but it could be used a bit more widely, could it not?

**Vera Baird:** Should we look at the precise words? I am not sure that anybody has suggested that it is so wide that it is capable of being problematic.

**Q54 Chairman:** If it is just hate preachers, why can they not be dealt with under the exclusion for the public good? There are other general powers of exclusion where people are going to come and cause trouble.

**Vera Baird:** They would be able to say that it is discriminatory on the basis of religion and if we did not have an exemption from that then they would be able to sustain a case to that effect.
Q55 Chairman: But it would not be discrimination on the grounds of religion, it would be discrimination on the basis that they are coming to cause trouble, which is not discrimination.

Vera Baird: The basis on which they would be causing trouble would be by preaching Islam fundamentalist doctrine, would it not, so they would say, “Yes, of course, it’s all rooted in our religion”.

Q56 Dr Harris: Could you not offer an objective justification under indirect discrimination because that is what it would be, they would be arguing that it is indirect discrimination because it is discriminating against them on the basis of a manifestation of their religion which would be that they are Jihadists.

Vera Baird: It is direct, is it not?

Q57 Dr Harris: That would be indirect, would it not, because you would say if someone is saying something because they are religious and you want to stop them saying something and you ban them because of that, it is indirect discrimination and that would enable you to give a justification under our law?

Vera Baird: No, I think it is direct.

Q58 Lord Lester of Herne Hill: If I could just declare an interest. I did the Roma rights case for the European Roma Rights Centre against the Home Office in the Prague Airport case. There was a similar exemption, extremely broad, a Home Office exemption, to allow race discrimination in immigration control, an order was made and we contested it up to the House of Lords. The Government at the last moment wisely withdrew the authorisation and lost on the merits because it was discovered that they were practising race discrimination in immigration control against the Roma in Prague Airport. Is it not very dangerous and unsightly, and a bad example generally, to civilised nations to have a broad exemption on the face of it allowing discrimination on the grounds of race or religion, direct discrimination, in immigration control? Would it not be more sensible to narrow it to what the Home Office really needs instead of this blanket exemption?

Mr Maskell: If you look at paragraphs 18(3)(a) and (b), you have got the two layers to it. One is conducive to the public good and the other is undesirable to permit the person to remain in the United Kingdom. The point being, it is conducive to the public good or undesirable because they are expressing particular religious views of a hate preacher or whatever. In order to get to the point where you are able to rely on this, you still have to satisfy either conducive to the public good or undesirable to permit the person to remain.

Vera Baird: You were talking about the race exemption?

Q59 Lord Lester of Herne Hill: I was. I am much more worried about the race point because of that case.

Vera Baird: It is not new, is it?

Mr Maskell: The race one is not new.

Vera Baird: The race exemption is not new.

Q60 Lord Lester of Herne Hill: I know it is not new, but that is my point. My point is that it is inherited from the Race Relations Act but it became extremely contentious and the Home Office was in the extremely embarrassing position, and behaved entirely honourably when they were found out, when it was shown to be direct race discrimination. Once the minister withdrew the authorisation they had no defence, but if they had had the authorisation in place it would have authorised direct race discrimination against Roma asylum seekers at Prague Airport in stopping them getting on planes to come to London. My only point is that it does not seem to me to be desirable to give that sort of reserve power to the minister on the face of the Bill.

Vera Baird: And your suggestion is that all the Home Office need instead is?

Q61 Lord Lester of Herne Hill: I do not think they need race at all. I do not understand why there needs to be an exemption for race, although some argue about the Pontic Greeks or something. It seems to me not sensible and just because it was there before does not mean it has to be there now.

Vera Baird: We do think we need a race exemption.

Q62 Lord Lester of Herne Hill: You do need it?

Vera Baird: Yes.

Q63 Lord Lester of Herne Hill: Can you think of an example as to why you would need it on grounds of colour or race in immigration control?

Vera Baird: Nationality is—

Q64 Lord Lester of Herne Hill: Not nationality. Of course you need it for nationality, but I am saying colour or race.

Vera Baird: No. Nationality is a component in race. Are you saying we should have it just on the basis of nationality?

Q65 Lord Lester of Herne Hill: Narrowly tailored to the real situation, which I think is nationality and certainly not colour or race.

Mr Maskell: It does not apply to colour, it is ethnic or national origins.

Q66 Lord Lester of Herne Hill: The trouble is national origins includes something much wider than nationality and I just do not see why we need it, but there may be some very good reason.

Vera Baird: Let me take it back if you think that we can carve up the usual definition of race, but that is why it is there, because that is the definition of race.
Lord Lester of Herne Hill: It has already been
narrowed from colour.
Vera Baird: It has not got colour in it at all.

Chairman: Can I ask about children and why
children are excluded from discrimination
protection in goods and services and public
functions. It makes it more complicated. Why did
you not do it the other way round and have children
included in the protection where it is age
discrimination, but allowing limitations for
justification to different treatment when it is
necessary?

Vera Baird: If I can put it this way: you got it right
the second time, children are not excluded from any
of this except the age provision. When you talked
about discrimination being available for children,
that is not correct, it is only the provision that under-
18s are not involved in. The way we put it is this:
although you can see with older people that there is
discrimination against older people who are simply
older, even in that band there will be exemptions.
For instance, there are bound to be some insurance
policies which are actuarially justified because the
risk is greater as you get older; there will be positive
things like Saga Holidays that we want to keep; and
cheap fish and chips in Redcar for older people, but
you can outlaw the body of it and mark out the
exemptions. With children it is more difficult because
you need to differentiate between children of one and
two, children of five and ten, all across the board.
To require every different way of treating a child
because of their age to be objectively justified is
going to have a massively chilling effect. It is better
to serve their individual needs in all the ways that we
currently do and leave discrimination out of it.
Furthermore, there have not been sizeable amounts
of evidence to say that there is an epidemic or even
an endemicity of discrimination against children
under 18.

Dr Harris: Again, we had this debate in
Committee on trans people but we need to take it as
evidence in this Committee, I am afraid.
Vera Baird: The definitions.

Dr Harris: You will know the question. This
Committee has had evidence from Press for Change
and the Equality Network that the definition you are
using, which is clearly not merely medical but which
defines gender reassignment as the protected
characteristic based on people proposing to have, or
undergoing, or having undergone, medical gender
reassignment, it is not sufficient to capture those
people who are subject to discrimination on the basis
of their transsexual status who are not proposing to
have, or undergoing, or have undergone, gender
reassignment. There is a group that are not covered
who are being discriminated against.
Vera Baird: And who are they?

Dr Harris: They are trans people who are not
proposing to have gender reassignment, and not
necessarily only self-defined, they are people who,
for example, manifest different gender identities at
different times. The key point is that because they are
not proposing to have, or undergoing, or have
undergone, gender reassignment they fall outside
your definition. The organisations representing
those people feel that the definition is therefore too
narrow to capture the protection that they want
from discrimination. I was wondering whether your
objection to widening the definition is either because
you disagree, the definition is wide enough to
capture those people who are proposing to undergo
gender reassignment or, as you have said in previous
examples, there is not enough evidence of
discrimination against people who are not proposing
to undergo gender reassignment.
Vera Baird: We did not get any body of evidence, as
you have just said, about discrimination against
such people. We are quite open to wanting to protect
as many people as we can and what we have done, of
course, is to get rid of the whole medical model and
turn this into what you can best describe, I think, as
a personal process which can be manifested in
however the person wishes to manifest their gender
reassignment: just proposing it; changing the way
they dress; changing their name. That is all it
requires to be part of a process. What is difficult to
envision is some freestanding definition of gender
identity that is not linked to that process, and I know
you tried one in Committee but it did not work. That
is the real difficulty. Buttress this definition, which I
think is wide, with the availability of protection
against discrimination by perception and you may
think that we have covered 99.9 per cent of the
people who are likely to be discriminated against
here.

Dr Harris: We have just had a very good
summary of the debate in Committee, a fair
summary as well, and one of the issues raised was the
perception has to be of someone considering
undergoing gender reassignment.
Vera Baird: Just to make a point: I do not know how
fantastically well informed the public is about all of
this. It is quite possible that there would be
discrimination on the basis of sexual orientation, is
there not? People may well think that a man who
dresses as a woman is gay or a woman who dresses
as a man is a lesbian, so there might well be that
perception of discrimination as well which, again,
ought to widen the ambit of protection.

Dr Harris: That may be true, but the trans
community may well want protection in their own
right. I just want to bring in a human rights point
here, which is that there is concern that the right to
privacy might be infringed by the exemptions that
exist from protection for trans people in Schedules 3
and 9, which we have also debated, which exist for
organisations to discriminate against them even
where a certificate is held. Under the Gender
Recognition Act, of course, that requires that people
be recognised in their new gender for all purposes.
Therefore, one of the questions I have is whether to
protect their human rights and be compliant with
that law, even if the Equality Bill could write out that
one did not have to be compliant, if there was not to
be regression how can you allow exceptions on grounds of gender reassignment even where people have a Gender Recognition Certificate? I do not think we raised this in Committee so it is a new human rights based point.

**Vera Baird:** What are the specific exceptions that you are worried about?

**Q74 Dr Harris:** For example, in Schedule 9 there is the ability of a religious organisation to discriminate, so they could say, “We will allow a woman priest”, that is if they had women priests—

**Vera Baird:** There are not many of them.

**Q75 Dr Harris:** Yes, indeed, but let us say they did, “But we are not going to allow a woman priest who is in possession of a Gender Recognition Certificate, who is a woman”. They would argue that is a permitted exception under gender reassignment. Is that a clash with the sex discrimination provisions?

**Vera Baird:** Is that right? She is a woman now for all purposes, not a transgender person, a woman.

**Q76 Dr Harris:** Right.

**Vera Baird:** That is the point of the certificate, is it not, to make it clear beyond doubt and that is where all her rights come from.

**Q77 Dr Harris:** So what you are saying is someone with a certificate does not fall within the protected ground and, therefore, exceptions on that protected ground—

**Vera Baird:** Will fall within the protected ground of sex.

**Chairman:** I think you have answered the question.

**Q78 Lord Lester of Herne Hill:** You very rightly said, and I am very encouraged, that the Government wants to protect whatever needs to be protected. I wanted to ask you about the sensitive question of caste discrimination. The Government has an excellent record already of tackling some social problems in this country, like forced marriage, genital mutilation and so on, even though it may cause upset here or abroad. In the context of caste discrimination, Greville Janner, MP for Leicester for 27 years, wrote in his memoirs, *To Life*, that he found in his experience of 27 years that caste discrimination in his constituency was a much more serious problem than anything affecting the Muslim community there. He singled that out. I know this is something which has been the subject of some evidence, but is there any good reason why what he perceived as the very long-serving MP should not be within the scope of the Bill so that Hindu communities settled here, British communities, will realise if caste discrimination is being practised there will be an effective remedy which is not covered by race or religion and, therefore, needs to be a separate ground?

**Vera Baird:** You have to go back to the confines of the legislation as Maria set them out: work, premises, public services, education and association.

I set out in the Committee, so it is in *Hansard*, the significant steps we have taken to look for caste discrimination but we have no inherent problem, neither the one that you perceived could be one or any other if there is discrimination on the basis of caste from dealing with it, we did not find any at all that fitted within those categories. What appears to be the most prevalent aspect of caste discrimination is about arranged marriages, preventing somebody from one caste marrying somebody from another caste, and that would not be covered by discrimination in law anyway, that is about social relations between castes. I cannot absolutely recall the three organisations that we approached in response to a writing campaign, which has probably touched you as well, suggesting that this was a real concern, but we did pinpoint three organisations that we felt could outreach into the relevant communities to find evidence for us. That was a sort of pilot because we were very ready, if they found sufficient evidence to justify it, to do a broader inquiry to see if we needed to deal with it, but we simply did not find it.

**Q79 Lord Lester of Herne Hill:** Not in employment, not in housing, not in services you are saying?

**Vera Baird:** No, not in any of the things that the Bill can cover.

**Q80 Baroness Prashar:** I want to ask about the human rights to equality because the memorandum that we received from the Government focused very much on the compatibility of the Bill with European Convention on Human Rights. To what extent have the UK’s other international human rights obligations under the International Covenants on Civil and Political and Economic, Social and Cultural Rights, and the Race, Women’s and others, influenced the Government’s thinking, if at all?

**Vera Baird:** I have not been involved with the Bill right the way from its current inception so I cannot give you a comprehensive answer about that, but I will make sure that we do write to you and indicate how we did deal with them. A related question, I suppose, may be why do we not introduce a constitutional equality right, is that part of what you are looking at? I think Maria answered why did we not implement CEDAW through it. A constitutional equality guarantee or, for instance, implementing Protocol 12 and using that as an influencing mechanism, the difficulty that I personally have about that is a concern about the availability of positive action. I worry that, for instance, Protocol 12, which talks about enjoying legal rights equally does not have an availability of positive action in the matrix of itself; it only has it in the preamble. Positive action is only one way of objectively justifying some things that we need to have in order to help, for instance, disabled people and I am not sure that Protocol 12, for instance, permits that either. That is specifically that. I think Maria has answered CEDAW. The ICCPR, and whether we should have signed up to that more fully, I think our
answer to that is we have only just signed up to CEDAW’s optional protocol and we want to see how that beds in before we go further with more optional protocols, and on the face of it we do not see that it would add anything to the Bill. My own fear, and I do not know that it is particularly expressed in Government policy, is that the more layers you have—a constitutional guarantee, a reference to the ICCPR, Protocol 12—the more complex an already complex Bill becomes and the more lenses everybody has to look through when they seek to implement it, when they seek to disseminate it. The point of the Bill is to engineer out inequality. It is to give a great boost to public authorities to try to drive across their spheres of activity and drive into the public sector equality on all grounds and thereby to change the culture. I am keen for it to be as simple as it can be, accepting nonetheless, as many of you have pointed out this afternoon, it is already a very complex piece of legislation. I am keen for there not to be any more overlays involved in it.

Q81 Baroness Prashar: I accept we all want this to be simple so that essentially it is implemented properly but, on the other hand, have you satisfied yourselves that the Bill gives full effect to the international human rights obligations because from our perspective that is quite important?

Vera Baird: Yes, I think that we have satisfied ourselves of that.

Mr Maskell: To the extent that they are relevant to it, yes, I think we have, certainly in relation to Convention rights in the human rights memorandum that we submitted a while back. Obviously, as the Government we do consider these international instruments to make sure that we are all square with our implementation at any particular given time. This is part of the background to the process. What we are trying to do with the Bill is to build on what we have already had so far and make it better and more forceful and drive through equality using the Bill in as straightforward and as simple a way as possible without trying to build extra layers on it and without thinking of the Bill as a vehicle on which to tag various other things, basically keep it doing what it does well as well as possible.

Q82 Chairman: Perhaps you could introduce your colleague?

Vera Baird: I am really sorry. This is James Maskell who is a leading lawyer on the Bill. He has been involved with this a lot longer than I have although I have been involved, as I say, since about last August so it is reasonable to ask me most questions.

Q83 Lord Lester of Herne Hill: Can I just suggest to you a problem about that approach with which I fully sympathise. I perfectly understand that there is a role for anti-discrimination legislation and that it cannot become a kind of cornucopia or panthecon of everything to do with inequality, but is not the problem that when I ask you, as I am about to, what about carers, what about cohabitants, and you say for various reasons you do not want them in the Bill, what that then means is because we will not accept the first optional protocol to the ICCPR you cannot go to Geneva and because we will not accept that something like Protocol 12 should be in the Bill you cannot use the Bill and because the Human Rights Act then becomes the only way of dealing with it the whole thing becomes ineffective. Would it not be sensible to hold the line as you are arguing about what the Bill can cover and say, “Okay, we are going to deal with these issues”, but to press your colleagues to agree at least that like the rest of Europe, which have written constitutions and we do not, there is the mechanism on the international plane for those things that are unequal but not covered by the Bill? Can I give as examples of that the two I have been asked to deal with. One is carers and the other is cohabitants who are neither civil partners nor married. These are categories of people who can complain of discrimination and unequal treatment in general terms but they cannot under the Bill as it stands. I am saying will the Government either (a) include them or (b), if not, make sure there is at least some kind of remedy on the international plane?

Vera Baird: I do not really accept your basic premise, which is that carers have got some real cause to complain that their human rights are being undermined.

Q84 Lord Lester of Herne Hill: Leave aside carers, let us just focus on cohabitants, unmarried people living together who are not gay, therefore, cannot register as civil partners and they cannot or will not marry, and they are a very large category of people, and they say, “We want lack of marital status to be the touchstone and, therefore, will you please put that in the Bill” and you will say, I am sure, “We will not”, I am saying if that is the position should there not be some other mechanism, at least on the international plane, where they can get a remedy?

Vera Baird: What you are trying to do is to bring other law in this jurisdiction to protect cohabitants in various ways in which you now think they suffer and that is a very different position. So far as this Bill is concerned, just defining a cohabitee in order for there to be an allegation of discrimination that can be levelled, how long do you have to cohabit, on what basis do you have to cohabit?

Q85 Lord Lester of Herne Hill: You put that in the Bill.

Vera Baird: It is not practical.

Q86 Chairman: You define that for personal injury law purposes.

Vera Baird: Sorry?

Q87 Chairman: It is defined perfectly well who is a cohabitee and who is not for personal injury law purposes and fatal injury accidents.

Vera Baird: For discrimination purposes it is a very different picture and it would be hugely difficult to define cohabitantes.
Q88 Lord Lester of Herne Hill: I have to say for the purposes of this Bill a cohabiting relationship means having lived together continuously for five years.

Vera Baird: In a sexual relationship.

Lord Lester of Herne Hill: Yes. There are other ways of describing what is, in fact, a sexual relationship.

Vera Baird: What is the seam of discrimination that you think we should meet by doing that? I say it is much more difficult than that to define cohabitants, but what is the seam of discrimination you are complaining about?

Q90 Lord Lester of Herne Hill: That they are treated less favourably than either married persons or civil partnerships in a wide variety of contexts, some of which are in a private Member’s Bill that I plead guilty to having introduced.

Vera Baird: Is not the way to deal with that to change their status so that they do have a protected status under separate law as if they were married or as if they were part of a civil partnership and then, once they are a recognised group, if there is discrimination against them, once they are defined, then you can deal with it? Is not the issue about inequality or inequity for particularly women who have been involved in cohabiting relationships because afterwards the money and resources are not split in an equitable way so they always suffer disadvantage? That is the disadvantage you want to meet. In that situation the cohabiting husband is not suffering from any discrimination at all. You need to meet a specific case there, do you not, rather than somehow seek to conjure up out of something that does not have a status in any other way a raft of discrimination. If you get a status and if there is then evidence of discrimination against that way of being then we may need to amend the Bill, but at the moment there is not such a position. With carers, again, we do not want to do it in that way. We do, of course, want to protect and support carers, and heavens knows we have done an enormous amount to do that, but a carer is what somebody does, it is not what somebody is. What we are protecting in this is what people are. We will come back to religion in a minute. We are protecting inherent characteristics, are we not? What we have done, of course, is hugely helpful to carers by protecting against discrimination on the basis of association, as you well know. Anybody who is optimally for the welfare of carers associated with an older person or a disabled person will be protected if they are discriminated against because of that association. Just coming back to the question the Chairman asked about young people, let me just take the opportunity to emphasise that discrimination by association with an older person will still protect a younger carer. A carer under 18 will still be protected because the discrimination comes from the association with the elder person, not from that person’s age. We have done a great deal to protect against where we see the damage from discrimination to fall rather than protecting a community which is a very fluid one where you are a carer one minute and not the next.

Q91 Dr Harris: I was just thinking about you saying carers amounted to what people do and not what they are. One might say that belief is what people believe rather than what they are, but I will skim over that.

Vera Baird: There is a boundary there that is more difficult. I do have a lot of sympathy with that position, but I suppose if you are thinking about a young child who has not yet acquired the ability to think for themselves, whether they want to have a faith or not, to be discriminated against on the basis of faith, then it becomes close to being an inherent characteristic. I know there are two views on this. One is that is good enough to make it a characteristic, and that is roughly the way I go, but the other is yours which is that actually you come in and out of beliefs.

Q92 Dr Harris: I want to talk to you about schools. While we are on this theme of when people do have the ability to know what their religion is, I would like to ask you a question. Is it right that a 16-year-old girl at a state school, who can make a decision without involving her parents on her fertility, or is accessing abortion services, within the law following Gillick under Fraser guidelines, is not allowed in and of herself if she is not in the sixth form to opt-out of what would otherwise be mandatory worship in the state school? How do you justify maintaining that position against two reports recommended by this Committee which say that it is a breach of their human rights not to do that where they are of an age to have a belief and know that they do not want to pray to someone they do not believe in and should not be made to?

Vera Baird: The way you characterise compulsory attendance at assembly is sometimes compulsory praying and sometimes compulsory hypocrisy by not praying, is it not, neither of which is a desirable commodity I accept. That is not something we are going to change in this Bill. All the person has to do is persuade their parents that they do not want to go or just ask not to go. There is a right and then there is an availability of being able to talk in a reasonable fashion to people who control what you do. There are many, many young people in Redcar who do not go to Assembly because the teachers have agreed with them that they can stay out.

Q93 Dr Harris: That should not be up to the discretion of teachers, should it, because it is a fundamental human right, the right in Article 9 and Article 14? We have never had as far as I know, and I will be nudged by the lawyer if I am wrong, a justification for not requiring a girl to say, “She only has to get permission from her parents to get this abortion” on the one hand, which is a private matter, and maybe her religion is a private matter that she does not want to share with her parents, and we can understand why that might be, and yet does not
want to be hypocritical or forced to attend worship that she does not believe in. What justification is there?

Vera Baird: I know the Committee thinks so and in due course there may be movements on it, but not in this Bill.

Q94 Dr Harris: I am just asking why. I accept you are not going to do it in the Bill, but do you have a justification for not changing your policy? Whether you change it in an Education Bill or not, or this Bill or not, is a separate question. What is the justification for your policy?

Vera Baird: Where would you want the age limit to be?

Q95 Dr Harris: Would it not be person specific like it is for doctors facing girls who have to make a decision about whether the girl is old enough to have that Gillick competence.

Vera Baird: I do not know that this is a particularly constructive conversation. People do vary at different ages in their ability to make decisions, certainly, or their willingness to make decisions. It is an interesting debate but it is nothing to do with this Bill.

Q96 Dr Harris: Let me change to a different question. Do you recognise that in order to discriminate on the grounds of religion in school admissions one has to have an objective justification under the Human Rights Act? I was wondering whether it is your judgment that Article 2, Protocol 1 of the ECHR, which is the right of parents to have their children educated in accordance with their religious convictions, is the justification for discriminating against children in school admissions? Is that part of the justification or part of the rights that are not being met for those children who are discriminated against? What is the justification?

Vera Baird: For allowing the admissions to be made on the basis of religion? It is to protect the ethos of the institution. We have faith schools, they are fact and they are not going to go away. Historically, of course, the state did not provide education, religions did, and that is where we are. I do not suggest for one minute that this is any reflection of my own views, but whether we would start from here if we were starting again is a different point. These schools are supported, they are successful, they are popular, they are in demand and if they are to survive they need some ability to protect the ethos which makes them have all of those characteristics. Of course there has got to be an availability of education other than that.

Q97 Dr Harris: I understand that. You are saying that the justification is that in order to protect their ethos they need to be able to discriminate in admissions. What evidence can the Government point to to show that is the case given that there are plenty of schools who maintain their ethos who (a) do not discriminate and (b) are filled with children not of the religion of the ethos but they still maintain their ethos? Do you not need to provide evidence for it to be proportionate?

Vera Baird: No, it is a principle, is it not, that if you are going to allow faith schools, and we have faith schools, that they have to be entitled to protect their ethos if they see fit to do so and if they need to do so and if they want to do so.

Q98 Dr Harris: I understand that.

Vera Baird: I think there is everything to be said for a school which has a coherent way of running itself successfully, run through by—

Q99 Dr Harris: That is not my question, Minister. I am running out of time.

Vera Baird: Then I have missed your point, but I do not think I am missing your point.

Q100 Dr Harris: My point was that if I accept they have a right to maintain their ethos, in order to show justification for discriminating against some people do you not have to show that it is that discrimination, the right to discriminate in admissions, that is essential to protect the ethos? I am asking what evidence there is that that discrimination is required in order to protect the ethos, or the ethos could be protected in another way.

Vera Baird: How?

Q101 Dr Harris: In our evidence from schools, there are plenty of schools that say, “We defend our ethos. We have our ethos and we do not need to discriminate in admissions in order to do it, even where we are over-subscribed”. Therefore, is not the onus on the Government in order to prove proportionality in this respect and justification that you need to discriminate in order to defend the ethos?

Vera Baird: No, I do not think so. I think it is a principle that if we are going to have faith schools at all, and we are, then they must be entitled, if they see fit and they need to, to select their pupils on the limited basis which is allowed of religion or belief. I do not think that if you are not going to do that then you can say you are protecting the characteristic of religion and belief appropriately in that way. I am content that we have got the balance right. This is all a matter of balance.

Q102 Lord Lester of Herne Hill: Could I suggest if you look at a decision of the Privy Council, a case I was in, called the Bishop of Port Louis and Mauritius v Tengur, you will see the problem in that principle struck down by the Privy Council in the context of Catholic schools and there is now a pending case in the Court of Appeal about Jewish Free School which raises similar issues.

Vera Baird: What are you suggesting by that, that this an unlawful provision?
Q103 Lord Lester of Herne Hill: I am suggesting that the principle that you suggest exercised in an arbitrary or discriminatory way is vulnerable to challenge in the courts, in my view.

_Vera Baird:_ It is bound to be exercised in a discriminatory way, that is its nature.

Q104 Lord Lester of Herne Hill: Perhaps afterwards I can show you the judgment of Lord Bingham & Co. It was raised during the passage of the measure and Lord Adonis had to try to deal with it. It is much more difficult than I think it suggests. When you have a faith school in a way that imposes religious or racial quotas it does give rise to serious problems under the existing religious discrimination and race discrimination laws.

_Vera Baird:_ I am not sure that we are talking about quotas, are we?

Q105 Lord Lester of Herne Hill: I thought you were saying that if they need to. There is one other point which we should have dealt with and it is on this question that the Equality and Human Rights Commission have been lobbying about, which is the need for a constitutional guarantee of equality. There are four possibilities that I can think of to try to do that. The first one would be simply to codify the common law and say in the Bill, as the common law courts have said, that it is an axiom of rational behaviour to treat like cases alike and unlike cases differently, and that could be generally expressed in a way that did not harm anything in the Bill. The second and slightly tougher way would be what the rest of Europe and the Commonwealth does, which is to have a general guarantee of equality before the law that expressly allows positive discrimination. The third possibility would be to incorporate Protocol 12, but in a way that made it clear that positive discrimination was allowed. The fourth possibility would be to amend the Human Rights Act to incorporate the ICCPR bit on equality. The fifth possibility is to do nothing at all. As I understand it, the Government’s position is do nothing at all.

_Vera Baird:_ In this Bill?

Q106 Lord Lester of Herne Hill: In the Bill, or in any Bill.

_Vera Baird:_ No.

Q107 Lord Lester of Herne Hill: Does the Government intend to produce a general guarantee of equality in any of those ways in any Bill?

_Vera Baird:_ Not in this Bill, no.

Q108 Lord Lester of Herne Hill: In any Bill.

_Vera Baird:_ For the reason I have already said. It is in the Green Paper about the Bill of Rights and Responsibilities, which is—

Q109 Lord Lester of Herne Hill: In any Bill?

_Vera Baird:_ We will wait and see what comes out of the Green Paper on the Bill of Rights and Responsibilities, but that is the work stream that is considering exactly this kind of guarantee.

_Lord Lester of Herne Hill:_ Thank you very much.

_Chairman:_ Thank you very much. We have finished on time—just—so you can go to your constituency engagement having completed our questioning. Thank you for coming.
Letter from Vera Baird QC, MP Solicitor General, to the Chairman, dated 27 April 2009

EQUALITY BILL: HUMAN RIGHTS

You will have seen that Harriet Harman has made, on the front of the Equality Bill, the statement affirming its compatibility with the Convention rights.

We have given careful consideration to the human rights implications of the Bill’s measures. I thought it would be helpful, given the links between equality and human rights, to send you a separate summary of the issues which the Government Equalities Office has identified, and which formed the basis on which Harriet signed the statement.

I am of course happy to discuss this further with you, if you wish.

I am placing copies of this letter and the attachment in the House Libraries.

1. In considering the human rights implications of this Bill, it is worth bearing in mind that the majority of the provisions are required in order to implement the UK’s obligations under EC law. Whilst, of course, this does not obviate the need to consider how challenges based on the European Convention of Human Rights (“the Convention”) could be brought in relation to its provisions, it does make it less likely that those implementing provisions will be contrary to the Convention. The main provisions of the Bill which do NOT implement a Directive are those which:

— Impose positive duties on public authorities to promote equality.
— Impose a duty on public authorities to consider socio-economic disadvantage.
— Prohibit discrimination on grounds of religion or belief and sexual orientation in the provision of goods, facilities and services and the disposal and management of premises.
— Prohibit discrimination on grounds of marriage or civil partnership at work.
— Prohibit disability discrimination in the provision of goods, facilities and services and management and disposal of premises.
— Prohibit discrimination in the exercise of public functions on grounds of race, sex, disability, religion or belief, age and sexual orientation.
— Prohibit discrimination in the provision of goods, facilities and services on grounds of age.
— Prohibit discrimination in education on grounds of race, sex, disability, religion or belief and sexual orientation.
— Prohibit discrimination in relation to private members’ clubs.

2. The Bill as a whole is creating, continuing and protecting the rights of individuals not to be discriminated against on certain specified grounds or to suffer other treatment related to discrimination. It is a right-enhancing piece of legislation which protects individuals from discrimination and as such, is very much in line with the principles of the Convention. For that reason the main areas where challenges under the Convention are a relevant issue are where:

— exceptions to the prohibition on discrimination are provided for, or
— the rights to non-discrimination conflict with each other and there is a need to balance them.

CONVENTION ARTICLES MOST RELEVANT TO THE BILL

3. The Articles of the Convention which are most relevant to the Equality Bill are Article 8 (right to respect for private and family life), Article 9 (right to freedom of thought, conscience and religion), Article 10 (right to freedom of expression), Article 11 (right to freedom of association), Article 14 (prohibits discrimination in the field of enjoyment of rights guaranteed by the Convention) and Article 1 of Protocol 1 (right to peaceful enjoyment of property). As the majority of the Bill is concerned with prohibiting discrimination it has a close affiliation with Article 14 of the Convention. However, it is important to realise the limitations of Article 14.

4. Article 14 is not a free-standing right—it is tied to the other substantive rights in the Convention. As noted in the Belgian Linguistics case,1 it is as if the provision is an integral part of each of the substantive articles. So an applicant complaining of discrimination must allege it in respect of, for example, freedom of religion or fair trial, it is useless to invoke it in the area of employment provision or housing provision.

5. Not all differences in treatment are relevant for the purposes of Article 14. The applicant must be being treated differently from those in comparable situations. So, for example, married couples cannot validly be compared with unmarried couples since they have chosen a particular legal regime to govern their relations. This criterion will sometimes overlap with consideration of whether there is a reasonable or objective justification for different treatment.

1 EHRR 252
6. Article 14 is limited to discriminatory treatment based on a personal characteristic or status of the person which differentiates the person or group being discriminated against. The Article lists the obvious characteristics such as sex, race, colour, language, religion, political or other opinion, national or social origin etc but this list is not exhaustive as it concludes with “or other status”. The limits of the concept of personal status have not been much discussed but a difference resulting from geographical location has been found not to amount to a difference in treatment on grounds of personal status.2

7. Although Article 14 is not subject to express exceptions, it has been recognised that not every difference in treatment in the enjoyment of the protected rights and freedoms can be prohibited. The test applied to assess whether differences in treatment are objectionable or not is whether they are based on objective and reasonable justification. The existence of the justification has to be assessed in relation to the aims and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. The concepts of legitimate aim, proportionality and the margin of appreciation are brought in when deciding this issue. Whether there is objective and reasonable justification will depend on the circumstances of each situation.

8. Administrative difficulties would not normally suffice as a justification as in Darby -v- Sweden3 where this was the sole basis for barring non-residents who worked in Sweden from an exemption to church tax at 5 June 2000, ECHR 2000—VI. Nor can justification for interferences with rights be derived purely from negative attitudes that a particular minority might arouse—see Smith and Grady -v- UK4 where this was rejected as a justification for the UK’s ban on homosexuals in the army. A certain allowance is, however, given to States as regards the timing of changes which reflect a shift in society’s attitudes, as in Petrovic -v- Austria5 where the court would not criticise the Austrian government for extending parental leave to fathers as well as mothers in a gradual manner.

**Exceptions in the Bill**

9. Wherever the Bill provides for exceptions to the general rule against discrimination (whether that be in the sphere of, for example, work or the provision of goods and services) careful consideration has been given to the impact of such an exception on the Convention rights of individuals. Where Convention rights are potentially engaged by these exceptions we are satisfied that the provisions are pursuing a legitimate aim in a proportionate manner and that the exceptions are sufficiently tightly drawn to ensure this.

10. For example Paragraph 3 of Schedule 23 provides that different treatment of people of each sex is, in certain circumstances, permissible in the provision of communal accommodation or benefits linked to that accommodation. The accommodation must be managed in a way which is as fair as possible to both men and women. Where reasonably practicable, in the context of Part 5 (work), arrangements to—compensate for any discrimination must be made.

11. These provisions permit discrimination on grounds of sex and so Article 14 (read with Article 8) is engaged. These provisions of the Bill enable the provision of communal accommodation to people of a particular sex in a way that is appropriate and compatible with Convention rights by clearly defining the circumstances in which this is permissible. This is because they pursue the legitimate aim of protecting the person’s privacy when they may be in a state of undress or in terms of using associated bathroom facilities and the limited grounds on which different treatment is permitted are proportionate means to achieving such aims. Thus any interference with rights under Article 14 is justified.

12. An exception which is of particular interest in the human rights context is the exception for religious organisations (at paragraph 2 of Schedule 23) from the prohibition on discrimination in the provision of services in clause 27 of the Bill. This exception relates both to discrimination on grounds of religion or belief and discrimination on grounds of sexual orientation. Dealing first with the religion or belief element of the exception, this ensures that the work of religious bodies providing welfare services to their particular community is not affected by the general prohibition on religious discrimination in the provision of services. It also permits the continuation of groups that come together to allow those of a particular religion or belief to share experiences and to discuss issues. The exception therefore allows for anything from a bible study group restricted to Christians to a lunch club for elderly Hindus or a Catholic retreat centre which only allows Catholics to use its services (provided that none of these organisations have a sole or main purpose which is commercial). We consider that this exception, in allowing individuals of a particular religion or belief to come together to associate or to receive a particular service, in fact upholds the Article 11 rights of those individuals, as well as of the religious organisation.

13. Whether or not the exception for religious organisations interferes with the rights of others will depend on the particular circumstances of the case. For example, the exclusion of a Muslim from the Hindu lunch club is unlikely to interfere with the Muslim’s right to respect for private life or his freedom of religion. To the extent that there is any such interference, we consider it to be justified as being necessary in order to protect the Article 9 and 11 rights of the organisations and their adherents.

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2 Magee -v- UK 6 June 2000, ECHR 2000—VI
3 13 EHRR 774
4 29EHRR 493
5 27 March 1998, RJD, 1998 II
14. The exception for religious organisations which would allow for them to discriminate on the basis of sexual orientation is more narrowly drawn than the exception for discrimination on the basis of religion or belief. The religion or belief exception allows action which would otherwise be unlawful, provided that the limitation is imposed to comply with the tenets of the organisation or to avoid causing offence on religious grounds to a significant number of persons of the religion to which the organisation relates. In other words, if the purpose of the organisation is to provide lunch to Hindu elders, then restriction of the provision of lunch to Hindu elders will be permitted irrespective of whether or not the tenets of Hinduism require that Hindus should only help out fellow Hindus. However, to benefit from the exception to the prohibition of discrimination on the basis of sexual orientation, it must be shown that the restriction is necessary to comply with the doctrine of the organisation or to avoid conflict with the strongly held religious convictions of a significant number of the religion’s followers.

15. It might be contended that in drawing the exception regarding religion or belief more widely than that for sexual orientation, we are giving less weight to the rights of those of a particular religion or belief (different from that of the religious organisation) than to those of a particular sexual orientation. For example, why should it be lawful for a Protestant to be refused the services of a Catholic adoption agency but not for a (Catholic) homosexual? Ultimately, the reason for drawing the balance at a different point is that, under the religion or belief exception, it is open for religious organisations to be ecumenical if they so choose (ie for the Catholic adoption agency to offer its services to prospective parents whatever their religion or indeed lack of religion) but we consider that, in order not to infringe the Article 9 and 11 rights of such organisations, we should not impose on them a requirement to be ecumenical. However, in relation to the sexual orientation exception, we do not consider it to be justified for a religious organisation to discriminate on the basis of a person’s sexual orientation unless it can be clearly established that it is intimately linked to the practice of the religion ie required by the tenets of the religion or of considerable importance to the religion’s followers.

16. It should be noted that the equivalent legislation in Northern Ireland to the Equality Act (Sexual Orientation) Regulations 2007 was the subject of a judicial review brought by seven different Christian organisations: The Christian Institute and Others re Application for Judicial Review.6 The application was unsuccessful regarding the claim that the Northern Ireland Regulations were in breach of the applicants’ Convention rights. The judge accepted the argument that he could not pronounce on the compatibility of the Regulations with the Convention in the abstract but that the Regulations would need to be examined on a case-by-case basis.

Balancing Competing Rights

17. The Bill balances competing rights throughout as is demonstrated by clause 96 and the exception to it at Schedule 16 and the way in which this would apply where a woman was denied membership of a men-only club. Her Article 11 and 8 (read together with Article 14) rights would be in direct conflict with the Article 11 rights of the male members of the club. Where there is such a conflict between competing interests, states must find a fair and proper balance [Associated Society of Locomotive Engineers and Fireman (ASLEF) v United Kingdom]7 § 46. We believe that the general prohibition on discrimination in this area, at the same time as allowing single characteristic clubs to continue, does indeed strike the correct balance. It ensures that, while the ability of a person to become a member of a particular association should not, in general, be dependent on their having a particular protected characteristic, individuals and associations can still choose to associate with or limit their membership to those who share a particular protected characteristic. Thus, for example, while a woman may wish to become a member of the Garrick club but is prevented from doing so by virtue of the club being lawfully able under Schedule 16 to limit membership to men only, she is free to apply for membership of other literary clubs which are open to both men and women on equal terms. We consider that this availability of other venues ensures that the restriction on her Article 11 rights, as prescribed by law, is proportionate to the legitimate aim of protecting the Article 11 rights of others who would wish to join men-only clubs. For similar reasons, we consider that there is no violation of Article 14 since any difference in treatment is proportionate to the legitimate aim of protecting the rights and freedoms of others.

Harassment

18. Clause 24 [080] provides the definition of harassment. The clause does not have free-standing effect, but attaches to conduct in particular areas covered by the Bill, for example, in the area of work. There are three forms of harassment. Subsections (1)(a) and (2) state that harassment occurs where a person engages in unwanted conduct related to a relevant protected characteristic (set out in subsection (5)) which has the purpose or effect of violating another’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. As it covers unintentional conduct (purpose or effect), subsection (3) states that in deciding whether the conduct has this effect the courts must take into account the victim’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have this effect. Subsection (1)(b) defines sexual harassment—that is, harassment that is of a sexual nature rather than being related to gender. The latter would be covered under subsection (1)(a) (for example, calling a woman

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6 [2007] NIQB 66
7 Application no. 11002/05; decision 27.2.2007
a “bimbo”) while the former covers conduct such as inappropriate touching and comments of a sexual nature. The definition refers to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The test in subsection (3) also applies to this definition. The third type of harassment is set out at subsection (1)(c) and arises where a person is treated less favourably because they have either submitted to or rejected the unwanted conduct.

19. The harassment provisions have been controversial in respect of certain protected characteristics (namely, religion or belief, sexual orientation and gender reassignment) and opponents have been concerned that the very broad definition of harassment in relation to these characteristics could infringe Article 9 and Article 10 Convention rights.

20. There is currently harassment protection in all areas of discrimination law except for harassment on grounds of religion or belief, sexual orientation and disability outside the workplace. There is currently no prohibition on age discrimination or harassment on grounds of age outside the workplace. There is no EC discrimination law in these areas—although a draft Directive is currently being negotiated which, if adopted, would oblige States to prohibit harassment in these areas.

21. The Government has decided not to extend freestanding harassment protection related to sexual orientation and religion or belief outside the workplace and institutions of further and higher education (where there are EC obligations).

Public Sector Duty and Socio-economic Duty

22. The two main areas of the Bill which do not involve implementation of EC law, the imposition of a public sector equality duty and the socio-economic duty, do not give rise to any human rights issues as they impose requirements only on public authorities.

Memorandum submitted by the Government Equalities Office

OFFICIALS’ MEETING WITH THE JOINT COMMITTEE ON HUMAN RIGHTS: FOLLOW UP

Thank you for the recent opportunity to speak with the Committee about the Equality Bill.

As promised, I am following up with information on a number of points raised by the Committee which we were unable to fully answer during the meeting.

Lord Onslow asked how many new criminal offences will be created by the Bill.

There is one new criminal offence created on the face of the Bill, at clause 104. Clause 104 deals with the liability of employees and agents for contraventions of the Bill and includes an offence which is committed by an employer or principal if they knowingly or recklessly tell their employee or agent that an act is not a contravention of the Bill. This is similar to the provision at clause 106 on aiding contraventions of the Bill, which combines the effect of provisions in several pieces of legislation in one clause.

There is also the power to create a new offence in regulations made under clause 73 (gender pay gap reporting). The power at clause 73 allows some flexibility on the method of enforcing regulations made under that power; they could be enforced by criminal penalty or by such other means as is prescribed, for example a scheme of civil penalties.

There are some other criminal offences contained in Part 12 and Schedule 20 of the Bill, dealing with the accessibility of transport for disabled people, which will come into force for the first time when the Bill is commenced and so are new to that extent. The offence provisions at clause 154 and paragraph 13 of Schedule 20 replicate the effect of provisions in the Disability Discrimination Act 1995 which have not been commenced.

Evan Harris MP asked why Part 2 of the Equality Act 2006 did not contain an explicit public funding carve-out from the exception for religious organisations, and therefore why such a provision is not in the new Bill.

The Equality Act (Sexual Orientation) Regulations contain a “carve-out” from the religious organisations exception for any organisation acting on behalf of a public authority. This is because, while the Government is sensitive to the religious beliefs held by some people, in circumstances where public money is being used to fund a service the Government takes the view that the service should be provided to people irrespective of their sexual orientation. On the other hand, it is recognised that there are organisations whose purpose is to provide benefits to people of particular religions. These can provide valuable services to particular sections of the community. Accordingly, the Government does not consider that a similar provision is necessary in relation to religion or belief. This does not affect the general position that public authorities should not discriminate in relation to any of the protected characteristics in the services they provide or the functions they exercise.

The provisions contained in Schedule 23 of the Equality Bill replicate the position under existing legislation with regard to the exceptions for religious organisations.
We said that we would pass back to the Committee Clerk some information on what happened to the Northern Ireland harassment provisions on sexual orientation—did they amend them, following the judicial review?

The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 came into force on 1 January 2007. They were subject to an application for judicial review by various Christian organisations. In September 2007, Mr Justice Weatherup quashed the harassment provisions in the Regulations (Re Christian Institute and others’ application for judicial review [2007] NIQB 66).

He stated (paragraph 43): “I have found an absence of proper consultation on the harassment provisions. By reason of that finding and of the extended reach of the harassment provisions beyond that of discrimination and statutory harassment, the wider definition of harassment than that appearing in the European Directive, the concerns of the Joint Committee and the added consideration required when the offending matter is grounded in religious belief, the harassment provisions in the Regulations will be quashed.”

The Equality Commission for NI indicated in its guidance (published in September 2008) that there will be legislation amending the Regulations in order to give effect to the Judicial Review. However, no amending legislation has so far been brought forward. The purpose of amending the legislation would be to make it clear on the face of it what the law actually is, since at the moment the Regulations contain provisions that have no legal effect.

Lord Lester asked for confirmation that the Bill contains no mechanism like the Central Arbitration Committee to provide collective remedies in Equal Pay cases.

The Government did not consult on the possibility of a new arbitration process in its review of discrimination law. Nor is there anything of this kind in the Bill at present. Nevertheless, any proposal to speed up the administration of justice and progress toward pay equality is interesting, and we and BERR, which is the lead Department in respect of Dispute Resolution, will consider any such proposals carefully. This is a complex area and we will need to consider in particular the potential impact of the proposal on the number and length of cases which proceed through the Tribunals, the capacity of the arbitrator/s to undertake the task, and compatibility of the process with European Law—particularly compatibility of any process which may seek to limit or restrict an individual’s right to bring a claim for equal pay.

The Government is not making provision for representative actions in the Equality Bill. As representative actions would be a new departure for Great Britain, we consider it important that we fully apprise ourselves of the possible impact, before legislating. We are therefore analysing the review undertaken by the Civil Justice Council, an advisory body to the Ministry of Justice, which was published at the end of 2008. Any proposals for reforming this area of the law would then be subject to a consultation.

I hope this clarifies the outstanding points from our meeting of 5 May. Please contact me if you require any further information.

Memorandum submitted by Government Equalities Office

INTRODUCTION

1. Section 19 of the Human Rights Act 1998 (“the HRA 1998”) requires a Minister to make a written statement prior to Second Reading, as to the compatibility of the provisions of the Bill with the European Convention on Human Rights (“the Convention”). The purpose of this memorandum is to analyse the issues arising from the Equality Bill (“the Bill”) in relation to assessing its compatibility with the Convention.

2. The provisions of the Bill are compatible with the Convention and the Minister has made a statement of compatibility under section 19(1)(a) of the HRA 1998 to the effect that in her view the provisions in the Bill are compatible with Convention rights.

3. The structure of this memorandum is as follows:
   Paragraphs 4–32: summary of the Bill
   Paragraphs 33–37: considerations of general application throughout the Bill
   Paragraphs 38–73: analysis of Articles most frequently engaged by the Bill’s provisions
   Paragraphs 74 onwards: consideration of issues arising from specific clauses, following the scheme of the Bill. Most consideration is given to issues raised by Part 3 (prohibition of discrimination in the provision of goods, facilities and services and the exercise of public functions) and Part 5 (prohibition of discrimination in the field of work).

4. SUMMARY OF THE BILL

The main purposes of the Bill are:
   — To harmonise and simplify the law on discrimination.
   — To extend coverage of the public sector duty across all the protected characteristics and unify them into one single equality duty.
To permit more measures which are designed to redress under-representation and disadvantage amongst those with protected characteristics ie more positive action.

To reinstate protection along the lines of disability-related discrimination and extend indirect discrimination to disability.

To extend protection from discrimination against a person associated with someone who has a protected characteristic or against a person who is perceived to have a protected characteristic.

To prohibit unjustifiable age discrimination in the provision of goods, facilities and services for people aged 18 or over.

To impose a new duty on certain public authorities to consider socio-economic disadvantage in their strategic decision-making.

To increase the protection on grounds of gender reassignment so that it is on a par with other protected characteristics.

To provide consistent protection for all protected characteristics against harassment of an employee by a third party.

To prohibit discrimination and harassment in private clubs and associations.

5. The structure of the Bill is to set out the key concepts in Part 2, such as the definitions of direct and indirect discrimination, and then in the following Parts to set out the circumstances in which discrimination is forbidden, eg Part 5 deals with the field of “work”. In relation to particular fields, some of the protected characteristics are not protected eg the provisions on schools in Part 6 do not apply to age.

6. These are followed by Parts covering the promotion of equality, enforcement, enforceability of contracts and exceptions. Part 1 of the Bill imposes a duty to consider socio-economic disadvantage on specified public authorities. There are 28 Schedules to the Bill and, as a number of these deal with exceptions to the general prohibitions against discrimination, they contain quite a number of the provisions which could engage rights under the Convention. Throughout this memorandum we have considered the Schedules along with the clauses in the Bill which bring them into effect.

Part 1

7. This Part imposes a duty on specified public authorities to consider socio-economic disadvantage.

Part 2 and Schedule 1

8. This Part sets out, at clauses 4 to 12, the characteristics which are protected under the Bill, such as disability and sex, and in some cases defines them. In other cases, where definition is unnecessary, it makes clear how a reference to a particular characteristic is to be read.

9. This Part also defines the types of prohibited conduct under the Bill:

— direct discrimination (clause 13)
— discrimination arising from disability (clause 14)
— indirect discrimination (clause 18)
— harassment (clause 24)
— victimisation (clause 25)

10. Clauses 19 to 21 set out the duty to make reasonable adjustments in relation to a person with a disability and related matters.

11. Schedule 1 makes provision about what constitutes disability for the purposes of the Bill.

Part 3 and Schedules 2, 3 and 23

12. This Part makes it unlawful for a service provider to do anything which constitutes discrimination, harassment or victimisation in their provision of a service or their refusal to provide a service. It further provides that it is unlawful for anyone exercising a public function to do anything which constitutes discrimination, victimisation or harassment.

13. Schedule 2 supplements duties imposed by various clauses to make reasonable adjustments for disabled persons in specified circumstances. Schedule 3 sets out various specific circumstances in which some or all of the prohibitions on discrimination or harassment do not apply eg the circumstances in which it is permissible to provide a service only to persons of one sex.

14. Schedule 23 also sets out various exceptions to the prohibitions in Part 4 (as well as other Parts).
Part 4 and Schedules 4 and 5

15. Part 4 is concerned with premises and it contains provision prohibiting discrimination in the disposal and management of premises. Schedule 4 contains a duty to make reasonable adjustments to assist disabled people to use the common parts of certain residential premises in certain circumstances. Schedule 5 contains the exceptions to the general prohibition in Part 4.

Part 5 and Schedules 6–9

16. This Part is concerned with the prohibition of discrimination in work situations, which is wider than the employment relationship. As well as prohibiting discrimination, harassment and victimisation in the work sphere (clauses 37–41), it goes on to cover:

- partners (clauses 42–44)
- the Bar (clauses 45–46)
- office-holders (clauses 47–50),
- qualifications bodies (clauses 51–52)
- employment services (clauses 53–54)
- trade organisations (clause 55) and
- local authority members (clauses 56–57).

17. Part 5 also makes provision with regard to equal pay (clauses 60–76), implying a sex equality clause into the terms of employment of a man and woman in the same employment doing equal work unless any difference in terms can be justified by a genuine material factor. Similar provision is made for occupational pension schemes, implying a sex equality rule into the scheme rules. It also deals with discrimination in relation to occupational pension schemes by implying into such schemes a non-discrimination rule (clauses 58–59).

18. Schedule 6 sets out the offices which do not constitute office-holders for purposes of Part 5 and are therefore excluded from its operation. Schedule 7 sets out the situations which are excepted from the implication of a sex equality clause and a sex equality rule. Schedule 8 deals with making reasonable adjustments in relation to a person’s disability at work. Schedule 9 contains exceptions from the prohibition against discrimination at work.

Part 6 and Schedules 10–14

19. Part 6 makes it unlawful for a school’s responsible body to discriminate in relation to some of the protected characteristics when making decisions on various matters such as admissions and exclusions. Similar provisions apply in relation to further and higher education institutions and to general qualifications bodies in relation to the conferring of qualifications.

20. Schedule 10 deals with accessibility for disabled pupils. Schedule 11 sets out the exceptions to the general prohibitions in relation to sex discrimination, religion or belief-related discrimination and disability discrimination. Schedule 12 deals with further and higher education exceptions. Schedule 13 deals with reasonable adjustments in educational establishments. Schedule 14 makes provision in relation to educational charities and endowments.

Part 7 and Schedules 15 and 16

21. Part 7 prohibits private members’ clubs from discriminating against or victimising or harassing their members and guests on relevant protected characteristic grounds in various ways eg by refusing to accept a person’s application for membership.

22. Schedule 15 deals with reasonable adjustments in private clubs. Schedule 16 provides exceptions to the general prohibitions on clubs set out by Part 7.

Part 8

23. Part 8 makes provision in relation to matters connected with prohibited conduct such as discrimination arising after a relationship has ended or aiding or instructing another to discriminate unlawfully.

Part 9 and Schedule 17

24. Part 9 sets out how rights given under the Bill (except in relation to rail vehicle accessibility, Chapter 3 of Part 12) are to be enforced. It deals with which types of claim can be brought in the civil courts and which in the employment tribunals, what remedies are available and various other procedural matters relating to enforcement.

25. Schedule 17 makes provision for enforcement of the rights of disabled pupils in schools through specialist tribunals.
Part 10

26. This Part deals with the extent to which terms of contracts, collective agreements and rules of undertakings are made unenforceable or void where they contain a provision which conflicts with the prohibitions under the Bill.

Part 11 and Schedules 18 and 19

27. The first Chapter of Part 11 deals with the duties imposed on public authorities to comply with the equality principles including promoting equality of opportunity for all. A public authority is a person caught by the list in Schedule 19. Schedule 18 sets out exceptions from the public sector equality duty.

28. The second Chapter of Part 11 provides that a person may take positive action in certain circumstances to alleviate disadvantage arising as a result of a protected characteristic.

Part 12 and Schedule 20

29. This Part and Schedule 20 make provision for the requirements that apply in relation to access for disabled persons to various different types of transport.

Part 13 and Schedule 21

30. This Part and Schedule 21 make further provision about reasonable adjustments in relation to disabled people.

Part 14 and Schedules 22 and 23

31. This Part and the Schedules together set out the most wide-ranging exceptions in the Bill, which prevent various activities from being unlawful discrimination in certain circumstances e.g permitting sporting activity to be divided between the sexes.

Part 15

32. This Part contains general provision about application, powers to make subordinate legislation and interpretation.

Considerations of General Application throughout the Bill

33. A large proportion of the Bill re-enacts previously existing discrimination legislation. At present the legislation is divided up to deal with the various protected characteristics separately eg the Sex Discrimination Act 1975 (“the SDA 1975”), the Race Relations Act 1976 (“the RRA 1976”) and the Employment Equality (Sexual Orientation) Regulations 2003. The Bill harmonises all the various protections available against discrimination into one coherent scheme. As a result of this change in treatment, the legislation may look quite different from the legislation that it replaces, but in many instances, the underlying substance of the right to non-discrimination is unchanged.

34. Quite a large proportion of the legislation that is being re-enacted was brought into force after commencement of the HRA 1998 and therefore previous consideration has been given to its compliance with the Convention. In some instances the Bill replaces primary legislation and in others it replaces secondary legislation (albeit often made under section 2(2) of the European Communities Act 1972 and amending primary legislation). The level of scrutiny for compliance with Convention rights received by the prior legislation depends on whether it was primary or secondary legislation.

35. In the section below which analyses the application of Convention rights to specific clauses of the Bill this memorandum states, where relevant, that the clause is re-enacting a previously existing provision in order to highlight two things:

— The pre-existence of the provision means that the human rights considerations in that part of the memorandum are less speculative than in the case of truly “new” legislative provisions; and

— Where the previous legislation was made after the commencement of the HRA 1998, previous consideration of the provision’s compliance with the Convention has been carried out, so this memorandum is briefer in its analysis of the potential challenges under the Convention. However, where the previous legislation was secondary, there is not as great a reduction in length of analysis because there has been less earlier scrutiny.

36. In considering the human rights implications of this Bill, it is worth bearing in mind that the majority of the provisions are required in order to implement the UK’s obligations under EC law. Whilst, of course, this does not obviate the need to consider how challenges based on a Convention right could be brought in relation to its provisions, it does make it less likely that those implementing provisions will be contrary to the Convention. The main provisions of the Bill which do NOT implement a Directive are those which:

— Impose positive duties on public authorities to promote equality.

— Impose a duty on public authorities to consider socio-economic disadvantage.
— Prohibit discrimination on grounds of religion or belief and sexual orientation in the provision of goods, facilities and services and the disposal and management of premises.
— Prohibit discrimination on grounds of marriage or civil partnership at work.
— Prohibit disability discrimination in the provision of goods, facilities and services and management and disposal of premises.
— Prohibit discrimination in the exercise of public functions on grounds of race, sex, disability, religion or belief, age and sexual orientation.
— Prohibit discrimination in the provision of goods, facilities and services on grounds of age.
— Prohibit discrimination in education on grounds of race, sex, disability, religion or belief and sexual orientation.
— Prohibit discrimination in relation to private members’ clubs.

37. The Bill as a whole is creating, continuing and protecting the rights of individuals not to be discriminated against on certain specified grounds or to suffer other treatment related to discrimination. It is a right-enhancing piece of legislation which protects individuals from discrimination and as such, is very much in line with the principles of the Convention. For that reason the main areas where challenges under the Convention could be a realistic prospect are where:

— exceptions to the prohibition on discrimination are provided for, or
— the rights to non-discrimination conflict with each other and there is a need to balance them.

Analysis of the Articles most frequently engaged by the Bill’s provisions

38. In order to avoid repetition of the analysis of the Convention Articles which are engaged most frequently by the Bill’s provisions, some analysis is provided here and not repeated in the consideration of the Bill’s provisions.

Article 8

39. Article 8(1) provides that everyone has the right to respect for his private and family life, his home and his correspondence. The aspects of most relevance to the provisions in the Bill are respect for private life and for family life. The case-law does not provide an exhaustive definition of “private life” but it is possible to draw from the case-law an indication of the areas which the concept covers. So, for example it covers aspects of an individual’s physical and moral integrity. The case establishing this principle was X and Y v Netherlands8 where Y, who was mentally handicapped, was raped but had no legal capacity to appeal against the decision of the prosecution not to pursue criminal charges and her father had no standing to do so on her behalf. The Court found that civil law remedies offered insufficient protection in cases of wrongdoing of this kind and that the criminal law suffered from a deficiency regarding Y which disclosed a lack of respect for her private life.

40. The concept of “respect for private life” also includes the privacy of an individual, protection of their personal data, an individual’s reputation and their personal identity. Of particular relevance to the Bill, given that it prohibits discrimination because of sexual orientation or gender reassignment, are the line of cases which establish that a person’s sexual life is an important aspect of private life and comes within the ambit of Article 8. Dudgeon v UK9 established the important principle that private sexual conduct, which is a vital element of an individual’s personal sphere, cannot be prohibited merely because it may shock or offend others. In such an intimate aspect of private life, there must exist particularly serious reasons before interferences can be justified.

41. Whilst Article 8 is potentially very wide, the courts, both here and in Strasbourg, have limited how far they are willing to extend its scope into all aspects of an individual’s life. The speech of Baroness Hale in the fox hunting case— R v Her Majesty’s Attorney General & Anr ex parte Countryside Alliance & Others10 contains a very helpful consideration of the scope of Article 8. At paragraph 115 she said:

42. “The right to respect for our private and family life, our homes and our correspondence, guaranteed by Article 8, is the right most capable of being expanded to cover everything that anyone might want to do. My noble and learned friend Lord Rodger of Earlsferry, has made a powerful case for Article 8 to include almost any activity which is taken sufficiently seriously by the people who engage in it…….”

She continued at paragraph 116

“As yet, however, as my noble and learned friend Lord Bingham of Cornhill has shown, the Strasbourg jurisprudence has not gone so far in its interpretation of the rights protected by Article 8; and for the reasons given above I am not sure that I share the desire of my noble and learned friend Lord Brown of Eaton-under-Heywood that it should. Article 8, it seems to me, reflects two separate but related fundamental values. One is the inviolability of the home and personal

8 (1986) 8 E.H.R.R. 235
10 [2007] UKHL 52
communications from official snooping, entry and interference without a very good reason. It protects a private space, whether in a building, or through the post, the telephone lines, the airways or the ether, within which people can both be themselves and communicate privately with one another. The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self in relationships of other people. This is fundamentally what families are for and why democracies value family life so highly. …… Article 8 protects the private space, both physical and psychological within which individuals can develop and relate to others around them. But that falls some way short of protecting everything they might want to do even in that private space; and it certainly does not protect things that they can ‘only’ do by leaving it and engaging in a very public gathering and activity.”

43. It is important to note that Article 8 is a qualified right. It is qualified by Article 8(2) which requires interference with this right to be necessary on the following grounds

- National security.
- Public safety or economic well-being of the country.
- Prevention of disorder or crime.
- Protection of health or morals.
- Protection of the rights and freedoms of others.

44. Any interference must also be shown to be proportionate to the justification which is put forward for that interference. This requires that there is a reasonable relation between the goal pursued and the means used. It is also used in the sense of finding a balance between the applicant’s interests and those of the community. The issue of whether the State could achieve the goal in another way may be relevant when considering proportionality but it can only go so far. Since the Convention is not setting ideal standards, it is not enough to establish a violation that, for example, other methods could be used or are used in another State. The method used must fail the proportionality test and fall outside the margin of appreciation having regard to the particular circumstances of the case. The further qualification which is worth noting is that Article 8(1) is couched in terms of the right to respect rather than a more absolute right.

45. In order to comply with the Convention a Contracting State must not only restrict its interferences to what is compatible with Article 8, but may, in some circumstances, be required to take steps to secure respect for an individual’s Article 8 rights. The extent to which a State may be under such a positive obligation will vary with the differing situations between States which enjoy in this respect a wide margin of appreciation. Insofar as positive obligations are concerned, the Court has indicated that the notion of “respect” is not clear cut. It has stated that a fair balance must be struck between the interests of the individual and those of the community and in striking that balance, the aims referred to in the second paragraphs may be relevant.11

46. The cases illustrate that the impact on the applicant’s rights must be serious and significant as in X and Y v Netherlands or Gaskin v UK12 where fundamental values and essential aspects of private life or identity were concerned. No positive obligation was found in Costello-Robberts v UK13 which concerned the application of corporal punishment to a pupil at school because the chastisement was minor. Whether an important State interest is involved may also be significant eg Abdulaziz v UK where vital State interests in immigration were concerned.

Article 9

47. Article 9(1) provides that everyone has the right to freedom of thought, conscience and religion. Article 9(2) provides that freedom to manifest one’s religion or beliefs shall be subject only to such limitations as meet the criteria in that provision. There has been little detailed discussion in the cases of the nature of the beliefs or principles which fall within the scope of Article 9. The validity of most religions raising complaints has been accepted but its scope has been limited in relation to “beliefs” to the extent that the Article has been held not to cover mere idealistic activities such as the stance taken by IRA prisoners with regard to “special category status”.

48. What counts as “manifesting” a religion or belief has been limited by the courts so that it does not cover each act which is motivated or influenced by a religion or belief. What are protected are acts intimately linked to beliefs or creeds such as acts of worship and devotion which are the aspects of the practice of a religion or belief in a generally recognised form. For example marriage, though considered desirable for Muslims, cannot be regarded as a form of expression of that religion. On the other side of the line kosher diet has been held to be a form of manifesting the Jewish religion.

11 Rees v UK (1986) Series A No. 106
12 1989, Series A, No. 160
13 1993 Series A, No.247—C
49. Measures which prevent a person from manifesting his belief in a way that is recognised under Article 9 or penalising him for doing so will generally constitute a limitation with the person’s right which will require justification. However, where an applicant’s beliefs conflict with contractual and employment conditions the approach adopted has been to find that the resulting dismissal does not necessarily interfere with the manifestation of religion. In *Dahlab -v- Switzerland* the Court held that it was justifiable to prohibit a primary school teacher from wearing a headscarf as it was a powerful external symbol that could have a proselytising effect and was not easily reconcilable with the messages of tolerance, respect, equality and non-discrimination that teachers in a democratic society should convey to pupils.

50. Requirements to act in a particular way will also not necessarily constitute an interference with Article 9 rights notwithstanding the person’s objection to them on grounds of principle. For example in *Valsamis -v- Greece*, where a child Jehovah’s Witness was suspended from school for failure to participate in a procession with her school on a Greek national day, it was considered that the obligation to take part in the school parade was not an interference with her right to freedom of religion. This case seems to show that the offensiveness of a particular measure to religious beliefs must meet a certain threshold of seriousness.

51. Where the State imposes restrictions on manifestations of belief these may be justified if they are prescribed by law and necessary on one of the following grounds:

- Interests of public safety.
- Protection of public order, health or morals.
- Protection of the rights and freedoms of others.

52. The aim of protecting public safety was found to justify requiring a Sikh to remove his turban at an airport, the Court commenting in response to the argument that the applicant could have been checked by other means, that the means lay within the State’s margin of appreciation. The exercise that the court must carry out is to decide whether the means are proportionate to the aim of the interference.

53. In the case of *Serif -v- Greece* the court said that while States have a legitimate interest in preventing tension in religious communities and in taking steps to protect those whose legal relationships can be affected by the acts of religious ministers, their interventions should be guided by the principle of pluralism and aimed to ensure that competing groups tolerated each other rather than to seek to eliminate one or the other.

54. Positive obligations may arise requiring the State to take steps to protect the exercise of religious freedom from others. A violation of Article 9 arose where the authorities failed to take any steps against a fanatical group that had attacked a congregation of Jehovah’s Witnesses. As regards differing levels of protection enshrined into domestic law, the Commission found the law of blasphemy an acceptable means of protecting the religious feelings of offended Christians. However it rejected complaints of an applicant Muslim that the inability to prosecute blasphemous attacks on the Islamic faith was contrary to Article 9 and disclosed discrimination contrary to Article 14 as such protection was only available to Christians. The Commission considered that the Government could not be said to have interfered in the applicant’s right to manifest his beliefs and that Article 9 did not guarantee a right to bring proceedings against publishers of works that offended the sensitivities of any individual or group. Thus the discrimination complaint was rejected as Article 9 was not engaged and there was no need to rule on whether it was justified to favour the religious feelings of one group more than another.

Article 11

55. Article 11 guarantees the right to freedom of peaceful assembly and to freedom of association with others and is particularly relevant to the provisions of the Bill on associations and those which relate to trade unions. Professional and other associations established by the State and governed by public law in principle fall outside the scope of this provision, since such associations are part of the regulatory framework and act in the public interest to ensure the maintenance of professional standards.

56. The provisions in the Bill are concerned with prohibiting discrimination in the formation of associations and the admission of guests to association events and premises. Therefore Article 11 is mainly engaged in relation to the Bill in conjunction with Article 14 which is considered in more detail below.

57. The Bill makes special provision to prohibit discrimination in relation to trade organisations which include trade unions. The Court has recognised trade union freedom as a special aspect of the freedom of association but it has not found that the Convention guarantees any particular treatment of trade unions or their members by the State. Article 11 is a qualified right and interference with it is permitted in the interests of national security or public safety, for the protection of health or morals or for the protection of the rights and freedoms of others.

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14 15 February 2001, ECHR 2001—V
15 18 December 1996 R.J.D. 1996—VI, No. 4
16 Phull -v- France 11 January 2005, ECHR 2005—I
17 14 December 1999 ECHR 1999—IX
18 97 members of the Gidani Congregation of Jehovah’s Witnesses -v- Georgia 3 May 2007, para 129
19 Le Compte, van Leuven and de Meyere -v- Belgium (1982) 4 EHRR 1
58. The extent to which the Court has been prepared to countenance interference with Article 11 rights has been very dependent on the type of association with which a case is concerned. So the Court has imposed high hurdles in relation to interfering with political parties’ freedom of association. In view of the essential role played by political parties in the proper functioning of democracy the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly. Thus in United Communist Party v. Turkey the Court found that the reference in the Party’s constitution to the Kurdish problem, perceived by the Government as a threat to the State’s territorial integrity, did not justify the dissolution of the party.

59. However, in relation to trade unions the Court has been much more willing to give States a wide margin of appreciation in how they deal with and balance the rights involved. For example in Gustafsson v. Sweden the Court refer to the wide margin of appreciation, noting the sensitive character of the social and political issues involved and the wide divergence of practice in Contracting States.

Article 14

60. Article 14 prohibits discrimination but only in the limited field of enjoyment of one of the rights guaranteed under the Convention. According to the case law, an applicant must establish that he is subject to a difference in treatment from others in a comparable position, in the enjoyment of those rights, which difference cannot be objectively and reasonably justified having regard to the applicable margin of appreciation.

61. Article 14 is not a free-standing right—it is tied to the other substantive rights in the Convention. As noted in the Belgian Linguistics case, it is as if the provision is an integral part of each of the substantive articles. So an applicant complaining of discrimination must allege it in respect of, for example, freedom of religion or the right to a fair trial, it is useless to invoke it in the area of employment provision or housing provision.

62. Not all differences in treatment are relevant for the purposes of Article 14. The applicant must be being treated differently from those in comparable situations. So, for example, married couples cannot validly be compared with unmarried couples since they have chosen a particular legal regime to govern their relations. These criteria will sometimes overlap with consideration of whether there is a reasonable or objective justification for different treatment.

63. It could be argued that Article 14 is engaged by the various provisions in the Bill which provide for differing levels of protection in relation to different protected characteristics. For example protection from harassment outside the workplace is not prohibited in relation to sexual orientation and religion and belief but it is prohibited in relation to race, sex and disability. However, it is considered unlikely that two groups with different personal characteristics could be properly compared under Article 14. A disabled person is not in a comparable situation to a lesbian when considering whether she has been discriminated against for the purposes of Article 14. The Article states that it is discrimination on any ground such as sex, race etc and giving different levels of protection in some circumstances to different protected groups does not amount to discrimination on the ground of their protected characteristic. To show that they have been discriminated against on that ground it is necessary to compare them to a person who does not share their protected characteristic eg a non-disabled person or a heterosexual person.

64. Article 14 is limited to discriminatory treatment based on a personal characteristic or status of the person which differentiates the person or group being discriminated against. The Article lists the obvious characteristics such as sex, race, colour, language, religion, political or other opinion, national or social origin etc but this list is not exhaustive as it concludes with “or other status”. The limits of the concept of personal status have not been much discussed but a difference resulting from geographical location has been found not to amount to a difference in treatment on grounds of personal status.

65. Although Article 14 is not subject to express exceptions, it has been recognised that not every difference in treatment in the enjoyment of the protected rights and freedoms can be prohibited. The test applied to assess whether differences in treatment are objectionable or not is whether they are based on objective and reasonable justification. The existence of the justification has to be assessed in relation to the aims and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. The concepts of legitimate aim, proportionality and the margin of appreciation are brought in when deciding this issue. Whether there is objective and reasonable justification will depend on the circumstances of each situation.

66. Administrative difficulties would not normally suffice as a justification as in Darby v. Sweden where this was the sole basis for barring non-residents who worked in Sweden from an exemption to church tax available to residents in Sweden. Nor can justification for interferences with rights be derived purely from negative attitudes that a particular minority might arouse—see Smith and Grady v. UK where this was rejected as a justification for the UK’s ban on homosexuals in the army. A certain allowance is, however, given.
to States as regards the timing of changes which reflect a shift in society’s attitudes, as in *Petrovic -v- Austria*²⁶ where the court would not criticise the Austrian government for extending parental leave to fathers as well as mothers in a gradual manner.

Article 1 of Protocol 1

67. A1P1 provides a general right to peaceful enjoyment of possessions. The Court has said that the articles comprises three distinct but related rules:

68. “The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property, it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third recognises that the States are entitled, amongst other things to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose, it is contained in the second paragraph.”

69. Interference with property, whether expropriation or control of use, will generally be justified if it respects the requirement of lawfulness and can be regarded as pursuing the general or public interest. The Court has imported a requirement of proportionality and the requirement to strike a fair balance between the demands of the community and the protection of the individual’s interests.²⁷ The possibility of the individual obtaining compensation is an important element in assessing whether the individual bears excessive burden. General and public interest is given a wide meaning and where the legislature intervenes in an area of economic or social policy, the Court will respect the State’s assessment unless manifestly without reasonable foundation. Adequate procedural protection of the applicant’s interests in proceedings decisive for property rights is also a relevant factor in assessing whether a fair balance has been struck.

70. The measures in the Bill which potentially engage A1P1 fall within the second paragraph of the Article because they control the use of property rather than depriving the owner of it. In this area the case law has emphasised the need to secure a fair balance between the individual interest and the general interest, although it has been acknowledged that a wide margin or appreciation will be accorded to States. In the case of *Chassagnou and others -v- France*²⁸ the Court said:

71. “The search for this balance is reflected in the structure of Article 1 as a whole, and therefore also in the second paragraph thereof: there must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.”

72. In the case of *Spadea and Scalabrino -v- Italy*²⁹ the Italian system of postponing the enforcement of eviction orders in order to avoid an upsurge in tenants having to find alternative homes because of the large number of leases that expired in 1982 and 1983 was challenged. The Court concluded that the system operated as a control on the use of the property by the freeholders but accepted that the legislation authorizing the delays in the enforcement of the eviction orders served the social purposes of protecting tenants on low incomes and of avoiding a risk of public disorder. A fair balance had been struck except in some of the cases where the delays were excessive and compensation was not payable.

Article 6

73. In several provisions of the Bill criminal offences are created. Wherever this occurs there is the potential for Article 6 to be engaged. These provisions are compatible with the Convention because any arrest in relation to such an offence or any custodial sentence arising from it would only be possible in accordance with the due process of law and the decision of a competent court. As the trial forum would be a UK criminal court, it would be directly subject to the HRA 1998. The enforcement procedures relating to such offences and the proceedings of the courts required to adjudicate in relation to such enforcement would be fully compatible with Article 6.

CONSIDERATION OF ISSUES ARISING FROM SPECIFIC CLAUSES

PART 1

74. Clause 1 imposes a duty on certain specified public authorities to consider how they may reduce relevant inequalities of outcome when they are making strategic decisions about how to exercise their functions. It is considered highly unlikely that a public body subject to this duty enjoys Convention rights. Therefore no Convention rights are engaged.

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²⁶ 27 March 1998, RJD, 1998 II  
²⁷ Sporrong and Lonnroth -v- Sweden 5 EHRR 35  
²⁸ 29 EHRR 615  
²⁹ 21 EHRR 481
Part 2 and Schedule 1

75. Clauses 4–12 provide definitions of protected characteristics and do not engage Convention rights except with regard to the definition of disability.

Definition of disability

76. Schedule 1 together with clause 6 defines “disability”. The definition, which re-enacts the existing definition in the Disability Discrimination Act 1995 (“the DDA 1995”), does not in itself raise any issues of incompatibility with the Convention.

77. However, as a more general matter, the restricted definition of “disability” in the Bill could lead a person with a physical or mental impairment, the adverse effects of which are not sufficient to cause him to be classified as having a “disability” within the meaning of the Bill but which is sufficient to cause some detriment, to complain of discrimination as regards the protection of his rights. It is thought likely that the European Court of Human Rights would recognise that it was legitimate for a State to set a threshold level at which protection of disabled people from discrimination should commence and would recognise a margin of appreciation for the State to determine where the threshold should be set.

Direct discrimination

78. Clause 13 defines direct discrimination. Direct discrimination occurs where, because of a protected characteristic, one person (A) treats another (B) less favourably than A treats or would treat other persons in comparable circumstances. This definition is broadly similar to the definitions of direct discrimination in the Race, Framework, Equal Treatment Amendment and Gender Directives, which existing provisions of anti-discrimination legislation have implemented. The protection afforded by subsection (1) is wider than that afforded by Article 14 of the Convention, which is not a freestanding prohibition of discrimination as it only applies to discrimination “in the enjoyment of Convention rights”. This protection is also wider because direct discrimination cannot, in most cases, be justified—it is only in relation to age that a justification defence is permitted. The protection from direct discrimination which the Bill provides will frequently provide a means of protecting a person’s rights to respect for his or her private life and to free expression.

79. Subsection (5) deems racial segregation to be automatically discriminatory, which is compatible with Article 3’s prohibition on degrading treatment. Other forms of segregation, by contrast, are not necessarily discriminatory (hence, for example, single-sex, special needs and faith schools are permitted).

80. We have considered how the prohibition of direct discrimination could engage Convention rights. An example of a situation with such potential would be if the prohibition required the same treatment of the sexes, then there could be an interference with an individual’s Article 8 or Article 10 rights. Constraints imposed on a person’s choice of dress or appearance constitute an interference with that person’s right to respect for his or her private life, or to freedom of expression.

81. However, there is settled case law that restrictions on choice of dress or appearance which are imposed to an equal degree on men and women are not directly discriminatory, even where those restrictions are not identical for both sexes. So long as they apply a common standard of what is conventional or smart, it has been held that one sex is not treated less favourably than the other. In Kara v UK, the European Commission of Human Rights ruled that a dress code requiring that employees dress “appropriately” to their gender was in accordance with the law (in that it was based on a lawful internal policy) and justified in terms of Article 8(2) of the Convention.

Discrimination arising from disability

Clause 14 defines the concept of “discrimination arising from a disability”. This type of discrimination arises if someone treats a disabled person in a way which amounts to a detriment because of the disabled person’s disability and the act cannot be justified as a proportionate means of achieving a legitimate aim. The provision makes it clear that a person cannot be liable if that person did not know and could not reasonably have been expected to know that the disabled person had a disability. The prohibition on certain treatment of disabled people might engage certain Convention rights such as Article 1 of Protocol 1, which is about the peaceful enjoyment of one’s possessions. This could be argued on the basis of, for example, a business not being free to choose who uses its facilities or services. However, these rights are limited and the State is able to control the use of property in “accordance with the general interest”. We are confident that the reason for limiting freedom of action in this case would be in accordance with the general interest and that the safeguards in this provision ensure that the rights of the disabled person and the property owner are properly balanced. The right to justify behaviour by showing that it was a proportionate means of achieving a legitimate aim ensures that these rights are properly taken into account in determining whether discrimination has occurred.

31 (1998) 27 EHRR CD 275
Gender reassignment discrimination: cases of absence from work

82. Clause 15 provides that it is discrimination against transsexual people to treat them less favourably for being absent from work because they propose to undergo, are undergoing or have undergone gender reassignment, than they would be treated if they were absent because they were ill or injured. Transsexual people are also discriminated against in relation to absences relating to their gender reassignment if it would be unreasonable to treat them less favourably than if they were absent for reasons other than sickness or injury. This provision replaces part of section 2A of the SDA 1975, which was inserted into the Act following the decision of the ECJ in \textit{P v S and Cornwall County Council}.\footnote{Case C-13/94, [1996] ECR I-2143} We consider that this clause is compatible with and supportive of the Article 8 rights of transsexual people and that it would not infringe the Convention rights of their employers.

Pregnancy and maternity discrimination

83. Clause 16 protects a woman from less favourable treatment for reasons of pregnancy and maternity, including breastfeeding, outside work; and clause 17 provides that less favourable treatment of a woman related to pregnancy or statutory maternity leave as regards work constitutes discrimination. These two provisions, which do not require any comparison of the woman’s case with that of another person, are derived from EC law and replace parts of section 3B(1) and section 3A of the SDA 1975, respectively. We consider that they are compatible with and indeed supportive of Article 8 of the Convention so far as relating to family life. The provisions do not protect a female-to-male transsexual person with a gender recognition certificate but we do not consider that this contravenes Article 6 because he is protected from direct discrimination on grounds of gender reassignment.

Indirect discrimination

84. Clause 18 defines indirect discrimination in accordance with the Directives that the Bill is implementing. Although earlier European Court of Human Rights case law on Article 14 did not recognise indirect discrimination as giving rise to a breach of the Convention, the position has developed so that now the European Court of Human Rights will consider whether a measure that is neutral as to discrimination on its face, in fact has a disproportionate affect on individuals belonging to an identifiable group or having an identifiable status (eg \textit{McShane v United Kingdom}).\footnote{(2002) 35 E.H.R.R. 23} This means that this provision is aligned with the case law on Article 14 and supports this Convention right.

Duty to make reasonable adjustments

85. Clauses 19 to 21 make provision about the various duties in the Bill to make reasonable adjustments. These apply to employers, providers of employment services, trade organisations, qualifications bodies, higher and further education institutions firms or proposed firms, existing or proposed limited liability partnerships, barristers and their clerks, advocates, people making or recommending appointments to public or personal office, local authorities in relation to their members, occupational pension schemes, providers of goods, facilities and services, public authorities, private clubs and actual or prospective landlords.

86. This duty could engage Article 1 of Protocol 1 of the Convention (right to peaceful enjoyment of possessions) as it requires people to take steps to make adjustments to their premises or to change the way they undertake their business. However, a balance is struck between the rights of the property owner and the rights of the disabled person to fully participate in society. An adjustment only has to be made if it is reasonable and this maintains the correct balance.

87. In addition, where the property is occupied under a lease, a person would not have to make adjustments where they are not entitled to do so without the written consent of the lessor (Schedule 21, paragraph 3). However, the lessor must not unreasonably withhold that consent. This ensures that the person who owns but does not occupy the property is informed about alteration of his premises and can object if he has reasonable grounds for doing so. Also, the occupier is protected from claims where he is unable to make the adjustment without the lessor’s consent (and can join the lessor in as a party if a claim is commenced against him (Schedule 21, paragraph 5)).

88. Also, the responsible person will not be required to undertake any works for which third party consent other than under a lease is necessary unless he receives that consent (Schedule 21, paragraph 2(2) and (3)).

89. In these ways, the extent to which the right to peaceful enjoyment of one’s property is affected are minimised by the protections given and achieve a balance between those rights and the rights of disabled people and therefore the reasonable adjustment provisions are compatible with the Convention.
Definition of harassment

90. Clause 24 provides the definition of harassment. The clause does not have free-standing effect, but attaches to conduct in particular areas covered by the Bill, for example, in the area of work. There are three forms of harassment. Subsections (1)(a) and (2) state that harassment occurs where a person engages in unwanted conduct related to a relevant protected characteristic (set out in subsection (5)) which has the purpose or effect of violating another’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. As it covers unintentional conduct (purpose or effect), subsection (3) states that in deciding whether the conduct has this effect the courts must take into account the victim’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have this effect. Subsection (1)(b) defines sexual harassment—that is, harassment that is of a sexual nature rather than being related to gender. The latter would be covered under subsection (1)(a) (for example, calling a woman a “bimbo”) while the former covers conduct such as inappropriate touching and comments of a sexual nature. The definition refers to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The test in subsection (3) also applies to this definition. The third type of harassment is set out at subsection (1)(c) and arises where a person is treated less favourably because they have either submitted to or rejected the unwanted conduct.

91. The harassment provisions have been controversial in respect of certain protected characteristics (namely, religion or belief, sexual orientation and gender reassignment) and opponents have been concerned that applying the broader domestic definition of harassment to these characteristics could infringe Article 9 and Article 10 Convention rights. The Directives define harassment as unwanted conduct related to the protected characteristic which has the purpose or effect of violating a person’s dignity AND of creating an intimidating, hostile, degrading, humiliating or offensive environment.34 The definition in clause 24 adopts the disjunctive approach used in current domestic discrimination law but also adopts the Directives’ “related to” formulation. This means that the definition in the Bill is somewhat broader than that in the Directives because a case may be brought if either a person’s dignity is violated or an intimidating etc environment has been created. There is currently harassment protection in all areas of domestic discrimination law except for harassment on grounds of religion or belief, sexual orientation, age and disability outside the workplace. There is no EC discrimination law in these areas—although a draft Directive is currently being negotiated which, if adopted, would oblige States to prohibit harassment in these areas.

92. The Government has decided not to extend freestanding harassment protection related to sexual orientation and religion or belief outside the workplace and institutions of further and higher education (where there are EC obligations). This decision is not to ensure compatibility with the Convention—we consider that such protection would be compatible with Convention rights on the basis that Article 10 and Article 9(2) rights are qualified rights which may be restricted to protect the rights of others. However in these areas the Bill will not pre-empt any extension of EC law on harassment in relation to these protected characteristics into non-work areas. The Government has decided to extend harassment protection outside the workplace to cover age and disability. We would argue that any interference with Article 10 and Article 9(2) rights is justified because of the need to protect the rights of others eg the Article 8 and 14 rights of disabled customers.

93. Although the definition in clause 24 is broader than the Directives’ definition as a result of following a disjunctive approach, as the Government has stated on previous occasions, it is difficult to see how the two concepts differ in practice: conduct which violates a person’s dignity almost invariably also creates an offensive etc environment for that person and vice versa. Some may claim that as clause 24 refers to “related to”, rather than “on grounds of”, this further extends the definition of harassment and thus the interference with these rights. However, irrespective of this change, the Court of Appeal has already established that “on grounds of” has a broad definition for the purposes of harassment (English v Thomas Sanderson Ltd35). The Government would argue, as it has done previously, that these are qualified Convention rights and may be restricted to protect others who also have Convention rights, notably Article 8 and Article 14 rights. Further, the definition of harassment is subject to an objective analysis in the case of unintentional conduct (albeit one which must take account of the perception of the victim), which would ensure that frivolous and vexatious claims would not be entertained by the courts.

Victimisation

94. Clause 25 defines the prohibited act of victimisation. It provides further protection of individuals’ Convention right not to be discriminated against but does not otherwise engage the Convention.

PART 3 AND SCHEDULES 2, 3, 23 AND 24

95. Clauses 26 to 30 and Schedules 2, 3 and 23 address discrimination, victimisation and harassment in the field of goods, facilities and services (collectively referred to as “services”) and in the field of non-service public functions in relation to all the protected characteristics except age, in respect of under 18s, and marriage and civil partnership.36 These provisions re-enact the substance of the existing provisions in the

34 See for example Article 2(3) of the Race Directive
35 [2008] All ER (D) 219
36 The exceptions in Schedule 23 apply in addition to other fields covered by the Bill.
SDA 1975, the RRA 1976, the DDA 1995, the Equality Act 2006 and the Equality Act (Sexual Orientation) Regulations 2007. The provisions in Part 2 of the Equality Act 2006 concerning discrimination in the provision of services and the exercise of public functions on grounds of religion or belief post-date the commencement of the HRA 1998 and consideration was given at that time to their compliance with the Convention. There is no reason why the considerations given to the religion or belief provisions are not equally applicable to the other protected characteristics.

96. Clause 27 prohibits discrimination, harassment (though not in relation to religion or belief or sexual orientation) and victimisation on protected grounds in respect of the provision of services to the public or a section of the public (“the services provisions”) and in the exercise of non-service public functions (“the public functions provisions”). Clause 28 provides for the application of the services provisions to the provision of ships or hovercraft or services on such vessels to be prescribed by secondary legislation. This will enable the detail of when the services provisions apply to British registered vessels outside of territorial waters and to non-British registered vessels within territorial waters to be set out in secondary legislation.

The intention is that such secondary legislation will be commenced at the same time as the provisions of Part 3. Clause 29 ensures that a group of employees is to be treated as a section of the public for certain purposes. This will ensure that the services provisions apply to the provision of a service by a third party to an employer’s work force where there might otherwise be doubt as to whether such a group constitutes a section of the public. Clause 30 is an interpretive provision.

97. The prohibition in clause 27 is subject to the exceptions set out in Schedule 3 (specific to Part 3) and also in Schedule 23 (applicable to several Parts). It is also subject to Schedule 2 which sets out the duty of reasonable adjustments for service providers. The principle exceptions in Schedule 3 concern certain constitutional and public policy exceptions in respect of the prohibitions in the exercise of non-service public functions (paragraphs 1–5), education-related exceptions (paragraphs 6–12), health and social care exceptions (paragraphs 13–15), immigration exceptions (paragraphs 16–19), insurance exceptions (paragraphs 20–22), separate and single service exceptions (paragraphs 23–27) and certain transport services for the disability strand (paragraphs 28–30). Of these exceptions, the constitutional and public policy, education-related, care in the family and immigration exceptions (insofar as they relate to the protected characteristic of religion or belief) have previously been subject to scrutiny regarding their compliance with the HRA 1988 when enacted in Part 4 of the Equality Act 2006.

Potential engagement with the Convention

98. In terms of Convention engagement, the above clauses and Schedule 3 could potentially engage Article 8, Article 9, Article 11 and Article 1 of Protocol 1. Potential engagement of the Convention is considered below in relation to the service provider, those seeking to access a service and those seeking access to a non-service public function respectively.

99. In respect of the service provider, an area of potential engagement with the Convention is Article 1 of Protocol 1 and the service provider’s right to peaceful enjoyment of his or her property, including disposal of such property. It is conceivable that the restriction on who a person can sell his or her goods to constitutes an interference with his or her right to peaceful enjoyment of such property. This is not established but if this were the case, we would contend that the general restriction on who one can provide one’s goods to constitutes a necessary control on the use of property in accordance with the wider public interest in ensuring non-discrimination on prohibited grounds and, as such, is justified under the second limb of Article 1 of Protocol 1. Given the fundamental importance of the right to non-discrimination in democratic societies, we are confident that, in the language of the European Court of Human Rights, the restriction imposed by clause 27 strikes “a fair balance ... between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights” (Sporrong and Lonnroth v Sweden).

100. Another area where clause 27 could arguably infringe the Convention rights of the service provider arises where the service is being provided within the context of the family and the restriction on discrimination could thereby constitute an interference with the service provider’s own right to respect for family life (Article 8). This might arise, for example, where a person acts as a foster parent and, for their own reasons, only wishes to foster children of a particular sex, race, religion etc. Any requirement whereby the foster parent was obliged to foster children irrespective of their particular sex, race or religion would in all likelihood be held to amount to an interference with the foster parent’s right to respect for family life. The question would then be whether it was justified in accordance with Article 8(2). However, the exception from clause 27 at paragraph 15 of Schedule 3 for care within the family (whether provided for reward or not) means that a foster parent who did in fact stipulate that they would only take male children into their home would not in fact be in breach of clause 27. Accordingly, no interference with the right to respect for family life of the service provider in fact arises under the legislation.

101. A further area where clause 27 could potentially infringe the Convention rights of the service provider is in respect of Article 9 and the freedom to manifest one’s religion. Further consideration is given to this matter in considering the religious organisation exception in Schedule 23 at paragraphs 131–133.

37 (1983) 5 EHRR 35
102. Finally, clause 27 could potentially infringe the Article 11 rights of service providers who wished to restrict participation in the activities of their organisations to those of a particular shared characteristic. In most situations we consider that any interference presented by clause 27 is justified under the second limb of Article 11 as being prescribed by law and as proportionate to the legitimate aim of protecting the rights of others not to be discriminated against (itself a fundamental principle of a democratic society). This is primarily because clause 27 is specifically concerned with services which are provided to the public or a section of the public, eg the facilities of a cinema, hotel, pub, local bingo hall, travel agency or local grocery store. That being the case, in general we see no reason why a body providing such services to the public should be able to restrict such provision to those who are of, for example, a particular sexual orientation, race or gender. (Nevertheless, we recognise that there are particular situations where such restriction may be justified, for example, the provision of separate services for women to avoid embarrassment. Such restriction would be permitted by the gender-specific services exceptions which are considered in more detail at paragraphs 136–137).

103. The one area where we consider that it may be legitimate for certain organisations to be able to limit participation in activities and provision of services, on a more general basis, to those sharing a particular protected characteristic is in respect of religious organisations limiting provision and participation to those of a particular religion or belief. This is due in large part to the need to uphold the Article 9 and 11 rights protected characteristic is in respect of religious organisations limiting provision and participation to those of a particular religion or belief. This is due in large part to the need to uphold the Article 9 and 11 rights of both the organisation and those receiving the service or participating in the activities. The religious organisation exception in Schedule 23 is examined in more detail at paragraphs 131–133 below.

104. With respect to the person receiving the service, there is no general right under the Convention to be able to access certain goods or to receive a particular service. Thus, for example, in Botta v Italy,38 a physically disabled applicant contended that the state was under a positive obligation under Article 8 to ensure that private beaches complied with local laws which required facilities to be installed to enable disabled people to access beaches. The European Court of Human Rights, while recognising the breadth of Article 8 and that it was “primarily intended to ensure the development, without outside interference, of the personality of each individual in his [or her] relations with other human beings”, considered that the right asserted by the applicant, namely to gain access to the beach and sea, “concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the bathing establishments and the applicant’s private life”. It cannot therefore be contended that Article 8 and the right to respect for private life protects some form of general right to access goods and services in order to ensure the development of an individual’s physical and psychological integrity. Instead, whether the ability or inability to access a particular service constitutes an interference with an individual’s Article 8 rights will depend on the particular circumstances of the case and the nature of the service in question. If anything, the prohibition on discrimination in the provision of services, ensures that individuals’ rights under Article 8 (alone and in conjunction with Article 14) are upheld by ensuring that individuals have access to services which impact upon the development of their physical and psychological integrity without discrimination.

105. It is also conceivable that clause 27 could engage an individual’s freedom of association (Article 11). For example, an individual might wish to attend a night club where there were no homosexuals. However, under clause 27 it would be unlawful for the owner of the night club which was open to members of the public to prohibit homosexuals from entering. If the individual were to claim a breach of their Article 11 rights, then, to the extent that there was considered to be an interference with these rights, we are confident that any such interference could be justified as being prescribed by law and as being necessary for the protection of the rights of others not to be discriminated against in exercising their own Article 8 or 11 rights as the case may be. Furthermore, if an individual is adamant that they want a venue where they can essentially associate with their own kind, be it male, female, homosexual, transsexual, of a particular disability etc., then it is always open to them to join a private members’ club whose membership is limited to those of a given characteristic as allowed for under Schedule 16 (exceptions for associations). (On private members clubs more generally, see below at paragraphs 229–236.) We consider that the availability of alternative venues further supports the case that the restriction on Article 11 rights presented by clause 27 is proportionate to the legitimate aim of protecting the rights of others.

106. There is one area, however, where we consider that the balance between competing rights does warrant being drawn at a different point and this is in relation to individuals of a particular religion or belief participating in activities of religious/belief organisations. The religious organisation exception in Schedule 23 effectively allows individuals to participate in activities arranged by a religious organisation which are limited to those sharing the same religion or belief in order to protect the Article 9 and 11 rights of both the organisation and the individuals. (This exception is explored in more detail at paragraph 134 below.)

107. We consider it unlikely that the prohibition on discrimination in the exercise of non-service public functions will give rise to any interference with Convention rights. Examples of relevant public functions would be raising of revenue (potentially engaging Article 1 of Protocol 1), police investigations (potentially engaging Articles 5 and 8), prison-related functions (again, potentially engaging Article 5), regulatory and law enforcement functions of bodies such as HM Revenue and Customs and the Health and Safety Executive (potentially engaging Articles 5 and 8 and Article 1 of Protocol 1). However, public authorities are under a duty to secure the rights under the Convention without discrimination. For example, a person

38 (1998) 26 EHRR 241
should not be detained by police simply because he is black or be subject to higher taxation because she is lesbian. By prohibiting such discrimination, the Bill seeks to ensure the UK’s compliance with its obligations under the Convention.

Exceptions from Part 3

The exceptions in Schedule 3

108. The constitutional and public policy exceptions to the prohibition on discrimination in the exercise of public functions, contained in paragraphs 1 to 5 of Schedule 3 are designed to provide a balance between the rights of individuals not to be discriminated against in the exercise of public functions and the need for certain public authorities to be able to act in ways which might interfere with these rights in order to protect the wider interests of the community. For example, the exemptions for the Security Service and the Secret Intelligence Service enable these bodies to continue the important work of safeguarding national security (paragraph 5). The exemption for judicial functions is not because it is considered that judges should be above the law but rather that any challenge to their decision on the basis of bias or discrimination should be brought by way of appeal rather than through satellite proceedings under the equality legislation (paragraph 3). Finally, the exemption for legislative functions serves to enable legislation to be made which is in fact discriminatory for justified reasons eg health and safety legislation which potentially discriminates against disabled people (paragraph 2).

109. The education exceptions in paragraphs 6 to 12 are a necessary corollary to the disapplied or exceptions to Part 6 (education) for the protected characteristics of age, sex and religion or belief. (On the compliance of those exceptions with the Convention, see paragraphs 225 and following below.) Thus, for example, a local authority will not be in breach of clause 27 in setting up a single-sex school or in providing more secondary schools in its area than primary schools.

110. Paragraph 13 of Schedule 3 contains an exception for blood service operators which would enable them to refuse to accept blood from a person on public health grounds. This exception potentially engages Article 8 in that the blood service provider will presumably have to ask questions about a person’s private life to ascertain whether they represent a potentially at risk category of blood donor. However, we consider that any such interference is justified under Article 8(2) in terms of being in accordance with the law and necessary for public safety and for the protection of health. The requirement that the refusal is reasonable and based on data from a reliable source seeks to ensure that any interference is proportionate and no more than is necessary to achieve the legitimate aim in question.

111. Paragraph 14 contains an exception regarding pregnant women and the risk to health and safety. This exception potentially interferes with a pregnant woman’s right to respect for private and family life in that she could be said to be being penalised because she has chosen to become pregnant. However, we consider that any possible interference with a woman’s Article 8 rights is justified as being in accordance with the law and as necessary for the protection of health (as per Article 8(2)). In particular, any refusal to provide a pregnant woman with the service or only to do so with conditions attached must be based on a reasonable belief that to do otherwise would create a risk to her health and safety. In other words, the restriction is subject to an objective test rather than the subjective views of the service provider as to what is or is not harmful to a pregnant woman’s health. Furthermore, there is a requirement that the service provider would place a similar restriction on somebody who presented themselves with other physical conditions. We consider that the criteria that must be met for the exception to apply ensures that it is proportionate to the legitimate aim of protecting the woman’s health.

112. Paragraph 15 provides an exception in respect of care within the family which has already been considered above.

113. The immigration exceptions at paragraphs 16 to 19 are considered necessary to ensure that the prohibition in clause 27 does not prevent the effective exercise of immigration functions which, in some circumstances, are necessarily based, directly or indirectly, on matters of nationality or ethnicity, religion or belief or health (and therefore potentially disability, depending on whether the effect of the disease on the individual is such as to come within the definition of disability for the purposes of the Bill). Examples of areas where there is differential treatment based on nationality or ethnicity include intelligence-led immigration control; policy (eg allowing Kosovan Albanians exceptional leave to remain in the wake of the 1999 conflict); granting of visas; casework management (eg priorities for determining claims by reference to the nationality or ethnic group of the claimant when it is known that the claims of a certain group are relatively straightforward or have an exceptionally low acceptance rate).

114. In relation to religion or belief, it may be necessary to exclude from the UK a person who holds extreme religious views. Also, ministers of religion, missionaries and members of religious orders are treated as a distinct category under the Immigration Rules subject to their own requirements as to leave to enter, leave to remain and indefinite leave to remain.

115. In respect of disability, there may be situations where a person may need to be refused entry into the UK because they present a risk to public health (eg those with particular strains of TB or carriers of the human strain of avian bird flu). There is no general right under the Convention to be able to move freely in or out of a country or to reside in a particular country. Nevertheless, it is recognised that in some circumstances the differential treatment permitted by the immigration exceptions may involve an
interference with a person’s Article 8 rights concerning the right to family life. However, any such interference that there might be is considered to be fully justified under the second limb of Article 8 in order to protect the national security, public safety, the protection of public health and the protection of the rights of others.

116. Paragraphs 20 to 22 provide exceptions from the prohibition in clause 27 in relation to insurance. They permit a provider of insurance to act in a way that is based on sex, disability or pregnancy in certain circumstances. The exceptions are drafted restrictively so that, to come within the exception, an insurer needs to show that they have acted reasonably and based on information from a source on which it is reasonable to rely (and in the case of sex or pregnancy the information relied on must be actuarial or statistical). Although the exceptions engage the Article 8 (read with Article 14) rights of an affected individual who is purchasing insurance, we are satisfied that they do not breach those rights because they are pursuing the legitimate aim of protecting the rights of the insurer (as permitted by Article 8(2)) and they are a proportionate means of achieving that aim.

117. Paragraph 23 sets out where different treatment is permissible in the provision of separate services for each sex; paragraph 24 sets out where different treatment is permissible in the provision of services for only one sex. The exercise of public functions in relation to the provision of such services is also permitted. We have considered whether these exceptions potentially engage the Article 8 (read together with Article 14) rights of individuals.

118. Paragraphs 23 and 24 support people’s Article 8 rights by providing privacy where otherwise the provision of services to both sexes jointly might engage those rights. These provisions permit discrimination on grounds of sex in limited and clearly defined circumstances and so Article 14 (read with Article 8) is engaged. Examples of the services which could be provided under this exception are refuges for victims of domestic violence, referral centres for victims of sexual assault, healthcare treatment of conditions which affect only, or primarily, one sex (such as ovarian or prostate cancer), projects which provide support for fathers and changing rooms/toilet facilities. As these examples show, these provisions of the Bill enable the provision of separate or different services to people of a particular sex in a way that is appropriate and compatible with Convention rights. In relation to the actual provision of such services, the Bill specifically requires that such treatment must be a proportionate means of achieving a legitimate aim. The legitimate aims they pursue eg protecting the privacy of people of both sexes in hospital and the limited grounds on which different treatment is permissible are proportionate means to achieving such aims. Thus any interference with rights under Article 14 is justified in accordance with the test laid down by the Court in the Belgian Linguistics case.39

119. Paragraph 25 sets out that the treatment of transsexual people in relation to the provision of separate and single-sex services must be a proportionate means of achieving a legitimate aim. In most cases a trans female will wish to be treated in her acquired gender. This will be the case, for example, in the use of female toilets. However, in the case for instance of screening for prostate cancer, a trans female might wish to be treated in her birth gender. In both these examples, there are likely to be issues of privacy for the transsexual person, as well as potentially the privacy of other users of those services.

120. We have considered whether the Article 8 right to respect for private and family life may be engaged regarding the treatment of transsexual people in the provision of separate or single-sex services. Article 8(2) provides in particular that there shall be no interference by a public authority with the exercise of this right except as is necessary for the protection of the rights and freedoms of others. Paragraph 25 is likely to satisfy Article 8(2) as it is justified by the need to protect the rights and freedoms of others.

121. These provisions permit discrimination on grounds of gender reassignment in limited and clearly defined circumstances and so Article 14 (read with Article 8) is engaged. These provisions of the Bill enable providers of separate or different services to people of a particular sex to treat transsexual people in a way that is appropriate and compatible with Convention rights. This is because they pursue legitimate aims eg protecting the privacy of people of either sex in hospital where a transsexual person is admitted and it is not considered appropriate for that person to be on a ward limited to a particular sex, and the limited grounds on which different treatment is permitted are proportionate means to achieving such aims. Thus any interference with rights under Article 14 is justified.

122. There is a wide margin of appreciation that is usually given in the treatment of sensitive issues in relation to transsexual people. In R and F -v- UK,40 the court held that it was well within the margin of appreciation for the UK to require married transsexual people to divorce before they could be recognised in their new gender.

123. Paragraph 26 provides that, where a service is provided for religious purposes at a place occupied or used for those purposes, there may be circumstances where different treatment of each sex is permissible. This would be where the provision is necessary in order to comply with the doctrines of the religion or is for the purpose of avoiding conflict with the strongly held religious convictions of a significant number of the religion’s followers. Examples would be where particular services are held for members of one sex only or perhaps separate seating arrangements for people of each sex are considered necessary.

39 (1979–80) 1 EHRR 252
40 (App No. 35748/05)
124. These provisions permit discrimination on grounds of sex in limited and clearly defined circumstances and so Article 14 (read with Article 9) is engaged. These provisions of the Bill enable different treatment of each sex in the context of services that are provided for religious purposes in certain circumstances in a way that is appropriate and compatible with Convention rights. This is because they pursue legitimate aims, allowing for the doctrines of the religion or the avoidance of conflict with the strongly held religious convictions of a significant number of the religion’s followers, and the limited grounds on which different treatment is permitted are proportionate means to achieving such aims. Thus any interference with rights under Article 14 is justified.

125. Paragraph 27 of Schedule 3 contains an exception which permits a service provider, who generally provides a service only for people who share a particular protected characteristic, to refuse to provide that service to people who do not share that characteristic where it would be impracticable to do so. The exception is limited by the requirement that A’s belief that it is impracticable to provide the service must be reasonable. We are satisfied that this limitation means that even if Article 8 were engaged by this provision, it would not constitute a breach because it only permits discrimination where there is a legitimate aim and the means of achieving that aim is proportionate.

126. Part 7 of Schedule 3 (paragraphs 28–30) provides an exception to the prohibition on disability discrimination for air and water transport services. Such services are already subject to various international agreements (eg Regulation (EC) no. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air). The predominantly international nature of air and water travel has resulted in the view that it is best for any duties in this area to be as provided for under those agreements rather than by imposing separate, and possibly different, domestic duties. It is therefore not a question of, for example, an air carrier being under no obligations in relation to disabled passengers but rather that the obligations are those agreed between countries at an international level rather than those imposed domestically which could result in an air carrier being subject to different obligations for each jurisdiction that it flies through. Certain land vehicles which are not listed in paragraph 30 are also exempted from the services provisions.

127. Part 8 of Schedule 3 (paragraph 31) contains powers to amend the exceptions in Schedule 3 in those areas where EC law does not currently apply. In particular, there is an order-making power which would enable transport services to be brought within the scope of clause 27. This will enable that section to be applied in whole or in part to different transport vehicles at different times. We consider that there could be an interference with the rights of a provider of transport services to enjoy his possessions under Article 1 of Protocol 1. In due course, he may be required to make alterations to practices, policies and procedures. However, such changes would only be required where it was reasonable to do so. Furthermore, Article 1 of Protocol 1 permits the State to make such laws as are deemed necessary to control the use of property in the general public interest. It is therefore considered that there is no contravention of this Article. To the extent that it does involve any interference with the rights of transport operators to peaceful enjoyment of their possessions, such interference is considered justified by the benefit to the public interest, and in particular the positive improvement in the rights of disabled people, in the application of existing anti-discriminatory principles to the providers of transport services.

128. Accordingly, it is considered that the order-making power contained in paragraph 31 can be exercised in conformity with the Convention, and that the exception as a whole raises no issues of incompatibility with the Convention.

The exceptions in Schedule 23

129. The exceptions in Schedule 23 are mostly of relevance to Parts 3 (services and public functions), 4 (premises), 5 (work) and 7 (associations).

130. Paragraph 1 permits discrimination where it is the result of acts authorised by the executive or by statute. The provision itself cannot be usefully discussed in terms of potential breaches of the Convention, as compliance with the Convention will depend on the statutory instrument or statute relied on to justify discrimination.

131. The exception from the prohibition in clause 27 for religious organisations in paragraph 2 of the Schedule was originally included in the Equality Act 2006 to ensure primarily that the valuable work of various not-for-profit religious bodies providing welfare services to their particular community was not affected by the general prohibition on religious discrimination in the provision of services, as well as allowing for the continued lawfulness of groups that came together to allow those of a particular religion or belief to share experiences and to discuss issues. The exception therefore allows for anything from a bible study group restricted to Christians to a lunch club for elderly Hindus or a Catholic retreat centre which only allows Catholics to use its services (provided that none of these organisations have a sole or main purpose which is commercial).

132. We consider that this exception in allowing individuals of a particular religion or belief to come together to associate or to receive a particular service in fact upholds the Article 11 rights of those individuals, as well as of the religious organisation. (To this extent, it has similarities with the exception to the prohibition on discrimination by private clubs in relation to members. The exception for single characteristic clubs and the relevant jurisprudence on the application of the Convention is considered further
at paragraphs 233–235 below.) Additionally, the exception, in enabling religious organisations only to provide for their own members can, depending on the nature of the religion in question, be viewed as upholding their Article 9 rights regarding freedom to manifest one’s religion. Whether or not the exception for religious organisations interferes with the rights of others will depend on the particular circumstances of the case. For example, the exclusion of a Muslim from the Hindu lunch club would be unlikely to be considered to interfere with the Muslim’s right to respect for private life or his freedom of religion. To the extent that there is any such interference, we consider it to be justified as being necessary in order to protect the Article 9 and 11 rights of the organisations and their adherents.

133. The exception for religious organisations which would allow for them to discriminate on the basis of sexual orientation is more narrowly drawn than the exception for discrimination on the basis of religion or belief. The religion or belief exception allows action which would otherwise be unlawful, provided that it is imposed to comply with the tenets of the organisation or to avoid causing offence on religious grounds to a significant number of persons of the religion to which the organisation relates. In other words, if the purpose of the organisation is to provide lunch to Hindu elders, then restriction of the provision of lunch to Hindu elders will be permitted irrespective of whether or not the tenets of Hinduism require that Hindus should only help out fellow Hindus. However, to benefit from the exception to the prohibition of discrimination on the basis of sexual orientation, it must be shown that the restriction is necessary to comply with the doctrine of the organisation or to avoid conflict with the strongly held religious convictions of a significant number of the religion’s followers.

134. It might be contended that in drawing the exception regarding religion or belief more widely than that for sexual orientation, we are giving less weight to the rights of those of a particular religion or belief (different from that of the religious organisation) than of those of a particular sexual orientation. For example, why should it be lawful for a Protestant to be refused the services of a Catholic adoption agency but not for a (Catholic) homosexual? Ultimately, the reason for drawing the balance at a different point is that, under the religion or belief exception, it is open for religious organisations, to be ecumenical if they so choose (ie for the Catholic adoption agency to offer its services to prospective parents whatever their religion or indeed lack of religion) but we consider that, in order not to infringe the Article 9 and 11 rights of such organisations, we should not impose on them a requirement to be ecumenical. However, in relation to the sexual orientation exception, we do not consider it to be justified for a religious organisation to discriminate on the basis of a person’s sexual orientation unless it can be clearly established that it is intimately linked to the practice of the religion ie required by the tenets of the religion or of considerable importance to the religion’s followers.

135. It should be noted that the equivalent legislation in Northern Ireland to the Equality Act (Sexual Orientation) Regulations 2007 was the subject of a judicial review brought by seven different Christian organisations: The Christian Institute and Others re Application for Judicial Review. The application was unsuccessful regarding the claim that the Northern Ireland Regulations were in breach of the applicants’ Convention rights. The judge accepted the argument that he could not pronounce on the compatibility of the Regulations with the Convention in the abstract but that the Regulations would need to be examined on a case-by-case basis.

136. Paragraph 3 sets out where different treatment of people of each sex is permissible in the provision of communal accommodation or benefits linked to that accommodation. The accommodation must be managed in a way which is as fair as possible to both men and women. Where reasonably practicable, in the context of Part 5 (work), arrangements to compensate for any discrimination must be made. We have considered whether these provisions potentially engage the Article 8 right to respect for private and family life read together with Article 14, the right to enjoy Convention rights without discrimination. Paragraph 3 supports people’s Article 8 rights by providing privacy where otherwise the provision of communal accommodation to both sexes jointly might engage those rights. The purpose of this exception is to provide for people’s privacy when sharing communal accommodation.

137. These provisions permit discrimination on grounds of sex in limited and clearly defined circumstances and so Article 14 (read with Article 8) is engaged. These provisions of the Bill enable the provision of communal accommodation to people of a particular sex in a way that is appropriate and compatible with Convention rights. This is because they pursue the legitimate aim of protecting the people’s privacy when they may be in a state of undress or in terms of using associated bathroom facilities and the limited grounds on which different treatment is permitted are proportionate means to achieving such aims. Thus any interference with rights under Article 14 is justified.

138. Sub-paragraph (4) provides that the treatment of transsexual people in relation to the provision of communal accommodation or benefits linked to that accommodation must be a proportionate means of achieving a legitimate aim. There may be issues of privacy for the transsexual person, as well as the privacy of other users of the accommodation.

139. We have considered whether the Article 8 right to respect for private and family life may be engaged regarding the treatment of transsexual people in the provision of communal accommodation. Article 8(2) provides in particular that there shall be no interference by a public authority with the exercise of this right except as is necessary for the protection of the rights and freedoms of others. Sub-paragraph (4) is likely to
satisfy Article 8(2) as it is justified by the need to protect the rights and freedoms of others. There is a wide margin of appreciation that is usually given in the treatment of sensitive issues in relation to transsexual people.

Schedule 24

140. Finally, reference should also be made to Schedule 24. This Schedule simply ensures that the provisions of the Bill (in practice, predominantly the requirements of Part 3 concerning services) are compatible with the requirements of the E-Commerce Directive\(^\text{42}\) concerning rules regarding country of origin and certain exceptions for intermediary information service providers.

Part 4 and Schedules 4 and 5

141. Clauses 31 to 36 and Schedule 5 address discrimination and harassment in the field of premises in relation to all protected characteristics except age and marriage and civil partnership.

142. Clause 32 prohibits discrimination, harassment (although not in relation to religion or belief or sexual orientation) and victimisation on protected grounds in relation to the disposal or potential disposal of premises. Clause 33 similarly prohibits a person whose permission is required for the disposal of premises from discriminating against or harassing a person to whom a disposal or premises may be made. Clause 34 prohibits discriminatory conduct by managers of premises in relation to occupant of premises.

143. The prohibitions set out in the clauses listed above are subject to exceptions set out in Schedule 5. These include exceptions in relation to owner-occupied premises and small premises.

144. The owner-occupier exception lifts the prohibition on discrimination in relation to all strands (with the exception of race discrimination) on a person who is disposing of premises, and in relation to religion or belief and sexual orientation in connection with the granting of permission for a disposal, in the context of a private (ie non-advertised and without the use of an estate agent) disposal of premises by an owner-occupier.

145. The small premises exception exempts disposers or managers of parts of premises from certain of the prohibitions if that person (or a relative) resides (and intends to continue to reside) elsewhere on the premises and the premises include certain shared parts (eg a common kitchen or bathroom). In these circumstances, the anti-discrimination provisions of clauses 32(1) and 33(1) (in relation to disposals and consent to disposals) will only apply in relation to the strand of race, and the harassment provision of clause 33(2) (in relation to consent to disposals) will only apply in relation to the protected characteristics of race and/or sex.

146. We have considered which Convention Articles might be engaged by the above clauses and Schedule 5 and concluded that Article 8 and Article 1 of Protocol 1 are the most likely ones.

147. In relation to Article 8, it is conceivable that a claim could be brought on the basis that placing restrictions on the manner in which premises may be disposed of or managed may restrict the rights of disposers/managers to respect for their private life or home.

148. While the European Court of Human Rights has generally taken a broad view of what constitutes a home, there have been relatively few standalone claims brought on this ground. Moreover, the few cases which may be relevant (and the key cases in relation to the right for respect for the home) generally relate to circumstances in which a state body has interfered directly with a person’s home, and particularly with the physical security of and/or belongings contained in a home.\(^\text{43}\) It therefore seems unlikely that a standalone claim could succeed on this specific aspect of Article 8.

149. More likely, is that a claim may be brought alleging an interference with the right to respect for private and family life. In order for this to be the case, however, such a claim would have to be brought in relation to a family home or a person’s own residence, in which case—for the most part—the small premises exception (outlined above) would very likely apply and the scope for challenges would diminish accordingly.

150. As the small premises exception does not apply in all circumstances in relation to sex and race discrimination, there is still some potential for Article 8 to be engaged in relation to this clause. However, a claim under Article 8 should be readily defensible as the restrictions involved in relation to small premises could reasonably be said to be: in accordance with law, for legitimate purposes and necessary in a democratic society to protect the rights and freedoms of others (per Article 8(2)).

151. The premises restrictions clearly are for the protection of the rights and freedoms of others because they are imposed in order to protect the rights of people not to be discriminated against, harassed or victimised on the grounds of sex and race.

152. In relation to the issue of whether a restriction on the disposal/management of premises is likely to be deemed necessary in a democratic society, the key issues will be as to whether the restrictions placed can be said to be “in response to a pressing social need, and... no greater than is necessary to address that pressing...
social need". It seems extremely unlikely that the European Court of Human Rights would find that preventing discrimination, harassment and victimisation does not qualify as a pressing social need. Moreover, the careful balance that has been struck throughout the premises provisions between the rights of individuals and the needs of society (as evidenced in the exceptions contained in Schedule 5) will support a defence against any claim that the Government has acted disproportionately in pursuing this need.

153. Also, in any event, the state has a margin of appreciation in determining the demand for, and proportionality of, any measure. Moreover, the courts can be said to regard (inter alia) "the qualities of pluralism, tolerance, broadmindedness (and) equality... as important ingredients of any democracy". As such, it seems extremely unlikely that the courts would decide that measures to combat inequality and discrimination would be deemed unnecessary in a democratic society, nor disproportionate in that context (as long as the measures were legitimately directed to that purpose).

154. The alternative possible claim under the Convention in relation to these clauses would be for breach of Article 1 of Protocol 1, which concerns the peaceful enjoyment of possessions. Where legally owned, real property is a possession within the meaning of Article 1 of Protocol 1. Moreover, to the extent that a right to withhold consent to a disposal of property is legally enforceable (under domestic law), such right is also likely to constitute property under this Article.

155. The measures set out in these provisions limit the ability of property owners to dispose of (or otherwise control the use of) their property. While not explicitly set out on its face, Article 1 of Protocol 1 of the Convention has been held to include a right to dispose of property.

156. That said, in the event that these clauses are held to constitute interference with the right of individuals or corporations to dispose of or control their property, such interference would be likely to be deemed acceptable to the extent that they are in accordance with domestic law and EC law, are for a legitimate purpose and are not disproportionate. Given the broader social purpose of anti-discrimination law, it seems very unlikely that any challenge to the premises provisions of the Bill could succeed.

157. It is possible that a claim could be brought against the UK on the basis that the Government had acted disproportionately in relation to controlling the use or disposal of property. To succeed, it would be necessary to demonstrate that the Government had placed an excessive and disproportionate burden on individuals. Such a claim would be unlikely to succeed because of the careful balance which has been struck between the rights of individuals and the interests of society more broadly, including through the use of the exceptions contained in Schedule 5.

158. Moreover, the European Court of Human Rights has recognised that the "notion of 'public interest' is necessarily extensive... (and that) the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one... (In consequence, the European Court of Human Rights) will respect the legislature’s judgments as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation".

159. Clause 35 together with Schedule 4 impose duties to make reasonable adjustments. These apply in relation to let premises, premises to let, commonhold premises and, in certain cases, to the common parts of certain residential property.

160. In the case of let premises and commonhold land, there is a duty to make reasonable adjustments to a provision, criterion or practice or a term of the tenancy or, in the case of commonhold land, the commonhold community statement or to provide an auxiliary aid if a disabled person is put at a substantial disadvantage compared to a non-disabled person in relation to enjoying the premises or making use of benefits or facilities. In the case of premises to let similar duties apply in relation to someone wanting to rent the property. There is no duty to make physical alterations. The duty only applies if a request is made by the disabled person or someone on his or her behalf.

161. The also duty requires, in the case of commonhold property, the commonhold association and in the case of leasehold property, the owner or manager of the property (referred to in the Bill and here as the "responsible person"), to make reasonable adjustments to the physical structure of the common parts of the property in certain circumstances.

162. The duty applies only if the adjustment is requested by a disabled person who lawfully occupies the premises as his or her only or main residence or by someone on his or her behalf. The duty arises if the disabled person is at a substantial disadvantage compared to a person without the same disability when using the common parts and the adjustment is likely to reduce or remove that disadvantage. There is also a prohibition on victimising the disabled person, a person who makes the request on behalf of the disabled person and on members of the disabled person’s household.

45 Ibid. at 233.
46 See Marckx v Belgium, (Judgment of 13 June 1979) at paragraph 63.
47 Broniowski v Poland (Grand Chamber judgment of 22 June 2004) at paragraph 149.
163. As with reasonable adjustments generally, these duties could engage Article 1 of Protocol 1 (right to peaceful enjoyment of possessions). In this context, it has the potential to force alterations to property which the responsible person might not wish to make and which other occupiers of the premises might not wish to be made (however, as mentioned above, the non-common parts duty does not extend to the physical structure of the property but there may still be an issue in relation to the use of the property).

164. However, we consider that this provision is compatible with the Convention. It is clear from the Convention that Article 1 of Protocol 1 does not provide an absolute right and that there will be circumstances in which the right can be limited. In the present case, the rights are being limited in the interests of enabling disabled people to make use of the premises in which they live and are limited only as far as necessary to achieve that aim as evidenced by the following points:

165. The adjustment only has to be made if it is reasonable and therefore, if there is a good reason why the adjustment should not be made, there is no obligation to do so.

166. Under paragraph 6 of Schedule 4, all persons who the responsible person thinks would be affected by the adjustment must be consulted and any views expressed have to be taken into account when determining whether the adjustment is reasonable or not (unless the responsible person believes a negative view is based on the disabled person’s disability).

167. If the adjustment is reasonable, a written agreement has to be made setting out the rights and responsibilities of the parties. The landlord or the commonhold association may insist that the disabled person pays for the costs of the work, including maintenance costs and the cost of restoring the property to its original condition when the adjustment is no longer needed. This helps to protect the property rights of other people affected by any adjustment made.

168. As set out above in paragraphs 85–89 in the context of reasonable adjustments generally, the responsible person is protected in relation to works for which third party consent is required or where he is a lessee himself.

Part 5 and Schedules 6–9


170. We have considered which articles of the Convention could be engaged by these clauses and concluded that Articles 8 and 9 are most likely to be engaged. Article 8 rights may be engaged to the extent the prohibition restricts an individual’s freedom in the selection of domestic workers (e.g., a personal assistant, carer or domestic cleaner). Article 9 rights may be engaged to the extent the prohibition restricts the ability of religions or religious organisations to comply with the tenets of their religion.

171. However, a claim under Article 8 or 9 should be readily defensible as the restrictions imposed are in accordance with law for legitimate purposes and necessary in a democratic society to protect the rights and freedoms of others. By making it unlawful to discriminate in the workplace on the protected grounds or to carry out other acts such as victimisation, these provisions are protecting the rights of people not to be discriminated against in the workplace. Further the Bill provides carefully limited exceptions in Schedule 9 (e.g., for occupational requirements, paragraph 1) which are considered to strike the balance between the rights of individuals and the needs of society correctly so that any potential infringement of the Convention rights is unlikely.

172. Clause 53 makes it unlawful to discriminate against, harass or victimise a person in connection with the provision of an employment service, which includes the provision of vocational training or vocational guidance. In our view, this provision does not engage any Convention rights. The right to education set out in Article 2 of Protocol 1 does not include the right to vocational training.

173. Clause 38 imposes liability on an employer for failing to protect an employee from persistent harassment by a third party, such as a customer. Under this provision, an employer is treated as harassing an employee where a third party harasses the employee in the course of employment and the employer has failed to take reasonably practicable steps to prevent such harassment. However, an employer will only be liable where he has knowledge that his employee has been harassed on at least two other occasions (i.e., there must be knowledge of persistent harassment). We do not consider that this provision raises any separate issues in respect of Convention rights to those already raised in relation to harassment.

Organisations and Bodies

174. As with the employment and contract work provisions discussed above, these provisions re-enact similar sections in existing primary legislation which implement EC law. Clause 55 prohibits discrimination against and victimisation and harassment of members (and applicants for membership) of trade organisations. Clause 51 prohibits discrimination against and victimisation and harassment of holders of (and applicants for) relevant qualifications.
175. The prohibition of discrimination against members of trade organisations (and applicants for membership) may conflict with the Article 10 and 11 rights of trade unions by restricting their ability to choose their members. Although these rights are engaged they are subject to various limitations including the protection of the rights and freedoms of others. The limitation here is set down in law, is necessary to comply with the values of plurality, tolerance and broadmindedness which are hallmarks of a democratic society and is for one of the specified legitimate aims ie the protection of the rights and freedoms of others. Therefore it is capable of being a legitimate interference with those Article 10 and 11 rights.

176. Although a union’s right to draw up its own rules and administer its own affairs may extend to substantive criteria such as the profession or trade exercised by an applicant, it does not extend to criteria which are wholly unreasonable or arbitrary. In striking a fair balance between competing interests, the state enjoys a certain margin of appreciation in ensuring compliance with the Convention. Discrimination, victimisation or harassment on grounds of a protected characteristic contrary to EC law would be unreasonable and arbitrary. Therefore the prohibition does not curtail a union’s ability to exercise its autonomy in a lawful fashion, and it strikes a fair balance between the Article 10 and 11 rights of the union and those of its members and prospective members.

177. Moreover, the prohibition is not “directed at or calculated to interfere with the freedom of speech or thought…of members of prospective members, who [are] left to think and say whatever they [like]”. 48 Although Article 11 “embraces the freedom to exclude from association those whose membership [an organisation] honestly believes to be damaging to the interests of the society,” 49 we think the prohibition of discrimination, victimisation and harassment achieves the “fair balance that has to be struck between the general interests of the community and the interests of the individual” in respect of both Articles 10 and 11. 50

Other activities

178. As with the employment and contract work provisions discussed above, the following provisions re-enact similar sections in existing primary legislation, most of which implement EC law. 51 Clauses 42 and 43 prohibit discrimination against and victimisation and harassment of partners by firms and limited liability partnerships. Clauses 45 and 46 prohibit discrimination against and victimisation and harassment of barristers (including pupils) and advocates (including devils). Clauses 47 and 48 prohibit discrimination, victimisation and harassment in respect of appointments to personal or public offices (defined in accordance with schedule 6). Clause 49 prohibits discrimination, victimisation and harassment in making recommendations or giving approval for appointments to public offices. Clause 56 prohibits discrimination against and victimisation or harassment of local authority members in connection with the carrying out of official business.

179. The analysis and conclusions regarding employment and contract work in paragraphs 170–171 above applies to these clauses as well.

180. Because the prohibition of discrimination prohibits anyone from discriminating against a person in relation to instructing a barrister or advocate, an individual’s ability to engage the barrister or advocate of their choice is limited to some extent. This potentially contravenes Article 6 which includes a right for an individual charged with a criminal offence, to defend himself through legal assistance of his own choosing.

181. The purpose of Article 6(3) is “to ensure that both sides of the case are actually heard by giving the accused, as necessary, the assistance of an independent professional.” 52 Where the accused chooses to be represented by a lawyer for whom he will pay, his choice is not absolute. For example, regulation of the qualification, conduct and number of lawyers is permissible. 53 The Court has held in Croissant -v- Germany 54 that the state may place reasonable restrictions on the right of the accused to counsel of his choice and that factors to consider were the basis of the defendant’s objections and the prejudice caused.

182. An argument could be made that a defendant should be entitled to choose his representative on grounds of, for example sex, where this would play more sympathetically with the jury (eg picking a female barrister in a case of sexual assault). However, there are reasonably strong counter-arguments to this on the basis that his defence will not be prejudiced because he will still be able to appoint counsel who are properly able to defend him without discriminating because of any of the protected characteristics. Further, the restriction has a legitimate aim in preventing discrimination proscribed by EC law and is a proportionate means of achieving that aim. In our view, an argument that the defendant should be entitled to discriminate would be unlikely to find favour at the Convention as it would be based on assumptions unsupported by evidence about how a jury reacts to advocates based on inherent characteristics.

48 Royal Society for the Prevention of Cruelty to Animals v A-G [2002] 1 WLR 448 (RSPCA entitled to adopt membership policy which excluded individuals advocating change to its position in opposition to hunting with dogs).
49 Id.
50 Appleby v United Kingdom [2003] AER(D) 39 (state did not have a duty to ensure access by campaign group to private property).
51 The prohibition of discrimination against and victimisation and harassment of public office-holders and local authority members is not required by EC law.
52 Enslin, Baader and Raspe v Federal Republic of Germany 14 DR 64 (1978), EComHR.
53 X and Y v Federal Republic of Germany 42 CD 139 (1972), EComHR (permissible to exclude lawyer for refusing to wear robes); Enslin, Baader and Raspe (permissible to limit the number of defence lawyers and exclude lawyer where serious presumption of abuse of contact with accused or justified grounds for fearing counsel is a threat to security of the state).
54 (1992) 16 E.H.R.R. 135
Exceptions

183. Part 1 of Schedule 9 is about occupational requirements. Paragraph 1 allows an employer to discriminate in exceptional cases where having, or not having, a particular protected characteristic (eg being a man or not being a transsexual person) can be shown to be a genuine and determining requirement for particular work. This exception, which meets the requirements of EC law, replaces and harmonises the strand-specific exceptions for occupational qualifications or requirements in existing anti-discrimination legislation. Those are contained in sections 7, 7A and 7B of the SDA 1975, sections 4A and 5 of the RRA 1976, Regulation 7(2) of the Employment Equality (Sexual Orientation) Regulations 2003, Regulation 7(2) of the Employment Equality (Religion or Belief) Regulations 2003 and Regulation 8 of the Employment Equality (Age) Regulations 2006. There is no right to work guaranteed by the Convention, and a person's right to seek a particular type of employment (assuming such a right can be said to exist) cannot constitute a “possession” within the meaning of Article 1 of Protocol 1 (Legal and General Assurance Co Ltd v Kirk55).

184. But an occupational requirement could engage Article 8 of the Convention. If, for example, being of a particular sexual orientation or religion or belief is a requirement for a job, then the employer will obviously have to ask applicants about their sexual orientation or religion or belief in order to find out whether they meet the requirement. It is doubtful whether or not a simple question could constitute an interference with the exercise of the Convention right, particularly when the applicant is not compelled to answer (though he or she may not get the job if he or she does not). However, even if there were an interference, we think it would be justified by the need to protect the employer’s rights: in other words, the employer has a right to recruit persons on the basis of whether or not it is satisfied that they can perform the functions of the job. If an applicant’s sexual orientation or religion or belief had no bearing on his or her ability to do the job, then this would not be an occupational requirement and so the employer would not be justified in making the enquiry.

185. In addition, an occupational requirement to be of a particular sex could engage Article 8 where it is essential for the job to be held by either a man or a woman in order to preserve privacy. For example, a woman using a public lavatory or changing room might reasonably object if the attendant were a man. An occupational requirement to be of the same sex as the employer could also engage the right of the employer to respect for his or her private life or home if, for example, the job were that of his or her companion or carer. And an occupational requirement to be of the same sex as co-workers or inmates could engage their Article 8 rights if, for example, the work had to be done in residence at a geographically remote or mobile location without separate sleeping accommodation, showers or toilets, or in a single-sex prison or hospital ward. But in none of those cases do we believe that there would be an interference with the exercise of Convention rights.

186. In R (on the application of Amicus) v Secretary of State for Trade and Industry56 the High Court held that the Employment Equality (Sexual Orientation) Regulations 2003 did not interfere with rights under Article 8(1) at all. They add to existing rights. Regulation 7(2) limits the scope of what is added, but does not interfere with any rights. Nor do the 2003 Regulations produce any difference in treatment in the enjoyment of rights falling within the ambit of the Convention; they simply confer certain rights not to be discriminated against. So regulation 7(2) is compatible with Article 14 of the Convention. That reasoning should apply equally to other pieces of existing anti-discrimination legislation and to corresponding exceptions within these for occupational requirements.

187. Paragraph 2 allows employment and appointment to offices for purposes of an organised religion (which is not restricted to the priesthood) to be confined to men (excluding transsexual people), or to single men who are not gay, so as to comply with the doctrines of the religion or avoid conflicting with the strongly held religious convictions of a significant number of its followers. This exception harmonises section 19 of the SDA 1975 and regulation 7(3) of the Sexual Orientation Regulations 2003, which was impugned together with Regulation 7(2) of those Regulations in the Amicus case but survived the challenge. The court also held that there is nothing in Article 8 of the Convention to preclude the adoption of a general legislative measure such as Regulation 7(3).

188. Paragraph 3 allows work to be confined to individuals with a particular religion or belief in certain circumstances. As outlined above at paragraph x such an occupational requirement could engage Article 8 of the Convention as employers will have to ask applicants about their religion or belief in order to find out whether they meet the requirement.

189. Paragraphs 4(1) and (2) narrow the exception in section 85(4) of the SDA 1975 so as to make this compatible with EC law. These provisions make it lawful for women or transsexual people not to be recruited, promoted or transferred to, or trained for, service in the armed forces where this is appropriate and necessary in order to ensure the combat effectiveness of the armed forces. This exception does not, however, permit women or transsexual people to be discharged from the armed forces simply because of their sex or transsexual status, so it would not involve an interference with the exercise of their right to respect for their private lives (cf. Smith and Grady v United Kingdom57). Paragraph 4(3) reproduces the current exemptions for the armed forces from the employment provisions of the DDA 1995 and the Employment

55 [2004] IRLR 124
56 [2004] IRLR 430
57 (2000) 29 EHRR 493
190. Paragraph 5 makes it lawful for providers of vocational training education to discriminate against a person if the discrimination concerns training that would only fit that person for employment which, by virtue of paragraphs 1–4, the employer could lawfully refuse to offer the person in question. This exception harmonises regulation 20(3) of the Employment Equality (Sexual Orientation) Regulations 2003, which was impugned together with Regulation 7(2) and (3) of those Regulations in the Amicus case but survived the challenge, with corresponding exceptions in other anti-discrimination legislation.

191. Paragraphs 7 to 15 of Schedule 9 re-enact certain provisions in the Employment Equality (Age) Regulations 2006. Paragraph 16 includes a new age exception in relation to employer contributions to personal pension schemes.

192. Paragraph 8 provides that it is not a contravention of the Bill to dismiss a relevant worker at or over the age of 65 if the reason for the dismissal is retirement. This is referred to as the “default retirement age”.

193. In a judgment dated 5 March 2009 in the case of R (on the application of the Incorporated Trustees of the National Council on Ageing) v Secretary of State for Business, Enterprise and Regulatory Reform, the ECJ confirmed that provisions in the Employment Equality (Age) Regulations 2006 providing for a default retirement age were within the scope of Council Directive 2000/78/EC. The case will now be returned to the High Court where will consider the question of whether the imposition of a default retirement age can be objectively justified by the government. We await the determination of the High Court on this issue.

194. We don’t think anyone has, to date, suggested that the default retirement age is incompatible with Article 8. This may be because the more obvious means of challenge is to argue that it is incompatible with the Directive. In any event, we do not think that the case law supports such a wide interpretation of Article 8 and we would take the view that Article 8 is not engaged.

195. Paragraph 17 provides an exception for the suspension of discretionary payments during maternity leave. The exception is carefully circumscribed such that it does not apply to maternity-related pay, pay in respect of times when a woman is not on maternity leave or pay by way of bonus in respect of times when she is on compulsory maternity leave, consistent with the requirements of European law. No convention rights are engaged.

196. Paragraph 18(1) provides that work-related discrimination on grounds of sexual orientation does not occur in relation to benefits payable for periods of service or where the right accrued before 5 December 2005 (when the main provisions of the Civil Partnership Act 2004 came into force). Paragraph 18(2) provides that such discrimination does not occur when benefits are conferred on married persons and civil partners but not on others. These provisions might engage Article 8 or Article 1 of Protocol 1 read with Article 14. However, provisions supporting marriage and (where applicable in national law) civil partnerships would appear to be compatible with the Convention. Article 12 of the Convention enshrines the special position afforded to marriage and European Court of Human Rights case law indicates that it is compatible with Article 14 to treat married and unmarried partners differently.
Chapter 3 of Part 5 and Schedule 7—Equal Pay

202. The clauses in Chapter 3 of Part 5 and the associated Schedules largely replicate existing provisions in the Equal Pay Act 1970 ("EqPA") and the Pensions Act 1995 governing equal treatment in relation to pay and other terms and conditions of employment and in the case of the latter, equal treatment in relation to occupational pension schemes. The provisions implement the requirements of EC law in this area, primarily Article 141 of the EC Treaty and the relevant parts of the Recast Directive 2006/54. Chapter 3 brings the existing domestic provisions together under the heading “equality of terms” in an attempt to simplify them.

203. Clauses 60 and 62 have the effect of implying a sex equality clause into a person’s terms of employment where that person is engaged in like work, work rated as equivalent or work of equal value to another person in the same employment. The provisions apply to employees, those appointed to a personal or public office and members of the armed forces. References to “employee” and “employer” in the text below are intended as shorthand and are to be taken to encompass all of the above who fall within the scope of the provisions.

204. Where a sex equality clause is implied as a result of the operation of these provisions, the effect of such a clause is to modify a term of an employee’s contract which is less favourable than a corresponding term in the comparator’s contract. Where a term which benefits the comparator is absent from the employee’s contract, the effect is to modify the latter so as to include such a term. These provisions are aimed at achieving equality between men and women in relation to pay and other terms of employment and we do not consider that any Convention rights are engaged.

205. Clause 61 defines like work, work rated as equivalent and work of equal value for the purposes of the equality of terms provisions. We do not consider that any Convention rights are engaged by this provision. Clause 66 deals with the respective application of the equality clause provisions and the sex discrimination provisions to discriminatory terms of employment. We do not consider that any Convention rights are engaged by this provision.

206. Clause 65 provides a defence to an employer to a claim for breach of an equality clause if the employer can show that any difference in terms is genuinely due to a material factor which is not gender related and in relation to which any indirectly discriminatory effect can be objectively justified. As a form of exception to the general rule requiring equal pay for equal work, it could be argued that Article 14 read with Article 1 of Protocol 1 is breached, in that the clause clearly allows an employer to pay an employee more than another employee of the opposite sex carrying out equal work. However, we consider that this defence pursues a legitimate aim in that it permits employers to regulate their own work force and meet the requirements of their business (for example, by recognising that market forces may sometimes require an employee recruited for particular skills to be paid more than an existing employee) and satisfies the requirements of the principle of proportionality by ensuring that any reason for a difference in treatment must be shown not to be tainted by gender discrimination and any disparate impact on employees of one gender must be objectively justified. We therefore consider any interference to be justified.

207. Clauses 68–72 are concerned with pregnancy and maternity equality. They replicate and seek to simplify the existing provisions in section 1(d)–(f) of the EqPA. The broad effect of these provisions is to ensure that: any pay increase awarded during the “protected period” as defined in subsection (6) of clause 17 is reflected in a woman’s maternity-related pay if she would have benefited from it had she not been on maternity leave; that a woman on maternity leave benefits from any pay by way of bonus awarded in respect of the period before maternity leave begins; after the protected period ends and in respect of the period of compulsory maternity leave; and that any increase in pay which a woman on maternity leave would have benefited from after the protected period had she not been on maternity leave is reflected in her pay after that period.

208. These clauses and clause 72 deal with the respective application of the maternity equality clause provisions and the pregnancy and maternity discrimination provisions. Clause 72 simply replaces paragraph 5 of Schedule 5 to the Social Security Act 1989 and replicates some of the Maternity and Parental Leave Etc Regulations 1999. Broadly speaking it ensures that when a woman is on maternity leave she must be treated as though she is not for the purposes of her membership of and accrual of rights under an occupational pension scheme and in relation to any determination about the level of benefits she will receive under the scheme. We do not consider that any Convention rights are engaged by this provision.

209. Clause 73 makes any term of employment which seeks to prevent an employee from disclosing details about his pay unenforceable and makes the disclosure of such information a protected act for the purposes of the prohibition against victimisation. We have considered whether Article 8 is engaged by this provision on the basis that it may interfere with the privacy of the employer by preventing him from keeping the amount that he pays his employees confidential. There is potential for Article 8 to be engaged but it would...
be going somewhat further than the established case law on privacy in the work context which is concerned with state-sanctioned intrusion such as search of premises or phone-tapping. In any event if Article 8 were engaged we consider that there are strong arguments to support there being no breach of the Convention. Any such interference would be considered justified as it pursues the legitimate aim of protecting the rights and freedoms of others by encouraging transparency and fairness in pay structures and ensuring that employees are in a position to be able to bring an equal pay claim. Enabling disclosure is a proportionate means of achieving this aim particularly as such disclosure is limited to the employee’s colleagues and therefore the employer’s commercial interests are protected as far as is possible.

210. Paragraphs 1 and 2 of Schedule 7 set out exceptions to the equality of terms provisions which relate to legal requirements on the employment of women, particularly in relation to maternity. In relation to both of these paragraphs, please see the analysis below at paragraph 306 in relation to paragraph 2 of Schedule 22 (the exception relating to the protection of women).

211. The remainder of Schedule 7 deals with exceptions in relation to occupational pension schemes—no Convention rights are engaged.

PART 6
Clause 80

212. This clause makes it unlawful for the responsible body of any school to discriminate or victimise any pupil or prospective pupil on the protected characteristics of disability, gender reassignment, race, religion or belief, sex and sexual orientation. It also makes it unlawful for schools to harass any pupil or prospective pupil of a school on the protected characteristics of disability, race and sex.

213. This re-enacts the existing legislation, and extends it to cover harassment and victimisation in the protected characteristics mentioned above.

214. Article 2 of Protocol 1 provides that no person shall be denied education and that the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. The italicised part of this Article is subject to a UK reservation that a pupil of a school on the protected characteristics of disability, race and sex.

215. Case law has established that Article 2 of Protocol 1 constitutes a whole which is dominated by its first sentence which enshrines the right of everyone to education. Providing redress for a student or prospective student who has been discriminated against or harassed because of a protected characteristic (or that of their parent or parents) is compatible with, and supports, Article 2 of Protocol 1, Article 9 (in respect of religion or belief) or Article 14 when read with another Article.

Clause 83 and Schedule 10

216. Schedule 10 requires both local authorities and schools to have plans to increase the access of disabled pupils to the physical premises of schools, to the curriculum and to information provided to pupils. This re-enacts provisions inserted into the DDA 1995 by the Special Educational Needs and Disability Act 2001. This provision may engage Article 1 of Protocol 1 as it will probably require the alteration of school premises over a period of time. As with the other requirements to alter premises, usually immediately, rather than phased over time, referred to above, we consider that this strikes a fair balance between the rights of the local authority and school as property owner, and the rights of the disabled person to fully integrate into society.

Clause 84 and Schedule 11

217. Clause 84 gives effect to Schedule 11 which contains the exceptions to the general prohibition on discrimination.

218. Part 1 of the Schedule permits single-sex schools to discriminate in relation to admissions to the school, and admit pupils of one sex only. This replicates the provisions of the SDA 1975. We have considered compatibility with Article 14 (taken with Article 2 of Protocol 1) on the basis that although Article 14 does not require the UK to take positive steps to prohibit discrimination in admission to education, it does prohibit discrimination in the measures the UK has chosen to adopt to protect the rights guaranteed by Article 2 of Protocol 1.

219. The Convention recognises the need for plurality and diversity in a State’s education system, including the right of parents to have their children educated in conformity with their philosophical convictions. The UK has a long tradition of single-sex educational institutions and there remains demand for such education. We consider that the existence and operation of such institutions is compatible with the Convention and that this exemption is necessary to ensure that they can continue, which supports the objective of Article 2 of Protocol 1.

220. Part 2 of the Schedule permits “State” schools with a religious character and independent schools with a religious ethos to discriminate in relation to admission to the school and in relation to access to benefits, facilities and services provided for pupils. This replicates the provision in the Equality Act 2006.
221. The UK has a strong tradition of “faith schools”, as religious bodies historically largely provided education and there remains a demand for such schooling. We consider that the existence and operation of such schools is compatible with both the Convention and the common law. It recognises the right of parents to have their children educated in accordance with their religious and philosophical beliefs. In addition, there is explicit recognition in Article 9 of the importance of religion and devotion to individuals. We consider the exemptions necessary to ensure that the prohibitions in clause 80 do not undermine or unduly interfere with the fundamental principle in Article 9, as well as the objective of Article 2 of Protocol 1, albeit partly subject to a UK reservation.

222. Part 2 of the Schedule also exempt from the discrimination provisions those matters relating to the content of the curriculum and collective religious worship in all schools. This also replicates provisions in the Equality Act 2006. Statutory obligations already exist on schools without a religious character or ethos in relation to the National Curriculum, and the basic curriculum as delivered in schools, which includes religious education and sex education. There are further statutory obligations and provisions in relation to collective religious worship. The exemptions ensure that the new provisions do not conflict with existing legislation that is itself compatible with the Convention and in particular Article 2 of Protocol 1.

Clause 86

223. This clause makes it unlawful for the responsible body of a further or higher educational establishment to discriminate against, victimise or harass a student or prospective student. All the protected characteristics are covered apart from marriage and civil partnership.

224. This re-enacts the effects of the existing legislation in respect of each of the strands. Providing redress for a student or prospective student who has been discriminated against or harassed because of a protected characteristic (or that of their parent or parents) is compatible with, and supports, Article 2 of Protocol 1 Article 9 (in respect of religion or belief) or Article 14 when read with another Article.

Clause 89 and Schedule 12

Part 1 of Schedule 12

225. Clause 89 gives effect to Schedule 12 which contains the exceptions to the general prohibition on discrimination and harassment. Part 1 of the Schedule permits discrimination in relation to admissions to single-sex institutions. This replicates provisions in the SDA 1975. As with the similar provision for schools, discussed in paragraphs [223–224] above, we consider that it is compatible with Article 14 (taken with Article 2 of Protocol 1).

Part 2 of Schedule 12

226. Paragraph 5 provides a power which enables a Minister of the Crown to designate an institution as having a religious ethos. The effect of designation is that the institution can give preference in admissions to applicants of a particular religion or belief if it does so to preserve its religious ethos provide that the course does not amount to vocational training. The intention is to use this power to replicate the effect of provisions in the Employment Equality (Religion or Belief) Regulations 2003 with respect to certain Catholic Sixth Form Colleges (CSFCs), currently listed in Schedule 1B to those Regulations.

227. The limited exemption this power would give is necessary to preserve the faith ethos of these institutions which support the plurality envisaged by Article 2 of Protocol 1. Further, the exemption is necessary to ensure that the general prohibition does not unduly interfere with Article 9 right, further supported by the weight section 13 of the HRA 1998 attaches to freedom of religion.

Clause 93 and schedule 13

228. Clause 93 and schedule 13 make provision about reasonable adjustments within education, please see paragraphs [80–84] for analysis. The only issue specific to education is the provision at paragraph 8, providing for confidentiality requests which will support Art 8.

Part 7 and Schedules 15 and 16

229. Part 7 and Schedules 15 and 16 address discrimination, victimisation and harassment in the field of private clubs in relation to all strands other than marriage and civil partnership. These provisions re-enact the substance of the existing provisions in the RRA 1976, the DDA 1995 and the Equality Act (Sexual Orientation) Regulations 2007 in relation to the protected characteristics of race, disability and sexual orientation.

230. Clause 97 prohibits discrimination, harassment (though not in respect of religion or belief or sexual orientation) and victimisation on protected grounds by a club in relation to potential members and potential guests and also to actual members and guests. A club is defined for these purposes in clause 102 as being an association with more than 25 members and the membership of which is not open to the public or section of the public but instead is regulated by the rules of the club so as to involve some form of genuine selection
process. The requirement for there to be 25 or more members and for membership to be regulated by rules serves to ensure that the prohibition does not unduly impact on small private gatherings or ad hoc gatherings. For example, family celebrations or a book club organised amongst friends.

231. The prohibition in clause 97 is subject to the exception contained in Schedule 16. By virtue of Schedule 16, a club is not in breach of the non-discrimination provisions if it restricts membership solely to those who share the same characteristic. For example, men only clubs, a club for the visually impaired or a club for those of Afro-Caribbean descent are all lawful. Such single characteristic clubs are similarly entitled to restrict guests to those who share the same characteristic as members.

232. The prohibition on discrimination by private members’ clubs in clause 97 potentially engages Articles 8 and 11 of the Convention in that an individual might claim that they should be free to associate with others in their private life even where such others are determined by the fact that they do not have a particular protected characteristic. Equally, the private members’ club/association could itself claim interference with its Article 11 rights in that it should be free to choose its own members (see, for example, Associated Society of Locomotive Engineers and Fireman (ASLEF) v United Kingdom[58]). As the European Court of Human Rights stated in that case “[w]here associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership. By way of example, it is uncontroversial that religious bodies … can generally regulate their membership to include only those who share their beliefs and ideals.”[59]

233. The exception for single characteristic clubs in Schedule 16 means that it is open, for example, to a man to associate only with other men by joining a gentleman’s club or for homosexuals to be able to form an association whose membership is limited to other homosexuals. We are therefore confident that the interference with an individual’s right to respect for private life or freedom of association and an association’s freedom to choose its members under clause 98 is justified under Articles 8(2) and 11(2) of the Convention. Because it is in accordance with the law and, by virtue of the exception in Schedule 16, is no more than is necessary for the protection of the rights and freedoms of others, namely the Article 8, 11 and 14 rights of others to be able to freely associate with others without discrimination.

234. It could be argued, in the alternative, that the exception for single characteristic clubs is itself in breach of Convention requirements in that it breaches the Article 11 (and possibly Article 8) rights of certain individuals, both individually and in conjunction with Article 14. It is apparent, therefore, that the prohibition in clause 97 and the exception to it at Schedule 16 constitute a potential conflict between the Article 11 (and 8) rights of some individuals and associations, on the one hand, and the same rights, alone and in conjunction with Article 14, of other individuals, on the other hand. Where there is such a conflict between competing interests, states must find a fair and proper balance [Associated Society of Locomotive Engineers and Fireman (ASLEF) v United Kingdom[60] § 46]. We believe that the general prohibition on discrimination in this area, at the same time as allowing single characteristic clubs to continue, does indeed strike the correct balance. It ensures that, while the ability of a person to become a member of a particular association should not, in general, be dependent on their having a particular protected characteristic, individuals and associations can still choose to associate with or limit their membership to those who share a particular protected characteristic. Thus, for example, while a woman may wish to become a member of the Garrick club but is prevented from doing so by virtue of the club being lawfully able under Schedule 16 to limit membership to men only, she is free to apply for membership of other literary clubs which are open to both men and women on equal terms. We consider that this availability of other venues ensures that the restriction on her Article 11 rights, as prescribed by law, is proportionate to the legitimate aim of protecting the Article 11 rights of others who would wish to join men-only clubs. For similar reasons, we consider that there is no violation of Article 14 since any difference in treatment is proportionate to the legitimate aim of protecting the rights and freedoms of others.

235. Schedule 16 also contains an exception which allows an association or club to differentiate in the terms on which it allows a pregnant woman to become a member of the club or in how it affords access to benefits to a member who is pregnant where it reasonably believes that to do otherwise would create a risk to the woman’s health and safety and also that the club would impose similar restrictions in respect of other persons with other physical conditions. To the extent that any such differential treatment might be said to interfere with the woman’s Article 8 or Article 11 rights (alone and in conjunction with Article 14), it is considered to be justified as being no more than is necessary to ensure the protection of health. The fact that the association’s belief as to risk must be reasonable (ie an objective rather than subjective standard) and that it would take similar measures in relation to individual’s with other physical conditions serves to ensure that any restriction is indeed proportionate to the legitimate aim of ensuring safety.

236. Schedule 15 sets out the duty of reasonable adjustment on private clubs for the purposes of the disability strand. The commentary at paragraphs 85–89 above also applies here.

58 Application no. 11002/05; decision 27.2.2007
59 Ibid §39
60 Application no. 11002/05; decision 27.2.2007
PART 8

Prohibited conduct: ancillary

237. These clauses provide for liability under the Bill to be imposed in some wider circumstances than arise in other parts. For example, clause 103 imposes liability for harassment and discrimination after the relevant relationship has ended and clause 106 imposes liability on someone who induces or instructs another to do anything in relation to a third party that constitutes a contravention of the substantive Parts of the Bill. The clauses are parasitic on the earlier substantive provisions of the Bill. We do not consider that they raise any separate issues in respect of the Convention to those already raised by the prohibition on discrimination, harassment and victimisation in the substantive Parts of the Bill.

PART 9 ENFORCEMENT

238. Clauses 107, 108 and 114 set out the scheme for enforcement of obligations imposed by the Bill. Clause 107 provides that there are three methods of enforcing the obligations imposed by the Bill. First, proceedings brought under the Bill in the civil courts or employment tribunal; secondly, proceedings brought by the Equality and Human Rights Commission under the Equality Act 2006; thirdly, judicial review or its Scottish equivalent and through specified immigration proceedings.

239. Clauses 108 and 114 provide which claims must be brought in the civil courts and which in the employment tribunals and other points relating to jurisdiction.

240. Article 6 requires the state to provide access to an independent and impartial tribunal so that an individual may have his civil rights and obligations determined at a fair and public hearing. These clauses fulfil that requirement and regulate the way in which claims can be brought. Although they limit how claims are to be brought they do not limit access to the court and will not be in breach of Article 6 because as the European Court of Human Rights stated in Golder v United Kingdom, the right of access to court is not absolute, “by its very nature it calls for regulation by the state which may vary in time and place according to the needs and resources of the community and of individuals”.

241. Clause 109 exempts certain immigration cases from the jurisdiction of the civil courts. However, if there is an allegation of discrimination in the making of an immigration decision, then an appeal can be made on that ground and clause 108(3) permits the relevant immigration tribunal to hear that claim. The exception therefore only operates to direct the claim to a different tribunal whose procedure is also compliant with Article 6, it does not deprive the claimant of access to court or limit that right.

242. Clause 110 exempts certain claims regarding disability discrimination in schools from the jurisdiction of the civil courts. However, these claims can be heard in specialist tribunals whose procedure complies with Article 6 and the claimant’s rights under Article 6 are therefore not infringed. Schedule 17 makes further provision regarding enforcement of these claims and replicates provisions in the DDA 1995 which were inserted by the Special Educational Needs Disability Act 2001. No Convention rights are engaged by it.

243. Clause 114 sets out the jurisdiction of the employment tribunals and includes two exceptions which could potentially engage Article 6. The first is at subsection (7) and prevents a responsible person from seeking a declaration about an equal pay dispute, in a case where the employee is a member of the armed services. As this only restrains the right of the Crown, which is the responsible person in relation to armed services members, and the Crown does not come within the definition of “victim” under the Convention, no breach of Convention rights arises. The second is at subsection (8) and prevents a claim regarding a qualification being brought to the employment tribunal until appeal proceedings have been brought and concluded, where such appeal is available. This requirement to exhaust the appeal avenue before bringing tribunal proceedings pursues the legitimate aim of keeping specialist decisions within the ambit of the experts who can best deal with them. It is proportionate to that aim in that the only restriction on access to the tribunals is to delay that access until the appeal is concluded.

244. Clause 115 imposes a requirement on members of the armed services to make and pursue an internal complaint regarding any discrimination before they bring a claim regarding that matter to the employment tribunal. Article 6 is engaged as this does limit their ability to complain to a fair and impartial tribunal but the limit is pursuing a legitimate aim and is proportionate to that aim. It’s aim is to ensure that discrimination issues are dealt with swiftly and locally within the armed services and the provision does not exclude access to the tribunal it merely requires an internal complaint as a prior step, which is proportionate to this aim. Further, members of the armed services are given a longer time in which to bring a claim to the tribunal, six months instead of three, to take account of this extra requirement (clause 118(2)).

245. Clause 111 makes special provision for the procedure in discrimination cases in the civil courts where the interests of national security need to be protected. It permits rules of court to be made to exclude the parties from the proceedings or part of them or to exclude an assessor. Subsection (4) gives a power for the rules to permit an excluded party to make a statement to the court before their exclusion commences.

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61 (1975) EHRR 524
Subsection (5) provides a power for the rules to permit the court to keep the reasons for its decision. Subsections (7), (8) and (9) make provision to allow the Attorney General or the Advocate General for Scotland to appoint a lawyer to represent the interests of the excluded party during their exclusion.

246. Article 6 is clearly engaged by clause 111 as it potentially infringes some of the procedural guarantees of a fair trial protected by Article 6. Those are, the right of the person affected by the decision to be present and participate in the proceedings and their right to know the reasons for a court’s decision. These rights are only compromised by this clause to the extent necessary to satisfy the legitimate aim of protecting national security. This is an aim that is permitted under Article 6(1). Although a party may have to be excluded they can be permitted to make a statement before that exclusion commences and they can be represented by someone with the appropriate clearance while they are excluded. The reasons for the court’s decision may be kept secret in whole or only in part. Therefore it is considered that the judicial procedures outlined will comply with the Convention because they are a proportionate response to the legitimate aim of protecting national security interests. Steps are taken in the provisions to ensure, as far as is consistent with protecting the interests of national security, that the principle of “equality of arms” between the parties to the proceedings is respected and that the ability of the party to argue their case before the court is not prejudiced.

247. Clause 112 imposes time limits for bringing discrimination cases to the civil courts. In the majority of cases the time limit is six months and in some prescribed circumstances it is nine months. A time limit does act as a restriction on access to the court and it therefore needs to pursue a legitimate aim and meet the test of proportionality. The European Court of Human Rights has said in *Stubbing vs United Kingdom* that limitation periods serve important purposes, namely to ensure legal certainty and finality, to protect defendants from answering stale claims and to prevent injustice arising from the deciding of a case long after the events which took place. It is considered that the periods imposed by this clause are not unduly short, especially when the immediate nature of discrimination claims is considered, and their length is proportionate to the legitimate aims they serve.

248. Clause 117 imposes time limits for bringing discrimination cases to the employment tribunals. In the majority of cases the time limit is three months, armed forces members are given six months in which to bring a claim. It is considered that the three month time limit is proportionate given the less formal nature of proceedings before an employment tribunal and the need to ensure that employment disputes are resolved as swiftly as possible. The same arguments apply in relation to clause 123 which deals with time limits in equal pay cases.

249. Clauses 113 and 118 set out the remedies which are available to a claimant in the civil courts and the employment tribunal for a breach of this Bill. No Convention rights are engaged.

250. Clause 119 prevents the remedy of a recommendation being available in a case which has been ordered or directed to be “national security proceedings”, where the recommendation would affect certain bodies connected with the UK’s national security. This restriction does not affect the procedural fairness of the proceedings as it relates to the remedies that are available and therefore Article 6 is not engaged.

251. Clause 120 sets out the remedies available in cases about occupational pension schemes. No Convention rights are engaged.

252. Clauses 127 and 128 replicate the provisions of the Occupational Pension Schemes (Equal Treatment) Regulations 1995 (SI 1995/3183), which modify the Equal Pay Act 1970 in its application to occupational pensions claims. We do not consider that any Convention rights are engaged, despite the retrospective application of some of these provisions. The right to join a pension scheme may be backdated to 8 April 1976, the date of the judgment in *Defrenne v Sabena* [1976] 2 CMLR 98 which established that Article 119 (now Article 141) of the Treaty was directly effective. However, it is only from 17 May 1990, the date of the judgment in *Barber v Guardian Royal Exchange Group* [1990] IRLR 240, that employers may be required to pay any contributions needed to secure the rights of the member. We do not consider that any Article 1 Protocol 1 issues are engaged because it the ECJ has held on a number of occasions that pensions are deferred pay for the purposes of Article 141.

253. Clause 130 provides that the burden of proof in claims under the Bill is initially on the claimant but that once they have established facts from which the court or tribunal could find that the defendant was in breach of the provision alleged, then the burden shifts to the Defendant to show that he is not in breach. This means that the burden shifts to the Defendant at the stage where he is required to provide a reasonable explanation of an act that is capable of being unlawful discrimination, victimisation or other conduct prohibited under the Bill. Article 6 does not prescribe the burden of proof applicable in civil proceedings and will not be infringed providing that the equality of arms principle is respected. The burden imposed here is clearly within that principle and no potential infringement of Article 6 arises.

254. Clause 131 prevents cases that have been decided under the predecessor legislation of the Bill, being re-opened as “new” cases under the Bill. No Convention rights are engaged.
255. Clause 132 provides a power for a Minister to prescribe the form of questionnaire that a claimant or potential claimant under the Bill may use to obtain information from the person who they think may have discriminated against them or in some other way breached the provisions of the Bill. It also permits a court or tribunal to draw inferences from a failure to answer a questionnaire or an evasive or equivocal answer. Such inferences are permitted in order to encourage the questioned party to consider early on the strength of their case and to plead it accurately so that its disposal by the court or tribunal is more straightforward and litigation issues are correctly identified early on in the proceedings. This is a legitimate aim for the provision and the sanction for the questioned party, namely inferences being drawn about their case, is proportionate to that aim. The fairness of the proceedings is maintained and Article 6 is not infringed.

PART 10 CONTRACTS ETC

256. The following provisions re-enact similar sections in existing primary legislation and implement EC law.

257. Clauses 136 and 137 render unenforceable a term of a contract to the extent that it constitutes, promotes or provides for prohibited treatment. Clause 138 renders a term unenforceable to the extent it purports to exclude or limit a provision of the Bill, except for specified settlement contracts.

258. Clauses 139–140 render void or unenforceable terms of collective agreements and rules of undertakings to the extent that they provide for prohibited treatment.

259. Rendering void or unenforceable the terms of contracts or collective agreements potentially contravenes Article 1 of Protocol 1 to the extent that the result deprives an individual of the peaceful enjoyment of his/her possessions. However, where it is in the public interest to do so and subject to the conditions provided for by law, no breach of the Convention arises. There is ample case-law under the HRA 1998 to the effect that the test of justification is very favourable to the public authority concerned. There has been little advance on James v UK where it was held that a justification will succeed unless it is manifestly without reasonable foundation. The justification here of protecting the broader social purposes of anti-discrimination law is clearly sufficient and the interference with property rights is proportionate as procedural safeguards are included to ensure that every person affected is given notice and afforded an opportunity to make representations.

PART 11 ADVANCEMENT OF EQUALITY

260. Clause 143 sets out a new integrated positive duty which requires public authorities to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation under the Act and to advance equality of opportunity and foster good relations between different protected groups.

261. The “positive duty” model requires public authorities to consider taking proactive steps to root out discrimination and harassment and advance equality of opportunity in relation to their functions—from the design and delivery of policies and services to their capacity as employers. The duties require public authorities to integrate equality considerations into all areas of a public authority’s work and to give consideration to taking positive steps to dismantle barriers. The advancing equality of opportunity limb reflects the fact that in order to ensure full equality in practice, this may necessitate a difference in treatment, rather than the same treatment.

262. It is considered highly unlikely that a public body subject to the obligations of the new duty enjoys Convention rights. As for the way in which such bodies discharge the duty, the duty does not create any new private law rights and must operate within the confines of the law. This means that the positive duty cannot sanction action which goes beyond what discrimination law permits.

263. Clause 152 allows positive action measures to be taken. In both EC and domestic law, it is accepted that in order to achieve full equality in practice, disadvantaged groups may actually require different treatment and equal treatment may perpetuate any disadvantage, because not all groups start off from the same position. This is a purely permissive provision which allows measures to be taken to overcome or minimise any disadvantage or to encourage participation in an activity where participation is disproportionately low. As this provision is an exception to the equal treatment principle, by definition, any measures taken in favour of a disadvantaged group will discriminate against advantaged groups. This may raise Article 14 concerns where other substantive Convention rights are engaged, for example, Article 8. However, we consider that such discrimination could be justified because it is in pursuance of a legitimate aim, which is to help disadvantaged groups to achieve a level playing field. The provision has an in-built proportionality test, in that in can only be invoked in certain cases—and where the disadvantage etc ceases, it can no longer be used.

264. Schedules 18 and 19 do not give rise to any human rights issues.

63 Accrued contractual rights are “possessions”, eg. the right to be paid for work done. But Article 1/1 “applies only to a person’s existing possessions: it does not guarantee a right to acquire possessions”: see R (Carson and Reynolds) v Secretary of State for Work and Pensions [2003] EWCA 797.

64 (1986) 8 EHR 123; see also Broniowski v Poland (Grand Chamber judgment of 22 June 2004) at para. 149 (the “notion of ‘public interest’ is necessarily extensive… the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one… [The Strasbourg court] will respect the legislature’s judgments as to what is ‘in the public interest’ unless that judgment is manifestly without reasonable foundation”).
Part 12 Disabled Persons: Transport

Clause 154: Taxi accessibility

170. This clause empowers the Secretary of State to make regulations for the purpose of requiring taxis to be designed and fitted out to improve their accessibility for persons who have disabilities.

171. Article 1 of Protocol 1 could be potentially engaged by this clause. This is because any regulations made under clause 154 would represent an impediment on the freedom of the owners or operators of taxis to have vehicles designed and fitted out as they please.

172. The objective behind this provision is to ensure that all taxis are designed so as to ensure that people with disabilities are able to travel in them in reasonable comfort and safety, thereby improving their mobility. We believe that the objective is within the proviso to article 1 which recognises the right of States to enforce such laws as are deemed necessary to control the use of property in accordance with the general interest.

Clause 156: Designated transport facilities

173. This clause empowers the Secretary of State in England and Wales and the Scottish Ministers to make regulations requiring the application of taxi provisions contained in Chapter 1 of Part 7 to vehicles used in the provision of services under a franchise agreement.

174. Article 1 of Protocol 1 could be potentially engaged but the same arguments apply as in the case of clause to justify the provision.

Clause 157: Taxi licence conditional on compliance

175. This clause imposes a requirement on a licensing authority to grant a licence for a taxi to ply for hire on when it complies with the provisions of the taxi access regulations. The same considerations apply here as to clause 155.

Clauses 158 and 159

176. No Convention rights are engaged.

Clauses 162 to 165: Carrying assistance dogs

177. These clauses impose a requirement on the driver of a taxi or private hire vehicle to carry an assistance dog which is accompanying a disabled passenger. Clause 164 also imposes a requirement on an operator of a private hire vehicle in relation to failing or refusing to accept a booking where an assistance dog would be accompanying a disabled passenger and to not imposing an additional charge.

178. Consideration was given whether these clauses might potentially engage article 8 (right to respect for private life) in so far as the carrying of dogs within a vehicle might impact on the driver’s physical health. Clauses 163 and 165 allow an application to be made to a licensing authority on medical grounds taking into account the physical characteristics of the vehicle for a certificate exempting the driver from such requirements. On that basis it is considered that these clauses are compatible with article 8, in so far as it might be engaged.

Clause 166: Appeal against refusal of exemption certificate

179. This clause allows a right of appeal to a magistrates’ court by a person who has been refused an exemption certificate by the licensing authority.

180. Article 6 would be engaged by this clause which is compliant with article 6 because it provides for appellants civil rights to be determined by a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, and directly subject to the HRA 1998.

Chapter 2—Public Service Vehicles

Clauses 168 to 171: PSV accessibility

181. These clauses empower the Secretary of State to make regulations for the purpose of requiring public service vehicles to be designed and fitted out to improve their accessibility for persons who have disabilities.

182. Article 1 of Protocol 1 could be potentially engaged by these clauses. This is because any regulations made under them would represent an impediment on the freedom of public service vehicle owners or operators to have their vehicles designed and fitted out as they please.
183. However, the purpose is that all public service vehicles used for public transport should be compliant with the appropriate design and operational standards so as to ensure that people with disabilities are able to use them in reasonable comfort and safety, thereby improving their mobility. The objective is believed to be within the proviso to Article 1 which recognises the rights of States to enforce such laws as they deem necessary to control the use of property in accordance with the general interest.

Clause 172: Special authorisations

184. No Convention rights are engaged.

Clause 173: Review and appeal

185. This clause makes provision for an applicant to request the review of any refusal to issue an approval certificate or to appeal against any decision refusing to issue an accessibility certificate or approval certificate within a prescribed time period. Such a decision, or the failure to make the decision within a reasonable period of time, could be the subject of judicial review.

186. Article 6 of the Convention (right to fair trial for the determination of civil rights) may be engaged. However, the clause would be compliant with Article 6 because the availability of judicial review would enable the civil rights and obligations of the applicant to be determined by a fair and public hearing within a reasonable time by an independent and impartial tribunal which is directly subject to the application of the HRA 1998.

Clause 174: Fees

187. No Convention rights are engaged.

Clause 175: Rail vehicle accessibility regulations

265. This clause empowers the Secretary of State to make regulations for the purpose of requiring rail vehicles to be designed and fitted out to improve their accessibility for persons who have disabilities.

266. Mandatory European rail vehicle accessibility standards came into force in the UK on 1 July 2008 which apply to the so-called interoperable rail system (ie the rail system to which the European interoperability directives apply, ie the major lines of the UK main line rail system). So the power is limited to those rail vehicles which are not used on the interoperable rail system (ie the power would apply mainly to so called “light rail” systems such as the London Underground, the Docklands Light Railway and the Tyneside Metro, and also to trams and other forms of guided transport).

267. This clause replaces, without substantive amendment, section 46 (rail vehicle accessibility regulations) of the DDA 1995, as it had been prospectively amended from a time to be appointed by the Disability Discrimination Act 2005 and by measures to facilitate the coming into force of the European standards.

268. The clause would bring within scope of the Secretary’s State power, vehicles which were first brought into use prior to 1999. The existing power currently only applies to rail vehicles first brought into force after 31 December 1998.

269. The clause also requires the Secretary of State to use the regulation making power to set an “end date” of no later than 1 January 2020 in rail vehicle accessibility regulations, by which time all rail vehicles within scope of the clause will be required to comply with such regulations made under this clause.

270. Consideration has been given as to whether this clause represents an interference with rights under the Convention. The only Article of the Convention which it seems could potentially be engaged by this clause would be Article 1 of Protocol 1 (protection of property). This is because any regulations made under the clause would represent an impediment on the freedom of rail vehicle owners and operators to have their vehicles designed and fitted out as they please.

271. However, the purpose is that all light rail vehicles used for public transport should in due course be compliant with appropriate design and operational standards so as to ensure that disabled persons are able to use them in reasonable comfort and safety, thereby improving their mobility. This objective is believed to be within the proviso to Article 1 which recognises the right of States to enforce such laws as they deem necessary to control the use of property in accordance with the general interest.

Clauses 176–180

272. No human rights issues arise in relation to these clauses.
Schedule 20: Rail vehicle accessibility: compliance

Paragraphs 1 to 4: Rail vehicle accessibility compliance certification

273. Paragraphs 1 to 4 replace, without substantive amendment, sections 47A to 47D of the DDA 1995, (as inserted by the Disability Discrimination Act 2005 but not commenced). They introduce a new requirement for all rail vehicles which are subject to rail vehicle accessibility regulations and which are prescribed by regulations, or of a prescribed class or description, to have a valid rail vehicle accessibility compliance certificate.

274. It is proposed that compliance certificates would have to be obtained for all new vehicles first used after a date which would be prescribed in regulations, and also for all existing vehicles where they undergo relevant refurbishment works after a prescribed date.

275. The Secretary of State would consider applications for compliance certificates in accordance with procedures to be set out in regulations which would be made under Paragraph 2 on the basis of a report of a compliance assessment submitted with the application, as described in Paragraph 3.

276. If the Secretary of State refused an application for a certificate, the applicant would have the right to request a review of that decision within a time period which would be prescribed in regulations, (sub-paragraph 1(7)). Such a decision, or the failure to make the decision within a reasonable time, could be the subject of judicial review.

277. Paragraph 3 provides that any regulations made under it would have to make provision for a procedure to resolve disputes between an applicant for a compliance assessment and an appointed assessor. Such disputes would be referred to the Secretary of State for decision.

278. With regard to the Convention it seems that paragraphs 1 to 4 could potentially engage Article 1 of Protocol 1 (protection of property). Any prohibition on the use of a rail vehicle without their being a compliance certificate in force relating to it would represent an impediment on the freedom of rail vehicle owners and operators to use their property as they see fit. Also sub-paragraph 1(6) would empower the Secretary of State to require a rail vehicle operator to pay a penalty if the operator used a rail vehicle without a compliance certificate in force in respect of the vehicle.

279. However, the purpose of the compliance certificate regime would be to ensure that all vehicles which require them would be made compliant with appropriate design and operational standards to ensure that disabled persons are able to use them in reasonable comfort and safety, therefore improving their mobility. This objective is believed to be within the proviso to Article 1 which recognises the right of States to enforce such laws as they deem necessary to control the use of property in accordance with the general interest.

280. Finally, it would appear that Article 6 of the Convention (right for fair trial in the determination of civil rights) may be engaged in that insofar as the Secretary of State exercises any of the powers in these paragraphs (other than the power to charge a penalty under sub-paragraph 1(6)) an aggrieved party could challenge a decision of the Secretary of State by way of judicial review. However, these paragraphs would be compliant with Article 6 because the availability of judicial review would enable the civil rights and obligations of the applicant to be determined by a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, and directly subject to the HRA 1998, with judgement being pronounced publically.

281. With regard to the Secretary of State’s power to charge a penalty under sub-paragraph 1(6), any determination of a rail vehicle operator’s civil rights would also engage Article 6 of the Convention (right for fair trial in the determination of civil rights). Article 6 would be engaged as paragraph 12 provides a right of appeal against the imposition of a penalty to a court of law. This is compliant with Article 6 because it provides for appellants civil rights to be determined by a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, and directly subject to the HRA 1998, with judgement being pronounced publically.

282. Paragraphs 5 to 12: Penalties for rail vehicles not conforming with accessibility regulations, or for rail vehicles being used otherwise than in conformity with accessibility regulations, and associated inspection and enforcement powers

283. These paragraphs reproduce existing provisions inserted into the DDA 1995 by the Disability Discrimination Act 2005 but not commenced. They set out provisions for the imposition and enforcement of civil penalties against the operators of rail vehicles not compliant, or used in a way not compliant, with rail vehicle accessibility regulations. They would replace the existing criminal liability attaching to the use of non-compliant rail vehicles, currently set out in subsections 46(3) and (4) of the DDA 1995 (prospectively repealed by the Disability Discrimination Act 2005).

284. Paragraphs 5 and 6 set out the procedure to be followed by the Secretary of State where it appears that a rail vehicle is being used in breach of rail vehicle accessibility regulations and empowers the Secretary of State to serve notices and charge penalties for non-compliance.

285. Paragraph 7 would permit the Secretary of State to authorise the inspection of vehicles and, if necessary, to permit inspectors to enter premises to carry out such inspections. It provides a power to charge a penalty for obstructing such inspections.
286. Paragraph 8 empowers the Secretary of State to serve notices requiring a rail vehicle number or other identifier in default of which a penalty may be charged and power to require details of steps taken to comply with certain notices.

287. Paragraph 9 makes provision in relation to the amount, due date and recovery of any penalties imposed under this Schedule (with details to be set out in regulations). Paragraph 10 provides for the issue by the Secretary of State of a code of practice specifying matters to be considered in determining such penalties. Paragraph 11 sets out the procedure for imposing such penalties. The procedure would include a right for a person made subject to a penalty to lodge an objection with the Secretary of State, who would then review the imposition of the penalty and make a decision to reduce, cancel or uphold the penalty. Paragraph 12 provides a right of appeal to a court on the grounds the person is not liable to the penalty or that the amount is too high.

288. With regard to the Convention it seems that paragraphs 5 to 12, in so far as they would empower the Secretary of State to charge penalties, would engage Article 1 of Protocol 1 (protection of property).

289. However, the purpose of these penalty imposing powers would be to enforce and underpin the integrity of the rail vehicle accessibility regime to ensure that rail vehicles comply with appropriate design and operational standards to ensure that disabled persons are able to use them in reasonable comfort and safety, thereby improving their mobility. This objective is believed to be within the proviso to Article 1 which recognises the right of States to enforce such laws as they deem necessary to control the use of property in accordance with the general interest.

290. With regard to the Secretary of State’s power to charge a penalty under paragraphs 5 to 8, any determination of a rail vehicle operator’s civil rights would also engage Article 6 of the Convention (right for fair trial in the determination of civil rights). Article 6 would be engaged as paragraph 12 provides a right of appeal against the imposition of a penalty to a court of law. This is compliant with Article 6 because it provides for appellants civil rights to be determined by a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, and directly subject to the HRA 1998, with judgement being pronounced publically.

291. Insofar as Paragraph 7 empowers the Secretary of State to authorise inspectors to enter premises and inspect vehicles, Article 8 of the Convention (right to respect for private and family life) may be engaged. The ECJ has accepted in case law that Article 8 may extend to business premises. However, the proviso to Article 8 recognises that interference with its exercise by a public authority would be acceptable where done in accordance with the law and as necessary in a democratic society in the interests of (inter alia) the protection of the rights of others. It is believe this proviso would apply as the exercise of such powers of entry and inspection could be reasonably necessary in order to enforce accessibility standards required by law for the benefit of disabled persons.

**Paragraph 13: Forgery etc.**

292. Paragraph 13 has the effect of extending the operation of Clause 181 (forgery etc.) in order to bring forgery etc of compliance certificates within its scope, making such activities criminal offences under that clause. As such, the paragraph in effect replicates the changes made to section 49 (forgery and false statements) of the DDA 1995 as amended by the Disability Discrimination Act 2005 (but not commenced).

293. Those guilty of these offences would be liable for fines or imprisonment. Paragraph 13 therefore engages Articles 5 (right to liberty and security) and 6 (right to a fair trial). However, it would be compatible with the Convention because any arrest in relation to such an offence, or any custodial sentence arising from it, would only be possible in accordance with due process of law and the decision of a competent court.

294. As the trial forum would be a UK criminal court it would be directly subject to the HRA 1998. The enforcement procedures relating to such offences and the proceedings of the courts required to adjudicate in relation to such enforcement would be fully compliant with the requirements of Article 6.

**Paragraphs 14 and 15**

295. No human rights issues arise in relation to these paragraphs.

**Part 13 and Schedule 21 Disability: Miscellaneous**

296. This Part gives effect to Schedule 21 which makes supplementary provision about reasonable adjustments. The analysis at paragraphs 85–89 above apply here.

**Part 14 and Schedules 22 and 23 General Exceptions**

297. Clause 185 excuses conduct made unlawful by the Bill if it is necessary for the purpose of safeguarding national security. This exception simplifies and harmonises the exceptions for national security in existing anti-discrimination legislation. An example of when this exception might apply would be in defence of a claim of direct race discrimination by persons on whom pre-employment checks had been carried out which were dependent on their nationality. In such a situation there is the potential for Article
8 read with Article 14 to be engaged. The exception would be consistent with Convention rights because it could only apply if the steps taken were necessary to safeguard national security—thus for it to apply the justification and proportionality elements of the Article 8(2) proviso would have to be satisfied.

298. Clause 187 concerns charities. In our view the subsections outlined below engage Convention rights.

299. Subsections (1), (2), (9) and (10) excuse unlawful discrimination outside work (or generally in the case of disability discrimination) through charities restricting their benefits to persons who share a protected characteristic if this is in accordance with their charitable instrument and either objectively justified or lawful positive action. These provisions narrow and harmonise with section 43 of the SDA 1975 the other exceptions for charities in existing anti-discrimination legislation, and are therefore compatible with EC law. We have considered whether Article 8 read together with Article 14 could be engaged by this provision. A small number of Catholic adoption agencies offering publicly-funded services sought to change their charitable objects so that they may place children with heterosexual couples or single people only. Such a restriction would amount to an interference with the Article 8 (read with Article 14) rights of same-sex couples to respect for their family life without discrimination on grounds of sexual orientation (Frette v France (2004) 38 EHRR 21), and the Charity Commission has therefore declined the agencies permission to change their objects. This example shows that attempts to escape the ambit of discrimination law by altering a charity’s instrument are unlikely to succeed and that the exception is narrow enough to be proportionate to its aim of protecting existing charitable work.

300. Subsection (4) corresponds to part of section 34(1) of the RRA 1976, which was applied by the High Court in the case of Gibbs v Harding [2007] EWHC 3 (Ch). It provides that a provision in a charitable instrument which confers benefits on a class of persons defined by reference to colour will take effect as if the reference to colour was disregarded or, if that is not possible, as if it provided for conferring the same benefits on people generally.

301. Subsections (5) and (6) ensure that organisations such as the Scouts or Guides can retain a requirement for their members to assert a belief in God. These provisions, which reproduce section 60 of the Equality Act 2006, are compatible with Article 9 of the Convention.

302. Clause 189 contains exceptions for sport. Subsections (1) and (3), which reproduce section 44(1) of the SDA 1975, make it lawful to confine participation in any competitive sport, game or other activity to competitors of one sex where the physical strength, stamina or physique of the average woman or man would put her or him at a disadvantage compared to the average man or woman. Subsection (2), which reproduces section 44(2) of the SDA 1975 and overlaps with section 19 of the Gender Recognition Act 2004, makes it lawful to discriminate in relation to the participation of a transsexual person as a competitor in an activity to which subsection (1) applies if this is necessary to secure fair competition or the safety of competitors.

303. Subsections (4) and (5), which reproduce section 39 of the RRA 1976, makes it lawful to select people on the basis of nationality, place of birth or length of residence to represent a country, place or area, or a related association, in any sport or game. It also excuses discrimination on that basis in pursuance of the rules of a competition which relate to eligibility to compete in any sport or game.

304. These exceptions could engage Article 8 if an individual’s right to right to respect for his or her private life extends to establishing or developing relationships with others by participating in competitive sporting activities. But we think that an interference with any such right would be in accordance with the law and necessary in a democratic society for the protection of the rights and freedoms of others, including fellow competitors.

305. Schedule 22 sets out exceptions for statutory authority. Paragraph 1 excuses conduct made unlawful by specified provisions of the Bill which must be done pursuant to particular statutory requirements. It simplifies and harmonises the exceptions for statutory authority in existing anti-discrimination legislation. We consider that this exception is compatible with Convention rights which are subject to exceptions. For example, age limits required by legislation are in accordance with or prescribed by law and necessary in a democratic society in the interests of public safety or for the protection of the rights and freedoms of others.

306. Paragraph 2 excuses unlawful conduct in a work context in relation to a woman which is necessary to comply with legislation protecting women who are pregnant, who have given birth or in any other circumstances giving rise to risks specifically affecting women. This exception reproduces section 51 of the SDA 1975 and section 4 of the Employment Act 1989. We consider that it is compatible with Article 8 so far as relating to family life.

307. Paragraph 3 makes it lawful to discriminate on grounds of sex in connection with certain educational appointments. This exception reproduces section 5 of the Employment Act 1989.

308. Paragraph 4 saves section 124A of the School Standards and Framework Act 1998, which enables an independent school with a religious character to give preference, in connection with the appointment, promotion or remuneration of teachers at the school, to teachers whose religious opinions are in accordance with the tenets of the religion or religious denomination on which the school is based. Further, in terminating a teacher’s employment, the school may have regard to conduct which is incompatible with its religious character. This saving carries forward part of the effect of regulation 39 of the Employment Equality (Religion or Belief) Regulations 2003. The other provisions saved by that regulation fall within paragraph 1 above.
309. Paragraphs 3 and 4 could engage an individual’s Article 8 rights (read together with Article 14). However, we consider that the exceptions are narrow enough to be a proportionate means of achieving the legitimate aim of preserving the character of religious schools and single-sex schools and that they fall within article 8(2) because they protect the rights and the freedom of others to be educated at that type of school.

310. Schedule 23 sets out general exceptions to the provisions in the Bill and is considered at paragraphs 129–140 above.

Letter to Vera Baird QC, Solicitor General, from the Chairman, dated 2 June 2009

EQUALITY BILL

Thank you for your human rights memorandum to the Joint Committee on Human Rights dated 5 May 2009. As you are aware, we are considering the human rights compatibility of the Equality Bill. Having carried out an initial examination of the Bill, we would be grateful if you could provide answers to the following questions concerning the human rights compatibility of some of the Bill’s provisions, and some missed opportunities to implement human rights obligations. The Committee may have further questions in due course, should the Government bring forward amendments to the Bill.

PART 1—SOCIO-ECONOMIC INEQUALITIES

The Bill creates a new duty on certain listed public sector bodies, when making strategic decisions, “to have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage”.65

1. Please explain how, in practice, the proposed new duty will enhance human rights for individuals.

Socio-economic inequalities experienced as a result of being subject to immigration control are specifically excluded from the duty in Clause 1.

2. Please explain why immigration measures are exempt from the socio-economic duty.

PART 2—EQUALITY: KEY CONCEPTS

Part 2 of the Bill defines key concepts such as “gender”, “race”, “direct discrimination” and “harassment”, which are used in subsequent Parts of the Bill to establish what forms of conduct are prohibited in specific areas of social activity.

Protected Characteristics

Chapter 1 of this Part sets out the “protected characteristics”, ie the aspects of an individual’s identity that are protected by the subsequent provisions of the Bill. Clause 7 changes the definition of “gender reassignment”.

3. Will the definition of the protected characteristic of “gender reassignment” in clause 7 exclude individuals with a transsexual identity from protection against discrimination where such individuals have as yet not embarked upon the initial stages of the medical process of reassigning gender, or manifested a clear intention to undergo such a process, or who may not be currently proposing to undergo any medically supervised process of gender reassignment?

The Definition of Disability

Chapter 1 together with Schedule 1 to the Bill does not alter the definition of disability, which has attracted criticism for adopting a “medical model” of disability (ie it focuses on whether an individual has a medically classifiable disability rather than whether a person is treated as disabled by employers, service providers and others, which is described as the “social” model of disability). We have recently reported on the UN Convention on the Rights of Persons with Disabilities, which adopts a social model of disability.66

4. Did the Government consider defining disability according to a social rather than medical model, which would be in line with what is increasingly recognised as international best practice? If so, why was this model rejected?

Marriage/Civil Partnership

Clause 8 provides that a person has the protected characteristic of marriage and civil partnership only if she or he is actually married or in a civil partnership. As a result, the Bill appears not to protect people who are in, or have been in, significant relationships aside from marriage and civil partnership and suffer discrimination or harassment as a result. Nor does the legislation appear to cover people who are discriminated against or harassed by reason of not being in a marriage or civil partnership. In addition,

65 Clause 1.

66 ???
discrimination in work on the basis of association with married persons or those in a partnership, or on the basis of perceived marital or partnership status, does not appear to be prohibited (Clause 13(4)). The Bill also contains a large number of provisions which exclude married people from protection (including Clauses 24, 26(1)(b), 30, 79(b), 85, 90 and Part 7).

5. Why has protection against discrimination, harassment and victimisation on the protected characteristic of marriage or civil partnership been restricted in the definition of harassment, in the provision of goods and services and the exercise of public functions, in the provision of education, in the disposal, management and occupation of premises, and in the treatment by associations of members, associates and guests?

6. Why is protection against discrimination, harassment and victimisation under the Bill limited to individuals who are married or in a civil partnership, and not extended to those who face discrimination and harassment on the grounds that they are not in such relationships?

Other Protected Characteristics

Legislation in Northern Ireland prohibits discrimination based on political opinion: legislation in some other Commonwealth and European states protects individuals against discrimination based on characteristics such as genetic predisposition, spent criminal convictions, or on socio-economic status, or on caste status. The Bill does not cover these forms of discrimination.

7. Did the Government consider extending protection against discrimination to cover discrimination based on characteristics such as genetic predisposition, spent criminal convictions, socio-economic status, political opinion or caste? If so, why did it reject their inclusion?

Harassment

Chapter 2 of Part 2 sets out standardised and clarified definitions of different forms of discriminatory conduct and provides subsequently for these standardised definitions to be applied in general across all the areas of social activity covered by the Bill in respect of all the protected characteristics. However, a standard approach is not adopted in respect of every protected characteristic and certain characteristics are not uniformly prohibited.

8. Why is harassment related to marriage or civil partnership, or pregnancy/maternity not prohibited?

9. Why is less favourable treatment because of submitting or failing to submit to harassment related to a protected characteristic not prohibited, with the exception of harassment related to sex or gender reassignment?

10. Did the Government consider making provision for an alternative and narrower definition of harassment to be applied in certain circumstances in order to ensure adequate protection for freedom of expression? In particular, was consideration given to whether a narrower definition of harassment could have been applied in the context of the provision of services and the performance of public functions in relation to the protected characteristics of religion or belief or sexual orientation? (This question is linked to questions 30 and 35 below, and you may wish to answer them together.)

Discrimination Related to Disability

The Bill attempts to respond to the consequences of the House of Lords judgment in London Borough of Lewisham v Malcolm, which made it more difficult to establish the existence of less favourable treatment related to disability. The Explanatory Notes state that Clause 14 was intended to strike a suitable balance between the equality rights of persons with disabilities and the needs of employers, following the impact of the Malcolm decision. However, the wording of Clause 14 does not reproduce the protection against disability-related discrimination that is currently provided by the DDA. It would appear not to cover a situation where an individual was subject to a form of disadvantage which would be a detriment to any person. By prohibiting “discrimination arising from disability” in Clause 14 and indirect disability discrimination in Clause 18, the Bill appears to be attempting to substitute these two new forms of discrimination for the prohibition on disability-related discrimination contained in the DDA.

11. Does the Government consider that the prohibition on “discrimination arising from disability” in Clause 14 taken together with the prohibition on indirect disability discrimination introduced by Clause 18 constitutes a sufficient substitute for the prohibition on “disability-related discrimination” contained in s. 3A of the Disability Discrimination Act 1995?


Discrimination Against Carers

The standard definition of direct discrimination set out in Clause 13 states that “person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”. The Explanatory Notes state that this definition is 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. In the recent case of Coleman v Attridge Law, the European Court of Justice interpreted the Framework Equality Directive 2000/78/EC as requiring the prohibition of direct discrimination based on association with a person with a disability. Harriet Harman MP suggested that this would ensure greater protection for individuals with caring responsibilities and those that are seen to look “too old” or “too young”. However, Clause 13 does not expressly prohibit discrimination based on association or perception: instead, it just prohibits discrimination “because of” a protected characteristic.

13. Is the definition of direct discrimination in Clause 13 sufficiently clear to ensure compliance with the decision of the European Court of Justice in C-303/06, Coleman v Attridge Law?

14. Why is discrimination on the basis of association and perception not explicitly prohibited on the face of the Bill, in order to provide greater clarity for employers and service providers?

15. Was consideration given to including carer status as a protected characteristic, or to giving carers a legal right to seek reasonable accommodation? If so, why was it rejected?

Multiple discrimination

In its consultation paper on the Bill, the Government states that, “having examined the evidence available”, it proposes to protect from multiple discrimination in relation to two protected characteristics. The consultation paper also indicates that the Government does not intend to prohibit indirect discrimination or harassment in how it will define unlawful multiple discrimination.

16. Does the Government accept that if multiple discrimination is confined to two protected characteristics, some individuals subject to other forms of multiple discrimination may be denied legal protection against unfair and unequal treatment?

17. Why does the Government consider that it is unnecessary to prohibit indirect discrimination or harassment which is based on multiple grounds?

18. Why was it not possible to complete the consultation in time for the Government’s proposed option to be included in the Bill at the outset?

PART 3—SERVICES AND PUBLIC FUNCTIONS

Service Provision and the Performance of Public Functions

This Part of the Bill prohibits discrimination, harassment and victimisation by people who supply services (which include goods and facilities) or perform public functions. It sets out, in Part 1 of Schedule 3, a list of bodies and functions to which the duty in Clause 27 on a service provider not to discriminate does not apply.

19. Does the Government consider the exceptions listed in Part 1 of Schedule 3 to be necessary and proportionate? If so, why?

A Constitutional Equality Clause?

Discrimination legislation is given no special status by the Bill: other legislation may override its provisions or carve out exceptions to its scope (see Part 1 of Schedule 3 and paragraphs 1 of Schedules 22 and 23). In our Report on a Bill of Rights, we stated that the UK’s statutory anti-discrimination laws are sufficiently established to be regarded as the foundation, along with the common law’s regard for equality, for a general free-standing right. In its Green Paper on a Bill of Rights and Responsibilities, the Government noted its aim to “set out in any Bill of Rights and Responsibilities an accessible and straightforward statement of equality to embody its central place in UK society” and sought views on how a statement of equality might be framed.

20. Was consideration given to including in the Equality Bill a provision which confers an equivalent level of constitutional protection on the “free-standing” right to equality and non-discrimination as is conferred on the rights contained in the ECHR by the Human Rights Act 1998? If so, what were the Government’s reasons for not wishing to recognise the constitutional status of the right to equality?

The Immigration Exceptions

Part 4 of Schedule 3 makes provision for exemptions in the field of immigration in relation to disability, religion or belief and nationality and ethnic origin. In our Report on the UN Convention on the Rights of Persons with Disabilities, we drew attention to the Government’s proposed reservation on immigration control and recommended that it was unnecessary, inconsistent with the object and purpose of the Convention and did not constitute a valid reservation.
21. Does the Government consider each of the exceptions in Part 4 of Schedule 3 to be necessary and proportionate, and if so, on what basis?

22. Please provide the evidence which, in the Government’s view, justifies the inclusion within the legislation of a power which would permit the exclusion of people with tuberculosis in certain circumstances? (See paragraph 668 Explanatory Notes)

Age Discrimination in the Provision of Services

The key change to existing discrimination legislation in this area is that Clause 26 of the Bill extends protection against age discrimination to the provision of services and the performance of public functions, which we welcome.

However, much of the substance of how this provision will operate in practice, including the exceptions, will be contained in delegated legislation. Clause 190 confers wide-ranging powers on Ministers to make orders setting out exceptions to the prohibition on discriminating against people outside the workplace because of age if they are over 18.

23. What exceptions are intended to be introduced in respect of age discrimination outside the workplace?

24. Why does the Government believe that it is appropriate to leave this matter to secondary legislation and what is the proposed timetable for implementation?

Protection against age discrimination is not provided for those under the age of 18. The government has justified this exclusion on the basis that it will often be legitimate to treat children (ie under-18s) differently in the provision of services and the performance of public functions. However, this could be contested on the basis that treating persons differently on the grounds of their age is capable of objective justification.

25. Why are children excluded from discrimination on the grounds of age in the provision of services and the performance of public functions?

26. Does the Government consider that this may prevent children from enjoying full protection of the rights set out in the UN Convention on the Rights of the Child? If not, why not?

The Exclusion of Harassment on the Grounds of Religion or Belief or Sexual Orientation

Clause 24 re-enacts existing legislation, which means that the Bill does not make explicit provision for individuals to be protected against harassment related to religion or belief or sexual orientation in either the provision of services or the exercise of public functions. Some protection against harassment nevertheless exists as a result of the general prohibition against direct and indirect discrimination on the grounds of religion or belief or sexual orientation, which may make certain types of harassment unlawful when they can be classed as constituting direct or indirect discrimination. However, the lack of an explicit prohibition on harassment related to religion or belief or sexual orientation in these areas continues to generate concern. It also could be seen as undermining legal certainty, on the basis that service providers and public authorities may be left without a clear definition of when conduct will amount to harassment.

27. Why does the Government consider it unnecessary to make provision for the explicit prohibition of harassment on the grounds of religion or belief or sexual orientation in the fields of service provision and the performance of public functions,72 and in particular why was it not considered necessary to prohibit harassment related to these characteristics in the provision of public services?

28. Is the absence of protection against harassment related to these characteristics compatible with the right of individuals under Article 14 of the European Convention on Human Rights to enjoy the rights and freedoms set out in the Convention without discrimination?

29. To what extent does the Government consider that acts of harassment related to the protected characteristics of religion or belief or sexual orientation in the provision of services or the exercise of public functions are prohibited by the ban on direct and indirect discrimination linked to these characteristics, even in the absence of an explicit prohibition of harassment?

30. Has the Government considered introducing an alternative definition of harassment on the grounds of religion or belief or sexual orientation in the fields of service provision and the performance of public functions which might have a narrower scope than the standard definition of harassment set out in Clause 24 of the Bill? In particular, has the Government considered the possibility of removing any reference to the creation of an offensive environment from the definition of prohibited “harassing” conduct in this context, and/or requiring any such conduct to both violate the dignity of a person and create an intimidating or hostile environment? If so, why was this alternative approach rejected? (This question is linked to question 10 above, and you may wish to respond to these questions together.)

PART 4—PREMISES

Part 4 prohibits discrimination, harassment and victimisation in relation to the disposal, management and occupation of premises. However, certain exceptions are made to this general prohibition. Clause 30 provides that discrimination on the basis of marriage/partnership and age in this area is not prohibited. This would appear to be so as to allow those letting or disposing of property to differentiate between different age groups and between single persons and those in marriages or civil partnerships.

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72 A similar exclusion exists in the field of the disposal, management and occupation of premises.
31. Why is it considered necessary to exclude all forms of protection against discrimination on the grounds of marriage/partnership and age in relation to the disposal, management and occupation of premises?

Part 4 and Schedule 4 to the Bill extend the obligation on landlords to make reasonable accommodation to include common spaces. However, the House of Commons Work and Pensions Committee has called for the imposition of a general “anticipatory” duty upon landlords to make reasonable accommodation for persons with disabilities in the disposal, management and occupation of premises.73

32. Has the Government considered introducing a general anticipatory duty on landlords to make reasonable accommodation for persons with disabilities in the disposal, management and occupation of premises, and if so, why was this rejected?

PART 5—WORK

Part 5 prohibits discrimination, harassment and victimisation in the field of employment, occupation and appointment to public bodies. Courts and employment tribunals have recently in a series of important cases considered the interplay between public sector employees’ right to freedom of religion (Article 9 ECHR), their contractual duties and their duties not to discriminate.74 For example, in Chondol v Liverpool City Council, the Employment Appeal Tribunal held that an employer was entitled to take action to prevent employees from proselytising in the course of their work, and that the disciplinary action taken in this case did not constitute discrimination on the grounds of religion or belief.

33. Has the Government considered inserting legislative provisions in the Bill which would give clear statutory expression to the approaches adopted by the courts and tribunals in cases concerning religion or belief and the non-discrimination duties of public and private employers (such as Chondol and Eweida v British Airways Plc75), provide legal clarity for employers and employees and avoid litigation? If so, why has it rejected this approach?

34. Is the Government aware of cases where employees have been accused of harassment of another employee on grounds of religion or belief or sexual orientation merely by expressing their view in a conversation of the morality of homosexuality or of the truth of a religion?

35. Has the Government given consideration as to whether the adoption of a narrower definition of harassment related to the characteristics of religion or belief or sexual orientation which continued to conform to the requirements of EU law (such as a definition of harassment which prohibited unwanted conduct that had the purpose or effect of both violating the individual’s dignity and creating a degrading, humiliating or offensive environment) would ensure greater protection for freedom of expression? (This question is linked to question 10 above, and you may wish to answer them together.)

Occupational requirements

Schedule 9 re-enacts and attempts to clarify existing legislation in respect of genuine occupational requirements. Where employment is for the purposes of an organised religion, Paragraph 2 of Schedule 9 makes provision for an additional form of occupational exception. Another wider exception is set out in Paragraph 3 of Schedule 9 which allows an employer with an ethos based on religion or belief to discriminate in relation to work by applying a requirement to be of a particular religion or belief, but only if, having regard to that ethos, being of that religion or belief is a genuine requirement for the work and applying the requirement is proportionate so as to achieve a legitimate aim.

36. Why does the Government not consider it to be necessary, in defining the scope of the occupational requirement exceptions set out in Part 1 of Schedule 9, to require in express terms that any such occupational requirements must be “genuine” in nature?

37. Does the Government consider that the provisions of Paragraph 3 of Schedule 9 will permit employers in certain circumstances to make adherence by employees to religious doctrine in their lifestyles and personal relationships a genuine occupational requirement for a particular post? Is the position different if a religious organisation is wholly or mainly delivering public functions?

38. Why is it justified to give employers greater scope through the provisions of Paragraph 3 of Schedule 9 to impose requirements upon employees to be of a particular religion or belief than to be of a particular sexual orientation?

Military exemption

In its Report on the reservations and declarations to the UN Convention on the Rights of Persons with Disabilities, the Committee noted the Government’s proposed reservation in respect of service in the armed forces. The Committee concluded that the Government should consider removing the existing exemption for service in the armed forces from the Disability Discrimination Act 1995 in the Equality Bill and stressed that evidence should be provided to support any justification provided by the Ministry of Defence that the

74 I, paras. 283–292.
75 E.g. Chondol v Liverpool City Council[2009] All ER (D) 155 (Feb); Ladele v London Borough of Islington Appeal No. UKEAT/ 0453/08/R.N, para. 111; [2009] All ER (D) 100 (Jan).
76 [2008] UKEAT 0123_08_2011 (20 November 2008)
existing exemption is necessary. It concluded that if the Government decided to lodge the reservation, it should commit to keeping the reservation under review and undertake to reconsider the necessity for the reservation within 6 months of the Equality Bill being granted Royal Assent. On 13 May 2009, the Minister Jonathan Shaw MP announced that the Government proposed to ratify the Convention on 8 June 2009, with the substance of the reservation remaining the same.

39. **What evidence does the Government rely on to demonstrate the necessity for maintaining the existing exemption? Does the Government intend to follow the Committee’s recommendation to reconsider the necessity for this reservation within 6 months of Royal Assent being granted to the Equality Bill?**

### PART 6—EDUCATION

Part 6 makes it unlawful for education bodies to discriminate against, harass or victimise a school pupil or student or applicant for a place.

**The scope of protection**

The Bill prohibits discrimination, harassment and victimisation in the field of education in schools. However, the education provisions do not apply to discrimination, harassment or victimisation on grounds of pregnancy and maternity, age, or marriage and civil partnership.

40. **Why is it justifiable to exclude discrimination on grounds of (1) pregnancy and maternity (2) age and (3) marriage and civil partnership from the scope of the Bill’s protections in the field of education?**

**School Admissions**

The Bill makes it unlawful for the responsible body of a school to discriminate against a person in its admission arrangements, in the terms on which it offers to admit the person as a pupil, or by not admitting them. However, the Bill also provides for some exceptions to the prohibition on discrimination on grounds of religion or belief, allowing schools which have a religious character or ethos (“faith schools”) to discriminate on grounds of religion or belief in relation to admissions. The Bill also provides an exception from the prohibition on religious or belief-related discrimination in the provision of services in relation to anything done in connection with admission to a school which has a religious ethos. The Government argues that an exemption from the prohibition on religious discrimination in school admissions is necessary in order to maintain the distinctiveness of religious schools and so maintain the “plurality of provision” which, it maintains, is desirable.

41. **On what evidence does the Government rely in support of its view that the desired plurality of provision is, on balance, a public good? What evidence has the Government considered which suggests that permitting religious discrimination in school admissions has public policy detriments, such as religious, racial and social segregation, and what is its view of such evidence?**

42. **On what evidence does the Government rely to demonstrate that religious discrimination in admissions is necessary in order to preserve a schools’ distinctive religious ethos and therefore to preserve the plurality of provision?**

43. **Does the Government’s “plurality of provision” justification for the faith school exemption carry more weight in relation to minority faith schools such as Jewish, Muslim or Catholic schools than in relation to Church of England faith schools?**

44. **Why does the Government consider it to be unnecessary to make provision for the explicit prohibition of harassment on the grounds of religion or belief or sexual orientation or gender reassignment in education (see Clause 80(10))?**

45. **In light of the decision in the Jewish Free School case, is it the Government’s intention that schools should have the ability to define their own religion for the purposes of discrimination law?**

**Curriculum**

The Bill provides that the responsible body of a school must not discriminate against a pupil in the way it provides education for the pupil. However, it also provides that none of the prohibitions apply to anything done in any school in connection with the content of the curriculum. The Bill also provides an exemption from the prohibition on religious or belief-related discrimination in the provision of services in

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77 13 May 2009, Col 58WS.
78 Clause 79.
79 Clause 80(1).
80 Schedule 11, para. 5, disapplying clause 80(1), so far as it relates to religion or belief, in relation to schools with a religious character or ethos.
81 Clause 27.
82 Schedule 3, para. 11(b).
83 Clause 80(2)(a).
84 Clause 84(2).
relation to anything done in connection with the curriculum of a school.\textsuperscript{85} The current law already provides an exemption for the content of the curriculum from the prohibition on discrimination on grounds of religion or belief, in the Equality Act 2006. The new curriculum exemption is much wider, however, because it extends the exemption to other protected characteristics. In our Report on the Sexual Orientation Regulations, we considered that the prohibition on sexual orientation discrimination should clearly apply to the content of the curriculum. We were concerned that this was not clear from the regulations themselves and by the risk that, if the prohibition on discrimination did not apply to the curriculum, homosexual pupils would be subjected to teaching, as part of the religious education or other curriculum, that their sexual orientation is sinful or morally wrong.\textsuperscript{86} In our view, the risk of the exemption for the content of the curriculum leading to unjustifiable discrimination is even greater under the broader exemption contained in the Bill.

46. Is it possible to make a meaningful distinction in practice between the content of the curriculum, the content of course materials and the way in which the curriculum is taught?

47. Why does the Government consider that such a wide exemption for the content of the curriculum, covering all schools and all strands, is necessary in order for religious schools to maintain their distinctive ethos?

48. Please explain why the Committee’s preferred approach in our Report on the Sexual Orientation Regulations should not be followed.

Collective worship

The Bill disapplies the prohibition on religious discrimination from anything done in relation to acts of worship or other religious observance organised by or on behalf of a school, whether or not it is part of the curriculum.\textsuperscript{87} The exemption applies to any school, not just faith schools. The purpose of the exemption, according to the Explanatory Notes, is to avoid any conflict with the existing legislative framework in respect of religious worship.\textsuperscript{88}

49. How is maintaining the legal requirement that collective worship in schools must be of a broadly Christian character consistent with the Government’s commitment to “a plurality of provision” and is this justifiable in view of the religious diversity of the UK today?

50. Please provide a more detailed explanation of why collective worship should continue to be exempt from the duty not to discriminate on grounds of religion or belief?

51. Are local Standing Advisory Councils for Religious Education permitted to discriminate on religious grounds in their appointments?

We have consistently recommended that children of sufficient age and maturity should have the right to withdraw from collective worship. When we have raised this in previous Bills, the Government has opposed it on the basis that such a provision would be too administratively burdensome because it would require schools to make a judgment in relation to each child who sought to withdraw. However, the human rights memorandum to this Bill recognises that administrative difficulties would not normally suffice as a justification for differential treatment.\textsuperscript{89} The UN Special Rapporteur on freedom of religion or belief, in her 2008 report on the UK welcomed the extension of the right to opt-out from collective worship to sixth-formers and recommended that children’s views should be given due weight in accordance with their age and maturity (Article 12 UNCRC).

52. Why are children who are not in the sixth form, but are of sufficient age and maturity, not permitted to withdraw themselves from (1) collective worship and (2) religious education classes, in light of the Government’s acceptance that administrative difficulties cannot justify differences of treatment in the enjoyment of Convention rights, and the UN Special Rapporteur’s recent recommendation?

School transport

Under the current law, the provision of free or subsidised home to school transport by local authorities is exempted from the duty not to discriminate on grounds of religion or belief.\textsuperscript{90} This is continued in the Bill.\textsuperscript{91} In previous Reports, we have emphasised the need for guidance to clarify the duty under the Human Rights Act to make equal provision for school transport for those with both religious and non-religious beliefs. Both the Guidance for Schools on Part 2 of the Equality Act and the recent School Transport Guidance now make this clear. However, the question remains whether the continued existence of the exemptions will encourage authorities to treat the religious and the non-religious differently.

\textsuperscript{85} Schedule 3, para. 11(a).
\textsuperscript{87} Schedule 11, para. 6. Schedule 3, para. 11(c) provides a similar exemption from the prohibition on religious or belief-related discrimination in the provision of services.
\textsuperscript{88} EN, para. 828.
\textsuperscript{89} Human rights memorandum, para. 66.
\textsuperscript{90} Equality Act 2006, s. 51.
\textsuperscript{91} Schedule 3, para. 11(e).
53. Given the clarity of the legal position, as correctly reflected in the Guidance, does the Government consider the continued exemption for the provision of school transport to be justified, and if so why?

Employment in religious schools

The Bill exempts from the prohibition on religious discrimination in employment, discrimination related to employment in faith schools which is permitted by the School Standards and Framework Act 1998.92 The Explanatory Notes explain that this means, for example, that schools with a religious ethos can restrict employment of certain teachers to applicants that share the same faith.93 Elsewhere in the Bill, however, an employer with an ethos based on religion or belief is allowed to discriminate in relation to work by applying a requirement to be of a particular religion or belief, but only if, having regard to that ethos, being of that religion or belief is a requirement for the work and applying the requirement is proportionate to achieve a legitimate aim.94

54. Why is a specific exemption for employment in faith schools necessary in light of the Bill’s provision for genuine and proportionate occupational requirements relating to religion or belief?

55. Why does the Government consider the exemption to comply with Articles 9 and 14 ECHR?

PART 8—PROHIBITED CONDUCT: ANCILLARY

The European Court of Justice in Case C-54/07 Firma Feryn established that discriminatory statements or discriminatory job vacancy announcements must be capable of constituting direct discrimination in national law. Paragraph 13 of Schedule 26 partially responds to this by extending the power of the Equality and Human Rights Commission to bring enforcement proceedings in respect of discriminatory advertisements and practices. Other provisions of the Bill may confer standing on individuals to bring actions where they have suffered a detriment as a result of discriminatory advertising or statements.

56. Does the Government consider that the provisions of the Bill will ensure that British discrimination law fully complies with the ECJ decision in C-54/07, Firma Feryn?

PART 9—ENFORCEMENT

This Part covers how and where to bring proceedings under the Bill. Clause 111 provides a rule making power for the Civil Procedure Rule (CPR) Committee in relation to national security cases. Under these rules, the CPR Committee may empower courts to exclude claimants, their representatives or assessors from all or part of the proceedings and/or keep secret all or part of a court’s reasons for its decision where “the court thinks it is expedient to do so in the interests of national security”.

57. What safeguards will be in place to ensure that those who are excluded from proceedings or not provided with reasons have access to a court and to a fair hearing (Article 6 ECHR)?

Tribunals are given a wider power to make recommendations (Clause 118), although there is no sanction for non-compliance (Clause 118(7)). However, they may not make recommendations in national security proceedings relating to certain bodies (Clause 119) (ie the Security Service, the Secret Intelligence Service, GCHQ, or the armed forces when assisting GCHQ).

58. Please explain the justification for excluding certain bodies from this enhanced power of Tribunals to make recommendations.

59. Why will the extended powers to make recommendations not be applied to equal pay cases?

The Bill does not make provision for representative actions. The Government is currently considering reform of standing requirements are part of a wider review of civil justice rules.

60. Does the Government consider that the “group” nature of many discrimination claims make it appropriate for the Bill to provide for the possibility of representative actions to be brought on behalf of claimants who allege that they have been subject to discrimination? If not, why not?

PART 11—ADVANCEMENT OF EQUALITY

Public sector equality duty

Clause 143 creates a single public sector equality duty. The second and third limbs of the duty do not apply to the protected characteristic of marriage and civil partnership. Schedule 18 sets out further exceptions to the duty (including age and immigration) and lists bodies which will not be classified as public authorities for the purposes of Clause 143 when performing certain listed functions, and who will not therefore be required to comply with the public sector equality duty in relation to those functions.
61. Please explain why each exception to the public sector equality duty is necessary and proportionate.

Whether Academies are considered by the courts to be public authorities for the purposes of the Human Rights Act 1998 has still not been definitively decided by judicial decision and remains a live issue in litigation and it is therefore not clear whether they would be caught by the public sector equality duty.

62. Will academies be considered to be public authorities for the purposes of the Equality Bill?

63. Has the Government given consideration as to how the ability of religious organisations to discriminate on the basis of religion or belief in the provision of public services (as provided for in Paragraph 2 of Schedule 23) is compatible with the obligations to promote equality of opportunity imposed on public authorities by virtue of Clause 143?

64. Has the Government given consideration as to how the provisions of Clause 143(1)(b) taken together with Clause 143(3)(b) will affect the relationship between public authorities and religious groups? Was consideration also given to the possibility of not applying either Clause 143(1)(b) and/or Clause 143(3)(b) to the protected characteristic of religion or belief?

Clause 149 (together with Clauses 147 and 148) deal with procurement.

65. How does the Government propose to ensure that public authorities incorporate equal opportunities considerations into their procurement criteria? Does the existing legislative framework which regulates public procurement allow public authorities to give due weight to equality opportunities considerations in awarding procurement contracts?

Positive Action Measures

Clause 152 provides that the Bill does not prohibit the use of proportionate positive action measures to alleviate disadvantage experienced by people who share a protected characteristic, reduce their under-representation in relation to particular activities, or to meet their particular needs. Clause 153 permits an employer to take a protected characteristic into consideration when deciding who to recruit or promote, where people having the protected characteristic are at a disadvantage or are under-represented. According to the Explanatory Notes, Clauses 152 and 153 extend the permissible scope of positive action “to the extent permitted by European law”. However, the restrictions imposed in Clause 153 on the use of positive action by employers may impose stricter requirements than European law, and do so in an unclear manner.

66. Does the wording of Clause 153(4) fully reflect the scope for positive action permitted by EU law? If not, why not?

67. Has the Government considered whether the provisions of Clause 153(4)(b) as currently worded may prevent any employer from adopting a general positive action strategy prior to making any recruitment decisions? Might the wording of Clause 153(4)(b) have a “chilling effect” and discourage employers from making use of the positive action measures permitted by Clause 152?

PART 14—GENERAL EXCEPTIONS

Restrictions on Foreign Nationals

Paragraph 5 allows restrictions on the employment of foreign nationals in the civil, diplomatic, armed or security and intelligence services and by certain public bodies. It also allows restrictions on foreign nationals holding public offices.

68. Was consideration given to minimising the restrictions imposed on the employment of foreign nationals lawfully present in the UK and how does the Government justify the remaining restrictions?

National Security

Clause 185 and Part 1 of Schedule 3 (in particular paragraph 5) re-enact existing legislation in making provision for a wide-ranging exemption for matters related to national security, the intelligence services and the armed forces. Clause 111 also provides that individuals (including the claimant) can be excluded from proceedings in relation to a discrimination claim if it is expedient to do so in the interests of national security.

69. Why does the Government consider it to be necessary to maintain such wide-ranging exceptions in the field of national security?

Charities

Clause 186 re-enacts existing legislation which allows charities to provide benefits only to people who share a protected characteristic (for example who are of the same sex, sexual orientation or disability), if this is in accordance with their charitable instrument and if it is objectively justified or to prevent or compensate for disadvantage. It also makes ancillary and associated provisions, including permitting single-sex activities and acceptance of a particular religion or belief in certain specific and limited circumstances. Clause 188 makes similar exceptions in respect of sporting activities.
70. Has the Government given consideration to restricting the circumstances in which charities will be able to discriminate on the basis of protected characteristics?

71. Will charities be able to discriminate on the basis of protected characteristics when delivering public services when this is in accordance with their charitable instrument? Would such discrimination be objectively justified under clause 186(2)(a) solely on the basis that a charity was established to benefit a particular group or to further a particular religion or belief?

Religious Organisations

Schedule 23 substantially re-enacts a number of important general exceptions to the prohibitions against discrimination and harassment, covering in particular organisations relating to religion or belief.

Paragraph 2 of Schedule 23 provides an exception for religious or belief organisations with regard to the provisions in the Bill that relate to services and public functions, premises and associations. Such organisations can impose restrictions on the basis of religion or belief or sexual orientation. However, when discrimination in the provision of services, premises and associations is concerned, a significant difference exists between the circumstances in which discrimination is permitted on the basis of religion or belief and when it is permitted on the grounds of sexual orientation. In relation to religion or belief, the exception can only apply 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. However, in relation to sexual orientation, the exception can only apply where it is necessary to comply with the doctrine of the organisation or in order to avoid conflict with the strongly held convictions of a significant number of followers of the religion. In addition, if an organisation contracts with a public body to carry out an activity on that body’s behalf then it cannot discriminate on grounds of sexual orientation in relation to that activity.

72. Why is a distinction made between religion or belief and sexual orientation in this context, especially in respect of the delivery of public services?

MISCELLANEOUS

Purpose Clause

The Equality and Human Rights Commission and other groups have argued for the insertion of a purpose clause into the Equality Bill, which could clarify the meaning of the legislation and give guidance about its underlying principles, aims and objectives. The Equality Bill introduced by Lord Lester in 2003 contained a purpose clause, as was also recommended by the Hepple Report in 2000.

73. Has the Government given consideration to including a purpose clause in the Bill and, if so, why has it rejected it?

Volunteers

The House of Commons Work and Pensions Committee has criticised the lack of protection for volunteers against discrimination, who are often not covered by existing discrimination law.95

74. Do volunteers receive adequate protection against discrimination or is additional specific provision to this effect required in the Bill?

I would be grateful if you could reply by 16 June 2009 and if an electronic copy of your reply, in Word, could be emailed to jchr@parliament.uk.

Letter from Vera Baird QC, to the Chairman, dated 19 June 2009

EQUALITY BILL

Thank you for your letter of 2 June with various questions about the Equality Bill. I attach further information as requested.

I am copying this letter and attachment to the Co-Chairmen and members of the Equality Bill Committee and placing copies in the House Libraries.

Vera Baird QC, MP

PART 1—SOCIO-ECONOMIC INEQUALITIES

1. Please explain how, in practice, the proposed new duty will enhance human rights for individuals.

The new duty will ensure that key public authorities—such as central government departments, local authorities, health and police authorities—have due regard to tackling the effects of socio-economic disadvantage. This should have a positive effect on the provision of education, housing, health, employment and other public services to those who are most disadvantaged. Organisations will have a certain degree of flexibility in taking this duty forward, but the Government expects them to consider how key services can improve outcomes for those who are most disadvantaged and excluded from society.

2. Please explain why immigration measures are exempt from the socio-economic duty.

Certain public authorities have a duty of care towards people who are subject to immigration control. This provision does not affect that duty in any way. Neither will it affect public authorities which go beyond their statutory responsibilities in this regard, as many do. What the provision will do is ensure that no public body is forced to go beyond those existing responsibilities in connection with helping such people.

The Government is aware that there are people suffering socio-economic disadvantage who have no right to remain in this country. The Government’s position in regard to such people is clear: it wants to deter people from entering or remaining in the country illegally, and to remove them if they are not entitled to be here.

For those who are legally allowed to remain in this country, the Government has a very clear aim: earned citizenship. The Government wants them to learn English, find employment, integrate into British society, and contribute to the country. To that end, the Government runs integration programmes for refugees—precisely in order to try and ensure that they do not become socio-economically deprived.

PART 2—EQUALITY: KEY CONCEPTS

3. Will the definition of the protected characteristic of “gender reassignment” in clause 7 exclude individuals with a transsexual identity from protection against discrimination where such individuals have as yet not embarked upon the initial stages of the medical process of reassigning gender, or manifested a clear intention to undergo such a process, or who may not be currently proposing to undergo any medically supervised process of gender reassignment?

The definition of gender reassignment in the Bill includes people who are “proposing to undergo…a process (or part of a process) for the purpose of reassigning the person’s sex…” [clause 7(1)]. This process need not involve any form of medical intervention; rather it is a personal process and can involve changes in dress and mode of living. The definition will cover those who are proposing to reassign their sex but have not taken any steps, medical or otherwise, to do so.

THE DEFINITION OF DISABILITY

4. Did the Government consider defining disability according to a social rather than medical model, which would be in line with what is increasingly recognised as international best practice? If so, why was this model rejected?

The Government considers that the starting point for protection from disability discrimination must be an acknowledgment that the disabled person has an impairment of some kind. Consequently, it has ensured that the Bill has a hybrid approach which takes account of the social model. The duty to make reasonable adjustments is specifically aimed at overcoming the disabling barriers that people with impairments face in society.

In developing proposals for the Equality Bill, the Government did consider the merits of a social model approach, but it concluded that it would be contrary to the aim of the legislation, which is to protect those people who have a disability in the generally accepted sense, that is to say, people who have a long-term or permanent condition.

MARRIAGE/CIVIL PARTNERSHIP

5. Why has protection against discrimination, harassment and victimisation on the protected characteristic of marriage or civil partnership been restricted in the definition of harassment, in the provision of goods and services and the exercise of public functions, in the provision of education, in the disposal, management and occupation of premises, and in the treatment by associations of members, associates and guests?

In the 2007 consultation paper on proposals for the Bill, “A Framework for Fairness”, the Government proposed to remove protection for married persons and civil partners as it was no longer required for its original purpose, which was to protect women who were required to resign from employment on marriage.

Responses to the consultation were equivocal on whether to keep or remove the protection. However, some responses did suggest that there were still work-related instances of discrimination on the basis of marriage or civil partnership. Some tribunal cases also support this view as they show that there are instances
of discrimination where employers have a blanket policy of not allowing married people to work together and these need to be challenged. Hence, the Government considers that removing this protection may run the risk of discrimination against married people re-emerging.

Responses to the consultation did not provide any evidence to show that extension of protection was warranted beyond the current range of protection. As one of the principles in the development of the Equality Bill was to not to legislate where there is no evidence of need, the Government decided not to expand protection further than the current provision. While the original reasons for introducing marriage protection in employment may no longer exist, we consider continued protection in this discrete area is warranted.

6. Why is protection against discrimination, harassment and victimisation under the Bill limited to individuals who are married or in a civil partnership, and not extended to those who face discrimination and harassment on the grounds that they are not in such relationships?

While responses to the 2007 consultation paper on the Bill suggested that there may be some discrimination on the grounds of marriage and civil partnership, they did not provide any evidence that unmarried people and those in other forms of relationships are discriminated against.

The Government therefore considers that extension of protection beyond marriage and civil partnership is not warranted on current evidence.

OTHER PROTECTED CHARACTERISTICS

7. Did the Government consider extending protection against discrimination to cover discrimination based on characteristics such as genetic predisposition, spent criminal convictions, socio-economic status, political opinion or caste? If so, why did it reject their inclusion?

Genetic predisposition—The Government has considered carefully whether protection from discrimination because of genetic predisposition should be included in the Bill. A question to that effect was included in the consultation paper on proposals for the Bill and the Government set out its conclusions in the response to the consultation. The Government’s view is that, at present, there is no clear evidence to suggest that discrimination is happening in this area. Some concerns were expressed about discriminatory practices in insurance and employment but in the Government’s view, many of the examples presented would actually qualify as disability discrimination. However, the Government acknowledges that this is a new and developing area and will keep the situation under review. For the time being, the Government considers that the voluntary measures in place are sufficient, in particular the moratorium agreed by insurers on the use of predictive genetic test results (which was recently extended to 2014) and the monitoring of how genetic testing is used in the UK by bodies such as the Human Genetics Commission.

If evidence were to emerge of a problem in the future, it might be that legislation other than anti-discrimination legislation was more appropriate to tackle it, for example, data protection legislation or specific rules on what can be done with genetic information.

Spent convictions—Domestic law is already clear on when spent convictions can and cannot be disclosed and considered by employers. The Rehabilitation of Offenders Act 1974 defines when convictions become spent, and the protection afforded when they do.

There are also a number of circumstances where spent convictions can legitimately be disclosed and where exceptions to the Rehabilitation of Offenders Act apply. These are specified in the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) Order 1974 as amended.

Under current legislation it is only legally possible for an employer or other body to obtain details of an individual’s spent convictions where they have a legitimate reason, covered by the Exceptions Order, for doing so.

It is therefore not necessary for spent convictions to be covered by the Equality Bill as there is already adequate cover from existing legislation which is unambiguous as to when they can and cannot be legitimately considered.

Socio-economic status—The Government did consider extending protection against discrimination to cover socio-economic status. But it concluded that (a) beyond a crude income or poverty measure, it would be very hard to define socio-economic disadvantage in a way that could be used to give individual rights; and (b) this would not in any case be the best way to address the inequalities of outcome which result from that socio-economic disadvantage.

Socio-economic disadvantage is not like the other protected grounds. It is not a single, unchangeable condition, or a fundamental aspect of someone’s being. On the contrary, it is a situation characterised by complex, inter-related factors; and is situation that people will, it is hoped, rise above and move on from. It is a situation that the Government ultimately wishes to eradicate altogether.

However, socio-economic disadvantage underlies, and can manifest itself as a consequence of, many of the inequalities associated with the protected characteristics. But it is not like them, and should not be treated as such. Putting the onus on public bodies specifically to eliminate discrimination against people facing socio-economic disadvantage, would not be the best way to address the inequalities of outcome
associated with that disadvantage. While it is, of course, possible that some people suffer discrimination, in particular cases, as a result of their socio-economic status, that is not the key cause of the inequalities of outcome we are looking to address. What is required is a measure to address the underlying socio-economic disadvantages.

The Bill therefore provides for a duty to be placed on key public authorities to consider the desirability of reducing the inequalities of outcome associated with socio-economic disadvantage when making decisions of a strategic nature. This will influence their priorities and their target setting, planning and commissioning processes. It will help to address the root causes of socio-economic disadvantage—in housing, in health, in education, and so on. These are the key issues. The Government considers this to be a more effective way of helping those experiencing socio-economic disadvantage.

**Political opinion**—The Government does not see the position of Northern Ireland and mainland Great Britain as being analogous when it comes to matters of political opinion. The Government is not aware that the exclusion of political opinion being covered as a protected characteristic has ever caused problems domestically.

**Caste discrimination**—The Government is always willing to consider whether there is a case for legislating to prohibit caste discrimination, but to date insufficient evidence has been presented to indicate that this is a significant problem domestically that could be resolved by anti-discrimination legislation.

In particular, there is no evidence of caste discrimination occurring in the specific fields which discrimination law covers: employment; vocational training; provision of goods, facilities and services; management or disposal of premises; education; the exercise of public functions.

Some anecdotal evidence suggests that caste considerations may be a factor in certain social or cultural situations—for example in choice of whom to marry. However, an individual’s marriage choice is not a matter for discrimination law.

While the Government continues to monitor the situation, it is clear that there is no consensus that caste is either a significant problem or that claims of caste discrimination would be solved by legislation.

**Harassment**

8. **Why is less favourable treatment because of submitting or failing to submit to harassment related to a protected characteristic not prohibited?**

Discrimination because of marriage and civil partnership is prohibited in order to address very narrow circumstances in which some employers still adopt policies which may discriminate against married people or civil partners: for example, where employers do not allow married people to work together. However, the Government is not aware of any evidence that people are harassed in the workplace because they are married or a civil partner. It does not therefore consider there is a need for such protection. If a civil partner is harassed because of their sexual orientation, protection is already provided.

With regard to pregnancy and maternity, any harassment that a woman is subjected to will be covered by the protection against harassment related to sex. The Government therefore considers that specific protection against harassment because of pregnancy or maternity is unnecessary and would add no value.

In the consultation paper on proposals for the Bill, the Government made clear that it would only legislate if there was evidence of a real problem. No such evidence was forthcoming in these cases.

9. **Why is less favourable treatment because of submitting or failing to submit to harassment related to a protected characteristic not prohibited, with the exception of harassment related to sex or gender reassignment?**

The definition of harassment in the Sex Discrimination Act 1975 includes a separate form of harassment which is treating a woman (or man) less favourably on the ground of her (or his) rejection of or submission to sexual harassment or sex harassment. The Act also contains a parallel provision in respect of gender reassignment. This form of harassment prohibits “less favourable treatment”, but the appropriate comparator is the victim of the harassment herself, hypothetically, if she had not rejected or submitted to the harassment.

These provisions were introduced into the Act in 2005 to implement a requirement in Directive 2002/73/EC96 that states that “A person’s rejection of, or submission to, [sex harassment, sexual harassment or gender reassignment harassment] may not be used as a basis for a decision affecting that person”. There is an identical provision in Directive 2004/113/EC. Directive 2006/54/EC98 states that for the purposes of the Directive, discrimination includes “harassment and sexual harassment, as well as any less favourable treatment based on a person’s rejection of, or submission to, such conduct”.

There is no equivalent provision in Directive 2000/43/EC99 or Directive 2000/78/EC100 and consequently there is no equivalent provision in respect of other protected characteristics domestically.

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96 Directive amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions
97 Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services
98 Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)
99 Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
100 Directive establishing a general framework for equal treatment in employment and occupation
The Government considers that this form of harassment is primarily relevant to sexual harassment where sexual advances may be made to a person and, following submission or rejection of those advances, the person in question is treated adversely. For example, a woman being refused a promotion by the person whose sexual advances she rebuffed. The refusal of the promotion constitutes less favourable treatment because the individual had rejected the sexual advances and is, therefore, unlawful harassment.

Given the lack of clear evidence of need beyond sexual harassment, the Government can see no sound reason to extend this form of protection to other protected characteristics, and there are currently no European law requirements for such protection in this regard. The existing protections in respect of sex harassment, sexual harassment and gender reassignment harassment must be retained to comply with European legal obligations.

10. Did the Government consider making provision for an alternative and narrower definition of harassment to be applied in certain circumstances in order to ensure adequate protection for freedom of expression? In particular, was consideration given to whether a narrower definition of harassment could have been applied in the context of the provision of services and the performance of public functions in relation to the protected characteristics of religion or belief or sexual orientation?

30. Has the Government considered introducing an alternative definition of harassment on the grounds of religion or belief or sexual orientation in the fields of service provision and the performance of public functions which might have a narrower scope than the standard definition of harassment set out in Clause 24 of the Bill? In particular, has the Government considered the possibility of removing any reference to the creation of an offensive environment from the definition of prohibited “harassing” conduct in this context, and/or requiring any such conduct to both violate the dignity of a person and create an intimidating or hostile environment? If so, why was this alternative approach rejected?

35. Has the Government given consideration as to whether the adoption of a narrower definition of harassment related to the characteristics of religion or belief or sexual orientation which continued to conform to the requirements of EU law (such as a definition of harassment which prohibited unwanted conduct that had the purpose or effect of both violating the individual’s dignity and creating a degrading, humiliating or offensive environment) would ensure greater protection for freedom of expression?

Since questions 10, 30 and 35 raise similar issues, it appears convenient to answer them together.

The conjunctive versus the disjunctive definition of harassment

Under the harassment provisions in British discrimination law, a person needs to show either that their dignity was violated by the unwanted conduct, or that an intimidating, hostile, degrading or offensive environment was created as a result of it. This is the disjunctive approach. In contrast, the definition contained in the relevant European Directives requires both of these conditions to be satisfied. This is the conjunctive approach. Conduct which violates a person’s dignity almost invariably also creates an offensive, etc. environment for that person and vice versa. So any extension to the breadth of the European definition is of limited effect, in the Government’s view.

In addition, the domestic definition is qualified by an objective element where the conduct in question is not intended to harass. In determining whether conduct can be regarded as constituting harassment, account must be taken of the complainant’s perception of the conduct, the other circumstances of the case, and whether it is reasonable that the conduct should be regarded as having the effect of harassment. This safeguard is to ensure that unreasonable allegations of harassment are not caught. This objective element is not found explicitly in the Directives, but it codifies domestic case law in a way which in the context of the definition as a whole is compatible with them.

The disjunctive approach was first adopted when the Race Relations Act 1976 was amended to implement the Race Directive. At the time, domestic case law had established that a person who complained of harassment contrary to the direct discrimination provisions of the Race Relations Act needed to show only that the conduct had been intended to violate his or her dignity (or had that effect) or had been intended to create an intimidating, hostile etc environment (or had that effect). Subsequent Directives define harassment in similar terms to the Race Directive, and the Government has implemented these provisions in broadly similar terms in domestic law. The Government considers that to use the conjunctive approach in domestic discrimination law now would risk breaching the principle of non-regression in European law.

Consideration of a narrower definition in certain circumstances

The Government has ruled out using a narrower definition of harassment where European law does not apply, because one of the key aims of the Bill is to simplify and harmonise the law. Introducing a two-tier approach to harassment would introduce new and, in the Government’s view, unnecessary legal complexity.

As regards the provision of goods, facilities and services and the performance of public functions in relation to religion or belief or sexual orientation, the Government has not been provided with evidence of a compelling case to provide protection from harassment. So it does not consider there is a basis for legislating nor that there is any need to consider whether a narrower definition would be warranted (with the complexities it would introduce) in these areas.
11. Does the Government consider that the prohibition on “discrimination arising from disability” in Clause 14 taken together with the prohibition on indirect disability discrimination introduced by Clause 18 constitutes a sufficient substitute for the prohibition on “disability-related discrimination” contained in s. 3A of the Disability Discrimination Act 1995?


Questions 11 and 12 raise similar issues, so the following text answers them together.

The provision in Clause 14 concerning discrimination arising from disability is intended to provide a level of protection similar to that provided by the disability-related discrimination provision in the Disability Discrimination Act 1995 [DDA] prior to the judgment of the House of Lords in the case of Lewisham v Malcolm. It was not appropriate to carry forward the disability-related-discrimination provision in the DDA because the interpretation of the House of Lords meant that disabled people did not have the level of protection the Government had intended. Therefore, it was necessary for the Government to revise the drafting when developing a successor provision for the Equality Bill.

Clause 14 is aimed at providing protection, as disability-related discrimination does at present, from discrimination that arises not simply because a person is disabled, but because of an effect of, or something arising from, that person’s disability. The new provision will provide protection for a disabled individual from a disadvantage which would be a detriment for any person. This may be illustrated by an example in the Explanatory Note to the provision in the Bill. A visually-impaired man is dismissed because he can only continue to carry out his job if he has access to assistive technology, and such technology is not compatible with the employer’s Information Technology system. Dismissal would be a detriment for any individual but, in this case, the detriment only arises because of the impact of the person’s disability. He would not have been dismissed if he did not have a visual impairment that meant he required assistive technology to enable him to perform his job.

The Government considers that the removal of the need to establish a comparator, which is currently required by the disability-related discrimination provisions in the DDA, will strengthen the legislation by making it easier for a disabled person to show that he or she has been subject to detrimental treatment. The application of indirect discrimination provisions to disability will further strengthen protection from discrimination for disabled people because it will assist in tackling and preventing systemic forms of discrimination that would have detrimental effects on particular groups of disabled people.

As a consequence, the Government is satisfied that the replacement of protection from disability-related discrimination by protection from discrimination arising from disability, and from indirect discrimination will not violate the “non-regression principle” set out in Article 8.2 of Directive 2000/78/EC.

13. Is the definition of direct discrimination in Clause 13 sufficiently clear to ensure compliance with the decision of the European Court of Justice in C-303/06, Coleman v Attridge Law?

In the Coleman case, the European Court of Justice ruled that Directive 2000/78/EC must be interpreted as meaning that the prohibition of direct discrimination laid down by the Directive “is not limited only to persons who are themselves disabled”. The Government considers that the definition of direct discrimination in clause 13 of the Equality Bill clearly complies with that ruling in that it does not specify that the victim must be a disabled person, merely that they have suffered less favourable treatment “because of” disability, in contrast with the definition of direct discrimination in section 3A(5) of the Disability Discrimination Act 1995. The formulation “because of”, like the currently used phrase “on grounds of” for certain protected characteristics, includes less favourable treatment on account of a person’s association with a disabled person.

14. Why is discrimination on the basis of association and perception not explicitly prohibited on the face of the Bill, in order to provide greater clarity for employers and service providers?

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 (e.g., 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 (as said by Lord Simon in Race Relations Board v Appin [1975] AC 259, at 289), or because the victim is wrongly thought to have it (as said by Lord Fraser in Mandla v Dowell Lee [1983] 2 AC 548, at 563). 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.

15. Was consideration given to including carer status as a protected characteristic, or to giving carers a legal right to seek reasonable accommodation? If so, why was it rejected?

The consultation paper on proposals for the Bill indicated that the Government was not persuaded of the need to create broad-based freestanding discrimination legislation for carers; and that it was considered to be more appropriate to continue with targeted provisions and specific measures instead. The Government asked for comments on this approach and, after considering the responses received, decided not to extend protection against discrimination specifically because of parenting or caring responsibilities. The main reason is that, unlike the other protected characteristics, the role of a carer primarily concerns what a person does, rather than who they are. The Government continues to believe that measures such as the right to request flexible working are better suited to supporting carers than the provision of an additional protected characteristic in discrimination law.

Under the Bill, carers are protected if they suffer direct discrimination or harassment because of their association with a disabled person or person of a certain age. This protection extends to carers under the age of 18 who are discriminated against because of their association with an older person they care for. The protection for associates of disabled people does not extend to requiring reasonable adjustments, such as flexible working. Such a provision is not necessary. This is because, in recognition of the valuable role carers play and the additional responsibilities and challenges they face, the Government has already extended employment legislation to include the right for carers to request flexible working.

**Multiple Discrimination**

16. Does the Government accept that if multiple discrimination is confined to two protected characteristics, some individuals subject to other forms of multiple discrimination may be denied legal protection against unfair and unequal treatment?

Following the 2007 consultation paper on proposals for the Bill and a further period of discussion, the Government has developed a proposal that is limited to combinations of two protected characteristics. Most of the examples that have been provided during consultations concern less favourable treatment involving just two protected characteristics. Whilst it is possible to envisage people being discriminated against because of a combination of three or more characteristics, as the number of protected characteristics being combined increases, it becomes decreasing likely that the particular combination being alleged is the reason for the less favourable treatment. Evidence indicates that enabling claims combining two of the protected characteristics would provide protection for the vast majority of people who experience multiple discrimination. Citizens Advice showed us that out of 13,000 clients who visited them between April 2008 and December 2008, 1,072 (8 per cent) presented with two grounds of discrimination and only a further 119 presented with three or more grounds. This indicates that the large majority of cases of discrimination concern one or two protected characteristics. Therefore 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.

A higher number of permitted combinations could make the law more complex and significantly increase the burdens for employers. Therefore, the proposal based on combinations of two protected characteristics would ensure, in the Government’s view that protection is provided for the great majority of incidents of multiple discrimination, without imposing disproportionate burdens.

17. Why does the Government consider that it is unnecessary to prohibit indirect discrimination or harassment which is based on multiple grounds?

The Government is not convinced of the need to prohibit indirect discrimination on multiple grounds as there is insufficient evidence that victims of indirect discrimination are failing to secure the protection they deserve through single-strand claims. Indirect discrimination involving more than one protected characteristic (for example, dress codes which prevent Muslim women from covering their faces or Sikh men from wearing turbans) is likely to be remedied under current law. Requiring employers to assess the impact of their provisions, criteria and practices on possible combinations of protected characteristics would impose a significant and in the Government’s view disproportionate burden, without clear evidence that there is a problem under existing law. Requiring businesses and employers to assess the impact of their provisions, criteria and practices on all possible combinations to ascertain whether any disadvantage may result would require significant time and resources. If unlimited (in number and as to protected characteristics), there are 511 possible combinations of protected characteristics. We consider this to be a disproportionate burden in light of the fact that there is little evidence to suggest that victims of indirect discrimination are failing to secure a remedy under the current law. In contrast, imposing the prohibition in respect of direct discrimination does not require businesses and employers to do anything more to avoid liability than to continue to ensure that they make decisions based on rational, non-discriminatory reasons.
As with indirect discrimination, there is no evidence that harassment cases are failing due to a lack of an intersectional remedy. Indeed, the broader definition of harassment in the Bill (replacing conduct “on ground of” a protected characteristic with conduct “related to” a protected characteristic) makes it even less likely that intersectional harassment would fail to find a remedy by means of a single strand claim.

18. Why was it not possible to complete the consultation in time for the Government’s proposed option to be included in the Bill at the outset?

Multiple discrimination is a complex issue. It has necessitated significant time and effort to identify whether or not there is a problem and, if so, its extent; and to propose an appropriate remedy. Having considered the responses to the 2007 consultation paper on proposals for the Bill, the Government made a commitment to explore the issue further. Given that the Government had not made up its mind because of the need to consider further, it would not have made sense to include provisions on multiple discrimination in the Bill at the outset. Instead, it has recently undertaken a six week discussion to specifically assess whether its proposal is both effective and proportionate. It will consider the outcome of this process before deciding whether or not to seek to amend the Bill.

PART 3—SERVICES AND PUBLIC FUNCTIONS

SERVICE PROVISION AND THE PERFORMANCE OF PUBLIC FUNCTIONS

19. Does the Government consider the exceptions listed in Part 1 of Schedule 3 to be necessary and proportionate? If so, why?

As reflected in existing legislation, including most recently the relevant provisions of the Equality Act 2006 and the Equality Act (Sexual Orientation) Regulations 2007, the Government considers that these exceptions in the Equality Bill are indeed both necessary and proportionate.

As reflected in current legislation, the Government considers that there are a number of public bodies and public functions which it is necessary to exempt, on constitutional and public policy grounds, from the prohibitions on discriminating against, harassing or victimising a person in the provision of services or the exercise of a public function.

The exceptions in Schedule 3 Part 1 are therefore designed to provide a balance between the rights of individuals not to be discriminated against in the exercise of public functions; and the need for certain public authorities to be able to act in ways which may interfere with these rights in order to protect the wider interests of society. The wider interests reflected in Part 1 are those of parliamentary sovereignty, legislative freedom, judicial independence, national security and combat effectiveness of the armed forces.

The Government has sought in drafting these exceptions to ensure that they are indeed proportionate. For example, the exceptions for the judiciary and the security services may appear broad on their face. However, in the case of the judiciary, it should be kept in mind that any apparent discrimination by a judge in conducting a case could be raised on appeal in so far as it amounted to his or her taking into account irrelevant considerations or not taking into account relevant considerations in reaching his or her decision. Equally, complaints against individual judges can be made to the Office of Judicial Complaints. Similarly if an individual believes that any of the intelligence and security agencies has discriminated against him/her in the exercise of their functions, he/she has a right of complaint to the Investigatory Powers Tribunal.

The law-making exception seeks to protect our fundamental constitutional principle of parliamentary sovereignty as well as allowing debates on and the making of legislation which may, for entirely legitimate reasons, treat people with particular protected characteristics differently: for example, health and safety regulations which might potentially discriminate against disabled people.

A CONSTITUTIONAL EQUALITY CLAUSE?

20. Was consideration given to including in the Equality Bill a provision which confers an equivalent level of constitutional protection on the “free-standing” right to equality and non-discrimination as is conferred on the rights contained in the ECHR by the Human Rights Act 1998? If so, what were the Government’s reasons for not wishing to recognise the constitutional status of the right to equality?

Ministers already have to make a statement of compatibility of legislation with the Convention rights, which encompasses Article 14 rights to equality in the protection of those rights—and indeed such a statement is made on the front of the Equality Bill.

Some initial consideration is also being given to a statement of equality, as part of the Green Paper, “Rights and Responsibilities: developing our constitutional framework”. Further consideration needs to be given to this issue and for this reason, the Government does not consider that the Equality Bill should contain a constitutional equality guarantee. Instead, the question should be considered as part of our broader work to develop our constitutional framework.

That Green Paper seeks views on, among other things, the articulation of “an accessible and straightforward statement of equality” as part of a possible Bill of Rights. The Government believes this issue should be considered as part of that wider debate about our constitutional framework.
This is potentially a complex area and the Government considers it is right to proceed with caution, so as to reduce the risk of unintended consequences for legislation generally, including the Equality Bill. It would be important to ensure, for example, that a constitutional statement of equality or an equality guarantee did not cut across specific provisions in discrimination legislation as embodied in the Equality Bill, in a way that would upset the highly nuanced balance which the Bill aims to achieve between potentially conflicting rights, through the use and extent of exceptions. Finally, it would also be necessary to ensure that domestic legislation continued to comply with EU legislation, given that much of the domestic anti-discrimination law follows the European law model.

**The Immigration Exceptions**

21. Does the Government consider each of the exceptions in Part 4 of Schedule 3 to be necessary and proportionate, and if so, on what basis?

The UK Border Agency needs to be able to treat different groups of people in different ways in order to deliver its immigration and public protection duties. In various circumstances policies and decisions may be such that they are based, whether directly or indirectly, on matters of nationality, national or ethnic origin, religion or belief and health (and therefore potentially disability).

It is therefore necessary to provide certain exceptions to the provisions prohibiting discrimination when exercising a public function to enable the UK Border Agency to carry out the Government’s immigration policy. The exceptions are of a limited nature and reflect existing legislation. They will not allow the immigration authorities to take any actions that they are not currently permitted to take.

The disability exception is needed to enable the immigration services to take decisions regarding a person’s entitlement to enter or remain in this country based on what is necessary to the public good, most notably to protect public health and safety. This exception is not about allowing the immigration authorities to exclude a person simply because they have a physical or mental impairment. Instead, it is aimed primarily at excluding people who present a risk to public health because they are carrying an infectious disease.

Many immigration laws and policies require differential treatment on grounds of nationality and also national or ethnic origin. For example, different visa requirements may apply to people from different countries depending on a variety of historical, political and diplomatic reasons. In addition, immigration officers may need to give extra scrutiny to entrants of a particular nationality, if there has been evidence of immigration abuse by people of that nationality. Effective casework management may require prioritising claims by reference to nationality or ethnic origin when, for example, it is known that claims from one particular group are relatively straightforward. The race exception allows the immigration authorities to carry out these policies with sufficient flexibility to enable them to respond to constantly changing situations.

The first of the exceptions for religion or belief is necessary to ensure a proper balance is achieved between the rights of individuals not to be discriminated against and the wider interests of the community such as public safety and national security. This exception would therefore ensure that immigration authorities excluding so-called “preachers of hate” where to do so is conducive to the public good could not be challenged for discrimination because of religion or belief.

The second of the exceptions for religion or belief serves to allow ministers of religion, missionaries and members of religious orders to continue to be treated as distinct categories under the new points based system and to ensure that only those belonging to genuine religious institutions can gain entry in such a capacity.

Finally, it needs to be kept in mind that the UK Border Agency is subject to monitoring by the Chief Inspector of the UK Border Agency, whose position was established by the UK Borders Act 2007. His statutory duties are to monitor and report on the efficiency and effectiveness of the UK Border Agency. This specifically includes considering and making recommendations about the agency’s compliance with law about discrimination in the exercise of its functions.

22. Please provide the evidence which, in the Government’s view, justifies the inclusion within the legislation of a power which would permit the exclusion of people with tuberculosis in certain circumstances? (See paragraph 668 Explanatory Notes)

The exception does not provide the UK Border Agency with new powers to exclude disabled persons from the UK. It supports existing powers to exclude from the UK people with serious infections, including tuberculosis (TB), where this is necessary for the public good and where the person is also disabled. Although TB is not in itself a disability, those with TB can be affected to the extent that they are considered disabled.

The UK Border Agency has a long-standing policy of screening people subject to immigration control seeking entry for more than six months from high risk countries for active infectious pulmonary TB. In 2005 the UK also commenced a pre-entry TB screening programme which currently applies to residents of 15 countries. Under this programme, visa applicants found to have active infectious pulmonary TB must complete a course of treatment in their home country before being re-tested. Those free of infection are given a secure certificate which they must present to the Entry Clearance Officer in advance of their visa application being considered.
Existing screening policy reflects the fact that TB remains a serious public health threat and that of the 8,417 cases of TB reported in the UK in 2007, 72 per cent involved people who were born outside the UK. In 2007, 7.4 per cent of people with TB were resistant to at least one first line drug, with this resistance being more common in people born outside the UK.

AGE DISCRIMINATION IN THE PROVISION OF SERVICES

23. What exceptions are intended to be introduced in respect of age discrimination outside the workplace?

The Government will be publishing a consultation paper this summer, on its proposals for exceptions to the ban on age discrimination in goods, facilities and services and public functions. The Government does not want to stop age-based practices that are justifiable, beneficial or based on good public policy reasons. The consultation document will cover three main areas:

— health and social care, where a national review led from the South West is looking at the issues in depth and will report in October, including on exceptions for those sectors;

— financial services, where the Government has always expected to make an exception for age to continue to be used as a criterion in so far as it relates to risk; and

— other services such as concessions and group holidays for particular ages.

24. Why does the Government believe that it is appropriate to leave this matter to secondary legislation and what is the proposed timetable for implementation?

Framing the exceptions for age across all goods, facilities, services and public functions is challenging and complex. It is vital to get this right and to give service providers time to prepare to implement the ban. The Government has made clear from the outset that targeted exceptions would be prescribed later in an Order, but only following further work and consultation.

The desire for urgency should not be at the expense of the quality of the law. The summer consultation will not be the last on the matter. The Government will also consult on the draft Order or Orders themselves (the target for this consultation is 2010 when the position on the new draft EU Anti-Discrimination Directive should be clearer) before they are laid before Parliament. So there will be a good deal of information available about the exceptions the Government intends to provide by the time the relevant clause in the Bill is scrutinised by Parliament and there will be a further opportunity to consider the draft legislation in due course.

The Government is determined to bring the ban, together with the relevant exceptions, into force as soon as is practicable. The aim is to do so by 2012 for everything apart from health and social care. For the latter, it is important that the further work the Department of Health has put in train is completed.

25. Why are children excluded from discrimination on the grounds of age in the provision of services and the performance of public functions?

The decision not to extend age provisions in relation to goods, facilities and services and public functions to under 18s has been taken after careful thought. The Government believes that discrimination law would not be an effective, appropriate or helpful way of tackling the problems experienced by children and supporting them in their upbringing, and could have significant negative consequences.

Most arguments presented in favour of extending age provisions to under 18s seem to be based on complaints about negative attitudes towards, negative opinions of and mistrust of young people—but the examples of such matters which have been provided to the Government are generally not issues which could be dealt with effectively through age discrimination law.

The Government wants to protect special and tailored services for children. Extension of the age discrimination ban outside the workplace to children could render any service aimed at children, or particular groups of children, vulnerable to challenge under discrimination law.

26. Does the Government consider that this may prevent children from enjoying full protection of the rights set out in the UN Convention on the Rights of the Child? If not, why not?

Nothing in the Equality Bill will diminish or remove a child’s rights under the UN Convention. There is no positive obligation on States under the Convention to provide protection from discrimination in all situations. The fact that a piece of legislation which provides such protection sets limits on the circumstances in which it applies does not give rise to any breach of Convention rights. In order to argue that a State has a positive obligation to legislate, it would be necessary to demonstrate that a lack of legislation gave rise to a serious breach of individuals’ Convention rights, which is not the case.
The exclusion of harassment on the grounds of religion or belief or sexual orientation

27. Why does the Government consider it unnecessary to make provision for the explicit prohibition of harassment on the grounds of religion or belief or sexual orientation in the fields of service provision and the performance of public functions, and in particular why was it not considered necessary to prohibit harassment related to these characteristics in the provision of public services?

The 2007 consultation paper on proposals for the Bill invited evidence of a need for express protection against harassment on grounds of age, disability, religion or belief and/or sexual orientation in any or all the relevant fields: the provision of goods, facilities and services; education in schools; the management or disposal of premises; and the exercise of public functions. Nothing in the responses received indicated that there is a problem of harassment related to sexual orientation or religion or belief in these fields such that there is a need for legislation in those areas.

After careful consideration of the issues, which are particularly complex (and often conflicting) in the case of sexual orientation and religion or belief, the Government found that there was little, if any, evidence that conduct amounting to harassment because of sexual orientation or religion or belief takes place in the fields outside work. In relation to sexual orientation, Stonewall confirmed this conclusion when giving oral evidence to the Public Bill Committee on 2 June.

Whilst a number of examples were provided of conduct that was considered by respondents to be harassment, the majority of these involved circumstances which would be caught by the discrimination provisions in the Bill or are not properly the subject of discrimination law at all, such as personal abuse in the street.

It should also be noted that the public sector Equality Duty has a role in ensuring that public authorities when carrying out all their functions will need to have due regard to the need to foster good relations in respect of all protected characteristics.

28. Is the absence of protection against harassment related to these characteristics compatible with the right of individuals under Article 14 of the European Convention on Human Rights to enjoy the rights and freedoms set out in the Convention without discrimination?

Yes. This is because the Government has not been provided with any evidence that people are subjected to unwanted conduct that would not be remedied by the protection provided against direct or indirect discrimination.

For the purposes of Article 14, the applicant must be being treated differently from those in comparable situations. To the extent that Article 14 is engaged by the lack of protection from harassment outside the workplace in relation to sexual orientation and religion and belief, the Article states that giving different levels of protection in some circumstances to different protected groups does not amount to discrimination on the ground of their protected characteristic.

29. To what extent does the Government consider that acts of harassment related to the protected characteristics of religion or belief or sexual orientation in the provision of services or the exercise of public functions are prohibited by the ban on direct and indirect discrimination linked to these characteristics, even in the absence of an explicit prohibition of harassment?

When the Government sought examples of harassment because of religion or belief or sexual orientation that might be occurring in the provision of goods, facilities or services or the exercise of public functions, there was little evidence that additional protection was needed in these areas. In these circumstances, the Government considers that the vast majority of situations where any such conduct takes place would be covered by the prohibition of discrimination.

30. Has the Government considered introducing an alternative definition of harassment on the grounds of religion or belief or sexual orientation in the fields of service provision and the performance of public functions which might have a narrower scope than the standard definition of harassment set out in Clause 24 of the Bill? In particular, has the Government considered the possibility of removing any reference to the creation of an offensive environment from the definition of prohibited “harassing” conduct in this context, and/or requiring any such conduct to both violate the dignity of a person and create an intimidating or hostile environment?

If so, why was this alternative approach rejected?

This question has been answered as part of the response to question 10 above.

Part 4—Premises

31. Why is it considered necessary to exclude all forms of protection against discrimination on the grounds of marriage/partnership and age in relation to the disposal, management and occupation of premises?

The Government undertook various discussions and a public consultation exercise in advance of the Bill, but insufficient evidence was forthcoming to justify extending the provisions on premises to cover the characteristics of age or marriage and civil partnership.

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101 A similar exclusion exists in the field of the disposal, management and occupation of premises.
In the case of marriage and civil partnership, protection on these grounds only exists in regard to employment matters. The Government can see no justification for extending such protection to matters related to premises. If there were any instances of discrimination related to the provision of premises in the context of employment, the provisions elsewhere in the Bill relating to work would apply, rather than the specific provisions on premises within this Part.

In relation to age, some forms of housing are provided exclusively to people in a particular age range. Age limits may be imposed to meet the needs of a disadvantaged group (defined by age), or to cater for the preferences of individuals who simply wish to live exclusively with people of a similar age.

The consultation responses did not reveal any instances of harmful age discrimination in the management and disposal of premises which would require the extension of prohibitions. The Government does not wish to interfere unnecessarily with the private arrangements which individuals make for their accommodation. The Government also believes that housing providers should be able to continue to impose age limits in order to cater effectively for age-related need and to meet individuals’ preference to live with people of a similar age.

32. Has the Government considered introducing a general anticipatory duty on landlords to make reasonable accommodation for persons with disabilities in the disposal, management and occupation of premises, and if so, why was this rejected?

The Government has considered whether it should place an anticipatory duty to make reasonable adjustments on landlords. It has decided, however, that the present provisions in the Disability Discrimination Act 1995, as amended, should be carried forward to the Equality Bill. These provisions reflect the fact that, generally, the relationship between a disabled tenant and landlord is longer-term than the transitory relationship between a disabled customer and a service provider. The Government considers that it is more appropriate to make the duty subject to a request by the disabled person, because it enables the adjustment to be better tailored to the requirements of the individual disabled person. Placing a duty on a landlord to make anticipatory adjustments could result in adjustments that are not suitable for the particular disabled tenant or occupier. Furthermore, it might result in the landlord having to use resources on anticipatory adjustments which could be channelled into more tailored adjustments.

PART 5—WORK

33. Has the Government considered inserting legislative provisions in the Bill which would give clear statutory expression to the approaches adopted by the courts and tribunals in cases concerning religion or belief and the non-discrimination duties of public and private employers (such as Chandol and Eweida v British Airways Plc[102]), provide legal clarity for employers and employees and avoid litigation? If so, why has it rejected this approach?

No explicit consideration was given to codifying recent case law developments in cases such as Chandol v Liverpool City Council or Eweida v British Airways.

This is for two reasons. Firstly, the Government considers that the Bill as it stands provides appropriate legal clarity, both for employers to determine their legal obligations and for employees to understand their rights.

Secondly, any judgment handed down by a court or tribunal is very much dependent upon the specific facts of the particular case in question. The Government does not consider it necessary, helpful or practical for legislative provisions to be so specific that they could attempt to cover every employment scenario that may arise. To attempt to do so would potentially create provisions too detailed and too cumbersome to be effective. One of the main considerations for this Bill is to achieve simplification of the law—adding the level of detail necessary to cover all potential scenarios would go against that principle.

The Government considers that there is sufficient legal clarity in the drafting of the Bill to enable courts and tribunals to apply the law properly to the facts of any particular case. In due course, guidance will also be issued that will assist employers in understanding their specific obligations under the Bill.

34. Is the Government aware of cases where employees have been accused of harassment of another employee on grounds of religion or belief or sexual orientation merely by expressing their view in a conversation of the morality of homosexuality or of the truth of a religion?

No. We are however aware of a situation where a Christian charity worker in Southampton was suspended from his job after revealing to a colleague that he did not believe in gay marriage or the ordination of gay clergy. We have been led to believe that his bosses told him that expressing his religious beliefs on same-sex unions broke the charity’s culture and code of practice designed to prevent people from being harassed. An investigation and a disciplinary hearing were ordered and we are not aware whether, or how, this matter has been concluded.

[102] [2008] UKEAT 0123_08_2011 (20 November 2008)
35. Has the Government given consideration as to whether the adoption of a narrower definition of harassment related to the characteristics of religion or belief or sexual orientation which continued to conform to the requirements of EU law (such as a definition of harassment which prohibited unwanted conduct that had the purpose or effect of both violating the individual’s dignity and creating a degrading, humiliating or offensive environment) would ensure greater protection for freedom of expression? (This question is linked to question 10 above, and you may wish to answer them together.)

This question has been answered as part of the response to question 10 above.

**Occupational Requirements**

36. Why does the Government not consider it to be necessary, in defining the scope of the occupational requirement exceptions set out in Part 1 of Schedule 9, to require in express terms that any such occupational requirements must be "genuine" in nature?

The word “genuine” does not add anything to the ordinary meaning of the word “requirement”. The question whether having a protected characteristic is or is not a requirement for a particular occupation will be a matter of fact to be determined in the circumstances of each case. If it is not genuine, the facts will show that it is not a requirement.

The Government does not therefore believe that including this word is necessary to achieve the desired legal effect. The inclusion of unnecessary words will not assist in achieving one of the principal objectives of the Bill: to make the law as clear and accessible as possible.

37. Does the Government consider that the provisions of Paragraph 3 of Schedule 9 will permit employers in certain circumstances to make adherence by employees to religious doctrine in their lifestyles and personal relationships a genuine occupational requirement for a particular post?

Paragraph 3 of Schedule 9 permits organisations with an ethos based on religion or belief to require an employee to be of a particular religion or belief. The organisation must show that being of that religion or belief is a requirement for the work, taking into account both the nature or context of it and the ethos of the organisation—the requirement must not be a sham or pretext.

It is very difficult to see how in practice beliefs in lifestyles or personal relationships could constitute a religious belief which is a requirement for a job, other than for ministers of religion (and this is covered in paragraph 2 of Schedule 9). It is perhaps worth noting, however, that if an employee has been employed on the basis of an occupational requirement to be of a particular religion or belief and the employee can no longer be considered to be of that religion or belief eg an employee who has lost faith, then the employer would be able to terminate employment as the employee would no longer meet the occupational requirement.

Is the position different if a religious organisation is wholly or mainly delivering public functions?

No.

38. Why is it justified to give employers greater scope through the provisions of Paragraph 3 of Schedule 9 to impose requirements upon employees to be of a particular religion or belief than to be of a particular sexual orientation?

Paragraph 3 of Schedule 9 sets out an occupational requirement test which covers organisations with an ethos based on religion or belief: for example, an organisation run by a religious group, such as a hospice. This provides an additional exception that organisations with a religious ethos may rely on. The reason for this additional exception is that it recognises that religious organisations need to be able to preserve their religious ethos, and that is why it covers only the religion or belief strand. This exception is derived from Article 4.2 of the Equal Treatment Directive [2000/78/EC], which allows a difference of treatment with regard to employment based on a person’s religion or belief in certain limited circumstances having regard to the employer’s ethos. However, this exception does not apply in relation to other protected characteristics such as sexual orientation. Similarly Paragraph 3 covers only religion or belief and not the other grounds, including sexual orientation.

**Military Exemption**

39. What evidence does the Government rely on to demonstrate the necessity for maintaining the existing exemption? Does the Government intend to follow the Committee’s recommendation to reconsider the necessity for this reservation within six months of Royal Assent being granted to the Equality Bill?

In its Report on the reservations and declarations to the UN Convention on the Rights of Persons with Disabilities, the Committee noted the Government’s proposed reservation in respect of service in the armed forces.

The Committee concluded that the Government should consider removing the existing exemption for service in the armed forces from the Disability Discrimination Act 1995 in the Equality Bill and stressed that evidence should be provided to support any justification provided by the Ministry of Defence that the
existing exemption is necessary. It concluded that if the Government decided to lodge the reservation, it should commit to keeping the reservation under review and undertake to reconsider the necessity for the reservation within six months of the Equality Bill being granted Royal Assent.

On 13 May 2009, the Minister Jonathan Shaw MP, announced that the Government proposed to ratify the Convention on 8 June 2009, with the substance of the reservation remaining the same.

There is a need to enter a reservation in respect of the Armed Forces, reflecting the relevant provisions of the “Equal Treatment Directive” (see above) and the Disability Discrimination Act. These provisions are required to preserve the combat-effectiveness of the Armed Forces.

The Armed Forces are called on to perform a wide range of different tasks and great damage would be done if the base requirement for physical fitness was abandoned. Personnel have to meet fitness standards to ensure that they have the fitness attributes to cope with the physical demands of service in the Armed Forces such as prolonged working, stressful situations and arduous environments and that they do not become a liability or danger to others in an operational environment.

PART 6—EDUCATION

THE SCOPE OF PROTECTION

40. Why is it justifiable to exclude discrimination on grounds of (1) pregnancy and maternity (2) age and (3) marriage and civil partnership from the scope of the Bill’s protections in the field of education?

It would be inappropriate to extend the marriage and civil partnership discrimination provisions to education. The Government can see no need for such protection. Pregnancy and maternity discrimination provisions are applicable in education generally, but not in schools where the Government considers that the current system—where schools are encouraged to work with any pupils who become pregnant, and those pupils are encouraged to seek help and support inside and outside school, including to help them get back into education—is the best way of ensuring that very young mothers and their children receive the best support.

SCHOOL ADMISSIONS

41. On what evidence does the Government rely in support of its view that the desired plurality of provision is, on balance, a public good? What evidence has the Government considered which suggests that permitting religious discrimination in school admissions has public policy detriments, such as religious, racial and social segregation, and what is its view of such evidence?

Faith schools make an invaluable contribution to the way in which this country discharges its duty under Article 2 of Protocol 1 of the European Convention on Human Rights (ECHR)—to respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions. The Government remains committed to supporting existing faith schools and the establishment of new faith schools, where local public consultation has shown that this is what parents and the community want.

There is a long-standing tradition of church schools in this country. The English education system developed in partnership with the mainstream Christian churches whose involvement in education predates the involvement of the state, catering for all children, but especially the most disadvantaged. Between 1811 and 1860, the Church of England founded 17,000 schools through its National Society to offer education to the poor. This was at a time when the Government was not prepared to take on this role.

The 1944 Education Act introduced the current dual system and since then faith communities have been able to apply to set up schools in the maintained sector in response to demand from parents. Roman Catholic, Church of England and Jewish schools have existed in the maintained sector since the late 19th century, along with Methodist and Quaker schools. Only recently, since May 1997 under this Government, have the first Muslim and Sikh state schools been opened, as well as the first Greek Orthodox, Seventh Day Adventist schools and United Reform Church school. The first maintained Hindu school opened in September 2008.

In September 2007 the Government and maintained faith school providers launched a joint vision statement—Faith in the System—to set out their shared understanding of the significant contribution faith schools make to school-based education, the wider school system and society in England. This publication demonstrates with case studies how faith schools are actively reaching out to their communities, building strong links which encourage good relations between pupils of different races and socio-economic backgrounds.

The Government is confident that the working relationships and trust that have contributed to this document, along with the new, statutory School Admissions Code and the new duty on all maintained schools to promote community cohesion, will provide the impetus for all schools, including faith schools, to improve on the good work already taking place around community cohesion.
Many parents, including those who are not of a particular faith, seek places in these schools because they value their distinctive ethos, character and standards. Faith schools make a welcome contribution to the school system, both as a result of their long standing role as providers of education, and now as key stakeholders in contributing to a more diverse school system with greater opportunities for parental choice.

Maintained faith schools enable parents to obtain a non fee-paying education in accordance with their religious, philosophical and ethical beliefs. By their existence, maintained faith schools empower and integrate minority faith communities by increasing the availability of places within the maintained sector where there is a demand for such places.

42. **On what evidence does the Government rely to demonstrate that religious discrimination in admissions is necessary in order to preserve a schools’ distinctive religious ethos and therefore to preserve the plurality of provision?**

The Government is clear that parents must have, wherever possible, a choice amongst local schools. It believes that this diversity of provision strengthens local delivery towards agreed outcomes, including raising standards. The Government encourages all schools to develop a distinct ethos, and some schools can lawfully base this on a commonly-held faith.

The UK has a duty under Article 2 of Protocol 1 of the ECHR to respect the right of parents to education and teaching in accordance with their own religious and philosophical convictions. The Government believes that to fulfil this duty, faith schools need to be allowed some freedom in relation to the pupils they admit. Otherwise, they would not be able to deliver education in the way that parents wish.

However, whilst allowing these exceptions, it is not always necessary for faith schools to use them for their entire intake. In practice, many faith schools take pupils of other faiths or none.

43. **Does the Government’s “plurality of provision” justification for the faith school exemption carry more weight in relation to minority faith schools such as Jewish, Muslim or Catholic schools than in relation to Church of England faith schools?**

Justification for the faith school exemption does not carry more weight in relation to minority faith schools. All maintained faith schools are in an equitable position in relation to admissions and may only apply faith-based admission criteria when the school is oversubscribed.

44. **Why does the Government consider it to be unnecessary to make provision for the explicit prohibition of harassment on the grounds of religion or belief or sexual orientation or gender reassignment in education (see Clause 80(10))?**

The Government has given careful consideration to the complex issues which arise in respect of harassment related to sexual orientation, gender reassignment and religion or belief. It does not consider that a real need for such protection has been demonstrated in education.

In relation to religion or belief, problems could arise when dealing with different religious views—people of certain faiths could object on religious grounds to such things as sex education, physical sports for girls, co-educational classes or use of IT. Claims that the mere existence of these functions or facilities in schools constitutes a hostile or offensive environment for a child of such a faith could make it difficult for schools to operate effectively in the interests of all their children. Similarly, issues could arise in schools or in higher education which could undermine the principles of academic freedom of exploration and debate of ideas of all kinds.

In relation to sexual orientation and gender reassignment, bullying and harassment in schools is an issue that the Government takes extremely seriously. However, evidence points to the main problem being bullying between pupils rather than harassment of schoolchildren by adults such as teachers. The relationship between one pupil and another is not covered by discrimination law and the extension of harassment protection would not offer any additional solution.

Behaviour by school staff which amounts to harassment of children because they are gay or transsexual will, in any circumstance that the Government can envisage, be caught by the provisions which prohibit discrimination by schools against pupils, so the addition of a separate prohibition on harassment would not add any extra protection.

45. **In light of the decision in the Jewish Free School case, is it the Government’s intention that schools should have the ability to define their own religion for the purposes of discrimination law?**

This is not the case. Faith schools are designated as such by the Secretary of State. Only those maintained schools so designated may apply faith-based admissions criteria and then only when the school is oversubscribed. [see question above]

Paragraph 2.48 of the School Admissions Code states that “admission authorities for faith schools should only use the methods and definitions agreed by their faith provider group or religious authority”. Paragraphs 2.50 to 2.52 then set out the legal duty for such schools to follow guidance issued by their religious authority.
It would not be appropriate to comment on the detail of the case involving the Jewish Free School*, as this is subject to a Court of Appeal judgment that is not expected until July 2009.

*The Jewish Free School is voluntary-aided school in the London Borough of Brent. From 6–8 March 2008, a judicial review was heard by the High Court on the grounds that the school’s admission arrangements were (allegedly) racially discriminating, naming two families as the primary complainants.

The case centred on the acceptance or rejection of religious conversions in the context of the school’s admissions policy, as to whether or not the children concerned were considered by the school to be Jewish. The case had to be brought for racial discrimination because it is unlawful for schools to discriminate on racial grounds—it could not be brought on the basis of religion or belief, since faith schools can obviously discriminate on those grounds.

The Secretary of State was named an interested party in the case, and submitted a witness statement setting out the purpose of maintained faith schools.

The High Court judge ruled that there was no direct or indirect racial discrimination. He dismissed the judicial review on all but one ground: that the school had not fully complied with section 71 of the Race Relations Act 1976 because in drawing up its Race Equality Policy it had failed to give sufficient consideration to the need to eliminate unlawful racial discrimination and the need to promote equality of opportunity and good race relations. However, the father who had sought a place and initiated the complaint was not entitled to damages—only a declaration to the effect above.

From 12–14 May 2009, the case was heard by the Court of Appeal. The arguments were essentially repeated to the three sitting judges, and centred around whether being Jewish was derived from a person’s ethnic origins, the manner of any religious conversion, their religious adherence, or a combination of these. At no stage was it argued or suggested that the JFS school’s religious orthodoxy—certainly in respect of its pupil admissions policies—differed from its religious authority. The Court of Appeal judgment is expected around July 2009.

CURRICULUM

46. Is it possible to make a meaningful distinction in practice between the content of the curriculum, the content of course materials and the way in which the curriculum is taught?

It is possible to define the content of the curriculum as this is contained in statutory programmes of study which set out the content of each subject to be taught. There is also a statutory inclusion statement which sets out the principles teachers must follow to ensure that every child, irrespective of ability, sex, social and cultural background, ethnicity or disability, has the opportunity to achieve to the best of their ability.

However, it is not sensible to define the content of course materials or the way the curriculum should be taught as this is for schools to decide as part of their responsibility for the management of the curriculum. Such matters are left to schools because it is only at this level that the needs of all pupils can be identified and met, through whole curriculum planning.

It is the role of schools and teachers to decide how best to organise learning, taking account of local circumstances, resources, interests, aptitudes and backgrounds of their pupils. It is also up to schools, head teachers and teachers, who are the professionals, to decide how the curriculum is organised and delivered and which aspects of the curriculum to cover in depth, and how long to spend on the different aspects.

47. Why does the Government consider that such a wide exemption for the content of the curriculum, covering all schools and all strands, is necessary in order for religious schools to maintain their distinctive ethos?

The purpose of the exemption is not to enable religious schools to maintain their ethos. Through the exemption, the Government is adopting a consistent approach for all maintained schools to allow them to provide a full curriculum with ideas that challenge pupils and lead to open and honest discussion and contemplation. The Government wants to ensure that every child, irrespective of ability, sex, social and cultural background, religion or belief, ethnicity, disability, or sexual orientation? has the opportunity to achieve to the best of their ability and to come into contact with a diverse range of views. The exemption for the curriculum is therefore necessary to ensure that all schools cannot be challenged over curriculum matters. In relation to religion or belief, this could take the form of complaints that certain texts or books are being used which are not in accord with a particular religion—or complaints about mixed lessons or P.E because this is contrary to the beliefs of a certain religion. In relation to faith schools, for example, a non-Catholic pupil in a Catholic school could complain about the Catholic theme and approach to lessons. It is therefore necessary that schools, faith or otherwise, are able to deliver a balanced curriculum, in accordance with education guidance and which cannot be challenged because someone disagrees with it on religious or other grounds.
48. Please explain why the Committee’s preferred approach in our Report on the Sexual Orientation Regulations should not be followed.

There has been no concrete evidence that the broader exemption from the content of the curriculum contained within the Equality Bill will lead to unjustifiable discrimination.

Personal, Social and Health Education (PSHE) enables children and young people to reflect on and clarify their own values and attitudes, and explore the complex and sometimes conflicting range of values and attitudes they encounter now and in the future.

The programmes of study are designed to be flexible so that schools can develop a curriculum relevant to their pupils and appropriate to pupils’ abilities and backgrounds. Through PSHE, pupils learn about different types of relationships, including gay and lesbian relationships. Faith schools will be able to teach, as now, the tenets of their faith including the views of that faith on sexual orientation and same sex relationships. What they cannot do is present these views in a hectoring or harassing or bullying way which may be offensive to individual pupils or single out individual pupils for criticism.

When PSHE becomes statutory in 2011, subject to the outcome of public consultation, all maintained secondary schools will be required to teach pupils about different types of relationships, including those within families, marriage and between older and young people, boys and girls and people of the same sex, including civil partnerships. Pupils will also need to be taught that all forms of prejudice and discrimination, including on grounds of sexual orientation, must be challenged at every level. In the new primary curriculum, to be introduced in 2011, it is proposed that all children are taught how to form and maintain relationships with a range of different people, and how to manage changing emotions and new relationships. It is suggested in the accompanying explanatory curriculum text that this should include learning about civil partnerships.

What is taught in Sex and Relationships Education explicitly allows faith schools to teach in a way consistent with their religious ethos and values, whilst recognising that pupils must form their own views and beliefs, and respect themselves and others. Faith schools should be able to retain that freedom, which is central to their role.

Imposing a duty not to discriminate on grounds of sexual orientation in relation to the content of the curriculum could be taken to expose faith schools to the possibility of legal challenge (even if ultimately found to be misconceived) on the grounds that the duty not to discriminate required them to give equal prominence to values and conduct which were incompatible with the school’s ethos. This is not the case and it for this reason that the Bill makes explicit that the content of the curriculum is not, of itself, discrimination.

COLLECTIVE WORSHIP

49. How is maintaining the legal requirement that collective worship in schools must be of a broadly Christian character consistent with the Government’s commitment to “a plurality of provision” and is this justifiable in view of the religious diversity of the UK today?

The law on collective worship reflects that the religious traditions in GB are, in the main, Christian. The latest evidence from the 2003 Census on religious affiliation confirms this position, with 73 per cent of the population identifying themselves as “Christian”. However, the law also allows schools to provide an experience of collective worship that is relevant to all pupils, no matter what their background or beliefs, ensuring that collective worship is presented in an inclusive and positive way that benefits the spiritual, moral and cultural development of children and young people.

Because collective worship must be appropriate to the pupils’ age and family background, if the head teacher of a school feels it is inappropriate to have Christian collective worship, the school can apply for a determination from the local authority to have this requirement lifted.

Parents can withdraw their child from collective worship and pupils in the sixth form can withdraw themselves, if they choose.

The Government does not believe that such a position is incompatible with the provision of faith schools as part of a plurality of provision.

50. Please provide a more detailed explanation of why collective worship should continue to be exempt from the duty not to discriminate on grounds of religion or belief?

Without the exemption, some parents might claim that the failure to provide equivalent collective worship for other faiths is discrimination or that being subjected to the teachings of another religion is discrimination and schools may be forced to answer such claims in the courts. It is therefore necessary to have the exemption to ensure that schools can continue to provide collective worship in the way legislation requires them to do. There is no intention for schools to be required to provide equivalent worship for children of other faiths, although they are free to do so as resources permit.
51. Are local Standing Advisory Councils for Religious Education permitted to discriminate on religious grounds in their appointments?

Local education authorities are required to constitute a standing advisory council on religious education by section 390 of the Education Act 1996. Section 390 requires SACREs to consist of representatives of Christian denominations and other religions which reflect the main religious traditions in the area covered by the LEA; representatives of the Church of England; representatives of recognised Teacher Associations and representatives of the LEA.

Membership of a SACRE does not, of itself, make the member an employee or officer of a local authority and there are no rules about members being paid for their position. As a result, appointments to the panels would not be covered by Part 5 of the Bill. Since the role of the SACRE is to advise on religious education, the Government considers that the provisions in the Education Act 1996 strike a fair balance in directing how they should be constituted.

52. Why are children who are not in the sixth form, but are of sufficient age and maturity, not permitted to withdraw themselves from (1) collective worship and (2) religious education classes, in light of the Government’s acceptance that administrative difficulties cannot justify differences of treatment in the enjoyment of Convention rights, and the UN Special Rapporteur’s recent recommendation?

In relation to collective worship, the Government believes that collective worship provides the opportunity for pupils to reflect on spiritual and moral issues and to explore the concept of belief. It also offers a unique opportunity to develop and celebrate the school’s ethos and establish shared values within the school community.

In relation to RE, Modern RE should be taught in an objective and pluralistic manner, and not as indoctrination into a particular faith or belief. It is important that pupils learn about the concept of religion and belief and the part it plays in the spiritual, moral and cultural lives of people in a diverse society. The Government does not believe that this constitutes a violation of an individual’s right, regardless of their age, to express their own religion or belief.

The Government believes that there is sufficient provision to allow for the enjoyment of Convention rights by all pupils. It considers it appropriate for parents to exercise these rights on behalf of their children as their legal guardians and the rightful guardians of their wellbeing, below a certain age, in this case 16. 16 is the age when young people are deemed to have the maturity to assume a number of responsibilities, for example, to determine their own career path in the world of work or further education.

SCHOOL TRANSPORT

53. Given the clarity of the legal position, as correctly reflected in the Guidance, does the Government consider the continued exemption for the provision of school transport to be justified, and if so why?

The Government believes that the exemption for school transport is still justified because it ensures local authority policies on providing transport are not challenged on religious grounds simply because they decide that it is necessary, in exercising their duty to ensure suitable school travel arrangements, to provide transport to faith schools.

The Government continues to attach importance to the opportunity that many parents have to choose a school or college in accordance with their religious or philosophical beliefs. It is important that local authorities respect parents’ philosophical, as well as religious convictions, so to the education to be provided for their children in so far as it is compatible with provision of religious education and training and the avoidance of unreasonable public expenditure and that specifically religious beliefs are not given greater status than those which are non-religious, such as atheism.

The guidance to local authorities on the provision of school transport is therefore clear that local authorities should ensure that, where travel arrangements are made for pupils travelling to denominational schools to facilitate parents’ wishes for their child to attend on religious grounds, “travel arrangements should also be made for pupils travelling to non-denominational schools, where attendance at those schools enables the children to be educated in accordance with their parents’ philosophical convictions, and vice versa.” Such philosophical convictions may be “non religious”.

The Government does not consider that the continued existence of the exemption encourages authorities to treat those religious and non religious differently.

If the exemption was removed, local authorities could be challenged on discrimination grounds if they provided transport to a particular faith school but they failed to provide transport for pupils at a non-denominational school, in cases where parents wanted their child to attend a particular non-denominational school even in cases where this was for reasons unconnected to their philosophical convictions/beliefs. So, an adverse consequence of removing the exemption could be that local authorities may decide, when exercising their discretion, that it is not necessary to put on buses to faith schools either—so as to avoid potential discrimination claims.
54. Why is a specific exemption for employment in faith schools necessary in light of the Bill’s provision for genuine and proportionate occupational requirements relating to religion or belief?

The provisions in schedule 22 for faith schools in relation to appointments are necessary to reflect the very real cultural influence that faith schools have had, and continue to have, in this country. Faith schools were fundamental in the establishment of education in Britain and today they continue to enjoy the respect of many parents—many of whom, religious or not, value the ethos and moral guidance which they offer. This ethos would simply not be the same if faith schools were not allowed flexibility in their arrangements for appointing staff who are of the relevant faith.

The Government believes the exceptions are fully compatible with both the European Convention on Human Rights and Directive 2000/78/EC. Article 4.2 of the Directive sets out a limited derogation for organisations with an ethos based on religion or belief, where being of a particular religion or belief is a genuine occupational requirement. Faith schools are organisations with an ethos based on religion, and that religion can be considered a genuine occupational requirement for much of the work done in them—including some teaching posts and the position of head teacher.

55. Why does the Government consider the exemption to comply with Articles 9 and 14 ECHR?

The Government considers that preserving the religious character and ethos of faith schools meets a legitimate aim and supports its commitments under Article 9 and Article 2 of Protocol 1. The system in the UK is based on choice—no parent is ever obliged to choose a faith school and no child will miss out on an education if they do not qualify for a local faith school. In order to maintain that choice, it is the Government’s policy that schools should exist which are able to provide education within a particular religious framework.

As noted above, plurality and diversity in a State’s education system support the right of parents to have their children educated in accordance with their philosophical convictions. They also support the rights of those who wish to teach and learn in schools with a particular religious character. The Government considers that the provisions of the School Standards and Framework Act, which will not be affected by this Bill, fulfil these aims without contravening Article 9 read with Article 14.

PART 8—PROHIBITED CONDUCT: ANCILLARY

56. Does the Government consider that the provisions of the Bill will ensure that British discrimination law fully complies with the ECJ decision in C-54/07, Firma Feryn?

The Government considers that the provisions of the Bill are fully compliant with the European Court of Justice decision in relation to Firma Feryn.

The Bill prohibits direct discrimination, where someone is treated less favourably than another because of a protected characteristic. This covers the situation where someone is deterred from applying for a job, as in essence happened in the Firma Feryn case, or from taking up a service because of a discriminatory advertisement. The Bill also prohibits indirect discrimination, with the wording of clause 18 covering the situation where someone is deterred from applying for a job or from taking up a service because of a discriminatory practice. This is made clear in the Explanatory Notes and will also be set out in guidance. The Government does not therefore see the need to have separate provision in the Bill on these issues purely for clarificatory purposes, particularly given the drafting principle that nothing superfluous should be included in legislation. Although the Bill does not include separate provisions for the prohibition of discriminatory practices and advertisements, as provided in current legislation, the amendment to the Equality Act 2006 (in Schedule 26, paragraph 13) will extend coverage of the Equality and Human Rights Commission’s enforcement powers to include direct and indirect discrimination across all the protected characteristics.

PART 9—ENFORCEMENT

57. What safeguards will be in place to ensure that those who are excluded from proceedings or not provided with reasons have access to a court and to a fair hearing (Article 6 ECHR)?

Whilst people are entitled not to be discriminated against, their rights need to be balanced against national security interests. The Government recognises that excluding a claimant, representative or assessor from any part of the proceedings and maintaining secrecy about the reasons for a decision is a special procedure. This is why clause 111 also makes provision for a claimant or representative who has been excluded to make a statement prior to the proceedings; and for a special advocate to be appointed to represent his or her interests where necessary.

The clause also expressly limits the ability of the court to exercise these powers to exclude a claimant and to keep part of the reasons secret, to situations where the court thinks it is expedient to do so in the interests of national security. There is no blanket power to take these steps.

The Government believes the measures provided for in this clause maintain access to justice whilst preventing the disclosure of sensitive information which could be damaging to national security.
58. Please explain the justification for excluding certain bodies from this enhanced power of Tribunals to make recommendations.

The Security and Intelligence Agencies are exempt in relation to the Bill’s extension of the power of employment tribunals to make recommendations to benefit the wider workforce. The nature of the Security and Intelligence Agencies’ work means that they are under operational and statutory restrictions about the information they may disclose. It is unlikely therefore that the tribunal would have heard sufficient evidence about wider employment practices to reasonably conclude that there were broader problems of discrimination and therefore make an appropriate recommendation. The Government has therefore decided in this instance to restrict the power of the tribunals to make recommendations that benefit the individual claimant only.

59. Why will the extended powers to make recommendations not be applied to equal pay cases?

This would be a significant change to equal pay law and it is necessary to be clear what the possible effect would be, before deciding whether or not to legislate. Evidence exists on how recommendations are currently used in discrimination cases, but there is no such evidence of how they could be used in equal pay cases. The Government considers that further work is required in this area.

Employment tribunals already provide lengthy and detailed comments when responding to equal pay cases. In addition, if an employer is found in breach of equal pay law it is assumed that it will, as a matter of common sense, want to assess what changes may be required in order to avoid further claims. The Government therefore needs to assess in more detail the additional value that allowing tribunals to make recommendations in this area would add.

60. Does the Government consider that the “group” nature of many discrimination claims make it appropriate for the Bill to provide for the possibility of representative actions to be brought on behalf of claimants who allege that they have been subject to discrimination? If not, why not?

The Government recognises that there are situations in which a number of individuals may wish to bring broadly similar discrimination claims against a single party.

However, because representative actions would be a new departure for Great Britain, the Government considers it important that the possible impact be fully explored, before deciding whether or not to legislate.

Work is being undertaken by the Ministry of Justice to analyse the findings of the review undertaken by the Civil Justice Council on the case for introducing representative actions, which was published at the end of 2008. The Government Equalities Office has also commissioned independent research, which will look at whether the recommendations made by the Civil Justice Council are applicable to discrimination and equal pay cases in the employment tribunals. Any proposals for reforming this area of the law would be subject to a consultation.

PART 11—ADVANCEMENT OF EQUALITY

PUBLIC SECTOR EQUALITY DUTY

61. Please explain why each exception to the public sector equality duty is necessary and proportionate.

Marriage and civil partnership exception

The Equality Duty will require public authorities to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation on the grounds of marriage/civil partnership, because the first limb of the duty extends to all prohibited conduct.

However, the Bill does not require public authorities to have due regard to the need to advance equality of opportunity on the grounds of marriage/civil partnership, nor to foster good relations between married people/people in civil partnerships and others. That is because a) the Government has not seen any evidence of disadvantage suffered by married people/people in civil partnerships; b) any such disadvantage that may exist could be better dealt with through the other strands (for instance, homophobic abuse or belittlement of civil partnerships would be dealt with through fostering good relations on the sexual orientation strand); and c) it could unhelpfully distract public authorities from tackling other, long-standing, inequalities.

Children

Schedule 18 has an exception from the Equality Duty for the provision of education and services to pupils in schools and the provision of certain services in children’s homes and in relation to other accommodation provided to children on the grounds of age.

Public authorities will need to consider how to eliminate discrimination and advance equality of opportunity for people of all ages, including children. This might mean, for instance, local authorities making sure swimming pools and leisure centres are accessible for children as well as adults, or local councils thinking about whether their bus services adequately cater for children.
But the Duty will not require public authorities to have due regard to the need to advance equality of opportunity for children of different ages in the provision of education and services to pupils in schools or in relation to children’s homes. The Government does not consider that such a duty would make sense in an environment which is based on treating children of different ages differently; and it could distract schools from the serious issues of advancing race, gender, disability or sexual orientation equality for instance.

Immigration

The Bill has an exception for immigration functions in respect of race, religion or belief and age. As far as race is concerned, this simply replicates what was included in the Race Relations Act because the application of the immigration and nationality legislation necessarily involves denying opportunities to some people on the basis of their nationality which are offered to others. The Government considers it necessary to extend the exception to age since many immigration functions rely on distinctions between individuals according to age; and to religion or belief since advancing equality of opportunity on these grounds could be incompatible with essential operational decisions in particular circumstances.

Authorities excepted from the Equality Duty

The House of Commons, the House of Lords, the Scottish Parliament, the National Assembly for Wales, the General Synod of the Church of England, the Security Service, the Secret Intelligence Service, the Government Communications Headquarters, and any part of the armed forces which is, in accordance with a requirement of the Secretary of State, assisting the Government Communications Headquarters are excepted from the scope of the Duty.

Although it is not intended to list these bodies in Schedule 19 as subject to the Equality Duty, there needs to be an exception to prevent them from being pulled into the scope of the Equality Duty as a consequence of their exercise of a public function.

These exceptions replicate the current exceptions in the disability and gender equality duties.

The first five bodies are excepted because the Government has no wish to fetter the legislative independence of Parliament, or the Scottish Parliament or Welsh Assembly, or the Synod. The Government is conscious of the need to respect Parliament’s historic right to regulate its own affairs. There is an exception for the security services on the grounds of national security.

There are also exceptions from the Equality Duty for functions in connection with proceedings in the House of Commons, the House of Lords, the Scottish Parliament and the National Assembly for Wales. This is to exclude areas directly connected with the preparation of legislation. There are also exceptions for judicial functions and functions exercised on behalf of, or on the instructions of, a person exercising a judicial function. These exceptions are necessary to ensure the impartiality of the judicial process. We are currently reviewing whether, for similar reasons, we need an exception for decisions to institute or continue criminal proceedings.

Whether Academies are considered by the courts to be public authorities for the purposes of the Human Rights Act 1998 has still not been definitively decided by judicial decision and remains a live issue in litigation and it is therefore not clear whether they would be caught by the public sector equality duty.

62. Will academies be considered to be public authorities for the purposes of the Equality Bill?

A public authority for the purposes of the Equality Duty is an organisation listed in schedule 19. Academies are not, at present, listed—but the Government intends to consider including academies as subject to the Duty when the schedule is updated following Royal Assent.

63. Has the Government given consideration as to how the ability of religious organisations to discriminate on the basis of religion or belief in the provision of public services (as provided for in Paragraph 2 of Schedule 23) is compatible with the obligations to promote equality of opportunity imposed on public authorities by virtue of Clause 143?

Yes. The Government believes, and the law already states, that public services which are being delivered to the whole of the community should be delivered in a fair and non-discriminatory manner—as indeed, the majority of religious organisations are already doing. Some public authorities may choose to use multiple suppliers to meet the different requirements of different sectors of the community. In those situations, religious organisations may make use of certain limited religious exceptions. The point remains, however, that the public authority (on whom the Duty falls) will need to ensure that it does not discriminate in carrying out its functions and will need to have due regard to the need to advance equality of opportunity for all the protected groups; so if it uses a religious organisation to provide services as a means of performing its functions, that organisation must either do so even-handedly or, if the organisation chooses to make use of exceptions, the public authority must ensure that it provides equivalent services to people of other religions and none.
64. Has the Government given consideration as to how the provisions of Clause 143(1)(b) taken together with Clause 143(3)(b) will affect the relationship between public authorities and religious groups? Was consideration also given to the possibility of not applying either Clause 143(1)(b) and/or Clause 143(3)(b) to the protected characteristics of religion or belief?

The duty is aimed at helping individuals, not groups or organisations—so there will be no requirement for public authorities to advance equality for religious organisations. Public authorities should consider whether adherents of particular religions have different needs when it comes to accessing public services that could be contributing to adverse outcomes, for instance in health or education. They should think about whether individuals are experiencing disadvantage linked to their religious beliefs; and they should think about whether adherents of particular religions are underrepresented in particular spheres, including in public life. If there is evidence of need, then it is right that public authorities should think about whether there is any action they could or should take to tackle that.

It may be that public authorities seek to involve religious groups or other religious and non-religious representatives when they are setting their priorities for action under the Equality Duty. It may also be the case, as now, that public authorities choose to contract out the delivery of some public services to voluntary organisations or religious organisations—either in respect of all the community, or in respect of certain parts of the community. However, the Duty is not designed to encourage the provision of separate services to different groups, unless the evidence points to a particular need in that area. The Government expects it to result in more inclusive services which meet the needs of all.

Following the 2007 consultation paper on proposals for the Bill, the Government discussed further, and with religion or belief groups in particular, but also women’s groups, other stakeholders, and public authorities, whether to apply the “advancing equality of opportunity” limb to religion or belief. The Government believes it is right to extend the Duty in this way, to help address the adverse outcomes some people experience as a result of their religious beliefs; and because a failure to extend the Duty would have resulted in a hierarchy of inequality in the Duty. Most of the public sector organisations consulted did not foresee any practical difficulties in including religion or belief, and the majority of stakeholders supported its inclusion.

65. How does the Government propose to ensure that public authorities incorporate equal opportunities considerations into their procurement criteria? Does the existing legislative framework which regulates public procurement allow public authorities to give due weight to equality opportunities considerations in awarding procurement contracts?

There is evidence to show that many public authorities are already incorporating equality considerations into their procurement criteria. The Government wants this good practice to become part and parcel of how public bodies carry out procurement.

Under the public sector Equality Duty contained in the Equality Bill, Government is proposing there should be specific duties on furthering equality through procurement for those public authorities classed as contracting authorities under the Public Contracts Regulations 2006. Government is currently consulting on proposals for specific duties. One specific duty being considered is whether, as part of a contracting authority’s process of setting its equality objectives and plans for achieving them, the authority will be required to set out in detail how it will ensure that equality factors are considered in its procurement activities. The Government is also considering two further specific duties that will require contracting authorities to consider the use of equality-related criteria at award stage, where it is relevant to the subject matter of the contract; and to consider incorporating equality-related contract conditions where they relate to the performance of a contract and are proportionate. The extent to which equality considerations can be included in the process will depend upon the nature of the contract, but the duty will ensure it is considered in the first place.

On the second part of the question, the answer is yes. The existing legislative framework which regulates public procurement permits public authorities to give weight to equality considerations when awarding contracts in that:

(a) The procurement process prescribed by Directive 2004/18/EC, as implemented by the Public Contracts Regulations 2006, is designed to ensure fair and open competition and, therefore, the equality of tenderers. They specifically provide that:

— suppliers that have breached relevant laws and practices may be rejected, as well as those who lack the requisite technical and/or professional ability to perform a contract—for example, this could permit the exclusion of candidates who have seriously breached discrimination laws and suppliers who are unable to meet an authority’s requirement to answer questions from service users with little or no English when providing the service;

— when awarding a contract based on the most economically advantageous tender a contracting authority must use criteria linked to the subject matter of the contract and this can include assessing the quality of the tender—if a contract includes the provision of services for people with disabilities a contracting authority can take into account the extent to which a candidate’s tender meets the needs of such users; and
contract conditions may, in particular, include social and environmental considerations—for example, a contract to manage a contracting authority’s recruitment function may include a condition that all jobs must be advertised on either a part-time basis and/or with flexible working provisions unless there is a justified business case why a particular job cannot be offered with these terms.

(b) Public authorities must comply with all equality legislation in awarding contracts, so must not discriminate on grounds of sex, race, religion or any other prohibited grounds;

(c) Where the subject matter of the contract involves equality considerations eg a contract to provide services in a diverse community where numerous languages are spoken, a contracting authority may include language skills and cultural awareness as one of the award criteria. The amount of weight to be given to equality will differ depending on the circumstances, specifically the relevance of equality to the services to be performed. For example, in a contract for paper and pencils, equality is unlikely to be relevant and therefore should not be used as an award criterion.

Further information and guidance on the possibilities for taking equality into account at the award stage of a procurement can be found on Page 16 of the OGC guide: Make Equality Count (http://www.ogc.gov.uk/documents/Equality_Brochure.pdf)

POSITIVE ACTION MEASURES

66. Does the wording of Clause 153(4) fully reflect the scope for positive action permitted by EU law? If not, why not?

Clause 153(4) is drafted to ensure employers have the flexibility to address disadvantage or under-representation in the workplace, but at the same time ensuring that employers do not adopt blanket measures which may be discriminatory to people without those protected characteristics. These provisions are in line with EU law which allows member states to maintain or adopt specific measures to prevent or compensate for disadvantages linked to protected characteristics.

Clause 153(4) strikes a balance between providing the opportunity to address under-representation against ensuring candidates without any protected characteristics to have the merits of their application considered. The effect of this clause is that it does not permit employers to have a policy of routinely treating people who are from under-represented groups more favourably than those who are not. The Government considers that clause 153(4) reflects the scope for positive action as permitted by EU law.

67. Has the Government considered whether the provisions of Clause 153(4)(b) as currently worded may prevent any employer from adopting a general positive action strategy prior to making any recruitment decisions? Might the wording of Clause 153(4)(b) have a “chilling effect” and discourage employers from making use of the positive action measures permitted by Clause 152?

The provisions in Clause 152 establish a framework in which employers could use any form of positive action to address disadvantage or under-representation in their workforce. The use of these measures is entirely voluntary and many domestic businesses recognise the benefits of using these measures to attract new business, fill skills gaps, create a more diverse workforce and better understand and meet customers’ needs.

The provisions in Clause 153 relate solely to matters of recruitment and promotion. The provisions in clauses 152 and 153 complement each other, rather than being mutually exclusive—the provisions in clause 153 could be used to support or supplement any positive action initiatives taken under clause 152.

Therefore, the Government does not see that the provisions in Clause 153(4) may discourage employers from making use of the more general positive action provisions contained in Clause 153. It is planned that comprehensive guidance will be issued by the Equality and Human Rights Commission covering use of the positive action provisions.

PART 14—GENERAL EXCEPTIONS

RESTRICTIONS ON FOREIGN NATIONALS

68. Was consideration given to minimising the restrictions imposed on the employment of foreign nationals lawfully present in the UK and how does the Government justify the remaining restrictions?

The great majority of posts in the Civil Service (some 95 per cent) are open to nationals of the following countries or associations of countries—United Kingdom (UK); Republic of Ireland; the Commonwealth; the European Economic Area (EEA); Switzerland and Turkey. Certain family members of EEA, Swiss and Turkish nationals can also be deemed eligible irrespective of their own nationality. The Government took a positive step through the European Communities (Employment in the Civil Service) Order 2007, which set out the criteria by which posts can be reserved for UK nationals, to open as many posts to all eligible nationals as was operationally possible rather than maintaining quite as many for UK nationals only.
However, there still remains a need which is recognised in existing legislation and which the Equality Bill replicates, to reserve certain particularly sensitive posts in the civil, diplomatic, armed or security and intelligence services and by certain public bodies, to persons of particular birth, nationality, descent or residence. This is because the posts are assumed to be of a nature—for example; security and intelligence services—that requires a loyalty or allegiance to the Crown that is presumed to be greater in the case of a person who is a UK national.

**National Security**

69. *Why does the Government consider it to be necessary to maintain such wide-ranging exceptions in the field of national security?*

Clause 185 of the Equality Bill replaces and harmonises the exceptions for national security in current discrimination legislation, narrowing those in section 52(1) of the Sex Discrimination Act 1975 and section 59(3) of the Disability Discrimination Act 1995.

The Government believes that this exception is necessary to ensure that national security is not compromised. However, the Government accepts that national security cannot provide a blanket excuse for discrimination or other prohibited conduct. Consequently, the exception in clause 185 is worded so that an act done to protect national security is not automatically exempt. The action taken must be proportionate to that purpose.

In addition, if an individual believes that any of the intelligence and security agencies has discriminated against him/her in the exercise of its functions, he/she may make a complaint to the Investigatory Powers Tribunal (established under the Regulation of Investigatory Powers Act).

**Charities**

70. *Has the Government given consideration to restricting the circumstances in which charities will be able to discriminate on the basis of protected characteristics?*

See question 71.

71. *Will charities be able to discriminate on the basis of protected characteristics when delivering public services when this is in accordance with their charitable instrument? Would such discrimination be objectively justified under clause 186(2)(a) solely on the basis that a charity was established to benefit a particular group or to further a particular religion or belief?*

Since questions 70 and 71 are similar, it appears convenient to answer them together.

The Government has given consideration to restricting the circumstances in which charities will be able to discriminate on the basis of protected characteristics. These circumstances are being restricted further through the Equality Bill. At the moment, most of the exceptions for charities mean that they can discriminate simply if their charitable instrument allows this. The Bill’s proposals mean that a charity would also need to show that it was justified in discriminating. This is currently the case only for single-sex charities.

Under clause 186, any charities benefiting only people who share a protected characteristic, such as people of the same religion or belief, will not be able to discriminate on the basis of that protected characteristic when delivering public or any other services just because their charitable instrument provides for this. They will also need to show that such discrimination is objectively justified or intended to prevent or compensate for disadvantage linked to the protected characteristic in question. It will ultimately be for the courts to decide whether one of those additional tests is met.

The Bill also narrows the existing exceptions for single-sex charities and charities benefiting only people of a racial group so that these no longer apply to discrimination on the basis of sex or nationality, respectively, in relation to employment or vocational training. It retains the bar on charities defining beneficiaries by reference to the colour of their skin.

**Religious Organisations**

72. *Why is a distinction made between religion or belief and sexual orientation in this context, especially in respect of the delivery of public services?*

Religious organisations providing public services are subject to the requirements of discrimination law in the same way as other organisations, save for the limited exceptions designed to ensure that a person’s right to hold and manifest a religious belief is not interfered with. These exceptions in the Equality Bill replicate the effect of provisions in Part 2 of the Equality Act 2006 and the Equality Act (Sexual Orientation) Regulations 2007.
The 2007 Regulations contain a “carve-out” from the religious organisations exception for any organisation acting on behalf of a public authority. This is because, while the Government is sensitive to people’s religious beliefs, in circumstances where public money is being used to fund a service the Government takes the view that the service should be provided to people irrespective of their sexual orientation.

On the other hand, it is recognised that there are organisations whose purpose is to provide benefits to people of particular religions. These can provide valuable services to particular sections of the community. Accordingly, the Government does not consider that a similar provision is necessary in relation to religion or belief. This does not affect the general position that public authorities should not discriminate in relation to any of the protected characteristics in the services they provide or the functions they exercise.

MISCELLANEOUS

PURPOSE CLAUSE

73. Has the Government given consideration to including a purpose clause in the Bill and, if so, why has it rejected it?

The Government made very clear, when publishing its response to the consultation on the Bill, why it does not think that a purpose clause is a good idea. It completely shares the presumed objective of those who want purpose clauses—which is to have legislation that is clear. But it does not believe that a purpose clause in this Bill would make it clearer. In fact, it could quite easily have the opposite effect.

As a general rule, purpose clauses tend to be unwise. Statements of fundamental principle or purpose are necessarily imprecise and inflexible, and inevitably risk making the law uncertain and confusing. Users with competing views and aims will ask the courts to construe the principles in different ways, and there is no reliable way of predicting or controlling the construction or ensuring that it matches the original legislative intention. These reservations are supported by the views expressed by former first Parliamentary Counsel, Sir Geoffrey Bowman in the evidence he gave to the House of Lords Select Committee on the Constitution in 2004:

“In the first place, it is sometimes not easy to express a purpose in a few words. They can degenerate into pious incantations. I am quoting now the late Professor Reed Dickinson and he gave an example of an ecology Bill that in substance said, ‘Hurrah for nature.’ They are vacuous. Another great difficulty is that problems arise if the general purpose provisions conflict with the specific provisions of the legislation. The risk arises because you are trying to say the same thing in different words. The third problem is that even if there is no overt conflict the relationship between the specific provisions and the general purpose provisions may not be clear. I can give an example from our tax statutes, a provision that says, ‘This section is enacted to prevent the avoidance of tax.’ Despite judicial expressions of opinion on this, nobody is quite clear what those words do. Some people say they do nothing. Some people say they do something but they are not quite sure what. It seems to me that we should not get into that position”

It is for these reasons that genuine purpose clauses are very rare in domestic legislation. Most of the provisions cited in support of a purpose clause in the Bill are not in fact purpose clauses but have more specific aims (thus clause 3 of the Equality Act 2006 is in reality a statement of the objectives of the Commission for Equality and Human Rights, not the purpose of the Bill; section 1(1) of the Children Act 1989 imposes a duty on the courts to act in the best interests of the child).

The Bill is aimed at simplifying and clarifying the law. Whatever the good intentions of those who advocate a purpose clause, including one in the Bill would therefore run the risk of undercutting many of the Bill’s benefits by introducing uncertainty, and making it far more difficult to apply on the ground. That uncertainty would inevitably lead to litigation, which would be unlikely to be resolved at first instance and could well lead to unexpected or undesired results. This is because there would be an inevitable tension between the general propositions in the purpose clause and the specific provisions of the substantive parts of the Bill.

It should also be noted in this context that the Bill will already need to be interpreted in accordance with Convention rights (including Article 14), as a result of the Human Rights Act. In addition, given that much of the Bill is based on European legislation, the courts will also need to interpret it consistently with European law. It is difficult to see what additional help a further layer of interpretative principles would give to the courts, particularly since it would inevitably have to be subordinate to the need to interpret it consistently with both the Convention and EU legislation.

It is for these reasons that including a purpose clause in this Bill would be particularly problematic, and this is why, after careful consideration, the Government decided not to adopt that approach.

103 Minutes of Evidence, 23 June 2004, response to Q 338.
Volunteers

74. Do volunteers receive adequate protection against discrimination or is additional specific provision to this effect required in the Bill?

The diverse nature of volunteering and the varied relationships between volunteers and the organisations that engage them mean that equality legislation does not apply to volunteers in the same way as employees. However, volunteers are currently protected from discrimination in so far as they qualify as employees and insofar as they are recipients of goods facilities or services provided to the public. These provisions will be retained in the Equality Bill and be extended to cover age.

Letter from the Chairman to Vera Baird QC, MP, dated 30 June 2009

EQUALITY BILL

Thank you very much for coming to give evidence to the Joint Committee on Human Rights last week and for your further memorandum of 22 June in which you responded to a number of our specific questions on the Bill.

The Committee would be grateful if you could address a few supplementary questions on the Bill which we were not able to cover during the evidence session. The Committee may have further questions in due course, once we have considered the implications of the recent Court of Appeal decision in R(E) v the Governing Body of JFS [2009] EWCA Civ 626, or should the Government bring forward any amendments to the Bill.

Equality compatibility

You refer in your evidence to the requirement for Ministers to make a statement as to a Bill’s compatibility with Convention rights under section 19 of the Human Rights Act 1998 (HRA). As a former member of this Committee, you are of course aware of the importance of that section in facilitating proper parliamentary scrutiny of a Bill’s compatibility.

1. In your view, would a similar provision to section 19 HRA, certifying a Bill’s compatibility with equality, be helpful in ensuring that Government considers the human right to equality with the necessary rigour when drafting new legislation?

No equivalent provisions to those included in the HRA (such as the section 3 duty to interpret compatibly, the possibility of declaring legislation to be incompatible under section 4 and the duty on public authorities to act compatibly under section 6) are contained within the Bill.

2. Has the Government considered including in the Bill an interpretive obligation equivalent to section 3 HRA, so that all other legislation must be interpreted compatibly with the Equality Bill (or the right to equality) so far as it is possible to do so? If so, what are the Government’s reasons for rejecting that approach? Please also explain the Government’s position on whether to include equivalent provisions to sections 4 and 6 HRA within the Equality Bill.

Multiple discrimination

You rely on evidence from Citizen’s Advice that the large majority of cases of discrimination concern one or two protected characteristics and suggest that increasing the number of grounds would make the law more complex and increase the burdens for employers. You also state that there is no evidence of a need to prohibit indirect discrimination or harassment on multiple grounds.

3. If the Government decides, follow its consultation, to legislate to prohibit direct discrimination in relation to only two protected characteristics, and not to allow claims on multiple grounds for indirect discrimination and harassment, will it commit to reviewing the operation of the legislation within two years of it coming into force to see whether further extension is required?

Education: Curriculum

In your response of 22 June, you state that faith schools will be able to teach sex and relationships education in a way consistent with their religious ethos and values, and that they should be able to retain that freedom which is “central to their role” (Q 48).

4. What is the justification for exposing a gay student to being taught that their sexual orientation and relationships with people of the same sex, are sinful?

I would be grateful if you could reply by 14 July 2009 and if an electronic copy of your reply, in Word, could be emailed to jchr@parliament.uk.
Letter from Vera Baird QC, MP, to the Chairman, dated 16 July 2009

EQUALITY BILL

Thank you for your letter of 30 June with various questions about the Equality Bill. I attach further information as requested.

I am sending copies of this letter and attachment to Mark Harper MP and Lynne Featherstone MP, and placing copies in the House Libraries.

Vera Baird, MP

Annex

EQUALITY COMPATIBILITY

1. *In your view, would a similar provision to section 19 HRA, certifying a Bill’s compatibility with equality, be helpful in ensuring that the human right to equality with the necessary rigour when drafting new legislation?*

   I find it difficult to see what value a requirement for a declaration of compatibility with “equality” for new Bills would add to the existing process. Under section 19 of the Human Rights Act 1998 (HRA), a Minister must already certify that any new Bill is compatible with Convention rights including, of course, with Article 14 on the prohibition of discrimination in enjoyment of other rights under the Convention. Compatibility with the “human right to equality”, as this is set out in Article 14, is therefore already a requirement.

   In addition, in line with the current public sector equality duties the Government assesses the impact of primary legislation and major policy decisions on race, gender, and disability equality. The Equality Duty, to be introduced by the Equality Bill, will require public bodies to assess the impact of their activities on the protected characteristics of race, age, disability, gender, gender reassignment, sexual orientation and religion or belief. The proposed new specific duty in this area would require certain of those public bodies to demonstrate how they have taken into account evidence of the impact on equality in the design of key policy and service delivery initiatives. I am not clear what a statement of compatibility with “equality” would add to this.

   The issue of a constitutional equality right or guarantee beyond what is required by Article 14 has been considered by the Government in some detail, and was discussed at length during the Commons Committee stage of the Bill. As I made clear then [Hansard 7 July 2009, columns 706–732] and in my response to your previous letter (see the answer to question 20) there are significant issues that would need to be worked through in relation to both the content and effect of any such a right, should it be decided that one would be desirable.

   These issues are best discussed in the context of the national conversation initiated by the Green Paper “Rights and Responsibilities: Developing our constitutional framework” which was published in March. We made clear in that context that we would like the widest possible public engagement on the range of issues that might be included in a future Bill of Rights. We also made clear that very careful thought would need to be given to whether, and in what circumstances, any rights, such as a right to equality, would be justiciable, and be clear how these would impact on the clear legal obligations imposed and rights given by the Equality Bill.

   With this in mind, the question of what should be done to ensure that sufficient weight is given to any statement of equality, including whether an appropriate mechanism might be Ministerial statements of compatibility or provisions mirroring those provisions of the HRA mentioned in your second question below, is not one that can be meaningfully answered in the abstract at this stage.

2. *Has the Government considered including in the Bill an interpretive obligation equivalent to section 3 HRA, so that all other legislation must be interpreted compatibly with the Equality Bill (or the right to equality) so far as it is possible to do so? If so, what are the Government’s reasons for rejecting that approach? Please also explain the Government’s position on whether to include equivalent provisions to sections 4 and 6 HRA within the Equality Bill.*

   You will no doubt be aware that, like the “section 19” approach discussed above, the question of whether to mirror sections 3, 4, and 6 of the HRA was also considered in some detail in the Committee debate referred to above.

   As far as an obligation to interpret legislation consistently with the Equality Bill is concerned, I am not clear what that would amount to in practice, over and above normal rules of statutory interpretation. While I can see the merits of the section 3 HRA approach in the context of Convention rights, the desirability of applying it to the detailed provisions of the Equality Bill is less obvious. It will already be the case, for instance, that if there is no applicable statutory authority exception to, say, the Bill’s prohibition on direct discrimination, any reliance on a current or indeed future statutory provision in defence of a claim for direct discrimination will almost certainly fail.

   Likewise it is difficult to see what value would be added by mirroring sections 4 and 6 of the HRA in relation to the Equality Bill itself. To the extent that the Equality Bill implements European law, there are already mechanisms whereby courts can deal with other domestic law that might deprive people of their
rights under the relative directives and treaty provisions. In addition, it is worth noting that the Bill will give rise to direct remedies against public authorities that provide services to individuals or perform public functions that affect them.

Further I should note that public authorities will also be obliged to act in accordance with the Equality Duty, which sets out in detail what is required of them in regard to promoting equality and eliminating discrimination. Failure to comply with that duty will potentially lay them open to claims for judicial review, and also possible enforcement action by the Equality and Human Rights Commission. We would not want to change those arrangements, or open them to possible challenge and confusion, without careful consideration of the consequences.

As I noted in my answer to question 1 above, the question of what means should be adopted to ensure that any constitutional statement of equality that might be adopted is taken sufficiently seriously is something that needs to be looked at in the context of the debate on whether such a right is desirable, and if so what its content and effect should be. This point applies as much in relation to whether or not to include something analogous to sections 3, 4 and 6 of the HRA in support of such a statement, as it does to a requirement to make declarations of compatibility.

**Multiple Discrimination**

3. If the Government decides, follow its consultation, to legislate to prohibit direct discrimination in relation to only two protected characteristics, and not to allow claims on multiple grounds for indirect discrimination and harassment, will it commit to reviewing the operation of the legislation within two years of it coming into force to see whether further extension is required?

As you will be aware, provision for dual discrimination has now been introduced into the Equality Bill by way of a Government Amendment, enabling claims of direct discrimination to be made combining two relevant protected characteristics. The provision is based on careful consideration of all the evidence presented during the six-week discussion period we held recently and throughout the process of consulting on the Bill with all interested parties. As I explained during the Committee session on Thursday 2 July, there has been insufficient evidence of the need to extend the provision beyond that which has been proposed.

The Equality and Human Rights Commission is charged with the duty to monitor the effectiveness of equality law and that duty will extend to the Bill once enacted. The Government Equalities Office will continue to ensure that the Commission meets its obligations under the Equality Act 2006, and that due priority is given by the Commission to the implementation and monitoring of the Equality Bill when it is enacted.

In addition to this and other forms of post-legislative review such as internal review or through the Impact Assessment process, the Government established a new system in March 2008 for promoting the post-legislative review of Acts, by which the responsible Department will, within three to five years after an Act has received Royal Assent, submit to the relevant Commons departmental Select Committee a Memorandum reporting on certain key elements of the Act’s implementation and operation.

If any new evidence comes to light which indicates that there is a need for extension of the dual discrimination provision to indirect discrimination or harassment or in respect of combinations of more than two relevant protected characteristics, the Government will of course consider this at the appropriate time.

**Education: Curriculum**

4. What is the justification for exposing a gay student to being taught that their sexual orientation and relationships with people of the same sex, are sinful?

I must point out that the curriculum exception is not in place simply to protect faith schools as your question implies, but is in place to protect all schools from possible claims which may arise from people who feel that they are being discriminated against simply by the inclusion of subjects or ideas with which they disagree and find offensive—and this is certainly not limited to religious views on single-sex relationships—in faith schools or otherwise.

Explaining such views in schools is only one aspect of the curriculum which could have the implication of leaving schools open and vulnerable to unwarranted challenge. Use of certain texts (and non-use of certain texts), scientific theories on evolution, mixed P.E lessons, use of computers could all be challenged under discrimination law under a range of protected characteristics without the exception.

It is essential that schools are able to maintain their academic freedom and deliver a broad-based and diverse curriculum in accordance with DCSF curriculum guidelines and to do that they must be free from the chilling effect of fear of discrimination claims for everything they teach.

With regards to your specific question about the ramifications of faith schools being able to deliver sex and relationship education in a way consistent with their ethos, as I explained in my original response, their ability to do this does not therefore mean that schools are justified in teaching to a gay student that their own sexual orientation or single-sex relationships are a sin, as you imply.
I set out that schools cannot present their views in a hectoring or bullying way which may be harmful or offensive to individual pupils. Singling out of individuals for criticism in such a way would not be an appropriate way for a teacher to behave and is likely to constitute less favourable treatment (and therefore discrimination) in the provision of education. Such actions could not benefit from the curriculum exception. The curriculum exception would allow a teacher to say that a particular religion takes a particular view of sexual orientation, but it would not allow a teacher to pick on or single out an individual pupil because of that pupil’s own sexual orientation.

Issues such as single sex relationships and religious views on that subject should be presented by schools in ways which would not be offensive to individuals or single out any particular pupils for criticism. Such explanations would have to be in an educational context and setting—for example in a religious education lesson.

We certainly would not expect schools to subject gay pupils to such criticism through inappropriate teaching, which I have already said is likely to constitute discrimination, but neither would we wish schools to be the subject of possible claims of discrimination for explaining aspects of their religion, with which some people disagree, in a perfectly appropriate way and in an educational context.

That is one of the reasons why the curriculum exception is in place; however, as I pointed out at the beginning of the answer to this question, the curriculum exception is in place for far more wide-reaching reasons than religious views on sexual orientation.

Memorandum submitted by Age Concern England

EQUALITY BILL

Thank you for inviting us to submit evidence to assist your scrutiny of the government’s draft legislative programme. Of the three Bills that you have identified, we have a particular interest in the Equality Bill and would like to draw your attention to some of the key issues affecting older people.

As you are already aware, Age Concern was very pleased that the JCHR’s report on the human rights of older people in healthcare recommended that age discrimination legislation should be extended to cover goods, facilities and services; and that providers of health and residential care should be placed under a positive duty to promote equality for older people. We have no doubt that your support on this issue lent weight to the case for introducing legislation.

Age Concern warmly welcomed the Government’s announcement that the Equality Bill would include powers to introduce regulations outlawing unjustifiable age discrimination in goods, facilities and services (“age GFS legislation”) and its decision to introduce a streamlined public sector equality duty incorporating age. However, we have a number of concerns about the design of these legislative changes and the timetabling of their implementation. We would like to draw these concerns to your attention in relation to the JCHR’s scrutiny of forthcoming Bills.

DELAYS IN IMPLEMENTING AGE GFS LEGISLATION

1. It is worrying that the Government has not yet made public its approach to framing the age GFS regulations. A further consultation on the draft regulations has been promised at some point in the new year, but no timetable has been indicated. There are now strong indications that implementation of secondary legislation may be delayed. The Written Ministerial Statement issued on 11 November by Phil Hope MP on “Age discrimination in health and social care” sets out the Department’s programme of work in this field. It states that the DH will shortly be setting up an Advisory Group which is not expected to complete its work until the summer of 2010. This statement therefore suggests that the Government would be content to wait until mid-2010 before establishing a clear timeline for the implementation of age GFS legislation.

2. Whilst we recognise concerns about the possible costs of implementing age GFS legislation in health and social care, we do not accept that this should delay the laying of regulations before Parliament. If necessary, there could be phased implementation of the legislation, with providers working towards the new framework within a transitional period. Age Concern is calling for the DH Advisory Group to advise on the shape of the legislation at the earliest possible opportunity, thus allowing draft regulations to be available for discussion before the end of the Parliamentary phase of the Equality Bill. We hope this would ensure that regulations can be laid before the next General Election, even if commencement is phased over some time. As you will know, it is now established Parliamentary practice for draft regulations to be available to Parliament when it is scrutinising bills with considerable delegated powers. This approach would also permit relevant select Committees—including the Joint Committee for Human Rights in this instance—to scrutinise the draft regulations.

3. We also have concerns about the timing for implementation of age GFS legislation. The Government has an ambitious change agenda for health and social care and it is essential that implementation of the regulations is included as part of these programmes. This includes the major programme to put quality of the heart of NHS reform as recommended in the NHS Next Stage Review and the transformation of social care through the Putting People First ministerial concordat. It will be equally important to secure a
commitment to full funding of the costs of eradicating age discrimination from health and social care services in the next Spending Review, sufficient to allow this legislation to come into force during the life of the next spending round (2011/12 to 2013/14).

AGE DISCRIMINATION IN FINANCIAL SERVICES

4. We also fear that the regulations will be less effective and/or less comprehensive than we had hoped. We have particular concerns about the scope of exemptions permitting age-based differences in treatment by the financial services industry. It is clear that legislation will be strongly contested by financial services providers: HM Treasury’s Expert Working Group on age discrimination in financial services, which reported in September 2008, was unable to reach a consensus on several key questions:

(i) whether wide age bands should be permitted to determine pricing;

(ii) whether minimum and maximum age limits should be allowed to continue in relation to certain products—for example, motor and travel insurance; and

(iii) how to cast an exception allowing risk-based pricing according to age, and what evidence should be acceptable to support differences in treatment.

5. It is our view, and that of Help the Aged, that legislation should only permit age-related differences of treatment in the financial services sector where this is justified by relevant and accurate information, based on hard data or a professional opinion from a bona fide source; and the treatment is a proportionate response—that is, the same aim could not be achieved by less discriminatory means, and the justification for the treatment is important enough to over-ride the impact of the discriminatory treatment. We would be strongly opposed to any exemption to the legislation that allowed providers to refuse a quotation to an older person, simply on the grounds of their age.

AGE-BASED CONCESSIONS AND EXCLUSIONS

6. We also recognise that there are likely to be some debates about the extent to which any age-based concessions and exclusions that favour one particular age group would be permitted under the new legislation. Age Concern has maintained that any age-based concessions or exclusions that can be objectively justified by evidence (for example, on social policy grounds) should be permitted to continue. For example, free travel on the buses for older people can be objectively justified, as this concession encourages older people to maintain social contact and pursue an active and healthy lifestyle. This approach broadly corresponds with the criteria for “positive action” permitted under comparable EU legislation—that is, measures that address or prevent disadvantage.

7. We believe that it is possible to avoid many exclusionary rules based on age (for example, holidays targeted at particular age groups) where similar results could be achieved by marketing. We would prefer there to be no exemption within the legislation permitting concessions that are merely designed to draw in customers during periods when business is slack—for example, cheap haircuts or fish and chips for pensioners on Tuesdays. There is some evidence that older people may find such concessions patronising, and there could be a perception of unfairness by other groups on low incomes.

PUBLIC SECTOR DUTY TO PROMOTE AGE EQUALITY

8. With regard to the proposed public sector equality duty integrated across all grounds of protection, we have fewer concerns. We are pleased that GEO has confirmed that the new duty will have a similar structure to the existing public sector equality duty—that is, general duties in the primary legislation with specific duties set out in secondary legislation. However, we would like to emphasise that the shape and scope of legislation to outlaw age discrimination in goods and services will also have an impact on the age element of the public sector duty. This is because part of the duty will be “to eliminate unlawful discrimination”. If age GFS legislation is subjected to various limitations and exemptions, then the age equality duty would be correspondingly weaker. This would lead to differences between the requirements for different strands within a duty that is supposedly integrated.

THE EQUALITY BILL AND HUMAN RIGHTS

9. The Government has decided that the Equality Bill will not have a purpose clause, on the basis that this would not be the right means of achieving legal clarity and that it might lead to an increase in litigation. It is suggested that a preferable approach would be a Ministerial statement to Parliament on the objectives of the Bill, probably at its second reading.

10. We do not agree with this view. Within our jurisdiction, there are precedents for having purpose clauses—including in the field of equalities. Section 9 Equality Act sets out the purpose of the EHRC by way of a statutory mission statement expressed in quite visionary terms, using language that is closely related to the Universal Declaration of Human Rights. In the area of family law, the Children Act 1989 sets out a number of over-arching principles, including (under Section 1(1)) that when the court determines any question the child’s welfare shall be the court’s paramount consideration. These principles have been
profoundly influential in the interpretation of the rest of the statute. Purpose or object clauses have also proved valuable in Canada, South Africa and also in Australia, for example the Age Discrimination Act 2004.

11. The Equality Act presents an important opportunity to acknowledge the role of human rights in protecting equality. In our view, the Act should be prefaced by a purpose clause that recognises the role of human rights in protecting equality and the close relationship between equality duties and public bodies’ positive obligations to promote and protect human rights. This would support the integrated remit of the EHRC as well as the emerging trend within public authorities of integrating human rights into single equality schemes.

We hope this evidence is of some assistance to your work. Please do contact us if you require further information.

Memorandum submitted by Barry Fitzpatrick

INTRODUCTION

I am making this submission in a personal capacity. I was the first Convenor of the Coalition on Sexual Orientation (CoSO) from 1999–2001 and have been a member of the Management Committee of CoSO at various times until April this year.

In those capacities I have been involved in preparing CoSO’s submissions to both the Northern Ireland Human Rights Commission in 2001104 and the Bill of Rights Forum in 2007105 on a Bill of Rights for Northern Ireland.

I would like to bring two matters to your attention. First between these two submissions, the Yogyakarta Principles were published, initially in Geneva in May 2007 and the European Court of Human Rights fully recognised sexual orientation as a ground for discrimination in Article 14 of the Convention. Secondly, the harassment provisions of the Equality Act (Sexual Orientation) Regulations (NI) 2006 were struck down in judicial review proceedings.

2. International Human Rights Standards

2.1 The Yogyakarta Principles

In CoSO 2007 submission, it is stated:

“1.2 Human Rights for LGBT People

We feel empowered by the adoption, in Geneva in March 2007, of the Yogyakarta Principles (www.yogyakartaprinciples.org), the product of a panel of esteemed human rights experts headed by Professor Michael O’Flaherty, Nottingham University. These are principles on the application of international human rights law in relation to sexual orientation and gender identity and form a template for the protection of LGBT rights, on a par with UN Conventions for Elimination of Racial Discrimination, for the Elimination of Discrimination Against Women, on the Rights of the Child and the Rights of Disabled People. The principles also encapsulate the most recent thinking on human rights protection and hence are a valuable template for the development of a Bill of Rights more generally.”

CoSO therefore used the Principles as the basis upon which it updated its original position on the Bill of Rights. It stressed throughout its Position Paper the importance of auditing human rights standards and domestic law on the basis of the principles.

In section 1.2 of the Position Paper goes to quote from the Preamble of the Principles:

“We consider that the bedrock of the Bill of Rights lies in respect for human dignity. In this context, it is worth repeating the two opening recitals of the Preamble to the Yogyakarta Principles:

“RECALLING that all human beings are born free and equal in dignity and rights, and that everyone is entitled to the enjoyment of human rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

“DISTURBED that violence, harassment, discrimination, exclusion, stigmatisation and prejudice are directed against persons in all regions of the world because of their sexual orientation or gender identity, that these experiences are compounded by discrimination on grounds including gender, race, age, religion, disability, health and economic status, and that such violence, harassment, discrimination, exclusion, stigmatisation and prejudice undermine the integrity and dignity of those subjected to these abuses, may weaken their sense of self-worth and belonging to their community, and lead many to conceal or suppress their identity and to live lives of fear and invisibility;” (emphasis added)
2.2 The judgment in Karner

The Position Paper proceeds to refer to the judgment of the European Court of Human Rights in the Austrian case of Karner, involving tenancy rights between a gay couple in 2003. There the Court stated:

“…very weighty reasons have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention … Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification…”. “… this assertion of ‘strict scrutiny’ of measures which are discriminatory on grounds of SO entrenches LGBT rights in the case law of the Court, but also in European human rights more generally. The Bill of Rights, in complementing the Convention, must give equal protection to LGBT rights as enjoyed under the Convention.

CoSO therefore considers that its key demands from the Bill of Rights are provisions on non-discrimination and freedom from abuse for LGBT people, as integral elements of a sense of human dignity allowing for the full participation of LGBT people in NI society.”

2.3 The lack of harassment provisions outside employment and training

In section 4.4 of its Position Paper, CoSO stated:

“CoSO welcomes the harassment clause. CoSO restates its view that incitement to harassment should be included in the Bill. It notes that, in relation to ‘degrading treatment’ in Yogyakarta Principle 10.A, reference is made to ‘the incitement of such acts’. More generally, although issues of harassment have been contentious, at least outside of the sphere of employment and training, and have been the subject of judicial review in NI in relation to the SO GFS Regulations, CoSO is of the view that homophobic abuse is one of the most significant human rights abuses perpetrated on LGBT people in NI. In its response to the GB Discrimination Law Review, CoSO stated:

“An explicit definition makes a public policy point that harassment in GFS, education etc is impermissible and increases the likelihood of harassment policies being amended to provide for SO harassment. Harassment is the most serious abuse of human dignity and equality rights which LGBT people suffer … An explicit definition also sets out clear demarcation lines as to what is and what is not harassment rather than the difficult construction of a harassment case out of the direct or indirect discrimination provisions.”

In that submission, in response to a question, “Do you think there is a valid distinction to be made between harassment in an ‘open’ and in a ‘closed’ environment and that the approach to its prohibition should be differentiated accordingly?” CoSO replied:

“CoSO considers harassment in schools, where students are in a regimented environment, and in accommodation, where a significant part of a person’s life is spent, is much more serious than being offended by a theatrical performance which the person was at liberty to avoid.”

Applying Karner to this failure to propose legislation on harassment outside employment and training, the Government has failed to provide “particularly serious reasons by way of justification” why this should be the case.

In its paper, Framework for a Fairer Future—The Equality Bill provides, under a heading “Time to strengthen the law”, examples of inequalities in Great Britain including:

“Six out of 10 lesbian and gay schoolchildren experience homophobic bullying and half of those contemplate killing themselves as a result”

And yet, within a month, the GEO was claiming that there was “no evidence” of a need to legislate for harassment outside employment, particularly in the education sector.106

I would submit that this is not “particularly serious reasons by way of justification” not to legislate.

3. Devising a Suitable Harassment Provision

In its judgment in the Christian Institute judicial review107 of the harassment provisions of the Equality Act (Sexual Orientation) Regulations (NI) 2006, the Northern Ireland High Court quoted from paragraphs 57 and 58 of your Committee’s report on the draft Regulations, on the imprecision and breadth of the proposed provisions.

At paragraph 41 of the judgment, the High Court concludes:

“The Joint Committee recommended that the new regulations for Great Britain contain a more precise and narrower definition of harassment so as to reduce the risk of incompatibility with the right to freedom of speech and freedom of religion and belief.”

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106 The July paper states, at para 25:

“But we do not propose to extend protection against harassment outside work, on grounds of sexual orientation or religion or belief, because we do not see evidence of a real problem.”

I would submit that it is possible to devise a harassment provision which satisfies the requirements of the Yogyakarta Principles and the European Convention on Human Rights on “equality of treatment” between non-discrimination grounds and the need to respect freedom of speech and religion. The present definition covers “creating an intimidating, hostile, degrading, humiliating or offensive environment”. Some of these adjectives, particularly “offensive”, may be too wide. The definition could start with a “degrading environment” and work its way out to an acceptable point.

Secondly, the definition could vary depending on the environment. It applies in employment because it is a “closed environment” in which individuals spend a significant portion of their time, under the “control” or “supervision” of those who control the environment. Other such environments are in education, healthcare and housing, as opposed to “one-off” situations, such as dramatic performances, so called “comedians” etc, at least unless sufficiently serious abuse has occurred.

Thirdly, some exceptions can be devised to deal with religious beliefs/values but these should be modelled on the revised “organised religion” provisions now proposed for employment and training. It should not however be possible to use an “ethos” provision to justify an “intimidating”, “degrading” or “humiliating” environment in schools and care homes where the human dignity of highly vulnerable LGBT children and young people, and patients and older people, must be protected.

Memorandum submitted by the Bhagwan Valmiki Trust

In view of the forthcoming Single Equality Bill unveiled by the Government of the UK on 26 June 2008, we would like to bring your attention on caste based discriminations that is gradually establishing roots amongst the Asian communities in the UK.

We understand that a number of representations were made during the Equalities Review Consultation process and calls to evidence during 2005 but this matter has not been addressed at the drafting stage.

We are very much concerned that since caste plays a vital part in regulating every day social life of the Asian Communities in the UK and based on Caste injustices are being perpetuated in the name of multiculturalism among the Asians living in Britain.

Caste Discrimination engenders group closure where certain Caste Groups maintain boundaries separating themselves from others. These groups deploy exclusion devices limiting and prohibiting inter-marriages or restrictions on social contacts; where social contact is possible when the individual is reminded of the Caste group and Caste status and its position in the Hierarchy of Castes.

In Britain, Caste operates at a much more subtle and sophisticated level. This is the reason why Caste discrimination has escaped the attention of the authorities and the public in the UK so far. Unfortunately there are cases of Caste discriminations on employments, marriages, inter-dinning, worshipping places etc. It’s about time that this serious Human Rights violation issue receives the deserving attention of the Authorities, the Government of the UK, Parliamentarians and other International Human Rights Agencies.

For example, Inter Caste marriages are frowned upon, if not forbidden. Couples have faced hatred and violence when such marriages are contemplated. Matrimonial sections of the Asian newspapers and Asian Marriage Bureau run Caste based matrimonial advertisements.

Religious places of worship are divided along Caste lines. For example there are Valmiki Temples, Ravidasia Temples, whole range of Hindu temples named after myriads of gods/goddesses and whole variety of Sikh temples eg Ramgarhia Bibi Nanaki, Dashmesh temple, Guru Nanak etc. All of these have Caste overtones. Many Hindu based organisations openly display their castes eg All India Association (UK), Bardai Brahmin Samaj etc.

Caste masquerades as entertainment in Punjabi Bhangra Music. This kind of music is regularly broadcast on Radio and Television where the Jat Caste songs are broadcast. (Jats are a predominant agricultural Caste in the Punjab), Caste is also manifest on the factory floor, in pubs and clubs usually through chauvinism and sometimes direct discrimination can result in hatred and violence. Inter-Caste marriages lead to the couple being shunned by so-called higher Caste parents. Caste based name calling in schools that lead to Caste awareness being created leading to bullying and violence.

In schools, Caste is taught in the religious educational curriculum as a religiously sanctioned hierarchy without an opportunity being provided to challenge the premises upon which it is based.

In the interest to promote Social Cohesion, we urge the Government to initiate an effective investigation and survey of Caste based discrimination and take cognisance of the blighting affects the most pernicious form of discrimination on the affected Asian communities in the UK.

Hence, I ask you to take necessary action so as to include “Caste” based Discrimination in the Single Equality Bill to do justice to the millions of the downtrodden in the UK.
Memorandum submitted by the British Humanist Association

THE BRITISH HUMANIST ASSOCIATION

The British Humanist Association (BHA) is the national charity representing the interests of the large and growing population of ethically concerned non-religious people living in the UK. It exists to support and represent such people, who seek to live good lives without religious or superstitious beliefs. Humanism is a “belief”, within the meaning of the ECHR, the Employment Equality (Religion or Belief) Regulations 2003 and the Equality Act 2006.

The BHA is committed to equality, human rights and democracy, and has a long history of active engagement in work for an open and inclusive society, and an end to irrelevant discrimination of all sorts. As a member organisation of both the Equality and Diversity Forum (EDF) and the Discrimination Law Association, the BHA has worked with other organisations to advance equal treatment on every ground. In recent years the BHA has participated in consultations and prepared submissions on such issues as the Employment Equality Regulations 2003 on Religion or Belief and Sexual Orientation, and the Equality Act of 2006, and our Chief Executive served on the Equality and Human Rights Commission’s Steering Group and on the Reference Group for the Equalities Review and Discrimination Law Review.

INTRODUCTION

This memorandum on the forthcoming Equality Bill has been prepared for the JCHR’s call for evidence on “The Draft Legislative Programme: JCHR priorities for 2008–09”.

Neither a draft Bill nor the Bill itself has been published. In June 2008 the Government published its White Paper “Framework for a Fairer Future—The Equality Bill” and in July 2008 published “The Equality Bill: Government response to the Consultation. July 2008”, which sets out in more detail (though not in comprehensive or consistent detail) its proposals in the White Paper. Our points in this memorandum are made mainly on the basis of the contents of those documents.

We are most disappointed that the Government is no longer publishing a draft Bill and that it does not intend to introduce the Bill to the House of Commons until later in the Parliamentary session 2008/09—possibly even as late as spring. It was the opportunity given to scrutinise the Equality Act 2006 as a draft Bill, we believe, that so improved its provisions.

Since the detail of what might be in the Bill is still not clear; it is difficult to make targeted and specific comments. However, in this memorandum we draw to the Committee’s attention to a number of areas where we consider the aims of equality and non-discrimination may not be realised in the forthcoming Equality Bill.

THE EQUALITY BILL

We welcome proposals to introduce an Equality Bill just as we have welcomed the Government’s overall commitment to equality and the positive developments of the last 10 years. We believe the new Equality Bill will build on existing discrimination and equality law and make it more readily accessible to service providers and employers. It will also represent a single charter for equality, which will be better understood by citizens and around which a new culture of equality can cohere with the Equality and Human Rights Commission (EHRC) as its watchdog.

We broadly welcome (although with some concerns about the details) the Government’s proposals to:

— Introduce a new equality duty on public bodies which will cover all protected grounds, including gender reassignment.
— End age discrimination.
— Require transparency.
— Strengthen enforcement.

In addition to those above, there are a number of specific proposals in the Government’s “Response to the Consultation” that we support. These include:

— Employment tribunals being allowed to make wider recommendations in discrimination cases.
— Proposal to allow discrimination claims to be brought on combined multiple grounds—although we are disappointed that specific measures on this seem unlikely to be included in the Equality Bill.
— Commitment to further work and consultation on representative actions in discrimination cases.
— Harmonisation of definition of indirect discrimination.
— The extension in various ways of protection against discrimination because of gender reassignment.
— More protection against discrimination in private clubs.
— Removal of discrimination on grounds of sexual orientation in insurance.
However, we would like to draw the Committee’s attention to a number of areas that we consider will weaken the forthcoming Bill and so may weaken protection from, or even increase discrimination. These include topics which have not been covered by the White Paper or in the Government’s “Response to the Consultation”: for example detail on the introduction of key provisions by secondary legislation, eg the equality duty, and the lack of discussion of specific exemptions that will be retained from existing legislation.

*Tribunal recommendations*

The proposal to extend the power of tribunals to make recommendations wider than in respect of the individual discriminated against is to be welcomed. This could be particularly helpful in cases where a religious ethos GOR is claimed, and the employer essentially ignores the findings of a tribunal in a particular case and carries on with its policy. The problem is that the Government is currently proposing that there should be no sanctions whatsoever for failure by an employer to comply with such a tribunal recommendation. This completely undermines its potential effectiveness and probably doesn’t comply with the requirement under EU law that any sanctions must be effective and dissuasive.

**Religious Privilege**

It is disappointing, although not in the least surprising, that those who oppose the extension of protection against discrimination in the Equality Bill to individuals because of, for example, gender reassignment are predominantly religious groups. What is more disappointing however is that there is every indication that the privilege that is afforded to religion in current legislation will not only be retained in the Equality Bill, but will be extended. For example, while we applaud the Government’s intention in its “Response to the Consultation” not to allow exceptions from the law on gender reassignment that would permit religious organisations to discriminate when they are performing public functions, we are astonished that the Government then unquestioningly states: “We accept there are good reasons to allow exceptions because of religious doctrine” (9.19). This suggests wide exemptions from the law, possibly for any group or organisation who claims that they are religious and that their religious beliefs prevent them from treating every human being equally and with respect. To allow wider exceptions from the law (there are already far too many—see below) so as to allow religion or belief groups to discriminate must be against the entire rationale for the Equality Bill—a Bill which should be a groundbreaking piece of legislation focused wholly on protecting individuals from unjust discrimination and not on providing wide exceptions for those who do not wish to comply with the law.

Another indication that the Equality Bill may further entrench religious privilege is in the Government’s “Response to the Consultation” itself. We were very disappointed to see that “faith” groups and communities are marked up at least twice in that response as deserving of special treatment and consultation (see paragraphs 2.60 and 5.35, for example). Communities or groups defined by “faith” should not be privileged in this way, but should be treated as any other civil society organisation. Indeed, especially in the context of the Equality Bill, it seems bizarre to see and treat “faith” communities in a way which can only be divisive and exclusive. We draw the Committee’s attention to the further point that, if the Government is going to single out such groups and communities, then they should be focusing on “religion and belief” communities and groups, which would include humanists, rather than exclusively “faith” groups, reflecting the terminology and equal status of religion and belief (including non-religious belief) as set out in the Human Rights Act 1998 and supported by European case law. We hasten to add that we seek no such special treatment or exemptions from the law for ourselves and would oppose them.

**Equality Duty**

We support a limited equality duty which will extend to cover age, religion or belief (which includes non-religious beliefs), sexual orientation and gender reassignment, as well as race, gender and disability and we welcome a statement of purpose for that duty (although depending on the detail of that). However, we are disappointed that more detail has not been given about what this duty will look like, when it will apply, to whom exactly it will apply, or what differences (if any) there may be in the general and specific duties.

We have particular interest in the extension of the general equality duty to the religion or belief strand. The proposed duty will retain but more tightly define the three “limbs” of the existing duties: eliminating unlawful discrimination and harassment; advancing equality of opportunity; and advancing good relations between different groups. While we would support a public duty to eliminate unlawful discrimination, we do not support a duty to advance equality of opportunity or to promote good relations in relation to religion or belief.

There are clear disadvantages to and practical difficulties in extending these duties to religion or belief. For many, religion or belief is a private matter and putting pressure on people to declare a religion or belief publicly and express it more openly than they may wish is undesirable. Furthermore, we consider that there is insufficient evidence that religion or belief is a useful marker of disadvantage.

As the Government itself recognises in its “Response to the Consultation”, reliable statistics on religion or belief (and on sexual orientation) “are not available” and “there are issues of privacy involved in gathering data which might provide statistics” (7.25). Religion or belief can be measured in many ways—in terms of
beliefs, in terms of practices and in terms of identity. Even within these indicators there are widely differing categories. If unreliable data—such as 2001 census data—is used by public authorities as the basis for action in the area of religion or belief, they may well take inappropriate actions.

Extending the duty to religion or belief may lead to particular groups being given too strong a voice, and so might lead to some prominent and perhaps unrepresentative individuals getting a disproportionate voice and influence which would, in turn, have negative impacts on social cohesion.

We are further concerned that exceptions provided for in the Equality Bill would exacerbate the potentially unequal position of humanists within the general duty. The exceptions currently permitted in the law on religion or belief (see below) are very wide and largely guarantee inferior treatment of humanists, and the non-religious generally. Other laws, such as the Education Acts as amended, largely prevent the full enjoyment by humanists of any positive impact of a future duty in precisely the areas where discrimination is most common.

For the general duty to be extended successfully to religion or belief, there must be statutory guidance to public authorities to stress the risks and difficulties they will face in implementing this duty, and many of the exceptions currently permitted in law on religion or belief and which are currently likely to be written into the Equality Bill must instead be repealed.

There is no warrant for creating a hierarchy in which “faith” beliefs are privileged in comparison with philosophical beliefs. If the duty is to be extended to religion or belief, the prohibition on discrimination and the positive duty to promote equality applies with the same force to those who have a humanist belief or have no belief at all (since lack of belief is clearly covered), and this should be reflected clearly in any government codes of practice and similar documents.

Procurement

Another area of real concern in relation to the Equality Bill generally and the equality duty specifically is that it is not clear whether the equality duty will be extended to organisations working under contract—the Government is looking at a range of legislative and non-legislative measures in procurement. With the Government increasingly contracting out welfare and other public services to religious organisations, it is vital that such organisations are bound by the equality duty and any other protective anti-discrimination measures or codes of practice when they are performing a public function.

There are problems of discrimination both in employment and in service provision that are specific to religious service providers—even those working under contract with the state. It is not only the exemptions from Part 2 of the Equality Act and the Employment Equality (Religion or Belief) Regulations 2003 and the Employment Equality (Sexual Orientation) Regulations 2003 that allow religious organisations to discriminate in various ways and to a wide extent. The fact that contracted organisations are not considered to be public authorities, or performing public functions, in terms of the HRA and are therefore not bound by that Act leaves religious organisations open to discriminate, harass and infringe service users’ human rights, such as the right to freedom of conscience and belief. At the least, should public services be contracted to religious organisations, there should always be a choice of an alternative, secular provider.

We recommend that all organisations performing public functions are bound by both the HRA and the equality duty. In terms of the Equality Bill specifically, there should be nothing less than a specific provision that any organisation, without exception, that is performing a public function must be bound by the equality duty. Importantly, the meaning of “public function” or similar terminology used in the Equality Bill must be wide and absolutely not take the currently very narrow meaning in the HRA as defined by case law.

Any exemptions from equality legislation for religious organisations should not apply when they are contracted to provide a public service.

Exceptions in the Equality Bill

In general, we welcome a more streamlined, transparent and consistent approach to exceptions and make the point that there should only be minimal exceptions from this Equality Bill.

Genuine Service Requirements

However, we are extremely disappointed that the Government has rejected the inclusion of genuine service requirements (GSR), despite the fact that “the majority of respondents on this issue favoured introducing a genuine service requirement”, and is instead opting for a series of blanket exceptions.

In our response to the Discrimination Law Review consultation, we urged the consideration of “genuine service requirements” as a feature of the Equality Bill. We see GSR as an alternative to the current practice in UK discrimination law (especially on grounds of religion or belief) of exempting whole classes of organisation from what should be universally applied principles of equality and as a way of introducing consistency and a harmonised approach to exemptions across the grounds.

108 We would recommend the meaning of public function in the Equality Bill to reflect that as proposed in Andrew Dismore MP’s Bill “Human Rights Act 1998 (Meaning of Public Function) Bill” http://www.publications.parliament.uk/pa/cm200708/cmbills/045/2008045.pdf
We are very concerned about the exemptions from prohibitions on discrimination granted to religion or belief groups in Part 2 of the Equality Act, which were hard-fought in both the Commons and the Lords. In the specific case of religion or belief, therefore, a “genuine service requirement” could have provided a flexible test that depended on the nature of what was being done rather than the identity or beliefs espoused by the organisation providing it or the individual doing it, and so minimise the risk that too wide an exception was being created.

We maintain our position that a genuine service requirement would simplify the law and help to minimise what we consider unnecessary and unjustified exceptions from the law (see list and further discussion below).

**Genuine Occupational Requirement**

Our experience of the GOR in terms of religion or belief has been, as we predicted, that the law is open to too wide an interpretation. Under the Employment Equality (Religion or Belief) Regulations 2003, regulation 7(3) permits employers with “an ethos based on religion or belief” to discriminate in cases where “being of a particular religion or belief is a genuine occupational requirement for the job” and “it is proportionate to apply that requirement in the particular case”. These employers have a less rigorous test to prove than employers who do not have a particular “ethos based on religion or belief” which, under regulation 7(2), must show a “genuine and determining occupational requirement”.

The test in the Employment Equality (Religion or Belief) Regulations 2003 to justify genuine occupational requirement is less rigorous than in the Directive and legislation on race and other grounds. We believe this is a serious infringement of the rights of people not to be discriminated against on the grounds of their religion or belief, particularly in view of the fact that large religious organisations are the most likely discriminators. Already there is DTI funded guidance from the Christian organisation Faithworks which advises organisations how even their coffee shop manager post can be reserved for a Christian. In our view, this is not what was intended by the law. There is some evidence that an unintended consequence of the Regulations has been an increase in discrimination suffered by humanists and others in the employ of organisations choosing to “clarify” their ethos as religious and take advantage of the newly explicit ability they have to discriminate (see below example).

For historical and other reasons, most of these organisations, including most of the largest employers, are Christian; hence it is not only the non-religious, but also adherents of minority religions who are discriminated against. Even organisations in receipt of public money to provide services are operating this wide discrimination.

In the forthcoming Equality Bill, if the GOR is to be retained we would like to see it modified and much more restricted than it is at present, in order to reverse the increase in discrimination against employees on grounds of religion or belief from what there was before the Regulations came in (see more discussion of these Regulations below).

Christian organisations are increasingly using the GOR under the Employment Equality (Religion or Belief) Regulations 2003 in order to discriminate widely. In 2007, this area of law was tested for the first time in two employment tribunals—the legal costs of one of the claimants were paid for by the British Humanist Association, the other’s by the claimant’s union UNISON. In May 2008 the Tribunal published its judgments which were unanimous in favour of the claimants.

The Tribunal heard that Prospects, a Christian charity which receives public money for its work with people with learning disabilities, had previously employed a number of non-Christian staff and volunteers, including a number who were transferred to them under TUPE Regulations, and that this arrangement had worked successfully. In 2004, however, Prospects began using the GOR and began recruiting only practising Christians for almost all posts, and told existing non-Christian staff that they were no longer eligible for promotion. The Tribunal found that Prospects had acted illegally in doing so, finding, in both Sheridan v Prospects and Hender v Prospects that the Respondent had unlawfully discriminated against the Claimants on the grounds of religion or belief contrary to the Employment Equality (Religion or Belief) Regulations 2003 and that they were constructively dismissed.

Importantly, the Tribunal in Sheridan v Prospects shows that blanket discrimination in employment policies and practices on grounds of religion or belief is unacceptable and clearly not the intention of the legislation to allow, and that an instruction to discriminate against someone on the basis of that person’s religion or belief will be unlawful. The Tribunal’s judgment makes clear that a court will make an objective assessment of what a “religious ethos” is, and states that it is not for the religious organisation itself to define its ethos, where this does not accord with reality on the ground.

We commend both judgments to the Committee:

http://tinyurl.com/sheridanvprospects

http://tinyurl.com/hendervprospects

Despite those judgments, Prospects are still discriminating widely in their employment positions, applying GORs to most positions advertised. We have raised this matter with the EHRC who are investigating this but make the point that in the forthcoming Equality Bill, great care needs to be taken to restrict as far as
possible the scope for discrimination on grounds of religion or belief in employment. This example also demonstrates the importance of tribunals being able to make recommendations—and for a legal requirement to comply.

We recommend that the GOR for religion or belief in the Equality Bill must be much more strictly defined than at present and should ensure that, rather than just asserting a religious “ethos”, employers must “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”,109 in order to apply a religion or belief GOR to a position.

**Specific exceptions of concern**

We are especially concerned that the Equality Bill will maintain (as was the Government’s intention in the Discrimination Law Review consultation document) the extraordinarily extensive exceptions in Part 2 of the Equality Act 2006. Some of those are necessary and justified, but together they amount to a codification of almost all current institutional religious discrimination—and to maintain those would compromise the principles of greater equality and less discrimination as is the aim of the new Bill. The exceptions in Part 2 of the Equality Act 2006 entrench discrimination and give immunity to the institutions responsible for it, rather than protecting individuals discriminated against by these institutions. The Equality Bill should only retain those exemptions that can be objectively justified.

Exceptions in the Equality Act 2006 that should not be retained:

**Equality Act Part 2 s50:** This section permits state and independent schools designated as having a religious character to discriminate against children on grounds of their religion or belief or the religion or belief of their parent[s]. They can discriminate against pupils in decisions about whether to admit them to the school, the terms of admission, and the access they afford them to any benefit, facility or service.

We acknowledge (though we regret) that it is the policy of the Government to continue to allow discrimination against children and their parents in admissions to state schools with a religious character. However, we do not believe that any school should be permitted to discriminate against a child once she is a pupil. Many pupils in state schools will not be of the religion or belief of the school. We argue at the very least therefore, for a repeal of the exception allowing schools to discriminate in the access they afford to children to any “benefit, facility or service”. However, we believe that a genuine service requirement would be sufficient to replace the whole of s50.

**Equality Act Part 2 s52(4)(k):** This section permits discrimination by public authorities if their actions are in relation to the curriculum of an educational institution, admission to an educational institution which has a religious ethos, acts of worship or other religious observance organised by or on behalf of an educational institution (whether or not forming part of the curriculum), the governing body of an educational institution which has a religious ethos, transport to or from an educational institution, or the establishment, alteration or closure of educational institutions.

Again, we realise that this exception is designed to protect the discriminatory provisions of other statutes and that the Government does not intend to repeal or amend those discriminatory statutes. However, as with s50, we believe this objective could be achieved through a single genuine service requirement without the risks of discrimination unintended by the Government which are presented by the current blanket exception.

**Equality Act Part 2 s57:** This section permits certain organisations to discriminate against people in admission to membership, participation in activities, the provision of goods, facilities and services and the use or disposal of premises.

We recognise that organisations such as the BHA, related to a “belief” in the terms of the law, are covered by this clause too, but we see no reason why the required exceptions in this area could not be provided more simply and with fewer possibilities for unwarranted discrimination by the use of a genuine service requirement as recommended above.

**Equality Act Part 2 s59:** This section permits educational institutions established or conducted for the purpose of providing education relating to, or within the framework of, a specified religion or belief to restrict the provision of non-educational goods, facilities or services, and the use or disposal of premises for non-educational purposes on the grounds of the purpose of the institution, or in order to avoid “causing offence, on grounds of the religion or belief to which the institution relates, to persons connected with the institution”.

We do not believe that “offence” is a sufficient reason to permit discrimination. Again, we believe that all such legitimate actions would be covered by a genuine service requirement.

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Equality Act Part 2 s60: This section permits secular charities that discriminate in requirements for membership on the grounds of religion or belief to continue to do so. We do not know how many organisations this applies to, but it was inserted into the Equality Act to allow the Scouts and Guides to continue to discriminate against humanists and other atheists in the conditions for membership.

Complaints about the discrimination by the Scouts and Guides and related requests for assistance are the second most commonly received by the BHA, following complaints about discrimination in education, and it is clear that the Scouts and Guides are two of the most discriminatory organisations in terms of the non-religious and the impact on their lives.

The Scouts and Guides are both in receipt of public funds and in some areas they represent the only youth activities available. They disingenuously claim to be inclusive while refusing membership from humanists and other atheists, and refusing to categorise themselves as religious organisations, even though they admit only religious members (although Scout and Guide organisations in some other countries admit atheists). For the law to assist them in this hypocrisy and to sanction their discriminatory behaviour is breathtakingly wrong. Removing this exception—introduced into the Bill at the last minute and without proper debate—and leaving the Scouts’ and Guides’ discrimination to stand or fall in the context of a genuine service requirement is the only way either to offer the many people suffering disadvantage at their hands some element of protection or to compel the Scouts and Guides to clarify their status as religious organisations, to the benefit of public understanding.

Equality Act Part 2 s51(2)(3): This section permits a local education authority or an education authority to discriminate in the provision of schools and functions related to transport. It could easily be repealed if a genuine service requirement were to be introduced.

Exceptions in the Employment Equality (Religion or Belief) Regulations 2003:

R/B Regulation 7(3): See above for discussion of this and our recommendation.

R/B Regulation 39: This regulation permits the discrimination allowed by sections 58 to 60 of the School Standards and Framework Act 1998 to continue.

We believe that the fact that the law prohibiting discrimination on grounds of religion or belief in Great Britain is subject to ss. 58–60 School Standards and Framework Act 1998 is a serious infringement of the rights of people not to be discriminated against on the grounds of their religion or belief and is arguably inconsistent with the EU Employment Directive. The number of senior posts open to humanist teachers is about 75% only of that open to Christians. We note that it is also not very good for schools and their pupils—the most re-advertised headteacher posts are those with a religious requirement attached. We believe that sections of education law allowing discrimination should be repealed by the Equality Bill.

Harassment

The Government is not extending protection against harassment on the grounds of sexual orientation or on religion or belief outside the field of employment. On the one hand, this may be positive—not least because should the Government introduce such protection in the Equality Bill, there is every reason to believe that it would never legislate to prohibit harassment in those areas where it is most prevalent, such as in “faith” schools, and would instead make exceptions within the law for the worst discriminators and so the law would never protect humanists and others where they need protection.

However, we are disappointed that the Government does not agree that a useful distinction can be made between “closed” environments, such as schools (there are particular and well-known problems in faith schools), prisons, hospitals and hospices (where service users are “captive” with limited choice and control over their environment) and other extra-employment contexts. Indeed, it is not just a question of open and closed spaces: harassment becomes an issue whenever people do not have a choice of service provider, including but not limited to when they have to receive a public service from a contracted religious organisation.

We are also disappointed that the Government does not agree that it would be reasonable to forbid harassment by public authorities (including organisations operating under contract). If religious charities or organisations increasingly provide such services under contract, the incidence of harassment, often of very vulnerable people, on religion or belief grounds will increase. In any case, we do not see any scope for exemptions from any future law on harassment in this area.

We would like the Government to look again at harassment; it is clear to us that there are circumstances where it would be appropriate to legislate against harassment on grounds of sexual orientation. We are very much in favour of a total prohibition of harassment on these grounds.
POSITIVE ACTION

We are concerned that some of the positive action measures that the Government proposes for inclusion in the Equality Bill may actually increase inequality.

We are concerned that the proposal to extend voluntary positive action measures in employment to allow employers to take under-representation into account when selection for promotion or employment between “two equally qualified candidates” may in fact lead to discrimination on the basis of a group identity rather than an individual’s identity. We certainly question whether there can ever truly be two candidates who are exactly and equally qualified.

Moreover and in reference to any positive action measures for religion or belief, there would be specific concerns related to identification and measurement of beliefs, to infringements of privacy and to the justification for making decisions on employment or promotion on the basis of religious or non-religious beliefs. We reiterate our concerns made above under discussion of the equality duty regarding difficulties with gathering, interpreting and using statistics and evidence for religion or belief.

British Humanist Association
30 October 2008

Memorandum submitted by British Naturism

INTRODUCTION

1. British Naturism is the representative organisation for naturists in the UK.

2. About 1.5 million people in the United Kingdom describe themselves as being a naturist and there are about 10 times that number who practise naturism to at least some extent. When a naturist gets dressed the disguise is perfect and there is a reluctance to “come out” so few people realise how numerous we are. There are surprisingly high level of acceptance by the public but there is a small minority who are deeply prejudiced against nudity.

3. For many people naturism is an important part of their faith and for many more it is a valuable part of their belief system and philosophy of life.

4. Provision for naturism in the UK is woefully inadequate. There are only a handful of clothes optional beaches, mainly along the south coast. There are no naturist beaches. Obtaining the use of local authority facilities such as swimming pools is often impossible. When we do manage to obtain a session the cost is often exorbitant.

5. The legality of nudity is characterised by vagueness and uncertainty. For example one police area commander was adamant that public place nudity is always illegal whilst another influential officer told us that it was lawful under circumstances that even we find surprising. Defending against fixed penalty notices or prosecution has been made extremely difficult, expensive and risky. Consequently the legality of naturism is largely determined by individual police officers and whether or not the naturist is prepared to risk their career. For health service workers, teachers or anyone else needing an enhanced CRB check naturism is effectively illegal in any public place apart from the dozen or so designated beaches. In many European countries nudity is a right but in the United Kingdom we enjoy no such protection.

6. Naturists encounter significant discrimination and prejudice. It does result in appreciable harm to individuals, groups and to society as a whole and it does cause unnecessary curtailment of individual freedom.

7. The currently available protection against discrimination is inadequate but we believe that comparatively minor changes to legislation and policy could remedy that deficit.

8. We have written to the Government Equalities Office in an attempt to open discussions but we were rebuffed.

GENERAL PRINCIPLES

9. Singling out particular forms of discrimination has the effect of making other types seem more acceptable. The protection against other unjustified discrimination must be strengthened to compensate.

110 NOP poll. 2001. “and would you describe yourself as being a naturist?”
111 The Statistics Briefing Note provides further information.
112 NOP poll. 2001. Sensible 40 per cent, harmless 88 per cent. No detectable difference for adults with children.
113 NOP poll. 2001. Beach naturism: Call the police 1 per cent, criminal 2 per cent, disgusting 7 per cent.
114 It is not coincidence that all of those countries have much better outcomes for many body image and body knowledge related problems such as teenage pregnancy.
10. The only justification for discrimination against any group or activity is to prevent harm that clearly outweighs benefit. There are many myths about what is harmful or beneficial and mistakes can cause immense harm. Hence there must be an absolute requirement that decisions are based on evidence. Anything else is indistinguishable from prejudice and a popularly held prejudice is not any less a prejudice because it is popularly held. Much of the discrimination that we encounter is due to the common misconception that there is a popular prejudice against naturists.

11. We are not aware of any evidence that nudity can cause harm to anyone, of any age but we do know of research showing that naturism is beneficial. There is also very conclusive evidence that censorious attitudes towards the human body cause immense harm. Hence there is a synergistic relationship between naturism and healthy attitudes towards the body.

PREJUDICE AND DISCRIMINATION

12. The principle causes of the discrimination that we encounter are:

1. Prejudice of individuals and reluctance by others to prevent it.
2. Misconceptions concerning public attitudes.
3. Misconceptions concerning the law.

13. People working in sensitive professions such as teaching or the health service are increasingly reluctant to practice naturism for fear that it could harm or even destroy their career. We have cases demonstrating that their apprehension is not unfounded.

14. We have encountered serious difficulties with both councils and swimming pool management companies. It is near impossible to persuade them to run naturist swimming sessions and it can be a mammoth task to find a pool to hire. Even when one can be found they often seek to impose unacceptable, offensive or ridiculous conditions. The most common reason for a naturist swim closing is a change of pool management and the next is the hire charges demanded. Admission prices are often well above the going rate and double or even treble is not uncommon.

15. Statutory bodies should be required to treat minority groups according to the evidence but many are reluctant to do so. Accordingly we believe it essential that there is a duty to make reasonable provision for naturists and other minority groups. It is difficult to see how there could be any objection to a requirement to be reasonable.

16. Many people assume that naturists can not possibly have any rights. It is important that naturists are recognised as a legitimate social group.

17. License conditions often fail to distinguish between the sex industry and naturism. This has caused serious problems and we suspect that many naturist events are only able to go ahead because a blind eye is turned. Regrettably legislation intended to regulate the sex industry is being used to control how people dress.

18. We far too often encounter statements in official documents or on signs that are offensive. They are often particularly offensive to naturist families.

19. Much censorship is based on prejudice. There are thousands of bodies with a responsibility to censor. There are none with a responsibility to prevent harmful censorship.

SUMMARY

1. The Bill will result in increased discrimination against many groups thereby denying them their human rights. It fails to address some important issues.

2. Naturists meet with significant discrimination due to prejudice against their lifestyle and beliefs. Recognition as a legitimate minority group is necessary.

3. People working in sensitive occupations increasingly do not feel free to be a naturist.

4. There should be a duty to make reasonable provision for minority groups such as naturists.

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115 The research on the effects of flashing cited in “Setting the Boundaries”, was a seriously flawed unpublished student dissertation. It was quoted out of context and it is not relevant to naturism. We can provide further information on request.

116 The differences between the most prudish western countries and the most liberal are enormous. Teenagers become sexually active younger, are more likely to be promiscuous and less likely to use a condom or contraception. The results are predictable. Over seventy times more likely to catch gonorrhoea and 10 times more likely to become pregnant or to have an abortion.

117 There is only one at present and it is the only naturist swimming session in the country that bans children and hence families.

118 One council, about a week before a new hire was due to start, imposed a condition that resulted in only one person being eligible to attend! They relented but it illustrates the problem.

119 Briefing note—Prejudice (Local Authority Pool).
5. Discriminative decisions need to be based on evidence that can be evaluated and if necessary challenged. There is a lack of transparency and accountability.

6. The activities of censors should be regulated to ensure that censorship is necessary and based on evidence. Much censorship is based on prejudice which leads to unjustifiable discrimination and there is no reasonably accessible means of appeal. The right to free speech does not have adequate protection.

British Naturism

11 January 2009

Memorandum submitted by Carers UK

About Carers UK

1. Carers UK is the leading organisation representing the views and interests of the six million carers in the UK who care for their frail, disabled or ill family member, friend or partner. Carers give so much to society yet as a consequence of caring, they experience ill health, poverty and discrimination. Carers UK seeks to end this injustice and will continue to campaign until the true value of carers’ contribution to society is recognised and carers receive the practical, financial and emotional support they need.

2. Carers UK is an organisation of carers, for carers, with a reach of around 1,500 organisations, including many run by carers, who are in touch with around 950,000 carers between them. Including Carers Week our reach extends to around 4,000 groups and 2.5 million carers.

3. Carers UK runs an information and advice service and we answer around 16,000 queries from carers and professionals every year. We also provide training to over 2,600 professionals each year. Our website is viewed by nearly 300,000 unique visitors and nearly 1000 carers are members of our website forum.

4. Carers UK has offices in Wales, Scotland and Northern Ireland and we also run a specific project in London.

5. Carers UK warmly welcomes the clarification sought by the Joint Committee on Human Rights and would like to provide the Committee with evidence that supports its well argued questions put to Government about the Equality Bill.

Clarity of Clause 13

6. Carers UK does not believe that Clause 13 is sufficiently clear to ensure compliance with the decision of the European Court of Justice in the decision of Coleman v. Attridge Law. We recognise that Ministers have clarified their intentions in parliamentary debate which will help to direct judges making decisions and interpreting the law. However, we do not believe that the drafting is sufficiently clear for the majority of those who will use the law or have to implement it.

7. The term “discrimination because of” is not sufficiently clear to mean discrimination by association. Discrimination law is usually hard to understand and to take cases under. It therefore follows that the law should be as clear as possible. If the Government’s intention is to outlaw discrimination by association, then it should be possible to state this specifically on the face of the Bill removing any need for misunderstanding and misinterpretation.

8. We know that misunderstanding and misinterpretation of laws are very common. To take one example, the brief and relatively easy to understand law, drafted by Professor Luke Clements, the Carers (Recognition and Services) Act 1995 is consistently misapplied. The drafting is very accessible to the ordinary reader and it is legislation founded on good common sense and carers’ basic human rights. It established that in considering a disabled person’s needs, a carer’s ability to provide care also has to be considered. Still, 13 years after the Act was passed, some local authorities have introduced a range of bars, thresholds, criteria, procedures, etc. which are unlawful and have been successfully challenged informally as well as through the courts.

9. The practical outcome of misunderstanding legislation is that families are missing out and are facing dire consequences as a result which directly affect their human rights as well as basic societal values and activities such as the ability to work and learn, etc. Carers providing regular and substantial care and who request an assessment are still repeatedly told that there is no point in having a carer’s assessment. The Carers (Recognition and Services) Act 1995 states that if a carer requests an assessment, the local authority has a duty to comply. Parents of disabled children are regularly informed that they are not entitled to an assessment of their own ability to care (and needs) in contravention of the law. One authority’s policy states that carers only providing over 35 hours of care are entitled to an assessment—which clearly is an unlawful fettering of discretion. Carers are regularly told that there is not a duty to provide services, when there is a duty to consider whether the disabled person should have their services increased or changed to accommodate carers’ needs for support in their ability to care. The use of this example demonstrates that even the simplest of legislation is liable to misinterpretation and misapplication and we would urge the Government to take up the Joint Committee on Human Rights’ recommendation that the Equality Bill is made clearer by including discrimination by association on the face of the Bill.
10. Carers UK facilitates Employers for Carers and these far sighted employers already have introduced policies which are supportive to carers in their workforce.

11. In our experience of assisting organisations in the implementation of legislation, clear drafting of the law will aid:

(a) quick and clear recognition that discrimination by association exists;
(b) easier and direct reading of the law which will lead to better briefing;
(c) a reduction in debate about “meaning”—which will distract from good implementation, will divert resources and could lead to multiple unhelpful interpretations;
(d) lower costs in implementation, including for advice organizations like Carers UK, as a charity with limited resources, which will spend less time responding to queries about interpretation if the drafting is clear and straightforward; and
(e) greater accessibility of primary legislation for carers and disabled people who stand to benefit from the provisions.

12. Carers UK considers the last point to be extremely important. Informed disabled people and carers are familiar with primary legislation and where laws are fairly clear and easy to understand, we send the provisions to these individuals to help them advocate or challenge their situation locally or work with lawyers to challenge the provisions. Families with disabilities and chronic illness already face sufficient challenges in their lives without increased debate about whether a provision applies or not to them because of poor drafting. Clarity for them is critical.

FOCUSING ON OUTCOMES

13. Legal judgment is not just about the law, it is about how people’s lives are affected. Incorporating the Coleman judgment into primary legislation is not just about implementing the law, it is also about creating the cultures and structures by which families are more able to cope with chronic illness and disability. We know that one in five carers gives up work to care. Many carers give up work because of the lack of flexibility and close friends, but this is a critical tool in that process. With the dependency ratio set to rise from a ratio of four to one workers to retired people, it will be two to one in a couple of decades, at the same time we need better funding of social care in order to help keep families in work whilst they still care for relatives and close friends, but this is a critical tool in that process. With the dependency ratio set to rise from a ratio of four to one workers to retired people, it will be two to one in a couple of decades, at the same time demanding that families care more and work longer, expected to contribute to pensions.

14. Carers UK believes that a well crafted and well implemented piece of legislation outlawing direct discrimination in the workplace will, ultimately, lead to more carers being able to juggle work and care. Employers for Carers believes that that better flexible working and more support for carers within the workplace will deliver more efficiency and effectiveness in the businesses making them more competitive in a tough economic environment.

15. Our final point is about this law which has the ability to help “future proof” our society. Of course we need better funding of social care in order to help keep families in work whilst they still care for relatives and close friends, but this is a critical tool in that process. With the dependency ratio set to rise from a ratio of four to one workers to retired people, it will be two to one in a couple of decades, at the same time demanding that families care more and work longer, expected to contribute to pensions.

DISCRIMINATION BY ASSOCIATION IN THE DELIVERY OF GOODS AND SERVICES

16. We have additional information to add about discrimination in relation to goods and services. A few brief calls to several local authorities has revealed that many senior officials do not consider the Equality Bill to have an impact on carers in relation to social care. There is widespread confusion about its application, how it will impact on carers and what their reaction would be.

17. There are several major difficulties. Discrimination is a difficult concept to grasp. There are also two levels of decisions to make in terms of discrimination by association—first a person has to be associated with the disabled person and then discriminated against on the basis of this association. This makes decision-making far more complex than if a caring strand were included directly. Carers UK has been using a series of real cases to “test” the legislation’s interpretation. We have found the legislation difficult to apply and complex to understand in relation to carers.

18. Debate at Committee stage suggested that carers have a choice about caring and that caring is not an intrinsic quality unlike race, gender or disability. First of all, carers argue that they do not have a choice, but it is undertaken out of a sense of duty and lack of services and support. Secondly, religion is arguably a choice for the majority of people in the first instance, but once chosen, is a path that people wish to continue. This is no different to caring.

CARING AS A PROTECTED CHARACTERISTIC AND SEEKING REASONABLE ACCOMMODATION

19. Carers UK has long argued that caring should be a protected characteristic. Section 75 in Northern Ireland sees caring as a protected characteristic that is irrespective of the type of caring activity—spanning both caring for non-disabled children and people of all ages caring for someone with a disability or chronic illness. At present, women have secured freedom from discrimination through protection from direct and
indirect discrimination in the workplace because they are more likely to provide childcare. However, men have not enjoyed similar rights under indirect discrimination. Allowing caring to be a protected characteristic treats caring as equal between genders and ages.

20. Carers UK believes that reasonable accommodation will be implemented by both employers and service providers as a means of preventing cases of direct discrimination and to fulfil the clause 143 equality impact assessment duties. However, it would be easier if this were made explicit on the face of the Bill.

Indirect Discrimination by Association

21. Government has not included discrimination by association as indirect discrimination. Examples are difficult to conceptualise. However, there is one very clear example that is given in the Explanatory Notes to the Bill in relation to childcare. Carers UK sees no distinction between parents who have to provide childcare and carers who have to provide care to elderly, chronically ill or disabled relatives. We would urge the Joint Committee on Human Rights to also look at this issue.

Discrimination Dossier

22. Carers UK is compiling a dossier of examples of discrimination faced by carers daily. This supplements our work earlier on the Human Rights Act—Whose Rights Are They Anyway? Published in 2005. These cases, we hope, will be useful to illustrate why this law is so important to families, how it can improve practice and to aid service providers and employers in implementing the legislation.

We would be happy to provide the JCHR with examples if that would be helpful.

Memorandum submitted by Central Valmiki Sabha International (UK)

I am writing this letter on behalf of Central Valmik Sabha (UK) which represents the interests of members of Valmik community, one of the ethnic minority groups in the UK. Our members live in most of the major cities in the UK and we have well established temples and community. Our community originates from India, worships Bhagwan Valmik Ji and follow his teachings through two of his famous holy scriptures known as “Ramayan” and “Yog Vashitha”, which provide valuable ideals and way of life for our people. These two scriptures also from the foundation of Hindu religion.

It is important for us to highlight that members of Valmik community have been victims of inequality, prejudice, oppression and caste discrimination in India for many centuries. Our members who arrived in this country in early fifties, found British Society to be more liberal, accepting and more harmonious. Our people from humble background found co-existence with British counterparts as more cordial and respectful. We thought and believed that we had left the caste discrimination behind forever and were proud to become an integral part of British society.

Since the arrival of upper caste Indian Diaspora from South Asia in greater numbers, the dimension of caste prejudice in the UK has dramatically changed for our people. In early sixties and seventies, our members were denied dignity and equality at the places of religious worship. Our members were not treated with respect in Hindu and Sikh temples and were made to feel uncomfortable. This kind of humiliation lead to formation of our own organisations and places of worship where we could pursue our religious beliefs freely and without any prejudice. Our first temple was established in 1978 (copy of the clip from Coventry Evening Telegraph attached). Our members have always lived in peace and harmony and tolerated the unethical behaviour of the so called upper castes Hindus and Sikhs, in the hope that exposure to British Values would change these people and would liberate them of their caste prejudiced attitude. Unfortunately, the situation has become worse for us over the years. We believe that following are the main reasons for this social suffering of our communities in the United Kingdom:

Education in School

Caste System is taught in schools as part of Hinduism in the religious studies curriculum. Our children are made to feel inferior from a very young age and experience name calling, derogatory remarks about their low caste and are not included in the peer groups. This bullying traumatizes our young children who find it difficult to complain to authorities as there is no awareness or guidelines available to school teachers to deal with caste related issues. Caste discrimination is brushed under the carpet and victims are disciplined instead. (Example of a Book used in schools in UK attached as evidence). It can be seen that people from so called low caste are officially taught in schools about their inferior origins and are given an impression that it has religious sanction.

Places of Hindu Religious Worship

Hindu priests, who are normally brought from India, bring their caste prejudice into UK with them. There is a lack of awareness on the part of priests about British values and the way of life in this country. They are persistently advocating caste prejudice, discrimination and the myths based on Hindu scriptures. This is causing a great concern to the members of our community because the caste training in schools is
reinforced in the minds of young children in the Hindu temples. People from low castes are portrayed to be impure in thoughts, in deeds and in general. (Copy of a Hindu Booklet given to visitors in Neasden Temple, London in May 2008—is a clear evidence of the caste prejudiced messages being portrayed in the Hindu temples. The section that deals with low caste people shows them as thieves, plunderers, low lives, impure in thoughts, impure in deeds).

**Caste Discrimination in Employment**

Indians have become major employers of workforce in this country. Normally these Indian employers are from high castes and in absence of any legal protection to people from low castes, caste discrimination is endemic in these places. Normally, if the caste is known before employment, the jobs are denied. If however, the caste is discovered later on, they victimized and treated very unfairly. Caste discrimination is also endemic in general workplaces where there is a significant Indian population in the workforce. People from higher castes mistreat fellow workers who happen to be from low castes. This phenomenon is not known to British employers and as a result of the complaints about discrimination are not taken seriously. Many cases have come to light where members of low castes were pushed out of employment with constant knit picking and fault finding by high caste fellow workers or Managers. (Example of a booklet published by Department of Equality and Social Justice in 1995—Coventry City Council—and it clearly shows an attempt by high caste Hindus to legalise caste discrimination in UK. This department of Coventry City Council was made aware of caste issues. The booklet was withdrawn immediately and Coventry City Council apologised to the campaigners. (News in Guardian Newspaper is also enclosed.)

**Caste Discrimination in Social Clubs**

There have been many instances when people were humiliated in social clubs and many times it all ended in violence. In absence of guideline to Police, these incidents where not recorded as caste related violence but just as pub brawls.

**Caste Discrimination in Marriages**

Caste prejudice shows its ugliest form when people from low caste happen to fall in love with someone higher castes. In the words of Mr Virendra Sharma MP, people have known to commit suicide because of caste discrimination (reference—More4 news at 8pm on 15 February 2008). The cases of violence and intimidation are not recorded against caste discrimination as there are currently no guidelines available to police. There have been highly publicised honour killings in London because of caste related issues.

**Caste Discrimination in Media**

Asian media is controlled by high caste people and religious sentiments of our community have been badly hurt on numerous occasions when proactive and derogatory remarks about holy Guru Bhagwan Valmiki Ji are openly broadcast on Asian Radio Stations. We always complain but get no resolution or apology. Once we lodged a complaint with Radio Authority against Radio XL (West Midlands) about inconsistent, discriminatory and damaging broadcast about religious beliefs. The campaign was spearheaded by Central Valmik Sabha UK and to our great relief, justice was done when our complaint was upheld by Radio Authority.—(Copy Attached).

We were shocked to read a recent report published by Hindu Council UK in which they categorically deny that caste system exists in this country. It is more shocking to find a statement from one of our sister organisations to support Hindu Council UK’s argument that caste discrimination is not being practiced in the UK. However, on investigation it has come to light that the statement included in Hindu Council’s report on Page 6 was never agreed, approved or provided by Shri Guru Valmik Sabha (Southall). A copy of the letter from this Sabha to Hindu Council UK is attached for your information. No talking about championing the elimination of caste discrimination in the UK. We would like to point out that they have never approached us or any of our affiliated organisation to put an end to this social and unacceptable evil. During our bitter campaigns mentioned in this report, no Hindu organisation ever offered any help.

On behalf of Valmiki community, which is one of the victim groups in UK, we would like to strongly express that this problem of caste discrimination cannot be abolished without providing proper legal framework. We are aware that British Government is in process of bringing in a new legislation on form of Single Equality Bill that is aimed to provide protection to British Citizens against any form of discrimination. We are disappointed to find that inspite of valuable contribution provided by our sister organisation CasteWatch UK during consultation process, their input has been totally ignored by the Government in coming up with the draft bill. We would like to urge the Government to reconsider the seriousness of this issue and take necessary action to include “caste” in the Single Equality Bill and ensure dignity and equality for members of our community in the UK. We would also like to request the Government to take appropriate action and stop Hindu Organisations from taking advantage of their status as an ethnic minority in this country and misguide, intimidate, patronise and bully other ethnic groups, Members of Parliament, Government agencies and other religious faiths, particularly Christian faith in the UK.
Memorandum submitted by the Children’s Rights Alliance for England

ABOUT CRAE

1. CRAE seeks the full implementation of the United Nations Convention on the Rights of the Child (UNCRC); and coordinates the Young Equals campaign, which has made a separate submission on the issue of age discrimination against children. Please also refer to the Young Equals report: Making the case: why children should be protected from age discrimination and how it can be done (http://www.crae.org.uk/protecting/age-discrimination.html).

SOCIO-ECONOMIC INEQUALITIES

Please explain how, in practice, the proposed new duty will enhance human rights for individuals.
Please explain why immigration measures are exempt from the socio-economic duty.

2. CRAE welcomes the new duty on reducing socio-economic inequalities, but notes its incompatibility with provisions only recently set out in the Childcare Act 2006. “Desirability” provides a much weaker commitment than requiring English local authorities to “… reduce inequalities amongst young children in their area”.

3. CRAE finds it inexplicable as to why immigration measures are exempt from the socio-economic duty. This fails to promote the rights of all children without discrimination (under Article 2 of the UNCRC); and goes against the intentions of government policy elsewhere, as signified by the UK Government’s recent withdrawal of reservations under Article 22 of the UNCRC (on refugee children).

EQUALITY: KEY CONCEPTS

DISCRIMINATION AGAINST CARERS

Is the definition of direct discrimination in Clause 13 sufficiently clear to ensure compliance with the decision of the European Court of Justice in C—303/06, Coleman v Attridge Law?

Why is discrimination on the basis of association and perception not explicitly prohibited on the face of the Bill, in order to provide greater clarity for employers and service providers?

Was consideration given to including carer status as a protected characteristic, or to giving carers a legal right to seek reasonable accommodation? If so, why was it rejected?

4. CRAE is concerned about the lack of regard, within the provisions of the Equality Bill, to the particular needs of young carers. Without attention to the reasonable protection of young carers from discrimination many will continue to (1) have their needs subsumed within those of the adults they are caring for, and be denied assessment for or entitlement to services in their own right under Section 17 of the Children Act 1989 as “children in need”; (2) be denied significant opportunities for play and learning; and, (3) may lose out on essential developmental aspects of their childhood. We would commend a recent Ofsted report: “Supporting young carers: Identifying, assessing and meeting the needs of young carers and their families” (June, 2009).

5. All under 18s should have protection from age discrimination on the basis of association and perception, which measures in Clause 26 would exclude them from.

6. Eliminating discrimination by association is of particular relevance to young carers. In protecting the rights of their parents, against less favourable treatment, the child’s own rights are more likely to be respected; including their rights under Articles 8 of the Human Rights Act 1998 and Articles 16 and 27 of UNCRC to family life, privacy and adequate standards of living (as exemplified in the recent Coleman v Attridge Law [2008] case).

MULTIPLE DISCRIMINATION

Does the Government accept that if multiple discrimination is confined to two protected characteristics, some individuals subject to other forms of multiple discrimination may be denied legal protection against unfair and unequal treatment?

Why does the Government consider that it is unnecessary to prohibit indirect discrimination or harassment which is based on multiple grounds?

7. Children are not only discriminated against on, for example, the typical equality grounds of gender, race, disability and sexual orientation but they are also discriminated against in British society for simply being children. That places children highly in the category of people most likely to experience multiple discrimination. The failure of government to include children, in all aspects of its measures to provide for a more equal society, only goes to exemplify the lack of worth that the State seemingly places on the value of our children.

8. Either it is wholly right to discriminate against people or it is not. Surely, there can never be a rational argument for an Equality Bill seeming to justify exclusion from protection against certain aspects or characteristics of discrimination.
AGE DISCRIMINATION IN THE PROVISION OF SERVICES

What exceptions are intended to be introduced in respect of age discrimination outside the workplace?

Why are children excluded from discrimination on the grounds of age in the provision of services and the performance of public functions?

Does the Government consider that this may prevent children from enjoying full protection of the rights set out in the UN Convention on the Rights of the Child? If not, why not?

9. CRAE believes that any exceptions should be based solely on objective justification, which must be proportionate and necessary.

10. Children should not be excluded from discrimination on the grounds of age in the provision of services and the performance of public functions. We have set out our detailed evidence in the Young Equals report: Making the case: why children should be protected from age discrimination and how it can be done referred to in paragraph 1. This report highlights the systemic nature of age discrimination against children in both public and private spheres, including healthcare, child protection, access to justice, public leisure facilities, shops and restaurants, and public transport. Age discrimination against children is a neglected problem, often unrecognised and often not taken seriously. The evidence we have gathered comes from a wide range of sources; including statutory inspectorates, regulatory bodies, government research, children, parents and carers.

11. CRAE recognises that children require protection against unfair age discrimination that should be provided to them in the provision of goods, facilities and services. We are not, however, arguing that they should be treated the same as adults or, indeed, necessarily the same as children of differing ages. Equality laws should not be about treating everyone the same, but about treating everyone as having equal worth and value. We are opposed to any treatment of children and young people, including on grounds of age, that is unfair because it cannot be objectively and rationally justified.

12. There has been much recent focus on child protection arising from the Baby Peter case and the Lord Laming report. However, one point CRAE would wish to emphasise, in trying to encourage government to think again about the issue of age discrimination as it impacts on children, is that child protection services are disproportionately provided to children in this country on the grounds of age, as too are a number of other so-called “children’s” services. That is not only discriminatory, but it is potentially harmful to a significant number of children, particularly older children.

13. Excluding children from discrimination on the grounds of age in the provision of services and the performance of public functions prevents children from exercising their rights under UNCRC. The Government has yet again missed an important opportunity to ensure that legislation affecting children in this country is compliant with our international obligations. The measure of its miscalculation in this regard is that unfair treatment for children not only impacts on children themselves, but also, inevitably, on many parents and other adults responsible for their welfare.

EDUCATION

RELIGIOUS WORSHIP IN SCHOOLS

How is maintaining the legal requirement that collective worship in schools must be of a broadly Christian character consistent with the Government’s commitment to “a plurality of provision” and is this justifiable in view of the religious diversity of the UK today?

Please provide a more detailed explanation of why collective worship should continue to be exempt from the duty not to discriminate on grounds of religion or belief?

14. In accordance with Articles 12 (right to be heard) and 14 (freedom of thought) of UNCRC, children with sufficient understanding to make an informed decision should be able to opt in or opt out of collective religious worship in schools. Currently the law only allows for sixth form students to opt out of collective worship. However, children with sufficient understanding may also wish to exercise the “opting out” right or, alternatively to opt themselves into collective worship following a previous withdrawal either by themselves or their parents.

Why is it justifiable to exclude discrimination on grounds of (1) pregnancy and maternity (2) age and (3) marriage and civil partnership from the scope of the Bill’s protections in the field of education?

15. CRAE is concerned about these exclusions and believes that these are bound to lead to the unequal treatment of certain children in schools.

PUBLIC SECTOR EQUALITY DUTY

Please explain why each exception to the public sector equality duty is necessary and proportionate.

16. The omission of the age element of the public sector equality duty from children’s homes may exacerbate age restrictions that can conspire to unnecessarily separate siblings in care and force children to leave settled children’s home and foster care placements.

17. The public sector duty will not prove to be a burden to the many good schools and children’s homes, up and down the country, that are already fostering “good relations”. Its omission, however, will succeed in providing solace to some of our poorest services.
18. The Equality Bill would benefit from being subjected to a “compatibility test”. Government has introduced other legislation that would be conflicted by the introduction of this. For example, the Childcare Act 2006 requires local authorities to: “reduce inequalities between young children in their area” whilst the Equality Bill expressly excludes children from certain safeguards necessary to achieve this.

19. In relation to children’s homes, Government is commendably trying to encourage greater stability in placements for children in care and more placements with siblings in care together. That could, however, be undermined if children’s homes remain exempt from applying protections against age discrimination. Age is one of the main criteria upon which children’s homes are registered. In practice, this means that once a child becomes “too old” to live in a particular children’s home they are required to move on.

20. Fostering good relations in children’s homes has been the bedrock upon which all guidance on “permissible forms of control” and good behaviour management has been based ever since the Community Homes Regulations 1972. Doing so, therefore, is not a burden on children’s homes, but a pre-requisite to their meeting national minimum standards and regulations.

21. It is perhaps most difficult to justify the exclusion of schools from the public sector equality duty to foster good relations amongst people of all ages. Surely, if there is one thing that we would wish to promote in schools it is respect and tolerance for others and, as previously inferred, it is hard to envisage how a school can possibly hope to function without having regard to promoting good relations with, and amongst, its pupils. Quite contrary to government concerns about this being a burden on schools, promoting good relations is recognised widely as prerequisite to managing them well. We would encourage government to look seriously again at how a public sector equality duty applied to schools could encourage children as citizens in their own right, and also as aspiring adults, to grow up having regard for each other, for others of different generations, as well as for others of different backgrounds, in terms of their equal worth and value.

22. There is an inherent contradiction in schools rightly being encouraged to address bullying whilst, at the same time, being given a legal dispensation from having to provide children entrusted to their care with equal protection from discrimination, harassment and victimisation. Government believes this problem can be addressed without recourse to legislation. In respect of good schools we would have no reason to disagree. However, it is beyond the powers of any government to guarantee that only good schools will prevail, and it is therefore wrong to deny children the protection that it takes for granted for persons who are over the age of 18, including those who work in schools.

Memorandum submitted by Church of England Archbishops Council

1. The Archbishops’ Council welcomes the opportunity to respond to the Joint Committee’s call for evidence on the compatibility of the Equality Bill with the United Kingdom’s human rights obligations. Most of this paper is devoted to detailed comments on a number of the particular questions that the Committee has set out in its letter to the Solicitor-General dated 2 June 2009. But we begin with some broader reflections.

2. Since the introduction of the first anti-discrimination legislation more than forty years ago, the Church of England has been consistent in its support for the use of the law to combat the manifestations of prejudice and to promote equality and fairness. The law has a key role to play in countering discrimination. At the declaratory level it makes clear what conduct society regards as unacceptable. At the practical level it provides practical redress for those subjected to detriment.

3. It seems to us that any assessment of the compatibility of the provisions of equality legislation will need to address the difficult and crucial area of conflicting rights and how a proper balance should be struck. We have been concerned at what has seemed in some recent debates to be a trend towards regarding religion and belief as deserving of a lesser priority in discrimination legislation than the other strands where the law seeks to bring protection. The argument appears to be that, because religion and belief is susceptible of personal choice in a way that is not the same in relation to other strands, that means that religion and belief should be subordinate to those other strands when they come into conflict. We think that this is a false analysis, both as a matter of general principle and as a matter of law.

4. In terms of general principle, the preservation of religious freedom, including the right to manifest religious belief in all its diversity, remains a cornerstone of an open, liberal and tolerant society. Nor is religious equality achieved by the elimination of expressions of religious belief in public institutions such as schools or local authorities. This does not amount to, or achieve, equal respect for different religious groups and those of no religion; rather it amounts to an enforced secularism that fails to respect religious belief at all.

5. In terms of law, under Article 9 of the Human Rights Convention it is not only the right to hold a particular religion or belief, but also the right to manifest that religion or belief in worship, teaching, practice or observance, either alone or in community with others, and in public as well as in private, that is protected.

6. The right to manifest a religion or belief is, of course, a qualified right under the Convention. But so are most of the other rights protected by the Convention, including the right to respect for a private and family life under Article 8. Where different, qualified rights come into competition with one another it is not the case that one right will inevitably be given precedence over another; rather, the enjoyment of the rights
in question has to be balanced. One does not begin with the balance tilted in favour of any particular qualified right: article 8 rights—which are those which most often compete with article 9 rights—do not receive automatic priority. Instead, the relative weight of each of the competing rights has to be considered separately in the circumstances of the particular situation and a proportionate balance struck.120

7. Section 13 of the Human Rights Act emphasises the point that the right to freedom of thought, conscience and religion will not, when exercised by a religious organisation, readily yield to other rights protected by the Convention and that it is not in any way subordinate to those other rights.

8. We turn now to a more detailed commentary on a number of the questions raised by the Committee with the Solicitor-General.

The exclusion of harassment on the grounds of religion or belief and sexual orientation

9. We agree that it is desirable to protect people from being placed in hostile, degrading, humiliating or offensive environments. The law already provides specific protection against harassment at work across all strands of discrimination and we welcome that. In relation to race and gender protection already exists or is planned in relation to a wider range of activity. In relation both to harassment on grounds of religion or belief and on grounds of sexual orientation there are, however, substantial difficulties with achieving any satisfactory extension of the law. There is a manifest need to strike a balance between potentially conflicting rights and a clear difficulty in defining harassment in a way that does not rest too heavily on the perception of the person who feels something said or done to be offensive to them.

10. In our response to the consultation prior to the introduction of the Bill we welcomed the Government’s assurance that it would only legislate to extend protection against harassment on the grounds of religion or belief and sexual orientation if to do so would be a proportionate response to a real problem and would not result in unintended consequences such as limiting the right to express a legitimate view or hold a different belief. From the point of view of the Church, particular issues arise in relation to harassment on the grounds of religion and belief, and sexual orientation.

11. We also raised concerns that the consultation paper envisaged the possibility of extending protection against harassment to the ground of sexual orientation but not to religion and belief; or alternatively of extending only a cut-down form of harassment protection to religion and belief. In paragraphs 3–7 above we draw attention to the falsity of the argument that results in lesser protection being accorded to religion and belief than to other protected grounds. To extend full protection against harassment to some grounds but not to religion and belief would result in the creation of a hierarchy of rights with religion and belief in the lowest place. We cannot accept that this should be the case.

12. Turning to more specific matters, in relation to religion and belief, it is inherent in the very existence of different religions that the followers of one religion may find it necessary—in order to expound the tenets of their own religion—to question and criticise, whether explicitly or by implication, the beliefs and practices of other religions. Such questioning and criticism is a legitimate exercise of the rights to manifest religious belief and freedom of expression.

13. Very similar considerations apply in relation to commending the faith to those of no religion or who hold no beliefs. Evangelism amounts to the manifestation of religious belief on the part of those carrying out that activity (particularly in the case of “missionary” religions such as Christianity and Islam, for which the propagation of their beliefs to others is an obligation rather than merely an option).

14. If—contrary to what is currently contained in the Bill—provision were to be made in relation to harassment on the grounds of religion or belief, it would not be sufficient to except anything done in relation to the provision of goods, facilities and services by a religious organisation or a minister of religion. That would cover activity in the context of religious services, such as preaching, and scriptural reading and exegesis, as well as other occasions when teaching and instruction is offered. But it is absolutely fundamental that the right to manifest religious belief through evangelism/proselytising extends to individual followers of the relevant religion.

15. Significantly, article 9 of the Human Rights Convention recognises that by providing that the right to manifest a religion may be either alone or in community with others. The exercise of that right—either by individuals or organisations—should not be inhibited by the possibility that some may claim that this constitutes harassment.

16. In the context of harassment on grounds of religion and belief, we are also concerned about the position of charities which have a religious ethos. We believe that there is a real risk of challenges to the use of religious practices (such as grace before meals) or of religious symbols (such as crosses) on the basis that they involve “harassment” of the users of their services.

17. Such risk arises in part from the widely drawn definition of “harassment” currently employed in British equality legislation, including as it does not only “creating an intimidating, hostile, degrading, humiliating or offensive environment” for the person making the complaint but also “violating [their] dignity”—a broad and uncertain concept, the parameters of which are far from clear.

120 Re S (A Child) (Identification) [2005] 1 AC 593, para. 17, per Lord Steyn.
18. That risk is increased by the emphasis placed on the perception of the claimant in cases where intention is not established and the court or tribunal has to consider the effect of the conduct in question. For that reason we are of the view that employing a definition of harassment that removed any reference to creating an offensive environment or by requiring that conduct must both violate the dignity of a person and create and intimidating or hostile environment would not answer the objections we have to extending harassment provisions to religion or belief and sexual orientation.

19. It is true that someone’s perception that they are the subject of harassment is not in itself sufficient for a claim to be guaranteed success: there is an objective test of reasonableness. But whether that test is satisfied can only finally be determined by a tribunal or court in an individual case. On these emotive issues there is therefore much potential for claims to be made against religious organisations, with all the implications that has in terms of the need to commit time and resources to defending them.

20. For these reasons we believe that there is a real risk that an extension of the law would encourage litigation in a sensitive area and that that cannot be in the public interest and that insofar as competing rights are in play here, extending the law on harassment on the ground of religion and belief would potentially have such a great inhibiting effect upon the manifestation of religion or belief that it could not be said that such an extension would strike a proportionate balance between the competing rights in question.

21. With regard to sexual orientation and sexual activity between persons of the same sex, the Church’s long-standing teaching is well known. While a range of views on the subject is to be found among members of the Church of England, the Church in its formal statements continues to maintain the traditional view as do a substantial proportion of its members. We seriously question whether there is a practical need for further anti-harassment legislation here given the other substantial protection that exists; for example, under the protection from harassment Act 1997 in relation to harassment in general, and under Part 5 of the Bill in relation to harassment in the workplace.

22. Indeed there will be many people of faith who would perceive an extension of the law in this area as essentially an attempt to harass them for having views on sexual morality which others find objectionable. However wrong this perception might be it does illustrate the difficulty of seeking to extend the law ever further into these controverted areas when key concepts such as “harassment” have much more elastic definitions than the term implies.

23. Were Parliament to take a different view, it would be crucial to ensure that a religion’s followers (and not just religious organisations and ministers of religion) continued to be able to express the views of their faith about homosexual conduct, including talking about the need as they saw it for people to lead lives consistent with the teaching of the Church. To deny Christians (and followers of other faiths which take a similar view) such a right would amount to an unjustified interference with the right to manifest religious belief. It would, wrongly, suggest that the right to manifest a particular sexual orientation was in effect a superior right to the right to manifest a religion or belief.

24. To make a perhaps rather obvious point, the fact that a homosexual person might hear the expression of views about homosexual conduct which they found uncomfortable would manifestly not prevent that person from believing, in the context of the right to private life, as they saw it. Thus creating legislative in such a way that the expression of religious teaching about same-sex relationships could not in any context be lawfully expressed would amount to denying a follower of that religion the right to manifest that aspect of their religious belief at all. Such a position would amount to a failure to balance competing rights in a proportionate manner.

25. We do not consider that article 14 of the Convention presents an obstacle to excluding the grounds of religion or belief and sexual orientation from the protection from harassment that is afforded in relation to other protected characteristics under the Bill. Primarily, this is because in considering whether there has been a violation of article 14 it is necessary to consider whether there has been discrimination on the ground of a person’s membership of a particular class; ie that there has been “a failure to treat like cases alike”.121

26. The non-extension of protection against harassment to the grounds of religion and belief and sexual orientation does not amount to failing to treat like cases alike. Protection against harassment is simply not extended at all to these two grounds: so that neither a Christian nor an atheist nor a person of any other religion or belief, or of none, can seek protection from harassment under the Bill on grounds of religion or belief. There is, therefore, no discrimination on the ground of religion in the application of the harassment provisions.

27. Likewise the Bill does not extend protection against harassment either to heterosexual or homosexual people on the ground of their sexual orientation. There is, therefore, no discrimination on grounds of sexual orientation in relation to the coverage of the Bill’s protection against harassment.

28. The harassment provisions contained in the Bill amount to the conferring of protection over and above the right to private life contained in article 8. Where a state chooses to afford additional rights or protection in this way, the fact that that additional protection is limited in its scope—is the field in which it operates—does not amount to a breach of article 14.122


122 As to this principle, see further below in the discussion relating to employment in religious schools.
29. In any event, the principle of equality of treatment under article 14 is violated only if there is no reasonable and objective justification for the distinction.\textsuperscript{123} For the detailed reasons set out above we do not consider that the Government would have any difficulty in establishing reasonable and objective justification for the genuine occupational requirement of religion or belief and sexual orientation on the basis that it amounted to a proportionate response to the need for balancing competing rights. Both religion and sexual orientation have been identified by Strasbourg case law as classifications in respect of which weighty reasons are required to justify a difference in treatment for the purposes of article 14. In relation to the present question they are both in the balance, one against the other and the outcome of the balancing exercise should therefore be determined by the question of the proportionality of treating these protected characteristics differently from others in the Bill in the light of the effect that including or excluding them would have. In the light of what is said above about the effect that extending harassment provisions to the ground of sexual orientation would have in relation to the right to manifest religious belief, the exclusion of this ground from the harassment provisions amounts to a proportionate response to a legitimate aim.

Employment in religious schools

30. Questions 37 and 38 of the Committee's letter to the Solicitor-General raise issues about the interrelationship between paragraphs 2 and 3 of Schedule 9 (Work: exceptions—Occupational requirements). The Committee asks whether the Government considers that the application of a genuine occupational requirement under paragraph 3 will, of itself, "permit employers in certain circumstances to make adherence to religious doctrine in their lifestyles and personal relationships a genuine occupational requirement for a particular post". It also asks why it is justified to give employers greater scope through the provisions of paragraph 3 to impose a requirement to be of a particular religion in circumstances where it could not impose a requirement in relation to sexual orientation under paragraph 2.

31. As paragraph 3 is drafted it does not appear to us that it is apt to cover the application of requirements as to personal conduct as distinct from the narrower question of a requirement simply to be of a particular religion. However, it seems to us both logical and necessary that in the case of a post in respect of which it is legitimate to impose a requirement that the holder be of a particular religion, it should equally be possible to impose a requirement that the holder of the post should not engage in conduct contrary to the tenets of that religion.

32. Indeed it is only in respect of posts that are subject to a requirement to be of a particular religion or belief that the Church would ever wish to impose any of the requirements listed in paragraph 2(4). It is our view that the scope of the exception contained in paragraph 2 should simply be expressed to apply to posts in respect of which a requirement to be of a particular religion was (lawfully) applied (rather than to posts that involved "employment for the purposes of an organised religion" as defined in that paragraph).

Occupational requirements

33. At question 54 of its letter the Committee asks why specific exceptions are required for employment in faith schools when the Bill makes more general provision for genuine occupational requirements in relation to religion or belief.

34. The exception in paragraph 3 of Schedule 9 is narrower than what is permitted under section 60 of the School Standards and Framework Act 1998 (and therefore under the exception contained in Schedule 22 paragraph 4 of the Bill). Under paragraph 3, it would have to be shown that being of a particular religion was a genuine occupational requirement for the particular post and that applying the requirement was proportionate way of meeting a legitimate aim. The GOR might be applicable to RE teachers and those with specific pastoral roles but would not be available in respect of the appointments of teachers generally.

35. By contrast, section 60(5) of the 1998 Act is not concerned with the nature or context of the particular employment; it simply permits a voluntary aided school to give preference to teachers who are likely to support and promote the school's religious ethos. That seems to us not only desirable but also necessary if the Christian ethos of church schools is to be maintained and promoted.

36. We cannot see how it could be argued that the exception contained in paragraph 4 of Schedule 22 to the Bill was not compatible with articles 9 and 14 of the Convention. The effect of that exception is not such as to interfere with anyone's right to freedom of thought, conscience and religion. It simply allows certain schools to give preference in the making of certain appointments to persons who are likely to support the school's religious ethos; it is a matter of personal choice for individuals as to whether they apply for positions in voluntary aided schools.

37. The fact that there are limits to the scope of the provisions in the Bill that prohibit discrimination in the context of employment on the grounds of religion and belief, and that the Bill's provisions do not cover all cases of such discrimination, does not mean that those provisions interfere with Article 9 rights.\textsuperscript{124}

38. As to article 14, the exception contained in paragraph 4 of Schedule 22 to the Bill has to be seen in the context of Part 5 of the Bill. The provisions of Part 5 afford a specific form of statutory remedy, over and above the right to freedom of religion protected by article 9 of the Convention, to individuals who suffer

\textsuperscript{123} Belgian Linguistics Case (No 2) (1986) 1 EHRR 252, 2824, para. 10.

\textsuperscript{124} Cf. R (Amicus) v Secretary of State for Trade and Industry & ors. [2004] EWHC 860 (Admin) at paragraphs 184—185
discrimination on grounds of religion or belief in the employment field. When a state provides such additional protection, while it cannot discriminate in terms of the classes of persons to whom that additional protection is provided (for example to Christians but not to Jews), it is open to the state to choose the extent of the field within which that additional protection is extended.

39. The fact that the legislation places a limit on the field in which those additional rights operate—ie by not extending the protection to the totality of the employment field—does not amount to an interference with article 14 rights because it does not amount to conferring rights on some persons but not on others on the basis of any of the grounds mentioned in article 14 (or on any equivalent grounds recognised as being covered by article 14). The Bill as drafted does not, therefore, produce any discriminatory treatment on grounds of religion in the enjoyment of rights falling within the ambit of the Convention.125

Supplementary memorandum submitted by the Church of England Archbishops Council

School Admissions

1. The religious settlement arrived at in the 1944 Education Act guaranteed to the partners in the Dual System who recommended voluntary aided status for their schools control over their admissions policy. This was in order that the original trust in relation to those schools, which in most cases identified the religious character of the schools and therefore the religious community for whom the provision was intended, might be preserved.

2. The Church of England has always recognised the two-fold focus of its schools, intended both for those who profess allegiance to the Church of England and also for the wider community desiring an education founded on and carried out in accordance with Christian values. In both those contexts the power to admit children from families sharing the religious foundation of the school is both logical and necessary.

3. The Dearing Report The Way Ahead (2001) addressed this issue on behalf of the Church of England and concluded that a mix of intake was necessary. There should continue to be a core of children from practising Christian families in order that the ethos and worship derived from the Anglican and wider Christian traditions is strengthened through parental support.

4. We do not believe there is any justification for treating Church of England schools differently from schools provided by the minority faiths. While the Church of England has a broader conception of the purpose if its schools, consistent with its position as the Established Church, for precisely that reason the exemption must remain. The religious foundation of the school is in greater danger of being weakened where a broader admissions policy is in place. The support of committed Christian parents must be assured through identifying places allocated on the basis of faith.

5. It is quite clear in the 2008 School Admissions Code that an individual school cannot define their own religion. The Code refers to the relevant religious authority, which in the case of the Church of England is the relevant Diocesan Board of Education, by virtue of the statutory role outlined in the Diocesan Boards of Education Measure 1991.

Collective Worship

6. The provisions regarding collective worship are to be understood in relation to the origins of the statutory education system in this country. The first providers of mass education were the Christian churches at the beginning of the 19th century. The entry of the State into public education in 1870 was, in the first instance, an acknowledgement that voluntary provision could not keep pace with growing need. Schools funded entirely from the public purse were provided to fill the gaps in voluntary provision. As such there was a significant consistency of approach, which included a carry over of basic assumptions about the nature and purposes of the curriculum.

7. In particular the contribution to children’s spiritual and moral development in the new Board schools was seen in exactly the same terms as in the voluntary schools provided by the churches, expressed in the requirements for compulsory religious education and collective worship. Both these were seen in Christian terms, albeit newly defined in a non-denominational way. The withdrawal clauses allowed those parents who had conscientious objections to either of those activities to remove their children from those classes and from collective worship.

8. The withdrawal clauses still adequately provide for those who do not wish their children to be part of the daily act of collective worship. The fact that parents rarely avail themselves of them indicates that the requirements are understood and carried out in a way which is not considered offensive. Many schools moreover testify to the positive impact of worship as they interpret the requirement in providing a spiritual focus for their school community, and as capable, within the definition of “broadly Christian”, of acknowledging the beliefs of all members of the school community.

125 Cf. ibid. at paragraphs 198–199. It would be different if the exception applied only in the case of schools of a particular religion or denomination as then the legislation would be discriminatory as between persons according to their religion. But that is not the case under the Bil.
9. Permitting pupils who are not in the sixth form but who are of “sufficient age and maturity” to withdraw on their own authority from collective worship would create the need for sophisticated and invidious procedures in order to determine whether they were in fact of “sufficient age and maturity”. How a suitable definition of maturity might be reached, and by whom, is not clear. The additional burden on schools to apply the resulting tests would not be welcome.

10. Where a school believes that the requirement for “broadly Christian” worship is inappropriate to their community it may apply to the Standing Advisory Council for Religious Education for a “determination”. This allows for the Christian basis to be replaced by some other religious basis more in keeping with the needs of the community. In practice this is rarely invoked though all Authorities have a process in place to enable this to happen.

11. The membership of Standing Advisory Councils of Religious Education is outlined in Circular 1/94, which specifies the representative character of each committee of the Council. Their function is to represent all those groups with a relevant interest in the content of the Religious Education syllabus to be taught in the community and voluntary controlled schools within the Authority.

12. The four Committees represent the interests of the faith communities, the Church of England, the teachers’ associations and the local authority. As such it is necessary that the members not only are members of the specified groups but also authorised in some way to represent them.

Memorandum submitted by the Committee on the Administration of Justice

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organization affiliated to the International Federation of Human Rights. CAJ seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities under international human rights law. Its membership is drawn from across the community in Northern Ireland and beyond. The organisation works across the whole gamut of human rights—civil, political, economic, social and cultural—and has made submissions to a range of parliamentary committees over the years. CAJ was honoured with the Council of Europe Human Rights Prize in 1998 for our efforts to mainstream human rights and equality into the Northern Ireland peace agreement.

CAJ fully recognizes that the Equality Bill (“Bill”) does not extend to Northern Ireland given that this area of work is now a matter for our devolved Assembly. We would however be keen to ensure that debates on equality issues in any region of the United Kingdom are as informed as possible, not least because regional assemblies may look to Westminster for guidance in relation to legislating in certain areas of public policy. While we recognize that the current Bill is lengthy and complex, with a range of important provisions, we have chosen to restrict our comments to part one of the Bill which relates to socio-economic inequalities. We have done this largely because there has been quite a debate recently within Northern Ireland about how best to address socio-economic disadvantage in legislation—not least with respect to the discussions around a Bill of Rights for Northern Ireland. We would also wish to add that our comments here are informed by our experiences of working closely with the statutory duties on the promotion of equality and good relations as contained in Section 75 of the Northern Ireland Act 1998. In this context, we hope that you find our evidence useful.

Undoubtedly, current patterns of increasing socio-economic inequality present a challenge to government and civil society alike. CAJ, like many organizations working in the field of human rights would be keen to see greater socio-economic equality. Our concerns with the measures outlined in the Bill therefore, originate, not with an opposition to the concept of greater equality, but rather with skepticism of the value of the current provisions. CAJ notes for example that there are a number of serious weaknesses with part one of the Bill.

These include for example the fact that the new socio-economic provisions:

— Only apply to “decisions of a strategic nature”, ie not all policies (as per Section 75 of the Northern Ireland Act for example).

— It will be for the public authorities subject to the duty to determine which socio-economic inequalities they are in a position to influence. In this context one wonders whether most public bodies will in effect decide that they are in a position to influence few, if any, inequalities.

— Individuals have no recourse to private law because of a failure by a public authority to comply with the duty. For example, the explanatory notes of the legislation specifically state that in situations in which an individual feels that the socio-economic disadvantages that they face should entitle them to a flat in a new social housing development ahead of those whom the individual judges to be less disadvantaged, there is no provision in the Bill for the individual to bring a case against the local council or other public authority in such circumstances.
— There are no requirements in the Bill for a socio-economic equality impact assessment, or any set of procedural obligations akin to the current Equality Impact Assessment provisions of Section 75 of the Northern Ireland Act, which one might use as a measure of compliance with the requirements of the primary duty.

— There is no enforcement role for the Equality and Human Rights Commission in relation to this provision.

— There are no equivalent complaints mechanism to the current paragraph 10 and paragraph 11 arrangements in Schedule 9 of Section 75 of the Northern Ireland Act. This would at least allow for an element of redress in relation to failure to follow procedural requirements.

CAJ fully recognises that legislating in this new area of law is complex. However we are also aware that a much more robust system is in place elsewhere in the UK to require public authorities to comply with certain procedures in order to give effect to a primary duty to promote equality—namely, in Section 75 of the Northern Ireland Act.

CAJ also notes that in relation to the explanatory notes attached to this provision, several examples are provided outlining how the provision might work in practice.

The explanatory notes state for example that:

“The duty could lead a public body with strategic functions in relation to health to allocate money from its agreed budget to a separate funding stream which targets geographical areas with the worst health outcomes.”

It is of course worth noting that under existing law, a public body could carry out just such a similar exercise. Given the absence of any adequate enforcement procedures, there is clearly a serious question as to the “value added” aspect of part one of the Bill.

CAJ would be of the view that ineffective laws are better left off the statute books altogether. Such provisions merely serve to undermine public confidence in the role of the legislator. Moreover, by introducing ineffective laws, the impression can be created superficially of “something being done”, when in actual fact the real changes which need to take place in society to address a particular problem are ignored.

Addressing socio-economic disadvantage is an important issue that should warrant meaningful action on the part of government to bring about positive change. CAJ believes that the current socio-economic clause is neither meaningful nor likely to lead to any positive change and as such should be withdrawn.

CAJ would also be of the view that it is important that legislators in other regions of the UK do not seek guidance on how to address socio-economic disadvantage from this provision. Within the context of Northern Ireland, we will continue to lobby for a strong and inclusive Bill of Rights with justiciable economic and social rights provisions. We will also continue to argue within the context of Northern Ireland for a robust and meaningful anti-poverty strategy. There are in fact a range of measures which we believe should be introduced to effect greater socio-economic equality. The provisions contained in part one of this Bill however would not be one of those measures and we would caution policy makers and legislators against seeking any guidance from the socio-economic clause in this Bill.

June 2009

Memorandum submitted by the Disability Charities Consortium

1. INTRODUCTION

1.1 We are the Disability Charities Consortium (DCC), an informal coalition of seven disability charities: Leonard Cheshire Disability, Mencap, Mind, RNIB, RNID, RADAR, and Scope. We offer information, support and advice to over ten million disabled people in the UK. The DCC comes together to work on issues of shared concern, including disability discrimination legislation. Due to the importance of the Equality Bill, we are working with other disability organisations: National AIDS Trust, NDCS, Sense, Skill and The Guide Dogs for the Blind Association. This is a joint submission from our twelve organisations.

1.2 We share concerns around a number of issues which have been raised by the Joint Committee on Human Rights, and we ask the Committee to use all its influence to persuade the Government to ensure no weakening in legal protection for disabled people. To make sure that disabled people’s human rights are adequately protected it is also essential to ensure that the Equality Bill fully reverses the damaging precedent that was set by the House of Lords judgement (Lewisham v Malcolm, 2008).

1.3 Human rights are universal and indivisible. The Disability Discrimination Act was an important stepping stone in the advancement of disabled people’s human rights and it is therefore essential that any new legislation must build upon the foundations laid by the DDA. Unfortunately, the Equality Bill as it stands has the unintentional consequence of weakening the rights of disabled people. We must ensure that new legislation must be absolutely clear about disabled people’s rights to be treated as full and equal citizens.
1.4 It is vital that the Equality Bill will not lead to a reduction in disabled people’s rights not to be discriminated against. For this reason, we have highlighted a number of areas where there is a real risk of regression:

— the definition of disability is not adequate to ensure that all disabled people are covered, and the Bill adopts the medical model of disability rather than the social model which is preferred by disability organisations;
— the new provision of “discrimination arising from disability” will not provide the same level of protection afforded by “disability-related discrimination” in the DDA, leaving the door open for another “Malcolm” case;
— the public sector equality duty will not achieve the same outcomes as the Disability Equality Duty, and we are concerned that a number of important public bodies will not be covered; and
— the reasonable adjustment duty shifts the emphasis onto taking steps to overcome the disadvantage rather than addressing the disadvantage itself.

2. The Definition of Disability

2.1 We share the Committee’s concerns regarding the Bill’s adoption of the “medical model” of disability over the “social model” which is increasingly recognised as international best practice. Disabled people developed the social model of disability because the traditional medical model did not explain their personal experience of disability or help to develop more inclusive ways of living.

2.2 The social model says that disability is caused by the way society is organised. The medical model of disability says people are disabled by their impairments or differences. Under the medical model, these impairments or differences should be “fixed” or changed by medical and other treatments, even when the impairment or difference does not cause pain or illness. It creates low expectations of people with impairments so that their education and employment opportunities are more limited and they are more likely to live in poverty. We are, therefore, disappointed that the Equality Bill adopts the medical model which leads to people with impairments and differences losing independence, choice and control in their own lives.

2.3 Disability discrimination legislation in the UK requires disabled people to face a dual burden of proof—first, the individual must prove that they are disabled (ie they must meet the defined criteria of disability), and only then the focus shifts to the treatment and whether it was discriminatory. Under every other protected characteristic in the Equality Bill the focus is on the treatment firstly, then on the connection with the protected characteristic.

2.4 Compared to other groups, disabled people are at a significant disadvantage when claiming discrimination because of the way the definition of disability operates, in particular the long-term requirement and the “normal day-to-day activities”. We are also concerned that the meaning of “substantial” is not defined on the face of the Bill. Currently “substantial” means “not more than minor or trivial”, however because this meaning is not on the face of the Bill, there is a risk for a narrower interpretation in the courts.

2.5 We believe that the definition of disability in the Equality Bill excludes disabled people with fluctuating conditions. Certain mental health conditions are fluctuating in nature. The requirement that the impairment is “long-term” (likely to last or have lasted for more than 12 months) can therefore be a barrier for people when they challenge discrimination relating to their mental health. In many cases it can also be very difficult to predict what the duration of a mental health condition is likely to be.

3. Discrimination Arising from Disability

3.1 We share the Committee’s concern regarding the new provision of “discrimination arising from disability”, which we believe does not sufficiently reproduce the protection of “disability-related discrimination” contained in the DDA. The provision does not provide adequate safeguards that another “Malcolm” case will not happen. By linking the treatment to the detriment, another “Malcolm” may happen where the court determines that as a non-disabled person suffered the same detriment, there was no unlawful discrimination against the disabled person. The definition needs to make it clear that the reason for the treatment is linked to the disability, not simply assess the treatment itself or the detriment.

3.2 The knowledge requirement in the Bill sets a higher threshold and can lead to protracted and complex cases. There is no knowledge requirement in the DDA and we fear that by inclusion in the Equality Bill it will make it much harder to prove disability discrimination. We would like to see this removed.

4. Public Sector Equality Duty

4.1 We welcome the single public sector equality duty but we are concerned about the risk of excluding bodies which are not listed in Schedule 19. Clause 143(2) states that “a person who is not a public authority but who exercises public functions” will still be covered by the General Duty; however there is ambiguity about what constitutes a public function, and organisations which are important for disability equality may be excluded, for example care homes, housing organisations and academies.
4.2 We are worried about whether the public sector equality duty will achieve the same outcomes as the Disability Equality Duty. We want to ensure that public authorities must have due regard to the need to take account of the needs of disabled people, even where this involves more favourable treatment. The public sector equality duty provides that compliance with the duty “may” involve treating someone more favourably. This is a regressive step as the current Disability Equality Duty “requires” public authorities to take account of disabled person’s disabilities even where this involves more favourable treatment. The Equality Bill needs to restore this feature.

5. Reasonable Adjustment Duty

5.1 We believe that the reasonable adjustment duty in the Equality Bill places the emphasis on taking steps to overcome the disadvantage rather than addressing the disadvantage itself. This undermines one of the fundamental principles in the DDA which is to ensure that disabled people enjoy the same level of access as non-disabled people. We want to restore the DDA approach where the focus is on removing the barrier, and where this is not reasonable, providing an alternative means.

5.2 Of particular concern is the power of regulators such as OFQUAL to determine which parts of exams are not subject to the reasonable adjustments duty, without stringent safeguards to ensure that the needs of disabled students are taken into account.

6. Purpose Clause

6.1 We agree with the Equality and Human Rights Commission and a number of other groups that the insertion of a purpose clause into the Equality Bill would clarify the purpose and intention behind the legislation and give guidance about its underlying principles, aims and objectives. We believe that a purpose clause in the DDA would have avoided the Malcolm judgment as the spirit and intention of the legislation would have been clear on the face of the Bill.

6.2 We believe that the government should also give consideration to inserting a purpose clause which explicitly sets out what reasonable adjustments are supposed to achieve.

6.3 Furthermore, the Equality Bill introduces a much stricter comparator test for the reasonable adjustment duty. We believe this to be inappropriate as the reasonable adjustment duty should focus on ensuring that the disabled person can actually do their job or can access the same level of service.

7. Summary

7.1 The Equality Bill is a vital vehicle for making sure that disabled people in the UK can enjoy their full human rights. The Disability Charities Consortium hope that the Government will ensure no regression in relation to the level of protection afforded to disabled people, and address specific issues to guarantee that disabled people are not disadvantaged.

Memorandum submitted by Discrimination Law Association

The Discrimination Law Association (“DLA”) is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law makers and others and of the necessity for the complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

The DLA welcomes the opportunity to make a brief submission to the Joint Committee on Human Rights in relation to the Committee’s pre-legislative scrutiny of the Equality Bill.

As the Committee will be aware, the Equality Bill in very broad outline was announced in today’s Queen’s Speech. In July this year the Government Equalities Office published “The Equality Bill—Government Response to the Consultation”, which provided some indication of some of the content of the Equality Bill and identified some matters on which further discussion or consultation was proposed. Many important elements which the DLA would expect to form part of the Equality Bill are not yet in the public domain, making it difficult for the DLA, or others making submissions at this time, to be able to identify specific provisions that may raise significant human rights issue.

We set out below some provisions we anticipate will be included in the Equality Bill which could raise human rights issues and ways in which we believe the Bill could do more to enhance human rights.

We note at the outset that, while equality has been a core element within human rights for at least sixty years, in the UK there has developed a curious dichotomy with human rights perceived as primarily civil and political rights—with the European Convention on Human Rights (ECHR) being the main point of reference—and equality—as embodied in the equality enactments—relating primarily to social and
economic rights. All indications are that the Equality Bill will, again, focus primarily on equality within social and economic fields, leaving barely touched protection against discrimination in relation to civil and political rights. Further, as one aim of the Equality Bill is to harmonise and consolidate existing equality enactments, there is a real prospect that the Bill will re-enact explicit exclusion from protection against discrimination of areas involving important civil and political rights.

One of the DLA’s main concerns is the apparent absence in proposals for the Equality Bill or otherwise in the government’s legislative programme of measures to ensure that victims of discrimination will have real and effective rights to seek legal redress, which they will be able, in practice, to exercise. This gap raises directly the right to a fair trial “in the determination of … civil rights” as provided for under Article 6 of the ECHR and Article 14 of the UN International Covenant on Civil and Political Rights (ICCPR). Discrimination law is increasingly complex, and it is unrealistic to expect victims of discrimination, many of whom may have physical or mental impairments or may have difficulty understanding English, to bring legal proceedings unassisted. Our concern, and that of a wide range of advice agencies, stems from the restrictions on public funding for discrimination cases and the stated policy of the Equality and Human Rights Commission (EHRC) to assist a limited number of cases regarded as strategic, and rarely at first instance.

It is anticipated that the prohibition of discrimination in respect of public functions that currently exists will be included in the Equality Bill. We are concerned that the Bill will also retain the current exceptions, thereby excluding protection against discrimination in respect of any of the security services agencies, judicial functions or anything done on behalf or on instructions of a person exercising judicial functions, anything done to reach a decision not to prosecute and critical immigration control functions. Questions relating to civil and political rights guaranteed under the ECHR and other international human rights instruments, which also guarantee a right to equality in the enjoyment of these rights, may well arise in these areas. The DLA submits that, instead of the current partial coverage, protection against discrimination in respect of the full range of civil and political rights protected under the ECHR should be included in the Equality Bill, especially as the UK continues to decline to ratify Protocol 12 to the ECHR.

The government has indicated its intention to retain a very long list of exceptions to the prohibition of discrimination. The DLA is concerned that the provisions within current legislation prohibiting discrimination on grounds of religion or belief that permits wide scope for discrimination both in relation to employment and provision of goods, facilities and services and use of premises will again form part of our law. Of even greater concern is the prospect that the Equality Bill will incorporate the exception in the Employment Equality (Religion or Belief) Regulations 2003 that enables section 58 to 60 of the School Standards and Framework Act 1998 to over-ride prohibition of discrimination on grounds of religion or belief in relation to employment in faith schools and the provisions in Part 2 of the Equality Act 2006 (section 52(4)(k)) in relation to the curriculum in faith schools (potentially allowing the teaching of prejudice in relation to other faiths or different sexual orientations), admissions or transport arrangements for such schools. The DLA submits that before the Equality Bill is finalised there is urgent need to consider whether the forms of privileging of religion or belief over equality in the current legislation reflects the right balance between the right to freedom of belief and the right to equality on all of the protected grounds.

The rights of all persons to participate equally and fully in the conduct of public affairs are enshrined in many of the international human rights instruments. In the UK a major barrier to participation is the field of education. Under ICERD, States Parties have a duty to take special measures “to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms”; consideration should be given to the inclusion of a provision along these lines as part of the public sector equality duty that is to form part of the Equality Bill.

The DLA is especially concerned that however the Equality Bill will deal with age discrimination in areas such as provision of goods, facilities and services, employment, use of premises and all other functions of public bodies, the government has stated that protections will apply only to persons over 18. So far as we are aware, none of the international human rights instruments includes an age bar, and we would expect that
instruments with a broad coverage would always be interpreted to guarantee the rights of all persons regardless of age. Further, the EU Charter of Fundamental Rights and the CRPD specifically address rights of children. The Convention on the Rights of the Child (CRC) applies to a wide range of civil and political and economic and social rights that are, or arguable should be, within the scope of the Equality Bill, including health, education, treatment as a refugee, non-exploitation, arrest, detention as well as specific prohibition of harassment.

As the Committee will be aware, the current position regarding statutory protection from harassment on grounds of religion or belief is inconsistent, with harassment as a separate unlawful act where it arises in the context of employment or further or higher education, but challengeable only as a form of direct discrimination, requiring comparator, where it arises in any other context. Further, since protection against discrimination on grounds of sexual orientation outside employment and further or higher education was introduced by regulations under the Equality Act to mirror provisions relating to religion or belief, this dual approach also applies to harassment on grounds of sexual orientation. So far as we understand, the government is not inclined to deviate from the current position, especially in relation to religion or belief, in the Equality Bill. This may be only a temporary problem, however, if the proposed EC Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation is approved in its current form, as this would require harassment on all four of these grounds to be explicitly prohibited. The DLA submits it should not be necessary to wait for EU legislation to resolve this matter. It is clear that from a human rights perspective, as well as a perspective of rationality or legislative clarity and certainty, the present position is unsatisfactory. We are unable to see any real basis for different form of regulation for harassment in activities outside the workplace compared to harassment at work.

The fact that discrimination occurs on more than one ground is recognised in many of the international human rights instruments, for example, CRC, CEDAW (see Concluding Comments of the Committee on the Elimination of Discrimination Against Women: UK, 18 July 2008 re ethnic minority women) and the CRPD. Nevertheless the government appears to be reluctant to incorporate discrimination on multiple grounds in its definitions of discrimination and harassment, regardless of the fact, as has been presented to them on many occasions, that this is the reality for many people.

UK anti-discrimination legislation has never given primacy to protection against discrimination over other legislation, including secondary legislation and ministerial orders. Certain amendments have been necessary in recent years, to give effect to requirements in the EU anti-discrimination directives which require all laws contrary to the principle of equal treatment to be abolished. However, as the government appears to be unwilling to incorporate a purpose clause into the Equality Bill which could signal the fundamental importance of equality, it is likely that the Bill will fail to heed the obligations under ICCPR. Art. 4 ICCPR enables States Parties in time of extreme public emergency threatening the life of the nation to derogate from certain of their obligations under that Covenant, this is permitted “provided such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” A simple solution would be to incorporate into the Equality Bill a provision comparable to Section 19 of the Human Rights Act, requiring pre-legislative scrutiny for compatibility with equality legislation before any new government legislation is introduced.

Discrimination Law Association
3 December 2008

Memorandum submitted by 11 Million

1. **Who are we?**

11 MILLION is a national organisation led by the Children’s Commissioner for England, Professor Sir Al Aynsley-Green. The Children’s Commissioner is a position created by the Children Act 2004.

2. **Summary**

11 MILLION believes that provisions in the forthcoming Equality Bill should be extended beyond the current proposals and ban the unjustifiable discrimination against under 18s, solely on the basis of their age, in the provision of goods, facilities and services. The proposed public sector duty to promote age equality should also apply to under 18s, which would mandate public sector organisations to promote age equality and good relations, which may help redress the current negative view of children in society.

Children of different ages require different treatment according to their varying needs and stages of development. This age-appropriate treatment is entirely correct and justifiable and it is not our intention in calling for this legislation to undermine the provision of age appropriate services. Protection from unjustifiable age discrimination would ensure that children are protected from discrimination which is not evidence based, cannot be shown to be reasonable or justified and has a negative impact on their lives.
3. Introduction

3.1 The Minister for Equality, the Rt Hon Harriet Harman QC MP, has promised of the forthcoming Equality Bill: “The agenda is for everyone because fairness is the foundation for individual rights”. It is however Government’s intention to exclude children and young people below the age of 18 from some of the key age equality provisions of the proposed Bill on grounds that the notion of unjustified age discrimination rarely applies to under 18s and, even in cases of less favourable treatment, that anti-discrimination legislation would not be the most effective solution.

3.2 This submission outlines 11 MILLION’s preliminary analysis of the Equality Bill, which we intend to supplement as we build our evidence base of children’s views and experiences over the coming months.

4. Government proposals

4.1 In the June 2007 consultation paper “A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain”, the Government outlined measures for tackling age discrimination in relation to goods, facilities and services, including a new age anti-discrimination law. The Government was clear however that these proposals would not extend to children and young people under 18 years of age, following the rationale that:

“it is almost always appropriate to treat children of different ages in ways which meet their particular needs and stage of development”,

and that

“The basic principle of age discrimination legislation, that people should not be treated differently on the basis of their age, is therefore rarely appropriate to the treatment of children.”

4.2 These sentiments were reiterated in the recent White Paper which confirmed that the Government’s plans to ban age discrimination in relation to the provision of goods, facilities and services would not apply to children under the age of 18.

4.3 The Government has also proposed a new, single public equality duty covering race, gender, disability, sexual orientation, religion and age to replace the three existing public duties (race, gender and disability). Consistent with the plans to exclude children from the scope of the age anti-discrimination law, the Government has made clear its intention that “children’s services” will not be covered by the age strand of the proposed single equality duty. Given the structure of the current public equality duties—in particular, the fact that their functioning depends on the pre-existence of specific anti-discrimination legislation—it appears that the intention to exclude children’s services from the age strand of the single duty is directly related to the exclusion of under 18s from the age anti-discrimination proposal.

5. 11 MILLION’s assessment

5.1 11 MILLION wholeheartedly agrees with the Government’s view that children of different ages will require different treatment according to their varying needs and stages of development. However, we believe that unjustifiable, less favourable age discrimination does arise, and age discrimination legislation for under 18s is necessary.

5.2 To extract from the line quoted above, Government contends that the “basic principle” of age discrimination legislation is “that people should not be treated differently on the basis of their age”. In 11 MILLION’s view, this misrepresents the nature and purpose of age discrimination legislation: rather than preventing different treatment on the basis of age, the idea of age discrimination law, as with any other type of anti-discrimination law, is to prevent behaviour that may result in less favourable treatment which cannot be justified objectively.

5.3 “Different” treatment—in this context, age-appropriate treatment—is not only something that 11 MILLION welcomes but something that we have actively pursued, especially in relation to children in the youth justice system, asylum seeking children and children with mental health needs. Disability anti-discrimination legislation, for example, does not deny the different needs and capabilities of people with disabilities, rather it operates to ensure that disabled individuals do not receive less favourable treatment on account of their disability. A parallel argument may be made in respect of children: age discrimination legislation would not deny different treatment for children based on their varying needs and capabilities, but would outlaw unjustified discrimination or less favourable treatment based on age. Equality is not achieved by treating everyone the same but by recognising difference and responding to individuals’ different needs.

5.4 This is an argument which the Government accepts in relation to older people, to whom the proposed age discrimination prohibitions will apply. In its recent White Paper, the Government stated:

“It [the proposed age discrimination prohibition] will not affect the differential provision of products of services for older people where this is justified—for example, free bus passes..... We want to make sure we only outlaw unjustified discrimination without unintentionally stopping things that are beneficial to particular age groups.”

5.5 Failing to extend this logic to children and young people not only has the consequence of excluding under 18s from the proposed discrimination law, but also denies the same population the benefits of a public duty to promote age equality that would otherwise apply. The Government Equalities Office has emphasised the high value of the public duty both in affecting cultural change and in ensuring that public services are designed and delivered with regard to the need to promote equality and prevent discrimination. The way in which the public duty is tied to anti-discrimination legislation means that children will lose out twice because of the Government view that age discrimination is not appropriate in relation to children.

5.6 11 MILLION believes that tailoring services to meet children’s different needs and capabilities is fully compatible with the proposed law prohibiting age discrimination.

6. The case for extending Age Equality and Anti-Discrimination proposals to children

6.1 We are currently building up a body of evidence to demonstrate that age anti-discrimination legislation would be not only logical but necessary for promoting and protecting children’s rights. Legislation would provide children affected by age discrimination with an effective form of redress, as well as playing the crucial proactive role of helping to improve children’s outcomes by encouraging greater societal awareness of age equality issues in relation to children and young people.

7. Examples of age discrimination against children in practice

7.1 Unjustified discrimination might arise when other interests are deliberately and illegitimately put before children’s interests (eg cost saving; bureaucratic concerns, power interests) or may arise unintentionally owing to lack of consideration. Unjustified discrimination might also occur more subtly in situations which, on the face of it, appear to be justified, but are only so because societal norms lead us to believe that such treatment is “fair”. Given the slow evolution of age discrimination as a concept, it is not yet possible to provide a complete list of practical examples where children and young people face less favourable treatment without justification. The following however provides a flavour of the types of ways in which children and young people may experience unjustified age discriminated in England today:

— Young people aged 14–18 who are in need of mental health services often receive inferior or less appropriate treatment than younger children;

— 16 and 17 years olds receive lower levels of certain benefits than adults despite paying the same in social security contributions;

— mosquito devices installed in shops and other public venues operate to deter children, young people and parents with young babies from accessing certain local amenities where the devices are in operation;

— shopkeepers and businesses regularly place restrictions on the number of children in stores at any one time while no such restrictions apply to adults;

— 16 and 17 year olds in part-time and full-time employment do not benefit from the minimum wage which is guaranteed to adult members of the working population;

— services that purport to be universal are often not accessible to children because of their design or because of assumptions made on grounds of age by operating staff (eg police complaints procedures).


134 Ibid.


137 See evidence from 11 MILLION’s “Buzz Off” campaign at: http://www.11million.org.uk/adult/buzz_off_campaign/.

8. Implications for children’s outcomes

8.1 Treating children less favourably, either compared to other children close in age or to adults, is likely to result in poorer outcomes for the affected children and young people. Research undertaken by 11 MILLION on mental health services has shown, for example, that older teenage children (particularly 16 and 17 year olds) are often cared for in adult psychiatric wards and, on occasion, detained in police cells or hospital accident and emergency facilities because of the lack of age-appropriate care provision.\textsuperscript{139}

8.2 11 MILLION’s “Buzz Off” campaign is a further example of our work which has highlighted the detrimental effects of age-based discrimination on children’s rights and outcomes. We have received high volumes of correspondence from children and young people explaining the exclusionary and discriminatory effects of the mosquito on their participation in community life and expressing concern about the effect of the device in creating a negative image of children in society generally.\textsuperscript{140}

8.3 Other issues such as the lower minimum wage, lower levels of benefit and less favourable treatment of 16 and 17 year olds in the criminal justice system require further research to determine their effects on children’s outcomes and their continued justification in light of updated evidence. Such analysis is clearly needed given the large numbers of children who allege being discriminated against on the basis of their age. In a recent survey of 3,900 children, the Children’s Rights Alliance for England found that 43 per cent of children reported that they had experienced age discrimination and that age was the single largest ground on which children felt discriminated against.\textsuperscript{141}

9. Implications for children’s rights of excluding under-18s from Age Equality and Anti-Discrimination provisions

9.1 11 MILLION is concerned that excluding under-18s from the proposed age anti-discrimination legislation and consequent age strand of the public equality duty presents a potential violation of Article 14 of the European Convention on Human Rights, as incorporated by the Human Rights Act 1998.\textsuperscript{142} Article 14 prohibits discrimination “on any ground” in regard to the enjoyment of the rights and freedoms set forth in the Convention. Denying children the benefits of age anti-discrimination legislation and of public duties to promote age equality which apply to all other age groups of the population, could infringe children’s rights to enjoy, for example, their private and family life (Article 8) or their right to education (Protocol 1, Article 2) free from discrimination.

Government may of course argue that a potential Article 14 breach (on grounds of age discrimination) could be justified if it were to satisfy the tests of necessity and proportionality. Until this case is made however, the question of compatibility with the Human Rights Act remains outstanding.

9.2 Article 2.1 of the UN Convention on the Rights of the Child (UNCRC) requires State parties to ensure for every child full enjoyment of the Convention rights “without discrimination of any kind”. Given the full range of civil, political, economic and social rights contained in the Convention, there is significant risk that excluding children from the age equality and non-discrimination proposals in the forthcoming Equality Bill will contravene the UK’s international obligations or, at the very least, present a missed opportunity to strengthen children’s rights.

9.3 The UN Committee on the Rights of the Child, following its recent examination of the UK Government’s performance against the Convention, highlighted the lack of tolerance and respect shown to children and young people in British society and encouraged the Government to take measures to mainstream age equality:

“The Committee welcomes the State party’s plans to consolidate and strengthen equality legislation, with clear opportunities to mainstream children’s right to non discrimination into the UK anti-discrimination law (forthcoming Equality Bill).…The Committee is also concerned at the general climate of intolerance and negative public attitudes towards children, especially adolescents, which appears to exist in the State party, including in the media, and may be often the underlying cause of further infringements of their rights.”\textsuperscript{143}

9.4 The Committee therefore recommended, amongst other things, that the State party should ensure full protection against discrimination on any grounds, including by:

“a) taking urgent measures to address the intolerance and inappropriate characterization of children,

b) taking all necessary measures to ensure that cases of discrimination against children in all sectors of society are addressed effectively, including with disciplinary, administrative or—if necessary—penal sanctions.”\textsuperscript{144}

\textsuperscript{139} See n.10 above.

\textsuperscript{140} See n.11 above.


\textsuperscript{142} Human Rights Act, 1998, s.1.

\textsuperscript{143} UN Committee on the Rights of the Child (2008), para.24; Concluding Observations—United Kingdom of Great Britain and Northern Ireland, Geneva, United Nations.

\textsuperscript{144} Ibid, para.25.
10. Conclusions

10.1 The concept of age equality is at a less advanced stage of evolution than other equality grounds such as gender, race or disability. While views on the extent of children’s capacities and capabilities have evolved significantly over time and continue to do so (eg the landmark “Gillick” judgment in 1985), society is still deeply ambivalent in its views towards children and young people.

10.2 Evidence shows that children and young people suffer unjustified discrimination on the basis of their age.

10.3 11 MILLION believes that there are strong reasons, based on considerations of children’s rights, interests and outcomes, for including under 18s in the scope of the proposed age anti-discrimination legislation and in the age strand of the single equality duty in the forthcoming Equality Bill.

10.4 The case for excluding children from the proposed age anti-discrimination legislation and the age strand of the single equality duty has not been satisfactorily made by Government and exclusion risks potential violation of both domestic and international human rights standards.

11. Recommendation

11.1 11 MILLION recommends that the Government extend the proposed prohibition on unjustifiable age discrimination in relation to goods, facilities and services to children and young people below the age of 18. This would have the double benefit of significantly strengthening anti-discrimination measures in respect of children and would ensure that children’s services are captured by the age strand of the proposed single equality duty.

Memorandum submitted by Equality and Diversity Forum

Equality law fit for the 21st Century?

1. The Equality and Diversity Forum is the network of national organisations committed to progress on age, disability, gender identity, race, religion and belief, sex, sexual orientation and broader equality and human rights issues.

2. We welcome the proposed Equality Bill which aims to:

“Make Britain a fairer place where people have the opportunity to succeed whatever their race, gender, disability, age, sexual orientation, religion or belief. Fairness and an absence of discrimination are the hallmarks of a modern, decent society, with a strong economy, which draws on the talents of all”.

3. We consider that the existing laws on age, disability, gender identity, race, religion or belief, sex and sexual orientation discrimination need to be brought together in a single Equality Act.

4. Current discrimination law is unequal in its scope. The table below shows the differences in anti-discrimination protection for the different grounds in relation to the three main areas of current law:

<table>
<thead>
<tr>
<th>SCOPE</th>
<th>Race</th>
<th>Sex</th>
<th>Disability</th>
<th>Religion or Belief</th>
<th>Sexual Orientation</th>
<th>Age</th>
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<td>Employment</td>
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<td>Goods and services</td>
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5. The Equality and Diversity Forum (EDF) considers that the proposed Equality Act should ensure full protection for all.

6. Additionally, there are numerous small and unnecessary differences between the discrimination provisions relating to the different grounds for discrimination, these should be eliminated unless there is specific clear, necessary and proportionate justification for retaining such differential provisions.

What is needed?

— An end to the current anomalous failure to outlaw discrimination on grounds of age in the provision of access to goods, facilities and services.

— A robust single public sector equality duty that covers all grounds, ensuring public bodies “think equality” throughout their functions.

— Express provision for the use of public procurement to secure equality outcomes in the private sector.

— Provisions to address multiple discrimination.

145 Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402 (HL).
— The use of simplified common definitions wherever possible.
— A clear statement of purpose and principles of equality rights in order to give overall coherence and direction.

Age

7. Currently there is no law that protects people from age discrimination in access to goods, facilities and services. Such a law has a vital role to play in establishing a fair and equal society, without these the Bill will fail in its objective of simplifying and strengthening the UK’s equality law, and will send out the message that some are more equal than others. Substantial evidence exists of the inequalities experienced by people because of their age—whether as patients in receipt of health care or social services, as volunteers or in respect of insurance and other financial services. For instance, a recent Help the Aged report found that 73 per cent of people agree that older people face discrimination on grounds of age in their everyday lives.146 Whilst Age Concern has noted that 23 per cent of adults report experiencing age discrimination, more than any other form of prejudice.147

8. We are concerned that the Government is proposing a further 18 months of discussion before regulations would be even be drafted. This would effectively guarantee that regulations will not be in place this side of a general election. We consider that this creates a real risk that regulation may never be put in place. We also feel it is too long to ask older people to wait for fair treatment in health and social care.

9. Whilst we acknowledge the Government’s concerns about the possible costs of implementing a ban on age discrimination and acknowledge the calls that have been made for a phased implementation of the legislation, this need not delay the laying of regulations, which will be vital in setting out a clear framework towards which providers can work.

10. Bearing in mind the findings of the Joint Committee’s Eighteenth Report of Session 2006–07: The Human Rights of Older People in Healthcare, and the serious and damaging nature of age discrimination in health and social care, we consider that regulations should be brought forward without delay.

11. There is also evidence of discrimination experienced by younger people. For example, a recent UK government report found the most common form of unfair treatment reported by children and young people related to that based on age (43 per cent).148

Public sector equality duties

12. Equality can be delivered by taking complaints or individual enforcement action, if discrimination occurs; however, it can also be achieved by requiring public authorities to promote equality in the way that they operate. These requirements are often called “public sector equality duties”. They are intended to ensure that public authorities mainstream equality considerations into all their actions. They do this by requiring public authorities to have due regard to the need to eliminate discrimination and promote equality in all that they do. Currently there are equality duties in force for race, gender and disability. Such duties can make a profound difference to equality outcomes in vital areas that impact on life chances, not least in education, health, housing, criminal justice and employment.

13. EDF considers that that the duties should be extended to cover religion or belief, sexual orientation and age, and be capable of addressing the specific needs of each ground. An integrated equality duty could be more efficient and effective, whilst not diminishing the impact of any of the existing duties. However, we do recognise that in order to ensure that there is no regression from the existing duties it may be necessary to have a very limited number of ground specific differential provisions, for example, to reflect the obstacles constructed by society that impede people with disabilities the provision that ensures that public authorities should “take steps to take account of disabled persons’ disabilities even where that involves treating disabled persons more favourably than others”. In the case of gender, a duty to promote equal pay between men and women.

14. Within the EDF there is a range of views about the extent of the duty in relation to religion or belief. Our discussions have led us to consider two additional provisions, firstly, a provision to confirm that “the objective of the duty to advance equality of opportunity is to achieve a society that is fair and equal and it does not mean the promotion of any particular identity or belief” and, secondly, a provision “to ensure that a public body cannot promote equality of opportunity for one protected group at the expense of another protected group”. We do not currently have a consensus on this, however, we thought that it would be worth suggesting as a possible way forward to resolve some of the concerns that have been raised.

146 Older people’s accounts of discrimination, exclusion and rejection, a report from the Research on Age Discrimination Project (RoAD) to Help the Aged, 2007.
Public procurement

15. It is important to ensure that employees in the private sector do not receive less protection than those in the public sector. One way to achieve this is for public authorities to include equality requirements in any contract they enter into to outsource work. The use of such requirements can be a very effective means for achieving change within the private sector. This is well recognised. The CBI has said “Employers believe public procurement is a highly effective lever for increasing diversity...”149 But the Discrimination Law Review found a lack of clarity about the extent to which public bodies are permitted to use procurement to achieve equality objectives. Some public bodies also lack motivation. The EDF is convinced that the opportunity should be taken in the proposed Equality Bill to include a specific clause to make clear that public authorities must build equality into all aspects of their procurement processes—ensuring that public bodies feel both entitled and obliged to use procurement in order to achieve equality outcomes.

16. The Review acknowledged considerable guidance was already available on this issue. So simply providing more guidance will not lead to action. With outsourcing increasing, EDF considers that it is vital that there be a statutory clarification of the role of procurement as a lever for equality. Professor Christopher McCrudden has drafted a possible clause to provide clarification of public authorities powers in relation to procurement which we would be happy to pass on to the committee if this would be helpful.

Multiple discrimination

17. There is an increasing awareness of the complexity of the operation of discrimination within our society. People do not simply fit into single-issue categories as black, disabled, gay etc. Individuals are diverse, complex and multi-layered, and sometimes they are treated unfairly for more than one reason. However, our equality laws assume that the treatment of people should be analysed by reference to one single characteristic at a time. EDF considers it important that any new equality law is able to take account of the treatment of the whole person, not just one aspect of their identity.150

Common definitions and concepts

18. A new equality act needs to be simple and clear and consistent in its application to all of the protected grounds, unless there is good objective justification for distinguishing particular grounds. We consider that common definitions should be used wherever possible and that it is important that these should be as close as possible, if not identical, to the definitions set out in the relevant EC equality directives.151

Statement of purpose

19. EDF considers that a clear statement of the way in which equality law should be interpreted would assist its application. A modern law should both reflect current thinking and set new standards—by changing hearts and minds without the need for litigation. By setting out the objectives and goals of the Act, it would provide guidance to those seeking to interpret it, both Courts and Tribunals, as well employers and service providers.

Equality and Diversity Forum,

December 2008

Supplementary memorandum submitted by Equality and Diversity Forum

The Equality and Diversity Forum (EDF) is a network of national organisations committed to equal opportunities, social justice, good community relations, respect for human rights and an end to discrimination based on age, disability, gender and gender identity, race, religion or belief, and sexual orientation. EDF raises awareness and disseminates information on all aspects of equality and human rights, providing a unique space for developing dialogue, trust and working relations between organisations tackling discrimination, social and economic disadvantage and human rights abuse. We carry out research, events and seek to inform public policy development. EDF also provides the secretariat for the All Party Parliamentary Group on Equalities. Further information about our work is available at www.edf.org.uk. In this briefing we will comment on a limited number of the questions put by the committee.

150 The EDF leaflet on Multidimensional Discrimination explains this further and is available at http://www.edf.org.uk/news/MultidimensionalDiscriminationLeaflet.pdf
1. Please explain how, in practice, the proposed new duty will enhance human rights for individuals.

This new duty will apply to government ministers and their departments and certain key public bodies such as local authorities and strategic health authorities. They will need to consider how desirable it is to take action to reduce socio economic disadvantage. The duty will only apply to the strategic decisions on spending, policy and service delivery taken by these public bodies. The duty will not set out specific targets or priorities; there is no obligation to publish information about the duty is being applied and no direct enforcement powers. Whilst an individual has no right to claim damages for breach of this duty, an action for judicial review could be brought if an individual believes that a relevant public body has not fulfilled this duty.

Although it is a modest proposal, the EDF broadly welcomes the new socio-economic duty which should further encourage public authorities to consider how to counter socio economic disadvantage.

3. Will the definition of the protected characteristic of “gender reassignment” in clause 7 exclude individuals with a transsexual identity from protection against discrimination where such individuals have as yet not embarked upon the initial stages of the medical process of reassigning gender, or manifested a clear intention to undergo such a process, or who may not be currently proposing to undergo any medically supervised process of gender reassignment?

The definition set out in clause 7 is focussed on those people who have decided to “undergo a process…” We would suggest a wider definition of gender re-assignment, gender identity, which will encompass those who are struggling with their gender identity but have not yet reached a point where they are proposing to undergo a process of changing physiological or other attributes of sex, but may nonetheless face discrimination and harassment.

13. Is the definition of direct discrimination in Clause 13 sufficiently clear to ensure compliance with the decision of the European Court of Justice in C-303/06, Coleman v Attridge Law?

It is currently unlawful to discriminate against or harass someone because they are “linked to” or “associated with” or perceived to be a person who is of another race, religion or belief or sexual orientation. However, current UK law does not provide the same protection in respect of age, disability, sex or gender re-assignment.

The European Court of Justice found UK law inadequate in the Coleman v Attridge Law case, which involved a mother who was discriminated against because she was the carer for her disabled son. The ECJ found that the use of the words “on grounds of” in the relevant European Directive, which had not been incorporated into the Disability Discrimination Act 1995, included discrimination resulting from an association with a disabled person.

The definition of direct discrimination in clause 13 is intended to bring UK law into line with European law and we strongly welcome this. However, we consider that this interpretation of the law is most clearly associated with the “on grounds of” formulation of direct discrimination and it is less certain that the “because of” formulation could be interpreted so widely. We therefore recommend that the “on grounds of” formulation of direct discrimination is used in clause 13.

16. Does the Government accept that if multiple discrimination is confined to two protected characteristics, some individuals subject to other forms of multiple discrimination may be denied legal protection against unfair and unequal treatment?

There is an increasing awareness of the complexity of the operation of discrimination within our society. People do not simply fit into single-issue categories as black, disabled, gay etc. Individuals are diverse, complex and multi-layered, and sometimes they are treated unfairly for more than one reason. However, our equality laws assume that the treatment of people should be analysed by reference to one single characteristic at a time. EDF considers it important that any new equality law is able to take account of the treatment of the whole person, not just one aspect of their identity. It seems likely that most cases will be restricted to a combination of two protected grounds, however, there are some cases where three grounds are engaged, for example, the case of a Bengali Muslim woman who is treated differently from a white Christian man.

17. Why does the Government consider that it is unnecessary to prohibit indirect discrimination or harassment which is based on multiple grounds?

The EDF regrets that the provision that the Government is currently consulting on is limited to direct discrimination only because we believe that this will cause problems for courts and tribunals hearing these cases. Once it is accepted that when people are subjected to discrimination on more than one ground “it can be difficult, complicated and even impossible, to prove such claims” there can be no good reason for excluding claims of indirect discrimination. It is not always clear until the full facts are heard whether a case under consideration is direct or indirect, whether the resultant discrimination is caused directly or by the imposition of a provision, criterion or practice. Restricting tribunals or courts to the consideration of direct
discrimination only in relation to intersectional discrimination would be to create further problems and complexities for them and is likely to add to the time that any intersectional discrimination case takes to be heard. Appropriate protection requires that indirect discrimination on more than one ground should be covered.

Harassment, as a separate civil wrong, is particularly important in relation to situations where there is no valid actual or hypothetical comparator, situations when the employer may say that everyone is treated equally badly. The fact that everyone is treated badly should not be permitted to allow harassment whether that harassment is on one ground or several grounds.

4. **Why does the Government consider it to be unnecessary to make provision for the explicit prohibition of harassment on the grounds of religion or belief or sexual orientation or gender reassignment in education (see Clause 80(10))?**

It is difficult to understand why harassment of school pupils is prohibited on grounds of race, gender and disability whilst the grounds of sexual orientation, religion or belief and gender re-assignment should be explicitly excluded. There is no reason for this exclusion as there is clear evidence of harassment in schools on grounds of sexual orientation and gender re-assignment and to a lesser extent religion and belief. Occurrences of gender reassignment issues are rare at school age but not unknown and when they occur there is a significant risk of harassment.

**Sexual orientation:** The 2007 Stonewall report, the School Report, concluded that 65 per cent of lesbian and gay secondary school pupils in Great Britain had experienced homophobic bullying, 41 per cent of these had been physically bullied and 17 per cent had experienced death threats. 154

**Religion or belief:** The UK charity Beatbullying has just reported that of over 800 children between 11 and 16 years of age 23 per cent reported being bullied because of their religion or belief. 155

Trans gendered people: The young trans person, who is forming their identity in school, faces bullying and harassment. Some 64 per cent of young trans men and 44 per cent of young trans women will experience harassment or bullying at school, not just from their fellow pupils but also from school staff including teachers. 156

73. **Has the Government given consideration to including a purpose clause in the Bill and, if so, why has it rejected it?**

EDF members would recommend that the Bill be amended to include a purpose clause. We believe that this concise clause stating the goals and underlying principles of the Bill would be a useful tool for all those involved in applying the law in practice.

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Memorandum submitted by the Equality and Human Rights Commission (EHRC)

1. **Introduction**

The Equality and Human Rights Commission (the Commission) commenced operating on 1 October 2007 and is the independent statutory body with a duty to promote equality, human rights and good relations in England, Wales and Scotland. 157 The Commission replaced three statutory equality commissions 158 and has jurisdiction over equality relating to race, gender, gender identity, disability, sexual orientation, religion or belief, and age. In relation to human rights the Commission has duties to: promote understanding of their importance; encourage good practice; promote awareness and protection; and encourage public authorities to comply with human rights obligations. 159

The Commission welcomes the opportunity to provide evidence in response to the JCHR call for evidence on the Equality Bill and its compatibility with the UK’s human rights obligations. The Commission is in a unique position to provide that evidence having jurisdiction over both enforcing and advising on all equality legislation, as well as promoting compliance with human rights obligations both domestically under the Human Rights Act (HRA) and internationally under international treaties.

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154 http://www.stonewall.org.uk/education_for_all/research/1790.asp
157 The Commission has statutory jurisdiction over Equality legislation in Scotland. In relation to human rights issues in Scotland it has jurisdiction relating to matters which are “reserved” to the Westminster parliament. In relation to matters “devolved” to the Scottish parliament the Scottish Human Rights Commission has jurisdiction. The Commission and the SCHR also have powers to act jointly or cooperate on matters relating to human rights in Scotland: see section 7 of the Equality Act 2006.
159 Section 9(1) Equality Act 2006.
The Commission has reviewed the government’s memorandum to the JCHR on the Equality Bill’s compliance with the HRA. This was prepared by the Government Equalities Office to support a statement pursuant to section 19 of the HRA. The Commission has also considered the JCHR questions to the government on the Equality Bill by a letter dated 2 June 2009. The Commission wishes to highlight concerns relating to the following key issues:

— the need to incorporate equality as a fundamental human right;
— the need for a purpose clause;
— the limited protection for particular characteristics;
— the limited protection from harassment; and
— concerns with exceptions.

We attach at Annex 1 our two submissions to the Commons Committee Stage (one on disability issues and the other relating to other concerns) and all the amendments to date we have tabled or supported other organisations in tabling. We note that the Commission is still developing its position on a number of issues and will be tabling further amendments as the Bill passes through parliament.

2. Incorporating Equality as a Fundamental Human Right

Any opinion on the compatibility of the Equality Bill with the HRA and international law instruments must proceed from the premise that respect for equality is a fundamental human right and one which is the very foundation of all human rights discourse. The UK Government is subject to numerous international law commitments to respect, protect and fulfil a fundamental human right to ensure the equal ability of all humans to participate in society, without facing unjustified discrimination or barriers on the basis of irrelevant characteristics.

The Universal Declaration of Human Rights 1948, which underpins all contemporary international human rights law proceeds from the underlying assertion that:

“the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”

(Preamble, emphasis added).

The Universal Declaration binds all signatories to “promote respect for” and to “secure [the] universal and effective recognition and observance” of the human rights standards and entitlements contained in it.

The Universal Declaration starts, in Article 1, with the assertion that:

“All human beings are born free and equal in dignity and rights …”

and in Article 2 that:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex language, religion, political or other opinion, national or social origin, property, birth or other status. …”

The presumption of inherent and inalienable equality of worth and entitlement is the starting point for Article 26 of the UN’s International Convention on Civil and Political Rights 1966 (the ICCPR). The ICCPR, one of the most comprehensive equality guarantees in international law, places equality before the law, equal protection of the law, and equal and effective protection from unfairly discriminatory treatment at the heart of human rights discourse. Article 26 ICCPR provides:

“All people are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 26 is important in safeguarding a right to equality and non-discrimination, and not just “equal protection” of the laws.

A central assertion in the Government Equalities Office’s Memorandum is that offering different levels of protection to different “protected groups” does not, in itself, violate Article 14 of the ECHR. That may or may not be so in any particular context. However, the Equality Bill is intended to bring together under one umbrella statute all the United Kingdom’s equality laws. So, to the extent that it fails to offer a comprehensive “equal and effective protection” against unjustified discrimination “on any ground”, it fails to offer full protection to the UN standard of equality which it has undertaken both to respect and to protect.

What is critical, in the Commission’s view, is that the Equality Bill should constitute a complete, and adequate, fulfilment of the rights which the UK has agreed to guarantee, as a matter of EU, Council of Europe or other international law. It is also important to ensure that in fields covered by the EU Equality Directives such as Directive 78/2000/EC (“the Framework Directive”), nothing in the Equality Bill inadvertently detracts from existing levels of protection, since to do so would contravene the non-regression principle in Article 8(2) of that Directive.
That the UK has failed fully to comply with its international obligations in that respect has been recognised by the United Nations’ Human Rights Committee, which monitors the implementation of the ICCPR. On 30 July 2008, in its latest report, it called upon the United Kingdom’s government fully to implement article 26 of the Convention (see Concluding Observations CCPR/C/GBR/CO/6). The government has also refused to sign and ratify the Optional Protocol 12 of the ECHR and to incorporate that into the HRA to provide a free-standing right to equality.

In April 2009, the Commission made detailed submissions to the government on the need for on the need for an Equality Guarantee in the Equality Bill which is attached (see Annex 2). The Commission believes that an Equality Guarantee is essential for a number of reasons: to ensure that equality has the same status as other human rights; to ensure that relevant exceptions in the Bill and other legislation are subject to equality guarantee (this would mean discriminatory laws will be subject to a requirement of being a proportionate means of achieving a legitimate aim); and to help to further embed equality in key public functions, including the courts and parliament in developing legislation. We note that the Commission has received no substantive response to the detailed arguments in our submission as to why they will not include an Equality Guarantee.

We also note that although the government has included in its consultation on a Bill of Rights launched in March 2009 the possibility of a right to equality, they have also stated that they will not seek to bring forward any legislation before the general election. It is possible that no Bill of Rights will eventuate or that the level of protection it provides is insufficient. The Equality Bill therefore represents a unique opportunity to incorporate a right to equality which may not reappear for another generation.

The Commission is aware that the Liberal Democrats tabled an Equality Guarantee amendment on 11 June 2009 in the Commons Committee stage. We understand this was based on our proposed amendment and it is in very similar terms. The Commission therefore supports that tabled amendment.

3. The Need for a Purpose Clause

The Commission notes that the JCHR has asked the government why it has rejected including a purpose clause to the Bill. The Commission also made detailed submissions to the government in April 2009 as to why a purpose clause should be included in the Bill (see Annex 3).

Equality legislation should be viewed as different from other civil legislation such as commercial law. It not only provides civil remedies but also gives effect to fundamental principles concerning the right to equality as embodied in international conventions to which the United Kingdom is a party. This requires a positive and proactive approach to securing equality and alleviating disadvantages encountered by various groups in society. It is therefore appropriate for such legislation to set out the principles and values underpinning the substantive provisions in order to provide a clear statement of how the legislation seeks to give effect to the right to equality. A purpose clause would also provide an important tool of interpretation for the general public and the courts, to ensure that the protections provided in the Bill are not interpreted narrowly.

The government has not provided any substantive response to our submission. The Commission is tabling an amendment to introduce a new purpose clause in the same terms as the model in our submission to the government (see Annex 3).

4. The Limited Protection for Particular Characteristics

4.1 Age Discrimination and Children

The Equality Bill includes “age” as protected characteristic, for the purposes of both direct and indirect discrimination (see clauses 4 and 5, 13 and 18). The Bill provides for direct discrimination on grounds of age not to be regarded as unlawful discrimination if the discriminator can establish that his treatment of a person is a “proportionate means of achieving a particular end” (see clause 13(2)).

However, clause 26 excludes from any protection from discrimination in the context of services and public functions children under the age of 18. This means that there is no legal protection against discrimination in the provision of public services and performance of public functions, even where equal provision of such services may be very much needed. For example, a police officer who harasses young people under the age of 18 because of their age; or a homelessness organisation which refused to give advice to a 17 year old who is in obvious need, though it would give advice to an older person in an analogous situation is not even arguably committing an unlawful act of discrimination. Likewise, a police force which refuses to prosecute an assault by a parent on a child in circumstances where it would prosecute if the child were an adult may well be discriminating on grounds of age, without any legitimate aim in mind or proportionate justification for doing so. But neither would this be outlawed under the terms of the Equality Bill as it stands.

The apparent justification for the government’s decision to exclude those under 18 from protection against age discrimination in provision of goods, services and public functions altogether, is that it avoids the need for formal justification for differential treatment of adults and children, where such differences in treatment are likely to be justified in very many contexts by their difference in status.


161 To be tabled by Tim Boswell MP.
There may often be justification for distinguishing between the circumstances of adults and children, but that is an argument for providing a “justification” limitation to age discrimination against those under 18, such as that contained in clause 13(2). In cases where a difference in treatment is obviously justified based on the “bright line” cut-off of the age of majority, the legality of such differential treatment will easily be justified under the provisions of clause 13(2).

However, there will also be contexts in which an failure to protect children from treatment which would be unlawful if inflicted on an adult, or which would not occur if the child were an adult, serves no legitimate purpose and is not justified. In such circumstances, the differential treatment of the child may amount to a violation of Article 14 (if it is a question which arises in the ambit of another right protected by the ECHR), and in any event, a violation of Article 26 ICCPR. The lack of protection from discrimination may also may inhibit the ability of children to fully enjoy key rights under the UN Convention on the Rights of the Child (UNCRC) such as freedom of expression, privacy, the right to physical and mental health, social security and education.

The Commission does not consider that the absolute exclusion from those under 18 from the protection against discrimination on grounds of age is compatible with the UK’s international law obligations.

The Commission has supported an amendment by Age Concern to amend Clause 26 of the Equality Bill to ensure that children are protected from discrimination in the provision of goods, facilities and services and public functions.

4.2 Disabled Persons

The UK government ratified the UN Convention on the Rights of Disabled Persons (CRDP) on 8 June 2009 with a number of reservations. The Commission has a number of concerns in the Equality Bill relating to protection from discrimination on grounds of disability, some of which relate to compliance with the UK’s human rights obligations under the CRDP. Attached at Annex 1 is the Commission’s submission to the Commons Committee stage on disability issues.

There are two main concerns that link to human rights obligations: the definition of disabled persons and exceptions relating to disabled persons and reflected in several of the reservations to the Convention.

Definition of disabled persons

The CRDP adopts what is known as a social model of disability, in contrast to a “medical model”. The Convention recognises (in Preamble (e)), that disability:

“results from the interaction between persons with impairments and the attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others”.

The CRPD does not offer an exhaustive definition of “people with disabilities”, but it provides in Article 1 that:

“Persons with disabilities include those who have long-term physical, mental intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

The definition of “disability” in clause 6 and Schedule 1 of the Equality Bill, repeats the “medical” model of disability which is currently contained in the Disability Discrimination Act 1995 (DDA) and the regulations made thereunder. It does this by protecting only those persons who have (or have had) a physical or mental impairment which “has a substantial and long-term adverse effect on that person’s ability to carry out normal day-to-day activities”. “Long term” is defined in paragraph 2 of Schedule 1. Paragraph 1 of the schedule allows for the making of regulations which provide for a condition of a prescribed description to be, or not to be, an impairment. Paragraph 3 of Schedule 1 allows for certain disfigurements (which could include the consequences of self-harm) not to be regarded as disabilities, and paragraph 4 of Schedule 1 allows for the making of regulations which may prescribe what inabilities to carry out “normal day-to-day activities” may be treated as being, or not being, a substantial adverse effect.

The Equality Bill definition of disability is significantly narrower than the minimum definition of a person with disabilities contained in the UNCRDP. In particular:

(a) the UN definition focuses on whether the person with an impairment experiences an environmental or attitudinal barrier which “hinders” their full and effective participation in society on an equal basis with others, rather than whether the person’s impairment alone has a practical effect on ability to perform specific functions. Anybody facing the combination of impairment and attitudinal barrier falls within the protection of the CRDP. However, the proposed Equality Bill apparently only protects those defined as disabled, and does not define a person as disabled unless they have a physical or mental impairment which has a substantial, long-term adverse effect on their ability to function day to day. What is substantial, what is “long-term”, and what is “ability to carry out normal day to day activities” are all matters capable of generating fruitless litigation and legal uncertainty.
functions. According to the Explanatory Notes: the Disability Discrimination Act (DDA) did not cover direct discrimination in the exercising of public function, could be justified if it was necessary not to endanger the health or safety of any person.

(b) The UN definition is inclusive, and allows for no exemptions. The proposed Equality Bill definition allows for certain impairments to be excluded from the definition of disability. Indeed, the current Disability Discrimination (Meaning of Disability) Regulations 1996 (SI 1996/1455) (“the Meaning of Disability Regulations”) exclude a whole swathe of “psycho-social” disorders, such as alcoholism and voyeurism from the definition of disability.

(c) The UN definition covers “physical, mental, intellectual or sensory impairments”, whereas “intellectual” and “sensory” impairments are specifically excluded from the Equality Bill definition. This could lead to judicial interpretation of the Bill which is narrower than that required by the UN definition. Whilst a “mental impairment” is apt to encompass a person with learning difficulties, proved by an educational psychologists’ report, it has been held that “it is unlikely to be sufficient for a claimant to put his case only on the basis that he had difficulties at school and is not very bright” (Dunham v Ashford Windows [2005] IRLR 608).

(d) The UN definition has no limitation as to how serious an impairment must be to amount to a disability. The proposed Equality Bill definition requires the effects of the impairment itself to be both “substantial” and “long term” before they are covered. A “substantial” effect has been held—under the terms of the Disability Discrimination Act 1995—to be one which is more than minor or trivial (Leonard v South Derbyshire Chamber of Commerce [2001] IRLR 9).

The Bill removes the list of “normal day to day activities” from the definition of disability so potentially opening up protection to individuals whose impairments or conditions did not readily match these “capacities”, but it repeats the requirement that the effects of an impairment are long-term.

The Commission has tabled an amendment to delete from the definition of disability the words “long term” (see Annex 1). This would help address discrimination faced by people with short term or fluctuating impairments—especially mental health conditions—and therefore the contribution it is able to make to wider policy objectives including reducing the flow of people onto Employment and Support Allowance (previously Incapacity Benefit). It would also provide a broader definition more consistent with the broad definition in the CRDP.

Exceptions permitting discrimination

The Commission is concerned that two types of exceptions in the Equality Bill which permit discrimination against disabled persons are not in compliance with the CRDP. This relates to employment in and provision of services by the armed forces and an immigration exception. The Commission has submitted to the government that parallel reservations to the Convention are also not consistent with the object and purpose of the CRDP, unnecessary and should be withdrawn or reviewed.

Armed Forces

In relation to the armed forces, under Schedule 9 Paragraph 4 there is an absolute exclusion of the armed forces regarding protection from discrimination in employment on grounds of disability. In addition, under Schedule 3 Paragraph 4 discrimination in the provision of services for the purpose of ensuring combat effectiveness of the armed forces is not prohibited on grounds including disability.

Article 27 of the CRDP relates to the right of employment for disabled persons. The Commission considers that the blanket exclusion from protection from discrimination of disabled persons in employment is not necessary or compliant with the Convention. A test of a proportionate means of achieving a legitimate aim should be introduced to an exception and the Commission is considering tabling an amendment to that effect. In relation to the combat effectiveness exception for services, the Commission agrees that it is reasonable to have the exception but that a requirement of proportionality should be introduced. The Commission has already tabled an amendment to that effect (see Annex 1).

Immigration

Schedule 3 Paragraph 16 creates a new exemption concerning disability discrimination and immigration decisions. Protection from disability discrimination in relation to decisions to refuse entry clearance and in relation to leave to enter or remain, is not prohibited where it is on the ground that doing so is “necessary in the public good”. The explanation for this is said to be that such was not necessary prior to the Bill because the Disability Discrimination Act (DDA) did not cover direct discrimination in the exercising of public functions. According to the Explanatory Notes:

“An express exception was not previously needed since the Disability Discrimination Act 1995 did not prohibit direct discrimination in the provision of services or exercise of a public function, and because disability related discrimination, which did apply to the provision of services or exercise of a public function, could be justified if it was necessary not to endanger the health or safety of any person.

Example

A person who arrived at a British airport with TB could be refused entry if this was considered necessary to protect the health of the general public.”
The explanation is problematic because, as the Explanatory Notes acknowledge, disability-related discrimination was always covered by the DDA in the context of the exercising of public functions including immigration functions (section 21D, DDA) and there was no blanket exclusion in relation to the same. Instead, any such discrimination would only be unlawful where not justified having regard to certain conditions or if any discrimination was proportionate means of achieving a legitimate aim.

This exception links to the government’s reservation to the UN Convention on the Rights of Disabled Persons relating to immigration. The Commission with the recent JCHR report on reservations to the Convention that the reservation is not only unnecessary but also inconsistent with the objects and purpose of the Convention, in particular the right under article 18 of the Convention to liberty of movement without discrimination on grounds of disability.

The proposed new exception does not require a legitimate aim or proportionality and also is not in compliance with the government’s obligations under the Convention.

In relation to paragraph 16, the Commission’s position is that an approach similar to section 21D is appropriate, requiring a legitimate aim and proportionality, with an addition that any amending Regulations also be subject to a requirement of a legitimate aim and proportionality. The Commission has tabled an amendment to that effect (see Annex 1).

4.3 Discrimination by association and perception

Paragraphs 24 and 71 of the explanatory notes to the Equality Bill state that the definition of direct discrimination in proposed definition includes those whose impairment, condition or illness is “imputed”, or for those who are discriminated against by reason of their association with those who have a disability. The Commission agrees that it is necessary to have a broad definition of discrimination “because of” disability, broad enough to cover those wrongfully assumed to be disabled and carers or other associates of disabled people. Without such a broad definition, the UK will fail to comply with its obligations under the EU Framework Directive (insofar as work and further and higher education are concerned). It will also fail to comply with Article 26 ICCPR and Article 14 ECHR (within the ambit of other ECHR rights), which both require protection from unjustified discrimination on grounds of a particular “status”.

A ban on “associational” discrimination and discrimination on “imputed” or associational grounds is required, in the context of work and higher education to give effect to the decision of the ECJ in the Coleman case referred to above. It is also required so as to avoid regression from the principle established in two recent domestic court decisions. In Saini v All Saints Haque Centre [2008] UKEAT/0227/08 (in which “discrimination on grounds of religion” was held to include discrimination on grounds of association with someone of a particular religion), such an interpretation was said to be necessary to comply with the EU Framework Directive.

In English v Thomas Sanderson Ltd [2008] EWCA Civ 1421, the Court of Appeal held that discrimination “on grounds of” sexual orientation included discrimination on grounds of imputed sexual orientation, whether or not the victim of the discrimination had the sexual orientation imputed to him, (and indeed whether or not the discriminator believed that he did). Again, this was partly so as to comply with the EU Framework Directive, and partly because, as the Court of Appeal recognised, characteristics such as “sexual orientation” are not capable of precise “scientific” definition.

If the Equality Bill does not protect those associated with disabled persons from discrimination “because of” this association or those to whom disability is wrongly imputed, it will not fulfil the United Kingdom’s international law obligations under Article 26 ICCPR, Article 14 ECHR, and the UNCDPR. It will also violate the non-regression principle in Article 8(2) of the Framework Directive. The government intends the current text to afford such protection. But it is not entirely clear from it that the Bill does prohibit discrimination by association or imputation. In order to avoid unnecessary public and private legal expenditure, and breach of the UK’s international law obligations, it would make sense for this to be clarified. The Commission has supported an amendment to introduce express prohibitions on discrimination by association and perception.

4.4 Discrimination on grounds of marriage or civil partnership

Clause 8 of the Bill appears to suggest that the protection is only afforded to those who are married or civil partners. The same suggestion is made explicit, in the context of work, by clause 13(5), which provides that direct discrimination on this ground is only unlawful if the treatment is because a person “is married or a civil partner”. It does not appear to protect against discrimination against someone because they are not married or a civil partner, and this is borne out by the explanatory notes which accompany the Bill. This is by contrast to clause 10 of the Bill, in relation to religion or belief, which explicitly states that reference to religion includes a reference to lack of religion.
Consequently, there is no free-standing guarantee against discrimination on grounds of “marital status”. Instead, a decision to discriminate in favour of those who are married or civil partners, against those who are neither married nor in a civil partnership, is intended to be lawful.

Such discrimination against a person on the basis that they are unmarried, or not in a civil partnership, would obviously be discrimination on grounds of marital/civil partnership status. It would therefore contravene Article 26 ICCPR, as well as Article 14 ECHR within the ambit of other rights protected by the ECHR.

The Commission is still considering its position on these issues.

5. The Limited Protection from Harassment

Exclusion of pregnancy, maternity, marriage and civil partnership from the relevant protected characteristics protected from harassment altogether

There is no explanation in the explanatory notes to the Bill of the failure render unlawful harassment in relation to pregnancy or maternity, or marriage or civil partnership, even though these are some of the most distressing forms of behaviour to people who may be acutely vulnerable.

The failure to provide such protection for women from harassment on grounds of pregnancy or maternity, in the contexts of service provision, public functions and work, where the specific earlier provisions of the Equality Bill explicitly exclude such behaviour from being regarded as a form of sex discrimination, almost certainly violate the EU Directives, Article 26 ICCPR and CEDAW (for reasons which are analogous to those given for failure to protect against indirect discrimination, in paragraph 46 above).

Harassment on grounds of pregnancy and maternity or marriage or civil partnership is behaviour which would fall within the ambit of article 8 ECHR, or even—in certain circumstances—within the ambit of article 3. However, it is far from clear that positive obligations under Article 14 would stretch to rendering such behaviour unlawful if performed by a private individual, not himself or itself susceptible to direct challenge under the HRA. It does not, therefore, seem likely that this lacuna would be filled by recourse to a remedy under the HRA. The Government’s reasons for excluding pregnancy and maternity, marriage and civil partnership from the “relevant protected characteristics” under clause 24(5) remain opaque.

The Commission is still considering its position on these issues.

6. Concerns with Exceptions

The Commission’s position on a range of exceptions can be seen from the amendments we have tabled to date (see Annex 3). The Commission’s broad position on exceptions is that they must be fully compliant with EU law and should (where appropriate) be subject to a requirement of being a proportionate means of achieving a legitimate aim. This is essential and reasonable as it only permits public authorities and the private sector to discriminate where it is justified. It is also consistent with existing discrimination principles (for example justification for indirect discrimination) domestically and at EU level in the Equality Directives, and human rights principles in relation to article 14 of the European Convention of Human Rights and international treaties.

The Commission is pleased that a number of the exceptions as currently drafted do require a legitimate aim and proportionality. However in relation to a large number of other the exceptions there is no express requirement of a legitimate aim and proportionality. The Commission is currently considering its position on proposing a new clause that would subject appropriate clauses to a requirement of being a proportionate means of achieving a legitimate aim.

The Commission also notes that it is considering the Charitable Sector exception. Clause 186 of the Equality Bill as currently drafted proposes to allow charities to discriminate in the provision of services and restriction such provision to persons with a particular protected characteristic (apart from “colour”) if:

(a) the person acts in pursuance of a charitable instrument, and

(b) the provision of the benefits 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 (clauses 186(1), (2) and (4)).

Clause 186 also proposes that charitable organisations which have historically required an assertion or implies membership of or belief in a religion, such as Girl Guides and Scouts, as a condition of membership continue to be able to do so (clause 185(5)), and for certain fundraising and other supporters’ activities to be restricted to particular groups.

162 For example the provisions on separate and single services under Schedule 3 Part 6 Paragraphs 23 to 25, communal accommodation on grounds of sex and gender reassignment under Schedule 23 Paragraph 23, genuine occupational requirements relating to religion or belief under Schedule 9 Par 1 Paragraph 3, and national security under clause 185.
The intention of clause 186, according to the explanatory notes, is to harmonise the current “service provision” charitable exceptions which permit restrictions in provision of benefits contained in charitable instruments. These are currently contained in:

(c) Section 43 of the Sex Discrimination Act 1975 (sex);
(d) Section 34 of the Race Relations Act 1976 (race, nationality);
(e) Section 58 of the Equality Act 2006 (in relation to members of a particular religion or belief);
(f) Regulation 18 of the Sexual Orientation Regulations 2007 (persons of a particular sexual orientation).

The Government’s Memorandum recognises that the charitable exceptions raise human rights issues. The Commission agree that this is so. 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 charity is defined, in clause 187 of the Equality Bill, as having the meaning given by the Charity Act 2006 (that is, a body which has a potentially charitable purpose which is also of sufficient “public benefit” to be regarded as a charity).

In the Commission’s view, 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 fall within Article 14— as all the protected grounds will—in a context which falls within the ambit of another Convention right 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”.

In deciding whether a charitable instrument complies with Article 14 ECHR, it is important to appreciate that it is the discrimination in the conferment of benefits to a limited group which must be justified, and not the generally beneficial purposes of the charity: see A v UK [2005] 2 AC 68 (it was not the necessity of detention without trial which fell to be justified, but the necessity of detaining only foreign nationals without trial).

As currently drafted, clause 186 risks being interpreted in a way which is incompatible with Article 14 ECHR, because:

(g) in relation to clause 186(2)(a), it is not apparent that it is the limitation on conferment of benefits to a particular group which must meet a legitimate aim: it implies that the general nature of the proposed “good works” may intrinsically justify discrimination in the delivery of them; and

(h) in relation to clause 186(2)(b), it is not clear that merely intending to prevent or compensate for a disadvantage linked to the protected characteristic is insufficient justification, on its own, for a discriminatory charitable instrument. To comply with Article 14, this limb would have to state that a charitable instrument which discriminated in this way would pursue a legitimate aim, but that the terms of the instrument would also have to be a relevant and proportionate means of achieving it.

The concern that clause 186 as presently drafted could be incorrectly interpreted is not a mere fanciful or theoretical one. In its Memorandum, the Government says that his exception would be interpreted narrowly, and gives the example of the Charity Commission’s refusal to allow Catholic Adoption Charities to change their charitable objects so as to permit them to discriminate on grounds of sexual orientation. It uses this as support for the proposition that an exemption of this kind will not be misused so as to discriminate in illegitimate ways. However, since the Memorandum was drafted, matters have moved on. The Catholic Charities appealed to the Charity Tribunal. The Charity Tribunal decided, in its preliminary decision dated 13 March 2009, (para 72) that:

“Regulation 18 [of the Sexual Orientation Regulations 2007] permits charities to discriminate on grounds of sexual orientation if this is within the realm of pure charitable activity, is permitted by the charitable instrument, is not otherwise unlawful, and the expediency test under regulation 18(2) is satisfied”.

The Charity Tribunal did not accept submissions from the EHRC that any such discrimination could only be permitted if it was justifiable to the Convention standard, since charities are not public authorities bound by s6 HRA. (It did not address the argument that a “charitable benefit” must be interpreted compatibly with s3 HRA, by any body, public or private).

In the Commission’s view, the Charity Tribunal could easily interpret clause 186(2)(a) of the Bill in the same way—indeed it was urged to maintain a wide reading of regulation 18 of the Sexual Orientation Regulations 2007 by counsel for the Catholic Charities by reference to the wording of clause 186(2)(a).  

At the final hearing of this appeal, the Charity Tribunal upheld the Charity Commission’s decision not to allow the Catholic Charities to change their charitable objects in the context of this case. But that was not because it considered any such change of objects must comply with the Convention. It was on the basis that The only reason that, at the substantive hearing, the Charity Tribunal decided that the charities could not change their objects was because it was perceived that to permit them to do so would also contravene regulation 15 of the Sexual Orientation Regulations 2007, which would not apply to every act of discrimination.  

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We assume that the intention of clause 186 (2)(a) of the Equality Bill is not to allow (say) a Catholic Charity to discriminate against beneficiaries on grounds of sexual orientation, without justification, on the basis merely that the benefits it distributes are generally a good thing, without expressly justifying the discrimination itself. Yet, in cases other than those involving an element of public funding, that is the implication of the Charity Tribunal’s decision on Regulation 18 of the Sexual Orientation Regulations 2007 in the Catholic Charities case, and a like interpretation could be carried over to clause 186 of the Equality Bill. The Commission therefore considers that clause 186(2) as presently drafted could be incompatible with Article 14 ECHR in circumstances where other ECHR rights are engaged, and incompatible with Article 26 ICCPR in any event.

The Commission considers that the proposed “charitable exception” would most clearly be compatible with Article 14 if it were limited to contexts where the provision of services to a group restricted by reference to a protected characteristic was a proportionate means of meeting special needs of a particular disadvantaged group.

The Commission is currently considering a formulation of an amendment to ensure that the exception is compliant with human rights obligations.

Acknowledgment
The Commission expresses its gratitude for the invaluable written advice from Helen Mountfield of Matrix Chambers which has formed the basis of substantial parts of the Commission’s submission.

Memorandum submitted by Equality Network
1. The Equality Network is a network of lesbian, gay, bisexual and transgender (LGBT) organisations and individuals in Scotland, working for LGBT equality. The Equality Network’s Scottish Transgender Alliance Project is the first government funded transgender-specific equality project within Europe.

2. We would like to comment briefly on the human rights implications of three parts of the Equality Bill: the definition of gender reassignment, the exceptions in schedules 3 and 9 (in relation to gender reassignment), and the provisions on harassment.

The Gender Reassignment Protected Characteristic
3. The Equality Bill somewhat extends the scope of the present gender reassignment protected characteristic, by removing the requirement for a person to be medically supervised for their gender reassignment. It also extends the protection to cover those who are perceived to be transsexual, and those who associate with transsexual people. We welcome these changes.

4. However, the bill still only protects transsexual people who propose to transition, are transitioning, or have transitioned to live full time in the gender opposite to that on their original birth certificate. Many transgender people do not fall within this definition. For example, for a number of reasons such as family commitments, a transsexual person may not to be able to transition full time. Intersex people often face discrimination as a result of their intersex status, and most do not transition from one sex to the other and so would not be protected under the gender reassignment definition in the bill. And people who face discrimination because they are seen as expressing a gender identity different from the norms are not protected—this is a particular problem for pupils in schools.

5. 24 per cent of respondents to a 2008 Scottish Transgender Alliance survey were transgender people who were not undergoing gender reassignment and instead had an ambiguous gender presentation (“Transgender Experiences in Scotland”, Equality Network, 2008). Only 57 per cent of 248 transgender respondents to our most recent survey identified the bill’s definition of “gender reassignment” as applying to them (“Equality Bill Survey—Scottish Transgender Alliance & Gender Spectrum UK”, Equality Network, 2009).

6. All transgender people are at serious risk of discrimination, and all should be protected explicitly. We believe therefore that the protected characteristic should be gender identity, rather than gender reassignment.

7. The United Nations Economic and Social Council (ECOSOC) has recently recommended that states should prohibit discrimination on grounds of gender identity (ECOSOC General Comment 20, 25 May 2009). ECOSOC use the definition of gender identity adopted in 2007 by an international group of human rights lawyers and experts, as part of the “Yogyakarta Principles” on the application of international human rights law in relation to sexual orientation and gender identity:

“Gender identity” refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

(See www.yogyakartaprinciples.org for details)
8. The group who developed the Yogyakarta Principles state: “the Yogyakarta Principles reflect the existing state of human rights law in relation to issues of sexual orientation and gender identity”. We therefore commend their definition of gender identity to the Committee.

9. The Council of Europe’s Commissioner for Human Rights has called on European countries to address discrimination against transgender people, based on the same definition of gender identity (Thomas Hammarberg, 5 January 2009 www.coe.int/t/commissioner/Viewpoints/090105_en.asp).

THE EXCEPTIONS IN SCHEDULES 3 AND 9

10. Schedule 9, paragraph 1, allows discrimination in employment if there is an occupational requirement, and the discrimination is a proportionate means of achieving a legitimate aim. We are very concerned that this is regression from the existing protection for transsexual people, in a way which breaches their human rights.

11. Employers are currently allowed to discriminate on grounds of gender reassignment for certain posts (such as posts involving living in someone else’s private home), but only where the transsexual person concerned does not have a gender recognition certificate. Once the person does have gender recognition, no employment discrimination is allowed on grounds of gender reassignment.

12. The general exception in schedule 9, paragraph 1 is therefore a regression—it would allow discrimination on grounds of gender reassignment against transsexual people who have obtained gender recognition. In our view this undermines the core purpose of the Gender Recognition Act 2004, which is to ensure the privacy of transsexual people. We believe that the wider exception in the bill breaches transsexual people’s article 8 right to privacy (Goodwin v UK, I v UK).

13. We have similar concerns about the exception in schedule 3, paragraph 25. While this appears to restate existing law, and is not a regression, it does provide that providers of single-sex and sex-segregated services can discriminate against transsexual people who have gender recognition, and so raises the same privacy concerns.

14. We are also concerned about the effects of schedules 3 and 9 on transsexual people who have transitioned to live full-time in their acquired gender, but have not yet obtained gender recognition. It is a requirement of the Gender Recognition Act 2004 that a person lives for at least two years in their acquired gender before they can obtain gender recognition.

15. We suggest that the article 8 privacy rights of transsexual people in that situation also need to be protected as far as possible. We would also suggest that if a person is living full-time in their acquired gender, then whether or not they have obtained gender recognition, there is no good reason for an employer or service provider to treat them less favourably on grounds of their being transsexual.

HARASSMENT

16. We are very concerned about the missing harassment protections in the Equality Bill: for sexual orientation (and religion/belief) in clauses 27 (services), 31 to 33 (premises) and 80 (schools), and for gender reassignment in clause 80 (schools).

17. Sexual orientation harassment by service providers is just as commonplace as harassment related to other protected characteristics. The Explanatory Notes to the bill provide examples of harassment which is made unlawful by the bill, including harassment on grounds of race in a pub (paragraph 116, final bullet point), and harassment on grounds of disability by a schoolteacher (paragraph 284, final bullet point). Both are examples that are just as likely to occur on grounds of sexual orientation, but the bill does not make this unlawful.

18. Concerns have been expressed about the effect of provisions on harassment related to gender reassignment, sexual orientation and religion/belief, on rights to freedom of religion, and freedom of expression, under ECHR articles 9 and 10. We suggest that similar issues could potentially arise for another protected characteristic, gender, where harassment provisions are already in place in the Equality Bill. This suggests to us that it should not be necessary to use a narrower definition of harassment for gender reassignment, sexual orientation and religion/belief, than for gender, to protect freedom of religion and expression.

19. The harassment provision in the bill, clause 24, includes a reasonableness test for deciding whether conduct is harassment (clause 24(3)(c)). We would suggest that that test can be, and therefore must be, interpreted compatibly with ECHR articles 9 and 10. If that is the case, the reasonableness test would ensure that the harassment provisions are used compatibly with the ECHR, and it would not be necessary to restrict the definition of harassment to achieve this.

20. The importance of harassment provisions covering sexual orientation and gender reassignment is illustrated by the research. The Equality Network’s 2007 survey of 97 lesbian, gay and bisexual (LGB) people in Scotland found that one in five had experienced sexual orientation discrimination or harassment by providers of services, and just under half of those experiences were clearly harassment, as distinct from direct discrimination—they were abusive or derogatory language, humiliating “jokes” and other bullying. The experiences covered a range of public and private sector services, including the NHS, prison, cafes and hotels.
21. Stonewall’s survey of LGB school pupils across Britain found that 65 per cent had experienced homophobic bullying, and 97 per cent had experienced homophobic language, in school. 30 per cent said that adults were responsible for homophobic incidents in their school (“The School Report”, Stonewall, 2008).

22. Research for the Equalities Review found that 64 per cent of young trans men, and 44 per cent of young trans women, experienced bullying and harassment at school, some of which was by staff (“Engendered Penalties”, Equalities Review, 2007).

Memorandum submitted by Help the Aged

1. Help the Aged is pleased to have this opportunity to submit evidence to the Joint Committee on Human Rights on:
   — The significant human rights issues likely to be raised by the Equality Bill.
   — Whether the Equality Bill presents opportunities to enhance protection of human rights.

Executive Summary

2. The Equality Bill will enable the principles of non-discrimination to be enshrined in domestic legislation.

3. The Equality Bill presents an opportunity to significantly improve the provision of healthcare services, especially mental healthcare, and social care services to older people.

4. We believe that the Equality Bill could tackle social exclusion and isolation for older people. Prohibiting age discrimination in goods, facilities and services can significantly improve older people’s enjoyment of their human rights.

5. It is concerning that in the areas in which age discrimination legislation has already been passed discrimination is still allowed to continue, for example through mandatory retirement ages.

Introduction

6. Help the Aged welcomes the proposal to introduce an Equality Bill and believes that this represents an opportunity to make significant developments in the protection and promotion of older people’s human rights. We are, however, concerned that during the process of getting from the Draft Legislative Programme to a draft Bill some of this ambition may be lost and we fear that the end product may fall short of realising the full opportunity that this Bill presents.

7. Help the Aged has previously argued that deep seated age discrimination deprives older people of rights that the rest of society is able to take for granted. Legislation to prohibit discrimination is the first step to challenging deep-seated and ingrained attitudes that should have no place in contemporary society. It is clear that similar legislation on discrimination has made a considerable difference to public attitudes and perceptions with regards to race and gender. In this way legislation can send a clear message:

“The law can be employed as an unequivocal declaration of public policy. It gives support to those who do not wish to discriminate, but feel compelled to do so by social pressure… At its most effective, it has the ability to reduce prejudice by discouraging behaviour in which prejudice finds expression.”

8. Placing a positive duty on public bodies may help to ensure the effective protection of existing human rights that are currently inadequately protected. In other words there is scope for the Equality Bill to strengthen conformity with, and enforcement of, the Human Rights Act 1998.

9. We believe that the Equality Bill represents an opportunity to enhance protection of rights far wider than simply those contained in the ECHR. For instance, Help the Aged views equality and non-discrimination as basic human rights, but while it is clear from Article 14 that equality and non-discrimination are fundamental human rights principles, Article 14 only applies the prohibition on discrimination with the enjoyment of the rights contained in Articles 2 to 13. The Twelfth Protocol to the ECHR extends the prohibition on discrimination to the “enjoyment of any right set forth by law”. It is unfortunate that the United Kingdom has not signed the Twelfth Protocol, but Help the Aged believes that the Equality Bill effectively presents an opportunity to secure the prohibition on discrimination contained in the Twelfth Protocol into domestic law. This will also reflect the importance of prohibiting discrimination in other Human Rights instruments.

165 Lord Lester of Herne Hill QC, “Age Discrimination and Equality, Help the Aged Annual Lecture” (2001)
166 International Covenant on Civil and Political Rights (ICCPR) Art 26; International Covenant on Economic, Social and Cultural Rights (ICESCR) Art 2
HEALTHCARE

10. The JCHR has previously recommended that age discrimination should be prohibited in the provision of healthcare.\textsuperscript{167} We wholeheartedly agree. There is clear evidence that not enough is being done to protect older people’s Article 2 rights.\textsuperscript{168} There are many examples of the importance of removing age discrimination and ageist attitudes. To take just one, we are aware of a woman who complained to her GP for years about back pain. He dismissed her complaint as “old age” and never examined her. It was only when she moved house and was sent for a scan by a new GP that it was discovered that she had a tumour the size of a football in her back, which could have killed her. To put it bluntly, age discrimination can be a matter of life or death.

11. However, Help the Aged also believes that the Equality Bill will enable the protection of older people where healthcare is involved but the situation is not so serious that their Article 2 rights are engaged. In these situations Help the Aged believes that the Equality Bill will enable the rights contained in Article 12 of the ICESCR to be strengthened for older people:

“... the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”\textsuperscript{168}

All the evidence suggests that older people are not offered the highest attainable standard of physical health. Help the Aged believes that this partly stems from attitudes towards older people. For example, 29 per cent of over-65s agree that health professionals tend to treat older people as a nuisance.\textsuperscript{169}

12. Important healthcare maintenance services which are particularly used by older people, for example podiatry and foot care services,\textsuperscript{170} are given low priority by Primary Care Trusts, resulting in older people losing mobility and becoming socially isolated.\textsuperscript{171} A public sector equality duty for age could help to ensure that resources were more equally shared between services predominantly used by older people, and those used by other age groups.

MENTAL HEALTHCARE

13. In addition to physical healthcare the Equality Bill could have a tremendous impact on mental healthcare. The ICESCR specifically mentions mental health.\textsuperscript{172} The right to good mental health and effective mental healthcare services can also be seen to engage ECHR Article 8, as stated by the European Court of Human Rights:

“Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.”\textsuperscript{173}

Furthermore the House of Lords has stated clearly that “the preservation of mental stability can be regarded as a right protected by article 8.”\textsuperscript{174}

14. As depression is a major risk factor for suicide it is clear that ECHR Article 2 can be engaged.\textsuperscript{175}

15. Mental health provisions for older people are vital. For instance, there are around 2.4 million older people with depression severe enough to impair their quality of life.\textsuperscript{176} Around 400 people aged 75 or over committed suicide in 2006.\textsuperscript{177}

16. Many mental health services are subject to a cut off at the age of 65. We believe that this blatant discrimination is clearly contrary to the principles of non-discrimination and would run counter to the proposed legislation on age discrimination.

17. We believe that promoting age equality will help to promote good mental health and well-being for older people. The Equality Bill can play a key role in delivering a “society where the needs of older people with mental health problems and the needs of their carers are understood, taken seriously, given their fair share of attention and resources, and met in a way that enables them to lead meaningful and productive lives”.\textsuperscript{178}

\textsuperscript{167} Joint Committee on Human Rights, “The Human Rights of Older People in Healthcare” (2006–07) 156-I p. 25
\textsuperscript{168} ICESCR Art 12(1)
\textsuperscript{169} Spotlight Survey 2008, ICM Research for Help the Aged (2008)
\textsuperscript{170} Help the Aged, “Best Foot Forward” (2005), produced with the University of Plymouth and University College Northampton; Age Concern, “Feet for purpose? The campaign to improve foot care for older people” (2007)
\textsuperscript{171} Healthcare Commission, the Commission for Social Care and Inspection and the Audit Commission, “Living well in later life: a review of the progress against the National Service Framework for Older People” (2006)
\textsuperscript{172} ICESCR Art 12(1)
\textsuperscript{173} Pretty v United Kingdom (2001) 33 EHRR 205 [47]; see also Bensaid v United Kingdom (2001) 33 EHRR 205 [47]; see also Pretty v United Kingdom (2002) ECHR 427 [61] where “psychological integrity” is referred to
\textsuperscript{174} R (Razgar) v SSHD [2004] UKHL 27 [74]
\textsuperscript{175} Keenan v United Kingdom (2001) 33 EHRR 38
\textsuperscript{176} UK Inquiry into Mental Health and Well-Being in Later Life “Promoting mental health and well-being in later life” (2006) p. 10
\textsuperscript{177} Office for National Statistics, “Suicide rates in the UK 1991–2006”
\textsuperscript{178} UK Inquiry into Mental Health and Well-Being in Later Life “Improving services and support for older people with mental health problems” (2007) p. 4
UK Inquiry into Mental Health and Well-Being in Later Life concluded that age discrimination was the fundamental problem and that the scale of depression in people aged over 65 demanded a public health approach.\textsuperscript{179}

**Housing**

18. Help the Aged believes that not enough is done to meet the housing needs of older people and to ensure respect for the homes of older people. This is particularly important with regards to homelessness.

19. Homelessness among older people is generally given a lower priority than that affecting other age groups. Many older homeless people have specific needs that require a tailored approach when developing strategies. A survey found that 60 per cent of homeless people aged over 50 had three or more presenting problems in addition to homelessness.\textsuperscript{180} As local housing authorities will be under the proposed public sector equality duty we believe that this could lead to a, long overdue, equivalent to the National Youth Homelessness Scheme.

20. Earlier this year Help the Aged released its manifesto for lifetime neighbourhoods, “Towards Common Ground”. We believe that the positive duty that the Equality Bill will place on public bodies will go some way to realising some of the goals in this manifesto and ensuring homes and neighbourhoods fit for older people.

**Social Exclusion and Isolation**

21. Recent research by the Social Exclusion Unit found that 29 per cent of older people aged 80 or over were judged to be excluded from important basic services, compared with only 5 per cent of those aged 55 to 59.\textsuperscript{181} The final report of the Equalities Review found that people aged over 80 are particularly at risk of suffering multiple exclusion.\textsuperscript{182} Social isolation and loneliness are risk factors for poor mental health and suicide.\textsuperscript{183}

22. Help the Aged believes that the jurisprudence of the ECtHR places issues of social exclusion and isolation squarely in the human rights arena:

\begin{quote}
“… the concept of ‘private life’ is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person… Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.”\textsuperscript{184}
\end{quote}

23. Help the Aged hopes that the Equality Bill will tackle social exclusion by promoting consideration for the needs of older people. For instance the shortage of benches, seats and public toilets in public areas particularly disadvantage older groups and can lead to social isolation.

24. According to a Help the Aged study:\textsuperscript{185}

- 68 per cent of people agree that there is a shortage of benches and seating in public areas.
- 74 per cent agree that there is a shortage of public toilets.

25. 52 per cent of older people say that they do not go out as often as they would like due to the lack of public toilets in their area.\textsuperscript{186}

26. Education policies which focus largely or exclusively on vocational and work-related aspects of education deny the importance of education to many people in later life, for whom it may be a source of continuing interest and reward. Such limitations also potentially restrict career development and social mobility. A public sector equality duty for age would require reassessment of the curriculum, teaching, marketing and financial support to ensure that older people were offered the same opportunities as younger people.

**Financial Services**

27. Financial services such as access to banking facilities and travel and motor insurance are essential to avoid social exclusion. Help the Aged submits that these can be viewed in a human rights context in the light of the discussion above regarding social exclusion. In addition the House of Lords has said that “private life” in Art 8 must be understood “as extending to those features which are integral to a person’s identity or ability to function socially as a person”.\textsuperscript{187}

\textsuperscript{179} “Improving services and support”, p. 8
\textsuperscript{180} P Bevan & A van Doorn, “Good Practice Briefing on Multiple Needs” (2002)
\textsuperscript{181} Social Exclusion Unit, “A sure start in later life” (2006)
\textsuperscript{183} National Institute for Mental Health in England, “Making it possible: Improving mental health and well-being in England” (2005)
\textsuperscript{184} Pretty v United Kingdom (2002) ECHR 427 [61]
\textsuperscript{185} B Bytheway, R Ward, C Holland and S Pearce, “Too Old: Older people’s accounts of discrimination, exclusion and rejection”, a report from the Research on Age Discrimination Project (RoAD), Help the Aged (2007)
\textsuperscript{186} Help the Aged, “Nowhere to Go” (2007)
\textsuperscript{187} R (Razgar) v SSHD [2004] UKHL 27 [9]
28. Services such as travel insurance are essential for ensuring that the fundamental European principle of freedom of movement is open to all. Older people are excluded from this by current discriminatory practices.

29. The Government has stated that the Equality Bill will tackle age discrimination in the provision of financial services. Help the Aged welcomes this development, but wishes the JCHR to be aware that these are important issues for tackling social exclusion and isolation. It is therefore important that legislation does not water down this commitment or delay its delivery unduly.

EMPLOYMENT

30. We note that the Government does not appear to intend to use the Equality Bill to address the issue of age discrimination within the workplace. This is unfortunate as Help the Aged does not believe that the current legislative regime goes far enough in order to guarantee equality in the workplace.

31. We believe that the right to work is a fundamental right. We note that ICESCR Article 6 recognises the right to work and that the concept of functioning socially as a person can also be construed as including such a right.

32. The Employment Equality (Age) Regulations 2006 were introduced to transpose Directive 2000/78/EC. Help the Aged believes that the exemption in Regulation 30 allowing enforced retirement at the age of 65 is unjustifiable discrimination and contrary to the fundamental human rights discussed above.

33. Help the Aged believes that the Equality Bill is an opportunity to address this legislative failing and ensure that age is not used as an indicator of an employee’s ability. We are also concerned that more needs to be done to stamp out age discrimination in the workplace. A recent survey of jobseekers aged over 50 found that 38 per cent had experienced age discrimination in the workplace and 50 per cent had experienced age discrimination in seeking employment. We believe that Regulation 30 sends out a powerful message to employers which is totally at odds with the aim of the Directive.

34. Due to changing demographics and life course patterns people are in education for longer, marrying and starting families later, getting mortgages later, have less in savings and lower pensions. Therefore, working lives need to extend in order to generate increased income, through labour and taxes, to support people in older age. A public sector equality duty for age could encourage longer working life amongst employees of public authorities and those who work for privately owned companies that provide public services, which in turn would help to support the economy and provide increased autonomy to older people.

35. As major users of public services, a public sector equality duty for age would be extremely beneficial to older people. It would provide a flexible, sustainable framework for assessing the reasoning behind age related practices and for reviewing seemingly neutral policies for their impact on different age groups, effectively helping to root out directly and indirectly discriminatory practices without the need for costly and complex litigation.

36. For a positive duty on public bodies to be effective it is important that there is clarity around both the content of the duty and those bodies that it will apply to. It is vital that the confusion that has surrounded s. 6 of the HRA does not hamper the effectiveness of the Equality Bill. Help the Aged believes that it is important that the duty operates on a wider basis than the HRA currently applies to.

37. Help the Aged echoes the Joint Committee on Human Rights in calling for the Government to settle the uncertainty surrounding the meaning of public authority within the HRA. We believe that the Equality Bill represents an ideal time to undertake this important work and clarify which bodies will be tasked with promoting equality and protecting human rights.

38. Where public sector equality duties covering age exist, research suggests that this has led to increased dialogue with older people, a focus on those issues which affect them most directly and growing evidence of improved outcomes. For example, in Northern Ireland the positive equality duty for age has:

— Provided “groundbreaking protection against age discrimination”.
— Raised the profile of age issues.

189 "The Meaning of Public Authority under the Human Rights Act" [2008]
191 See the discussion in Joint Committee on Human Rights, “The Meaning of Public Authority under the Human Rights Act” (2006–07) 77; YL v Birmingham City Council [2007] UKHL 27
193 “The Meaning of Public Authority under the Human Rights Act” [108]
— Brought together older people’s organisations and facilitated working across strands.
— Positively influenced the culture of public authorities and encouraged them to take a joined-up approach to equality.
— Raised the issue of multiple identities.  

40. Help the Aged has identified that the human rights of older people are often breached. Rights such as the right to be free from inhuman and degrading treatment, the right to life, the right to a family and personal life and the right to peaceful enjoyment of possessions may be contravened for older people, particularly in health and social care settings.

41. A public sector equality duty for age would help to ensure that older people’s human rights were better protected and observed because of the obligation on public authorities to consider explicit and implicit unlawful age discrimination in policies and practices and take a proactive approach to reviewing and monitoring discrimination via the complaints and satisfaction procedures.

42. The JCHR has stated that “… the existing legislation does not sufficiently protect and promote the rights of older people in healthcare. We recommend that there should be a positive duty on providers of health and residential care to promote equality for older people”. We agree. It is therefore essential that these providers are covered by the proposed duty.

43. A further example of the value of a positive duty in protecting human rights can be taken from the Crown Prosecution Service. The CPS has published a policy on prosecuting crimes where older people are the victims or witnesses. This will arguably strengthen the protection of rights contained in Article 2 and the Article 1 of the First Protocol to the ECHR. The CPS has taken this action in advance of a positive duty regarding age, but Help the Aged believes that this is a clear example of the type of action that could follow on from the introduction of such a duty.

EXEMPTIONS

44. Help the Aged welcomes the Government’s commitment to ensuring that the legislation does not prevent the differential provision of products or services for people of different ages where this is justified. Probably the most frequently cited example of this is free bus passes for the over 60s, but there are several other situations. There is a need here to be very cautious with the drafting of the legislation to avoid unintended consequences. This is arguably the case with the issue of access to education under the Employment Equality (Age) Regulations 2006. We are aware that training providers, especially Further Education institutions and Community Colleges, have withdrawn courses and cut subsidies that were offered to older learners. Help the Aged believes that concessions for educational courses can be justifiable in certain circumstances and feels that the Government should issue guidance on this area. Legitimate aims could include the promotion of social inclusion, the promotion of health and active ageing and the skilling up of older workers. In order for rights to be properly protected and promoted it is important that exemptions in all aspects of equality legislation are catered for where they are justifiable. We ask the JCHR to see that sufficient priority is given to this issue.

DRAFT DIRECTIVE

45. At the same time as the UK is working towards introducing an Equality Bill the EU is considering a draft framework directive on equality outside of the workplace. At this stage it is not clear what support there will be for such a directive, or what form it might ultimately take, so Help the Aged does not believe that it is acceptable to delay the Equality Bill while the directive is finalised. We do believe that this proposed European measure demonstrates that legislation prohibiting discrimination is placed firmly in the field of human rights and that there is a pressing need for such legislation.

DISCRIMINATION BY ASSOCIATION

46. The ECJ has recently confirmed that EU law on workplace discrimination protects those who have been discriminated against on grounds of their association with someone who is disabled. It follows that discrimination on grounds of association with someone who is of a particular religion, belief, age or sexual orientation is also prohibited by EU law. This ruling gives employment rights to carers of people with disabilities, but it equally follows that those caring for elderly people will also be protected. Help the Aged believes it is important to include similar protection in the age discrimination provisions in the Equality Bill and would urge the JCHR to recommend that the draft Bill reflects this need.

193 Age Concern, “Tackling Age Discrimination Beyond the Workplace: Age Concern Seminar Series” (July 2006); See also, Age Concern, “Age of equality? Outlawing age discrimination beyond the workplace” (May 2007)
198 Case C-303/06 Coleman v Attridge Law [2008] 3 CMLR 27
ENFORCEMENT

47. In order to ensure adequate protection of rights it is essential that a robust enforcement mechanism is available. Help the Aged believes that representative actions will be a crucial part of this. It is therefore unfortunate that there will not be provision for representative actions in the Equality Bill. However, we note that the Government will consider this issue further.\footnote{199 “The Equality Bill—Government response to the Consultation” (Cm 7454, 2008), p. 6} We would ask the JCHR to monitor progress in this area to ensure that the full protection of human rights that could be achieved by the Equality Bill is realised.

Memorandum submitted by Kailash Kaler

We would like to bring to your notice that the theme of Caste based discrimination has not been reflected in the themes of the Single Equality Bill unveiled by the Government on 26 June 2008. Even though representations were made during the Equalities Review in 2005 and during the consultation processes the theme of Caste based discrimination has escaped the concerns of the Government and also not being reflected in any of the documents, statements or draft of the Government thus the Single Equality Bill would not be able to address the hidden inequalities. Hence the incorporation of a provisions in the Single Equality Bill against Caste based discrimination will address the hidden inequalities among the Asian communities.

The Caste System being practiced in South East Asia has come along with Asians who migrated to Britain and vehemently practiced there and this you could find that Asian’s in Britain primarily relate with each other on Caste basis hence limiting each others contact, forming boundaries, Caste groups and Caste Status. This has a huge negative impact in the development of the Asian community and undermines the Government’s effort to annihilate any hidden inequalities in the society.

In the UK the practice of Caste discrimination could be found in lives of the Asian communities such as people only marry in their own Caste and have social relationship only with their Caste members. If anyone tends to marry out of their caste that will lead to society abandoning the couple and the couples are faced with hatred and violence and they are ostracised. The portrayal of Caste could also be seen in the matrimonial sections of the Asian newspaper columns and marriage bureaus. You could also find that the places of worship are based on Caste and each different temple depicts one’s Case eg Ramgarhia, Valmik Temples, Ravidasia temple and other Asian temples. There are also organisation on caste supremacy such as All India Brahmin Association (UK), Bardai Brahmin Samaj and so on. Caste is also propagated through media and could be found in Jat Caste songs is an example of such instances. Caste prejudices could be found even in Asian work places and other Asian social places. Asians are more Caste conscious and hence destroy the element of community cohesion.

Caste is taught in the religious educational curriculum but an analytical thinking of the nature of the Caste and its repercussion in the society is not given to the students. On account of which children develop Caste awareness leading to caste bullying, caste names and hence unknowingly sowing the seed of Caste hatred in the young age leading to a divided society.

Caste based discrimination is detrimental for the development of the Asian community and the Nation. It is a barrier for the community cohesion leaving Britain with divided societies and nullifying the effort of the Government to bring community cohesion. Go because of it’s hidden nature we request the Government to undertake a special review on Caste based discrimination and incorporate in the Single Equality Bill the provision to annihilate Caste based discrimination to experience a fairer cohesive community.

Memorandum submitted by Leonard Cheshire Disability

THE DEFINITION OF DISABILITY

Leonard Cheshire Disability has supported suggestions as previously made by the Disability Rights Commission for a move to a social model definition of disability within anti-discrimination law. The fact that the first hurdle that must be overcome in any disability discrimination case is to prove that an individual is disabled under the terms of the Act is an additional complexity that could be easily avoided. The medical definition of disability also presents additional problems with regard to discrimination on the grounds of perception—where it remains unclear as to exactly what a person who is discriminated against because someone perceived them to be a disabled person would need to demonstrate. Would they be required, for example, to prove that the discriminator was specifically thinking about a disability under the terms of the Act?

There are, however, benefits to retaining the structure that is set out in the DDA. It is important to retain the “asymmetry” of disability legislation to the extent that it ensures that more favourable treatment (through the provision of reasonable adjustments, for example) is maintained for disabled people. The current DDA definition of disability, as retained in the Equality Bill, is also a format that is fairly widely understood, and it is important to ensure that disabled people are familiar with and understand their legal rights.

\footnote{199 “The Equality Bill—Government response to the Consultation” (Cm 7454, 2008), p. 6}
Leonard Cheshire Disability would like to see continuing consideration given to a social model definition of disability. We would, however, suggest that our priority for the Equality Bill is to ensure that we work to ensure that the definition of disability as currently set out works as effectively as possible and achieves the correct coverage.

**DISCRIMINATION RELATED TO DISABILITY**

Leonard Cheshire Disability is very pleased that the Government has set out to rectify the damage done to anti-discrimination law through the Malcolm judgement. We, along with many other organisations, voiced very serious concerns when the Government initially proposed having only an “indirect discrimination” provision to replace “disability related discrimination”. We favoured filling the gap left by the Malcolm judgement by maintaining some form of “disability related discrimination” provision, alongside an “indirect discrimination” provision. As such we were very pleased that the Government came forward with a proposal along these lines.

We do have some concerns about the way in which the provisions have been set out at present. In particular we are concerned about the introduction of the knowledge requirement (subsection 14(2)) for “discrimination arising from disability”. The requirement of someone who discriminates to have knowledge of an impairment was one of the most damaging aspects of the judgement reached in Malcolm. As such we do not believe it should be replicated in the Equality Bill. Presumably the Government’s intention is that fore-knowledge should be required for “discrimination arising from disability”, but not for “indirect discrimination”—as such, depending on the circumstances of the case, an individual could take a case using one or the other of these provisions. However one of the key arguments against having only an “indirect discrimination” provision was that “indirect discrimination” and “disability related discrimination” do not always cover the same ground—one relates to individual circumstances and one relates to general policies that have an impact on a group.

The knowledge requirement drastically reduces the scope of the protection from “discrimination arising from disability”, but we are not convinced that this is fully covered by the introduction of “indirect discrimination”. At best it leaves the scope of the “indirect discrimination” provisions open to interpretation through the courts, with the possibility of another judgement like Malcolm being reached at a later point. To avoid any regression in disabled people’s rights we would like to see the knowledge requirement removed from Clause 14.

We would also question whether there is a need for a subsection in Clause 18 to specifically allow more favourable treatment for disabled people, as there is in Clause 13. Whilst we are concerned about the wording of the more favourable treatment subsection in clause 13, and so would be concerned about it simply being replicated in Clause 18, we would wish to ask the Government to confirm the rationale as to why it has not been felt necessary to specifically allow more favourable treatment in Clause 18.

**PREMISES**

Leonard Cheshire Disability would like to focus specifically on the issue of “common parts” within the Bill. We welcome the extension of the duties currently placed on landlords to make adaptations to the common parts of a let property. We believe that this is necessary and important to enable disabled people to remain in their own home.

We are concerned, however, that the Bill in its current form allows the landlord to require the disabled person who has asked for the reasonable adjustment to pay for all the costs involved. Disabled people are twice as likely to live in poverty as non-disabled people, and as such it is likely that having to bear the brunt of any costs made to the common parts of a property will present a serious barrier to disabled people actually making use of this provision.

Disabled people can receive support from programmes like the Disabled Facilities Grant and the Social Fund to cover some of the costs of making a property suitable for their needs. But this support may not be available for all. Of particular concern is Schedule 4, paragraph 7(3)(b), which suggests that agreements might be reached requiring a disabled person to cover the costs not only of installing an adaptation, but also of having it removed. If this is indeed the intention, and disabled people will be obliged to sign up to agreements to cover the costs both of installation and of removal at a later date, then this is likely to present a serious barrier to anyone making such an agreement.

Such a provision might also encourage some landlords to set exorbitantly high costs for restoration (including, for example, costs of removing an adaptation, costs of redecorating, costs of replacing other fixtures and fittings) in order to prevent the adaptation from being made in the first place.

Currently around a quarter of people who require adapted homes live in accommodation that is unsuitable for their needs. People who acquire an impairment, or whose impairment worsens, can end up having to stay in hospital for months if they cannot make necessary adjustments to allow them to return to their own home. This provision has the potential to significantly improve this situation, but it will not be successful if disabled people are forced to sign up to agreements that would oblige them to cover huge additional expenses if they ever decide, or are required, to move.
We would like to see arrangements put in place for funding to be made available for these reasonable adjustments, to ensure that cost is not a barrier to landlords meeting their obligations to disabled tenants. This could be done through the Disabled Facilities Grant or the Social Fund, or through a new funding stream.

OTHER ISSUES

Leonard Cheshire Disability is concerned with the current wording of section 91(8), relating to examinations. We are concerned with the equivalence given to public perception about examinations alongside the basic right of disabled people to enjoy equal access to examinations.

At present the clause suggests that regulators should have regard when making reasonable adjustments for disabled pupils to three areas:

— “the desirability of minimising the extent to which disabled persons are disadvantaged in attaining the qualification”;

— “the need to secure that the qualification gives a reliable indication of the knowledge, skills and understanding of a person upon whom it is conferred”; and

— “the need to maintain public confidence in the qualification”.

It must be more than “desirable” to minimise disadvantage and discrimination for disabled people—it should be a basic right. Beyond this, surely public confidence in examinations should be based on whether a qualification is a reliable indication of knowledge and skills? As such there is no justification for a further subsection on the need to maintain public confidence—such a subsection could end up offering a carte blanche to discriminate against disabled pupils should an examination body decide that the media might not agree with an adjustment that is made. We would welcome the Committee’s views on the human rights implications of this section.

Memorandum submitted by Liberty

INTRODUCTION

1. Liberty has a long-standing interest in discrimination and equality. We have been involved in many leading discrimination cases and we have recently responded to a number of consultations on the future of discrimination law. There is no doubt that significant steps have been taken towards greater equality in the United Kingdom over the last decade. We greatly welcomed the enactment of the Civil Partnership Act 2004, the Gender Recognition Act 2004, and the Equality Act 2006.

Liberty believes the post-war human rights consensus to be an essential part of the equality agenda. As such, we believe that the consolidation and harmonisation of discrimination protection is symbolic; recognising the inalienability and universality of the non-discrimination principle. A Single Equality Act presents a significant and historic opportunity for reviewing the principles underpinning our anti-discrimination scheme and for consolidating and extending discrimination protection to categories and strands not currently covered. We welcome the opportunity to present evidence to the Joint Committee on Human Rights in relation to the human rights implications of this Bill.

PROTECTED CHARACTERISTICS

2. Liberty welcomes the extension of the protection against discrimination on several grounds, including gender reassignment, marriage and civil partnership, religion or belief and sexual orientation as well as race, sex and disability. Greater harmonisation of the law of direct discrimination is long overdue and we are pleased that the Government intends to extend protection for victims of discrimination on protected grounds in a number of new areas. We are however, disappointed that there are a number of characteristics for which an unduly narrow definition is given and other characteristics which we believe should be protected, but which are not recognised here.

Age discrimination

3. Liberty welcomes the extension of protection from age discrimination in the provision of goods and services in this Bill. This change will make it unlawful for a person to discriminate against a person on the basis of his or her age in the provision of goods and services. We believe that extending protection from age discrimination in this way sends a powerful equality message. We believe that this extension will have a particular impact for older people many of whom suffer direct and indirect discrimination in so many aspects

200 See for example S and Marper v UK: R (on the application of S) v Chief Constable of South Yorkshire: R (on the application of Marper) v Chief Constable of South Yorkshire [2003] 1 All ER 148; Grant v United Kingdom (App. No. 32570/03) [2006] All ER (D) 337; Goodwin v UK (App No 28957/95) [2002] All ER (D) 158; Richards v Secretary of State for Work and Pensions [2006] 2 CMLR 49; A v Secretary of State for the Home Department (SSHD) (No 2) [2005] UKHL 71

201 We note that this Bill, when enacted, will not affect the compulsory retirement age (which involves clear age discrimination)—Schedule 22 protects anything done pursuant to a requirement of an enactment in respect of age.
of their lives. Indeed, a 2005 Age Concern survey found more people have reported suffering age discrimination than any other form of discrimination and that from age 55 onwards, people are nearly twice as likely to have experienced age prejudice than any other form of discrimination.

4. However, just as many older people experience age discrimination, younger people also face daily discrimination on the basis of their age. Liberty, would therefore, expect that in extending protection from age discrimination in the provision of goods and services, the Government would include everybody. Unfortunately, in its current form children under the age of 18 will not be protected against discrimination in the provision of services and the exercise of public functions (see clause 26). No reason is given as to why children are excluded from this important provision. The Minister for Women and Equality, Harriet Harman, stated in the House of Commons last year that “there is little evidence of harmful age discrimination against young people. Harmful age discrimination is basically against older people”. Yet, in Liberty’s view there is substantial evidence of young people facing daily discrimination in respect of the provision of services, and in the exercise by public officials of their public functions. Most worryingly, research shows that older children (ie 16–17 year olds) often receive less favourable treatment from health services, including mental health services and in respect of cancer treatment, and from child protection services. These are issues of serious concern and could at least be partially addressed by including a prohibition in respect of discrimination against all age strands in Part 3. In particular, clause 27 prohibits discrimination, harassment or victimisation by a service-provider against a person requiring the service or by a person in the exercise of a public function. Ex expressly excluding children from this requirement (as occurs in clause 26) sends a negative message about the attitude that society takes towards children. By including children within this protection, parliamentarians would still be free to frame appropriate exceptions to general rule that discrimination against children is prohibited. The government should therefore explain why it is considered necessary to exempt children from this protection, instead of including them and expressly excluding that which might be appropriate (eg excluding children from nightclubs, casinos or bars).

5. Clause 190 of the Bill provides that a Minister can amend the Act once passed by way of an order to provide that specified conduct, or specific arrangements do not contravene the Act in respect of age (except in relation to work or further and higher education). The Explanatory Notes state that this is a new provision “designed to allow exceptions to be made from the new prohibitions on age discrimination”. However, this power is not limited to amending the Act in relation to exemptions—it could allow for any amendment in relation to age, including to exclude it altogether. It is not clear why the relevant exemptions cannot be set out on the face of the legislation and then properly debated by parliamentarians.

Marriage and civil partnerships

6. The protected characteristic of marriage and civil partnership is defined in clause 8 as covering people who are married or a civil partner. This is a very narrow definition and does not cover either people who are in, or have been in, significant relationships for which they may well suffer discrimination or harassment, or indeed people who are discriminated against or harassed for reason of not being in a relationship. This is despite the fact that the House of Lords has ruled that a provision referring to a “married couple” should include an unmarried couple in order to comply with human rights law. The way clause 8 is drafted excludes this possibility. Liberty believes that people who cohabit should also be protected as protection from discrimination should not rest on the legal status of the union. In addition, those who have divorced or separated; those who have been widowed; and those who are single should not be allowed to be discriminated against on the basis of their status. It is difficult to see why, in principle or in practice, protection should be limited to those who are married or in a civil partnership. In Victoria, Australia, for example, equality legislation has for many years defined “marital status” as meaning a person’s status of being single, married, domestic partners, separated, divorced or widowed.

7. The Bill also contains a large number of provisions which exclude people from protection against discrimination including the prohibition against harassment (clause 24). Part 3 on the provision of goods and services (see clause 26(1)(b)), Part 4 on the disposal, management and occupation of premises (clause 30), Part 6 on education (both at school, clause 79(b), in further education, clause 85 and by
interpretation of discrimination by the House of Lords in means of achieving a legitimate aim. This clause is a new provision introduced as a response to the persons disability, amounts to a detriment where the treatment cannot be shown to be a proportionate have discriminated against a disabled person if he or she treats the person in a particular way, which due to disability an

Pregnancy

8. A woman who is treated less favourably because she is pregnant (or because she has given birth within the previous 26 weeks) is protected to some extent under this Bill (see clauses 4 and 16). However, we notice that this protection is not extended in respect of primary or secondary education (clause 79). No reasons are given as to why this is so. Research has indicated that young mothers experience discrimination and disadvantage at school212 and are less likely to have qualifications than others.213 We hope that by excluding this characteristic from primary and secondary education the government is not intending to send a green light to schools to say it is acceptable that pregnant girls be excluded from education merely on grounds of their pregnancy. We hope that, if not provided for in this Bill, an appropriate framework will be brought forward to ensure that pregnant school girls are given appropriate access to education (balanced of course with any medical concerns regarding their health).

Disability Discrimination

9. Liberty welcomes the inclusion of clause 14 in the Bill. This clause explicitly provides that a person will have discriminated against a disabled person if he or she treats the person in a particular way, which due to the persons disability, amounts to a detriment where the treatment cannot be shown to be a proportionate means of achieving a legitimate aim. This clause is a new provision introduced as a response to the interpretation of discrimination by the House of Lords in Lewis v Malcolm.214 In Lewis v Malcolm the local council sought to evict Mr Malcolm from his council home after he sublet his flat in breach of his tenancy agreement. Mr Malcolm, who has schizophrenia, sublet his flat during a period when he was not taking his medication, and claimed that because of his disability he didn’t understand that he was not allowed to sublet his flat. The Council argued that its policy was non-discriminatory as it would evict anyone who breached their tenancy agreement. The House of Lords agreed with the Council and found, by a majority, that if the policy was applied equally to everyone who illegally sublet their flat then that was not discrimination under the Disability Discrimination Act 1995 (DDA). The basic effect of that decision was that if a policy was applied equally to all people it would not be discriminatory, even if it unjustifiably placed disabled people at a particular disadvantage.215 We are therefore pleased that clause 14 has been included in this Bill to clarify this.

Public Sector Equality Duty

10. Clause 143 of the Bill introduces a public sector equality duty requiring public authorities to have due regard to the need to eliminate discrimination, harassment, victimisation and anything else prohibited by the Bill; to advance equality of opportunity; and to foster good relations between people with a protected characteristic (eg race, sex etc) and those that don’t share it. There is currently a public sector equality duty that applies in relation to race, disability and gender. However, there is nothing in existing legislation covering age, religion or belief or sexual orientation. Liberty has consistently supported the creation of a public sector equality duty that covers all strands of discrimination and we therefore welcome the introduction of this provision. In addition to the extra protection that such a duty will provide, we believe that a unified equality duty sends an important message about the universality and inalienability of the principles of equality and non-discrimination. We also believe that a unified duty will help to guard against the creation of a hierarchy between equality strands. We do not think that equalities legislation should prioritise one group over another. That is, of course, not to say that those seeking equalities protection should be able to use the protection afforded to them to discriminate against others. We believe that a unified equality duty which promotes the equality of opportunity for individuals will best incorporate the overarching human rights approach to non-discrimination.

213 Teenage Pregnancy: Accelerating the strategy to 2010, 2006 DfES.
214 Mayor and Burgesses of the London Borough of Lewisham v Malcolm [2008] UKHL 43.
215 There may be a separate duty to make reasonable adjustments to prevent any substantial disadvantage to disabled persons (see para 7), but this duty is not sufficient to cover all instances of indirect discrimination.
11. The public authorities that are bound by this duty include Ministers, government departments, the armed forces, the NHS, local government, educational bodies and the police (see Schedule 19). Who is and is not included as a public body can be amended by an order (clause 145), and we would once again caution against the excessive use of secondary legislation in this way. We also welcome the fact that persons exercising public functions, who are not themselves public authorities, must have due regard to the public sector equality duty when exercising those functions (clause 143(2)).

**Positive Action**

12. Clauses 152 and 153 cover positive action. Liberty notes that the inclusion of clause 152 extends the positive action provisions beyond what was previously muted. Clause 152 would represent a significant departure from measures that can currently be taken in relation to disadvantaged groups. One of the examples cited in the Explanatory Notes is: “Having identified that its white male pupils are underperforming at maths, a school could run supplementary maths classes exclusively for them”. Liberty hopes that over the Bill’s passage parliamentarians will fully examine the full implications of this proposal, in particular whether or not clause 152 may result in unintended consequences.

13. Liberty welcomes the introduction of clause 153 which will allow employers to take under-representation into account when selecting between two equally qualified candidates. Currently, positive action is allowed under existing discrimination law, both at EU and UK level. Unlike positive discrimination, positive action aims to provide a level playing field—the idea being that historically disadvantaged groups can then compete on the same terms for jobs or access to services. Positive discrimination can be distinguished on the grounds that it involves recruitment or promotion decision-making based primarily on the basis of a characteristic, irrespective of whether the person is the best candidate for the job.

14. Positive action is specifically permitted under EC law. The European Court of Justice has held that a provision similar to that contained in clause 153 would be lawful as long as the two candidates are initially compared with one another on an objective basis. Under existing UK law employers can target a provision similar to that contained in clause 153 would be lawful as long as the two candidates are initially compared with one another on an objective basis. Under existing UK law employers can target a particular under-represented group through advertising, training or mentoring schemes. However, the legal position as regards priority selection for an equally qualified candidate in an under-represented group has so far been unclear. The Government has previously highlighted that this has led to confusion amongst employers as to how positive action can be used in practice. Gloucester Police have, for example, in the past confused the positive action/positive discrimination distinction by de-selecting 108 white male applicants and considering less qualified minority ethnic applicants for positions within the force.

15. The government has made clear that clause 153 aims to address historical disadvantage suffered by certain groups as well as protect employers who may wish to balance their workforces and promote diversity. Indeed, few would argue that structural disadvantage does not still exist in the UK. While clause 153 may extend slightly the positive action remit, we would stress that it does not represent any grand departure from the existing discrimination framework. Indeed, as many commentators have pointed out, the law in this area is currently unclear and the number of situations in which employers are faced with two equally qualified candidates is rare. Discrimination in the workplace is still rife and if positive action/positive discrimination measures exist on a continuum (with help for under-represented groups at one end and discrimination on their behalf at the other) this proposal is fairly modest. Clarification of the law will also protect employers who try to balance their workforces from the threat of discrimination claims.

16. We would also stress that while this proposal has been depicted and perceived by many as advantaging only women and minority ethnic employees, it is worth noting that as this is expressed in gender and race neutral terms this could allow re-balancing in any workplace where under-representation is established. This means that it will not always be women and minority ethnic groups that will feel a benefit. Sectors where, for example, white men are under-represented (such as the teaching sector) would also be able to use the power to rebalance the workforce.

**Exceptions**

17. There are a number of exceptions to the discrimination provisions contained within the Bill. The main exceptions are found in Schedules 3 and 23. While there is clearly a need for certain well-defined exceptions to be included in the Bill, we have some concerns with how broad some of these exceptions are and, in particular, the fact that many of these exceptions will be set out in secondary legislation, so it is impossible to know what they will contain. For example, Schedule 1, paragraph 1 provides that Regulations may...
prescribe a condition to be, or not to be, an impairment for the purposes of determining what is a disability. Paragraph 31 of Schedule 3 provides that a Minister may amend the Schedule, which sets out exceptions to the prohibition of discrimination in the provision of services and public functions, by an order either to add to, vary or omit an exception in relation to a disability, religion or belief or sexual orientation. The order could also add, vary or omit an exception in respect of the exercise of a public function on all of the other applicable grounds (except age, for those over 18). There is also a very broad power in clause 191 which allows a Minister to make an order to harmonise UK legislation with a European Community law. As Liberty has consistently stated, secondary legislation should not be used to amend primary legislation. Instead amendments to legislation should be allowed to be properly debated and considered by Parliament with the ability for amendments to be proposed and made by Parliament. If not, it becomes the Executive branch of government that wields the most power rather than democratically elected representatives.

Disability and immigration

18. Schedule 3, paragraph 16 provides that the prohibition on discrimination in the provision of services and in the exercise of a public function does not apply to immigration decisions to refuse entry clearance, or to refuse, cancel or vary leave to enter or remain in the UK, if necessary for the public good. This effectively means that a person will not discriminate against a person by refusing entry into the UK if the person has a disability, or if he or she is required to leave the UK because of a disability. This is a new exception. While it is understandable that some people may be refused entry into the UK because it is necessary to protect the health of the general public (for example, because that person has a contagious disease), this provision goes much further and applies to all disabilities simply if it is “necessary for the public good”. This could mean that a non-citizen who develops cancer could be expelled from the UK simply because it is in the public good to do so, as the cancer treatment will need to be paid for by the NHS, regardless of how long that person may have been resident in the UK. It could also mean that a family with a child with a disability could be refused entry on the basis that the child will be a cost to the public health system over time. This is a controversial clause that urgently needs proper parliamentary scrutiny, despite being hidden away in a paragraph in a Schedule.

Religion and immigration

19. Similarly paragraph 18 of Schedule 3 provides that the prohibition on discrimination on the ground of religion or belief in the provision of services and in the exercise of a public function does not apply to immigration decisions to refuse entry clearance or to refuse or cancel leave to enter or remain in the UK, if the person’s exclusion is conducive to the public good or to vary such leave if it is undesirable to permit the person to remain in the UK. This effectively means a person can be refused entry or expelled from the UK on the basis of their religion or belief if to do so is considered conducive to the public good. It is clear that there may be occasions on which a person might be excluded from the UK on the basis of the public good, for example where there is evidence that the person may incite people to commit violence. Exclusion on this basis would not be discriminatory because it would be exclusion because of the person’s actual or suspected behaviour. A decision taken to exclude a person on the basis of the public good should be restricted to whether or not that person is suspected of holding extreme and violent views, irrespective of religion. There should therefore be no need for this exception (nor the exception on the basis of religion contained in paragraph 2 of Schedule 18 in relation to the public sector equality duty).

Security Services and National Security

20. There are a number of provisions in this Bill that exclude provisions from applying to the security services or provide exemptions on grounds of national security. For example, clause 185 provides that a person will not contravene anything in the Bill if it was done for the purpose of safeguarding national security and is proportionate to that purpose. Moreover, paragraph 5 of Schedule 3 provides that there are no grounds for discrimination in the provision of services or in the exercise of a public function if done by the Security Service, the Secret Intelligence Service, the Government Communications Headquarters (GCHQ) or a part of the armed forces assisting the GCHQ. Clause 111 also provides that people (including the claimant or pursuer) can be excluded from proceedings in relation to a discrimination claim if it is expedient to do so in the interests of national security. No particular reasons are given for this broad and blanket application of rules other than use of the term “national security”. This government has played fast and loose with the broad “national security” justification in recent times. Liberty hopes that parliamentarians will reflect and consider whether such justifications are legitimate or necessary in the sphere of equalities protection.

Concluding Observations

21. There is much to be welcomed in this Bill and we applaud the government for introducing this important piece of consolidating legislation. Above we have outlined many of the areas in the Bill which we welcome, as well as areas in which we believe there is room for improvement. In addition to our comments above we also particularly welcome clause 73, which empowers regulations to be made requiring information to be published in order to ascertain whether in larger workplaces there are differences in the
pay of male and female employees. According to the *Equalities Review* published in 2007, the gender pay gap, at present rates of change, will not close until 2085. Liberty considers that utterly unacceptable. Although there is nothing in clause 73 that will address structural and entrenched forms of pay disadvantage, it is a step along the way to identifying whether there are unjustified pay differentials. We acknowledge that discrimination is not the only cause of unequal pay but disadvantage associated with gender—including discrimination—are the causes of unequal pay. Voluntary measures have not worked, as the statistics demonstrate. We also welcome the extension of the ability of the Secretary of State to give directions to a school to comply with duties not to discriminate under clause 82. This currently only applies in relation to sex discrimination but will now appropriately apply to all protected characteristics. Finally, Liberty also supports clause 118 which empowers an employment tribunal to make wider recommendations in discrimination cases rather than just in respect of the individual claimant.

Memorandum submitted by Mind

**INTRODUCTION**

Mind welcomes the opportunity to respond to the Joint Committee on Human Rights’ call for evidence on the compatibility of the Equality Bill with the UK’s human rights obligations.

Many people with experience of mental distress are regularly denied their human rights, such as the right not to be discriminated against, the right to a private and family life or, in extreme cases, the right to liberty. Around 9 out of 10 people with mental health problems have experienced stigma and discrimination, denying them the opportunity to live their lives to the full.

Although equality legislation has strengthened people’s rights to fair and equal treatment in the UK, there remain significant weaknesses in the protection of people with mental health problems from discrimination. Moreover, as the Equality and Human Rights Commission has found, there is a lack of knowledge, particularly among vulnerable groups, about their rights under equality law and how to assert them.

Mind therefore welcomes the Equality Bill, as harmonising equality legislation will make discrimination law easier to understand, so disabled people know their rights and duty-holders know their responsibilities. Nevertheless, Mind has concerns about a number of areas where the Bill appears to be a regression from the protection disabled people currently enjoy under the Disability Discrimination Act (DDA) and believes opportunities have been lost to address gaps or inconsistencies in current legislation.

In this submission we respond to some of the areas where the JCHR has identified potential issues in relation to the compatibility of the Equality Bill with the UK’s human rights obligations, particularly those with relevance for people with mental health problems.

Mind is a member of the Disability Charities Consortium and the Equality and Diversity Forum. This submission should be read as complementary to their submissions, which we fully support.

The Definition of Disability (Q 4)

Mind was disappointed that the Government did not take the opportunity presented by the Equality Bill to move towards a definition of disability based on the social rather than the medical model.

The current definition of disability seems to be at odds with the UK’s human rights obligations under national and international law. The Human Rights Act enshrines the right to live free from discrimination. The UN Convention on the Rights of the Disabled Person creates a duty on states to prohibit all discrimination on the basis of disability and guarantee “equal and effective” legal protection to everyone. Mind believes the protection afforded to disabled people by the current definition in the Equality Bill is neither effective nor equal.

The complex definition of disability in the Bill offers ineffective protection because it requires people to prove their impairment is severe enough to warrant protection from discrimination. This means that the focus of much litigation is on whether the claimant meets the legal definition of disability, not whether the motivation for the defendant’s behaviour towards the claimant was discriminatory. Currently one in four cases brought under the DDA are lost because the claimant did not satisfy the definition and this is the biggest single cause of failed cases.

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220 See http://archive.cabinetoffice.gov.uk/equalitiesreview/
221 See page 24 of the Equalities Review.
224 Claimants must demonstrate that their impairment has a “substantial adverse effect on day to day activities” as well as that these effects are long term, that is, have lasted or likely to last 12 months or for the rest of the claimant’s life.
A definition based on the medical model therefore creates uncertainty, meaning often the only way to definitively determine whether a person is disabled is to go to tribunal, which can lead to costly and stressful litigation. For example, Mr Kappadia had long term depression but his case had to go to the Court of Appeal to determine that he was protected by the DDA. Mrs Gittins was a nurse who was denied employment because she had Bulimia Nervosa, but the hospital trust concerned successfully argued that since her impairment did not constitute a disability under the DDA she was not legally entitled to challenge their decision.

In both these cases a social model definition would have shifted the focus of attention from the severity of the medical condition to whether discrimination had occurred—and whether the individual’s human rights had been breached. The social model definition would provide more effective protection for disabled people from discrimination.

The current definition also fails to offer equal protection from discrimination, both among disabled people and compared to other protected characteristics. The medical model definition effectively creates a hierarchy of disabilities, where some disabled people are not protected from discrimination, because their impairment is deemed less significant under the definition. There is no protection for people with fluctuating conditions, like depression, or with short term but severe conditions. Mr Compton had attempted suicide and had his job offer withdrawn as a result, but was held not to be disabled because he could not establish that the substantial adverse effects of his depression were likely to last 12 months or more.

This definition problem is not faced by the other protected characteristics, where there is no subjectivity in determining whether someone meets the definitions set out in the Bill. A social model definition would remove unfair distinctions between those who are and are not entitled to legal protection.

**DISCRIMINATION ARISING FROM DISABILITY (Qs 11 & 12)**

Mind does not believe that clause 14 sufficiently restores “disability-related discrimination” to the situation before the Malcolm judgment. In particularly, the knowledge requirement in 14 (2) is a regressive step back from the pre-Malcolm situation.

The knowledge requirement places great faith in the ability of duty-holders to recognise that certain behaviour is related to a disability, particularly in relation to mental health. Stigma and misunderstanding surrounding different conditions is widespread and this can lead to mistaken assumptions about a person’s mental health. For example, the effects of some medication, such as slurring words which can be a side-effect of anti-psychotic drugs, may be mistaken for drunkenness. Equally, mental distress is often invisible, so behaviour is not always easily attributed to an underlying mental impairment, and stigma leads to many people choosing not to disclose a mental health condition. Therefore, the knowledge requirement would limit the scope of the protection of people with mental health problems under the Bill.

The example given in the Explanatory Notes relating to a person with a learning disability suggests that people with hidden disabilities would have to anticipate potential discrimination in any given situation and disclose their disability at the outset, in order to be able to subsequently claim discrimination on grounds of disability. This is entirely inappropriate and impractical, meaning people with invisible disabilities are almost exempt from this part of the Bill, which leaves a large group, including people with most mental health problems, effectively unprotected from discrimination.

**MULTIPLE DISCRIMINATION (Qs 16 & 17)**

Mind is concerned that if a provision on multiple discrimination is confined to two protected characteristics some individuals may be denied legal protection against unfair and unequal treatment. People with mental health problems can often experience discrimination on the basis of a combination of three grounds.

There is considerable evidence of intersectional multiple discrimination based on gender, ethnicity and mental health, with men from certain black and minority ethnic (BME) groups more likely to experience disproportionately aggressive and intrusive treatment by the police and by mental health services. Gay men often experience multiple discrimination on the grounds of their gender, sexuality and mental health, and the British Association for Counselling and Psychotherapy (BACP) has identified negative attitudes towards gay men among some therapists.

Mind does not believe that allowing claims on two or more grounds would introduce new burdens on those who have responsibilities under the law. Providing that duty-holders are complying with good practice in relation to each of the separate protected characteristics, they should not risk falling foul of the law on discrimination based on two or more characteristics.

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225 Kappadia v L B Lambeth 2000
226 Gittins v Oxford Radcliffe NHS Trust EAT/193/99
227 Compton v Bolton Metropolitan Council, Manchester, Case No. 2400819/00
Mind’s also believes multiple discrimination should be extended to indirect discrimination and harassment. Harassment based on multiple grounds is prevalent and people should be able to seek legal redress whether they experience harassment on one ground or several. Moreover, some of the discriminatory practices faced by people with mental distress relate to the treatment of an entire group (or sub-group) of people, so indirect discrimination may be more relevant in those cases. At any rate, it is not always clear until the full facts are heard whether a case under consideration is direct (discrimination caused directly) or indirect (discrimination caused by the imposition of a provision, criterion or practice). To deny people the option of claiming under indirect discrimination would be legally impractical and fail to address much of the multiple discrimination which occurs.

Mind
June 2009

Memorandum submitted by National Aids Trust (NAT)

SUMMARY OF RECOMMENDATIONS

Recommendation: The Government should ratify the UN Convention on the Rights of Persons with Disabilities, and ensure the Equality Bill reflects the commitments set out in the Convention.

Recommendation: The Equality Bill should prohibit the use of pre employment health questionnaires before the offer of a job has been made to protect disabled people from discrimination and make discrimination easier to prove.

Recommendation: The Equality Bill should introduce a clear prohibition of indirect discrimination into disability law.

Recommendation: The Equality Bill should provide explicit statutory protection against harassment on the grounds of disability in the provision of goods, facilities and services.

Recommendation: The Equality Bill must provide protection on the grounds of association and perception in respect of disability. This protection should extend to goods, facilities and services.

Recommendation: The Government should work with the EHRC to ensure the needs of disabled people, particularly those living with HIV, are not overlooked in the single Duty.

Recommendation: Clear and effective privacy measures should be introduced into the tribunal process to encourage people living with stigmatised conditions, such as HIV, to take discrimination cases to tribunal.

Recommendation: Representative actions in discrimination cases should be introduced to remove the burden of bringing a claim from the individual.

Recommendation: The Equality Bill should amend the law so that people can bring a claim that someone has treated them unfairly on more than one characteristic (eg race and disability).

INTRODUCTION

1. NAT (National AIDS Trust) is the UK’s leading independent policy and campaigning charity on HIV. NAT develops policies and campaigns to halt the spread of HIV and improve the quality of life of people affected by HIV, both in the UK and internationally.

2. NAT welcomes the chance to submit evidence to the Joint Committee on Human Right’s scrutiny of the Equality Bill.

3. NAT’s submission focuses on human rights issues raised by the Equality Bill for people living with HIV, as well as the opportunity the Bill presents to improve the human rights of disabled people, particularly those living with HIV.

4. Throughout this submission NAT refers to the UN Convention on the Rights of Persons with Disabilities. Article 1 sets out the Purpose of the Convention:

Article 1

Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

NAT believes the Equality Bill presents an opportunity to ensure that UK equality legislation reflects these commitments.
5. NAT commends the Government for signing the UN Convention on the Rights of Persons with Disabilities but now urges the Government to ratify the Convention.

**Recommendation:** The Government should ratify the UN Convention on the Rights of Persons with Disabilities, and ensure the Equality Bill reflects the commitments set out in the Convention.

**Disability, Human Rights and Employment**

6. NAT welcome the steps taken by the Government to prohibit discrimination in employment for disabled people. Sadly, however, people living with HIV still face discrimination; employers often do not understand that today someone living with HIV can live a long and active life and have a fulfilling and busy career. This lack of understanding about the advancement of treatment means that many employers will discriminate against an HIV-positive person, even if they are the best candidate for the job. In addition to health-related discrimination, people living with HIV often faces discrimination in relation to other prejudices such as homophobia and racism.

7. NAT believes the Equality Bill presents an opportunity for the Government to take further steps to bring an end to this discrimination, and thereby meet its obligations under Article 27 of the UN Convention on the Rights of Persons with Disabilities, and Article 6 of the International Covenant on Economic, Social and Cultural Rights (ratified by the UK, but not incorporated into UK law) (ICESCR).

**Article 27 of the UN Convention on the Rights of Persons with Disabilities**

States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

**Article 6 of the ICESCR**

States recognise the right to work, which includes the right of everyone to the opportunity to gain his living by which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

8. NAT proposes that the Government should use the opportunity the Equality Bill presents to enhance the protection of disabled people’s rights, by prohibiting the use of pre employment health questionnaires before the offer of a job has been made. People living with HIV have significant concerns about discrimination during the recruitment process, and the Government’s planned reforms of Incapacity Benefit may result in more people living with HIV going through recruitment processes. If employers were only permitted to ask people to fill out a health questionnaire after the offer of a job had been made, this would guard against discrimination and make discrimination easier to prove.

**Recommendation:** The Equality Bill should prohibit the use of pre employment health questionnaires before the offer of a job has been made to protect disabled people from discrimination and make discrimination easier to prove.

9. The Government are considering how they can use the Equality Bill to respond to the implications of the Malcolm case. NAT is very concerned about the impact of this judgment, which has effectively narrowed the scope of Disability Related Discrimination. NAT welcomes the Government’s intention to use the Equality Bill to address the consequences of the Malcolm judgement.

**Recommendation:** The Equality Bill should introduce a clear prohibition of indirect discrimination into disability law.

**Equality in Goods, Facilities and Services**

10. The Equality Bill presents an opportunity to provide explicit statutory protection against harassment on the grounds of disability in the provision of goods, facilities and services, education in schools, disposal or management of premises or exercise of public functions.

11. The Government notes in *The Equality Bill—Government response to the Consultation* that it is considering the implications of the Coleman judgment for the definition of disability harassment before considering whether to extend protection against harassment outside work in respect of disability.

12. NAT believes that harassment on the grounds of disability represents inhuman or degrading treatment as set out in Article 3 of the ECHR and the Government should use the opportunity the Equality Bill presents to provide explicit protection against harassment in the provision of goods, facilities and services.
13. Providing this protection would also ensure the UK Government can meet its obligations under Article 16 of the UN Convention on the Rights of Persons with Disabilities:

**Article 16**

*Freedom from exploitation, violence and abuse*

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse….

14. NAT believes that harassment in the provision of goods, facilities and services represents “abuse” in this context and that the Government should ensure the Equality Bill provides explicit protection from this.

*Recommendation:* The Equality Bill should provide explicit statutory protection against harassment on the grounds of disability in the provision of goods, facilities and services.

**DISCRIMINATION BY ASSOCIATION AND PERCEPTION**

15. NAT strongly advocates that the Equality Bill should prohibit discrimination by association and perception.

16. NAT is particularly concerned about discrimination by perception as HIV positive status cannot be “seen” and this profoundly affects how stigma and discrimination are experienced.

17. Discrimination by association can also take place in the context of HIV; one case of discrimination by “association” that came to our attention was a nurse who was asked to change responsibilities at work and no longer engage in invasive procedures because her spouse was living with HIV.

18. NAT is waiting to see how the Government responds to the Coleman judgment. In the case, the ECJ decided that in order to comply with the EC Employment Framework Directive, such discrimination should be prohibited. We hope this will ensure that prohibition of discrimination by association and perception is included in the Equality Bill. If not, NAT will be lobbying to ensure that the Equality Bill ensures that UK’s disability discrimination law provides protection on the grounds of association with and perception of disability. We would like to see this protection extend to goods, facilities and services.

*Recommendation:* The Equality Bill must provide protection on the grounds of association and perception in respect of disability. This protection should extend to goods, facilities and services.

**THE PUBLIC SECTOR EQUALITY DUTY**

19. NAT supports the establishment of a single Equality Duty. It seems more appropriate to a single Equality Act and a single Equality and Human Rights Commission. In addition it can more readily and flexibly address the fact of multiple discrimination faced by so many in our society, in particular people living with HIV (many of whom are also gay and/or black African).

20. NAT also supports the extension of the single Equality Duty to other grounds. In particular, the discrimination and inequality faced by gay men in education and health systems has a direct impact on the ability of gay men to avoid HIV infection and, for those who are HIV positive, to enjoy and access services in a supportive environment.

21. NAT’s main concerns are that the broadening out of the Duty may mean that the needs of people living with HIV are overlooked. NAT’s research reveals that even with the current Disability Equality Duty, these needs are not always considered. Some recent research carried out by NAT revealed that:

— Of 26 Schemes considered where NAT believed it reasonable to expect that the relevant public bodies would have included HIV in their Scheme, only 15 did so;

— In single Equality Schemes reviewed during this research, there were even fewer references to HIV than in Disability Equality Schemes;

— Government Department Schemes that were commended by the Disability Rights Commission have not substantively addressed the needs and concerns of people living with HIV.

219 Figures released from the Health Protection Agency reveal that HIV is disproportionately affecting men who have sex with men and black Africans, groups that already face discrimination. 3,160 gay and bisexual men were newly diagnosed with HIV in 2007, the highest number ever. Across the UK one in 20 gay and bisexual men are now living with HIV. Black Africans accounted for an estimated two thirds of the 4,260 heterosexually acquired new diagnoses of HIV in 2007. Source: Health Protection Agency (2008) *HIV in the United Kingdom: 2008 Report*, http://www.hpa.org.uk/web/HPAwebFile/HPAweb_C/1227515298354
22. This is a particular concern because many people living with HIV in the UK are already from disadvantaged groups and HIV, as a stigmatised condition, leads to discrimination of a distinct and complex nature making it even more important that their needs are not overlooked.  

23. These findings show that steps must be taken to ensure that public authorities consider the different needs of individuals covered by a Scheme, including people living with HIV.

*Recommendation:* The Government should work with the EHRC to ensure the needs of disabled people, particularly those living with HIV, are not overlooked in the single Duty.

**Employment Tribunals**

24. Article 4 of the UN Convention states:

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake: …

   (e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

25. NAT believes that the measures in the Equality Bill related to employment tribunals, provide an opportunity to help eliminate discrimination against disabled people in employment. Currently employment tribunals can only make recommendations that directly benefit the person who has been discriminated against. As around 70 per cent of employees involved in discrimination cases leave the organisation, this ties the hands of tribunals. The Equality Bill will allow employment tribunals to make wider recommendations in discrimination cases.

26. NAT welcomes this measure which should encourage better employment practices. However, NAT would like to highlight the importance of considering tribunal complainant’s privacy and confidentiality in any proceedings.

27. The publicity surrounding employment tribunals is a significant disincentive to people living with HIV in seeking redress. Introducing appropriate measures to protect the privacy of claimants living with HIV and other stigmatised conditions during the tribunal process will encourage people to take discrimination cases to tribunal, helping to eliminate this type of discrimination.

*Recommendation:* Clear and effective privacy measures should be introduced into the tribunal process to encourage people living with stigmatised conditions, such as HIV, to take discrimination cases to tribunal.

28. The Government is considering introducing representative actions in discrimination cases. Currently individuals who have been discriminated against have to shoulder the burden of bringing a claim. Representative actions would enable bodies such as trade unions or the EHRC to take cases to court on behalf of a group of individuals. However, although the Government is exploring this further, it has recently announced this will not be included in the Equality Bill.

*Recommendation:* Representative actions in discrimination cases should be introduced to remove the burden of bringing a claim from the individual.

**Multiple Discrimination**

29. NAT welcomes the new single Equality Bill. HIV in the UK disproportionately affects two groups which experience inequality and discrimination—gay and bisexual men, and black Africans—and amongst black Africans, women are disproportionately affected. It is often hard to disentangle HIV discrimination from the homophobia, racism, anti-immigration prejudice and sexism which so many people living with HIV also experience. The single Equality Act presents an opportunity to recognise this and see disability in a broader discrimination context.

30. As the law stands people can only bring a claim against someone that has treated them unfairly because of one particular characteristic, but as set out above, there are examples where people are discriminated against for a number of reasons.

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230 Figures released from the Health Protection Agency reveal that HIV is disproportionately affecting men who have sex with men and black Africans, groups that already face discrimination. 3,160 gay and bisexual men were newly diagnosed with HIV in 2007, the highest number ever. Across the UK one in 20 gay and bisexual men are now living with HIV. Black Africans accounted for an estimated two thirds of the 4,260 heterosexually acquired new diagnoses of HIV in 2007. Source: Health Protection Agency (2008) *HIV in the United Kingdom: 2008 Report*, http://www.hpa.org.uk/web/HPAwebFile/HPAwebC/1227515298354
31. The Preamble to the UN Convention highlights the importance of considering the issue of multiple discrimination:

*The States Parties to the present Convention...*

(p) Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.

32. NAT therefore welcomes the Government’s commitment to look at the question of bringing claims involving multiple discrimination. However, we note that it discusses the need to explore “what the costs and benefits would be.” NAT is concerned that the Government may step back from these measures due to concerns about cost. We will encourage the Government to use the opportunity that the Equality Bill presents to take this area of work forward, as many people living with HIV are subject to multiple discrimination.

**Recommendation:** The Equality Bill should amend the law so that people can bring a claim that someone has treated them unfairly on more than one characteristic (e.g., race and disability).

NAT

December 2008

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**Supplementary memorandum submitted by National AIDS Trust (NAT)**

**INTRODUCTION**

1. NAT (National AIDS Trust) is the UK’s leading independent policy and campaigning charity on HIV. NAT develops policies and campaigns to halt the spread of HIV and improve the quality of life of people affected by HIV, both in the UK and internationally.

2. NAT welcomes the chance to submit evidence to the Joint Committee on Human Right’s scrutiny of the Equality Bill.

3. Throughout this submission NAT refers to the UN Convention on the Rights of Persons with Disabilities. Article 1 sets out the Purpose of the Convention:

**Article 1**

**Purpose**

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

4. NAT believes the Equality Bill presents an opportunity to ensure that UK equality legislation reflects these commitments.

**IMMIGRATION EXEMPTIONS**

5. Schedule 3, Part 4, Paragraph 16 of the current Equality Bill creates a new exception where disability discrimination is not prohibited where it is on the ground that doing so is "necessary for the public good". According to the Explanatory Notes:

"An express exception was not previously needed since the Disability Discrimination Act 1995 did not prohibit direct discrimination in the provision of services or exercise of a public function, and because disability related discrimination, which did apply to the provision of services or exercise of a public function, could be justified if it was necessary not to endanger the health or safety of any person."

6. Although it is correct to state that previously direct discrimination was not prohibited in the provision of services or exercise of a public function, disability related discrimination was prohibited in these areas apart from where “a proportionate means of achieving a legitimate aim” or in certain limited circumstances. The new exception on immigration is replacing the provision to justify disability discrimination in certain situations (see section 21D, DDA 2005) with a blanket exclusion. Under the new exception there is no requirement of proportionality and it is not clear what could fall within the scope of "necessary for the public good”.

7. NAT is concerned that the exception as it stands could be used to both exclude disabled people on grounds of cost (for example the additional cost of allowing a migrant with learning difficulties to enter or remain in the UK) and also on grounds of public health (allowing migrants living with HIV to enter or remain in the UK) in the interest of the “public good”. In terms of HIV, this could have potential individual and public health implications if people feel unable to disclose their HIV status or access treatment. It may also discourage migrants from seeking an HIV test, with obvious public health consequences.
8. The exception seems to be directly opposed to the policy set out in the UK Border Agency’s Equality Scheme which states: “Staff to ensure that asylum seekers are able to ask for assistance, and know that particular needs can be indicated. It should be made clear that disclosure of disability will not be a negative factor in the consideration of cases.”

9. The Government proposed a similar general reservation to the UN Convention on the Rights of Persons with Disabilities to retain the right to introduce wider health screening for applicants entering or seeking to remain in the UK. In the Joint Committee on Human Rights’ report on the UN Convention, it notes that the Government “has not provided an adequate explanation of its view that the proposed reservation is necessary” and they go onto “recommend that the Government abandon this reservation.”

10. NAT is particularly concerned about this new provision given the Australian precedent. The Australian Migration Act is exempt from the Disability Discrimination Act (section 52). Under the Australian system, there are several different categories under which people can apply to enter the country and within many of these (including refugee/humanitarian entrants), the fact that someone is disabled is offset against the value a potential migrant or refugee is thought to have for the community. Disabled people under go a health and medical check-up and the anticipated costs associated with a disability are offset against the anticipated contributions. The Multicultural Disability Advocacy Association of New South Wales has provided numerous examples of the impact of this system on disabled people which can separate them from their families.

Recommendation: The exemption around immigration in relation to services and public functions should be removed.

Recommendation: If the exemption is not removed, it should be modified to return to the approach under section 21D of the DDA, requiring a legitimate aim and proportionality in disability discrimination.

**DISABILITY, HUMAN RIGHTS AND EMPLOYMENT**

11. Despite the fact discrimination against disabled people in employment is unlawful, people living with HIV still face discrimination; employers often do not understand that today someone living with HIV can live a long and active life and have a fulfilling and busy career. This lack of understanding about the advancement of treatment means that many employers will discriminate against an HIV-positive person, even if they are the best candidate for the job. In addition to health-related discrimination, people living with HIV often faces discrimination in relation to other prejudices such as homophobia and racism.

12. NAT believes the Equality Bill presents an opportunity for the Government to take further steps to bring an end to this discrimination, and thereby meet its obligations under Article 27 of the UN Convention on the Rights of Persons with Disabilities, and Article 6 of the International Covenant on Economic, Social and Cultural Rights (ratified by the UK, but not incorporated into UK law) (ICESCR).

**Article 27 of the UN Convention on the Rights of Persons with Disabilities**

State Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

**Article 6 of the ICESCR**

States recognise the right to work, which includes the right of everyone to the opportunity to gain his living by which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

13. NAT proposes that the Government should use the opportunity the Equality Bill presents to enhance the protection of disabled people’s rights, by prohibiting the use of pre employment health questionnaires before the offer of a job has been made. People living with HIV have significant concerns about discrimination during the recruitment process, and the Government’s planned reforms of Incapacity Benefit may result in more people living with HIV going through recruitment processes. If employers were only permitted to ask people to fill out a health questionnaire after the offer of a job had been made, this would guard against discrimination and make discrimination easier to prove.

Recommendation: The Equality Bill should prohibit the use of pre employment health questionnaires before the offer of a job has been made to protect disabled people from discrimination and make discrimination easier to prove.

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MULTIPLE DISCRIMINATION

14. HIV in the UK disproportionately affects two groups which experience inequality and discrimination—gay and bisexual men, and black Africans—and amongst black Africans, women are disproportionately affected. It is often hard to disentangle HIV discrimination from the homophobia, racism, anti-immigration prejudice and sexism which so many people living with HIV also experience. The Equality Bill presents an opportunity to recognise this and see disability in a broader discrimination context.

15. As the law stands people can only bring a claim against someone that has treated them unfairly because of one particular characteristic, but as set out above, there are examples where people are discriminated against for a number of reasons.

16. The Preamble to the UN Convention highlights the importance of considering the issue of multiple discrimination:

  The States Parties to the present Convention…

  (p) Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status

17. NAT therefore welcomes the Government’s commitment to look at the question of bringing claims involving multiple discrimination. However, we are disappointed by the limitations of the Government’s current proposal.

18. NAT are concerned that the Government’s current multiple discrimination proposals only apply to direct discrimination. We echo the Equality and Diversity Forum’s concern that this will cause problems for courts and tribunals hearing these cases. It is not always clear until the full facts are heard whether a case under consideration is direct or indirect (whether the resultant discrimination is caused directly or by the imposition of a provision, criterion or practice). We believe that once it is accepted that people are subjected to discrimination on more than one ground, there can be no good reason for excluding claims of indirect discrimination or harassment.

Recommendation: The Government should extend the current proposals so that indirect discrimination and harassment on more than one ground are covered.

19. NAT also regrets the limitation of the current proposals to two grounds. There may be many cases where people face discrimination on more than two grounds: an HIV positive black African woman could be discriminated against because of her race, disability and gender; an ethnic minority gay man living with HIV could face discrimination because of his sexual orientation, disability and race. Whilst NAT commends the Government for the current proposals, limiting them to two grounds will needlessly reduce their effectiveness.

Recommendation: The current proposal should be amended to allow cases on multiple grounds.

20. However we recommend that if this current limitation is retained, it should be revisited within two years of this provision being introduced to consider whether the number of grounds should be extended.

Recommendation: If the current proposal is retained it should be revisited within two years of this provision being introduced to consider whether the number of grounds should be extended.

NAT
June 2009

Memorandum submitted by Press for Change

PRESS FOR CHANGE AND THIS SUBMISSION

Press for Change (PFC) is the largest representative organisation for trans people in the UK. Formed in 1992 to “seek respect and equality for all trans people in the UK”, through case law, legislation, and social change, it reaches around 2,500 transgender and transsexual people in the UK. This response is supported by over 21 other organisations for trans and gender variant people.

SUMMARY OF PRESS FOR CHANGE’S CONCERNS

1. The problems and limitations, and legal issues, of using the term of “Gender reassignment” as the characteristic determining protection in the Bill.

2. The inappropriateness of the phrase “Gender Reassignment” to provide protection to children and adolescents who express their gender differently from that expected.

3. The Bill’s apparent allowing of school bodies to harass children and adolescents because they possess the characteristic of “Gender Reassignment”.

NAT
June 2009
4. The unlawful misuse of an exemption to the Bill’s protection because of the characteristic of “Gender Reassignment” in the provision of a Single Sex Services.

5. The unlawful inclusion of a Genuine Occupational Qualification that a Person not be a Transsexual Person.

We are also extremely concerned about the areas where the Bill attempts to undermine EU and ECHR caselaw, legislation and rights under the European Convention on Human Rights.

PFC’S CONCERNS: GENDER REASSIGNMENT OR GENDER IDENTITY

1. PFC welcomes believes the definition as suggested is unclear and will leave many members of the trans community unprotected.

2. First, it defines a protected characteristic by reference to a course of medical treatment and includes in that definition persons who do not undergo such treatment. Furthermore, we believe that “gender reassignment” is relevant to a protected characteristic, it is not however a protected characteristic itself.

3. Secondly, “gender reassignment” may exclude certain transsexual persons who do not seek treatment. “Changing sex” is not easy, as acknowledged by the European Court of Human Rights, and gender reassignment is a long and arduous road—which surely is not a pre-requisite to one’s human rights.

4. Thirdly, we believe that it is equally counter-intuitive to define the state of mind of a trans persons in deciding whether they would fall within a protected class of persons (asking questions such as: “is the person ‘proposing’ to undergo gender reassignment”) rather than focusing on the basis or motivation for the discriminatory behaviour by those discriminating against the person, namely the person’s perceived non-adherence to gender norms.

5. We believe that the term “gender identity” is more apt to providing protection for the groups of persons envisaged by the drafters as requiring protection including those enumerated in explanatory note 57.

6. Our position is supported by 98 per cent of respondents to the survey who said they believe that protection should be granted to anyone discriminated against on the basis of their gender identity or expression.

7. This terminology whilst being more appropriate is also in line with international developments. It is also terminology adopted and used by the United Nations and the Council of Europe.

8. The Scottish Parliament has also used “transgender identity for the Offences” (Aggravation by Prejudice) (Scotland) Bill 2009 which has a fully inclusive.

9. We are concerned with the use of the term “gender reassignment” as the protecting characteristic in relation to young people, in particular in light of the fact that gender variance in children will remit for the majority of children by adolescence (80–95 per cent).

10. The term “gender reassignment” would expect a young person to comment whether they “intend to undergo gender reassignment” in the future. It is important to note that many pre-pubertal children will not have heard of, or understand, the possibility of gender reassignment. In addition, in the UK, children below the age of 16 cannot meet the UK clinic’s gender reassignment criteria for undergoing gender reassignment or even establish that they wish to do so. Yet, young people considered “gender variant” by others need protection against bullying and victimisation.

Consequently, PFC believes the inclusion of “gender identity” as a defining characteristic in Vol 1, Part 2, Equality—key concepts, Chapter 1—Protected characteristics, S.7 is essential to protect trans people and gender variant children and adolescents.

THE BILL’S FAILURE IN RELATION TO THE HARASSMENT OF CHILDREN AND ADOLESCENTS

11. The apparent permission in Vol I pt.6, Chapter 1, Section 80, ss.10 for a responsible body of a school to lawfully harass young people, allowing them to be subject to discriminatory behaviour that would violate their dignity, creating a hostile, degrading, humiliating, or offensive environment, because they possess the characteristic of “Gender identity” (or sexual orientation or religion or belief).

12. This is at odds with the provision in Vol I Pt. 2, Chapter 2, S. 24 Harassment.

Press for Change therefore recommends that the clause Vol 1, Part 6—Education, Chapter 1—Schools, S.80, s10 be struck from the face of the bill.

THE FLOUTING OF EU AND ECHR LAW IN RELATION TO SINGLE SEX SERVICES AND EMPLOYMENT

13. Press for Change is very concerned by the exemption to protection for trans people in Vol II, Sch. 3 Part 6, Gender S. 25 (1) and in Vol. II ,Sch.9, pt. 1 General, ss. 3

14. Both of these sections fail to acknowledge that where a person has successfully applied for and been awarded a Gender Recognition Certificate (GRC) their gender becomes for all purposes the acquired gender.
15. And as there have been no problems of trans people applying for single sex jobs or using single sex services inappropriately since the introduction of the Employment Regulations (1999) and Sex Discrimination (Amendment of Legislation) Regulations (2009), it is clear the vast majority of businesses have adapted well to the use of their services by trans people. The provision is also, legally unsound.

16. PFC believes that the provisions contained in ss. 25 contravene articles 8 and 14 ECHR of those trans persons following the decisions of the European Court of Human Rights, in the cases of Goodwin, and I v United Kingdom (2002), as confirmed by Grant (2006) Furthermore in Bilka-Kaufhaus GmbH v Weber von Hartz (1987) ICR 110 the Court held that for any such justification in anti-discrimination law:

“the objective of the (providers) measure must correspond to a real need.”

17. There are also very good reasons for believing that the House of Lords and ECJ will continue to uphold in the question of access to goods and services or employment, the principles contained in the Equal Treatment Directive 2004/113 (ETD 113) will follow the principles of the ETD 76/207, ie that a person is recognised as a member of their new gender from the day they transition.

18. We believe that this has been reflected in practice. In practice, none of the GOQs introduced by the Sex Discrimination (Gender Reassignment) Regulations (1999) have proven to be relevant. There is little case law, and that which there is upheld the rights of the trans person to work in the employment. In A v Chief Constable of West Yorkshire Police [2004] HL. 21, E.W.C.A. Civ 1584, Baroness Hale held that following the decision of the ECJ in the case of KB v NHS Pensions Agency it is clear that:

“for the purposes of discrimination (Equal Treatment Directive 1976/2007/EEC) , a trans person is to be regarded as having the sexual identity of the gender to which he or she has been reassigned”.

19. This was later confirmed by the ECJ in the case of Sarah Margaret Richards v Secretary of State Pensions[1] and the ECHR in the case of Grant v. United Kingdom [2007] 44 EHRR 1.13

20. Furthermore barring a transsexual person from employment who is in possession of a Gender Recognition Certificate would be unlawful as persons with a GRC have to be treated “for all legal purposes” as a person of that sex. The Gender Recognition Act 2004 amended the SDA 1975 and removed GOQs from applying to persons who held a GRC.

21. We further believe that the principle can be extended to those trans people who are not living permanently in their preferred gender role.

22. Press for Change believes that these sections should be re-written, t make it quite clear that protection already obtained is not to be removed. We would suggest that the protection is extended to:

(3) A person who has the characteristic and a Gender Recognition Certificate is exempt from the provisions contained in …

(4) A person who has the characteristic and who is living permanently in their preferred gender role, whether or not they are intending to undergo, are undergoing, or have undergone gender reassignment is exempt from the provisions contained in …

(5) a person who has the characteristic but where the related gender expression does not take place within the (single sex setting)/(workplace) is exempt from the provisions contained in ss.(1)

REFERENCES

1 13 US States and Washington DC, and a further 93 cities afford protection from discrimination on the basis of Gender Identity and Gender Expression,(Transgender Law and Policy Institute at http://www.transgenderlaw.org/nldlaws/index.htm#jurisdictions ), Canada’s Northwest Territories also use the term “gender identity” to afford discrimination protection. In Spain, Aragon’s Public Authorities have to “guarantee the right of everyone not to be discriminated against on grounds of sexual orientation and gender identity”. In Northern Ireland , the Equality Commission has proposed an extended definition of gender to include “gender identity” (ECNI (2007) Commission Response to OFMDFM’s Consultation “Implementing EU Equality Obligations in Northern Ireland: The Gender Goods and Services Directive”, p. 5, available at: http://www.equalityni.org . The European Council Committee of Experts on Sexual Orientation and Gender Identity Discrimination has also suggested it would also be more appropriate to use the term Gender Identity. The Yogyakarta Principles also use the term Gender Identity , defining it in its preamble as “‘understanding gender identity’ to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms” (The Yogyakarta Principles at http://www.yogyakartaprinciples.org/principles_en.htm ).

2 On 18 December , 66 countries of the United Nations reaffirmed “the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity.”

3 Thomas Hammarberg at http://www.coe.int/t/commissioner/Viewpoints/090105_en.asp
The second meeting of the European Council Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT) is meeting in Strasbourg on 3–5 June 2009. They have published their Preliminary draft of the future Recommendations on measures to combat discrimination based on sexual orientation or gender identity. Relevant to the Bill, their recommendations call for member states to comprehensively review... (cont) and improve existing law, and take further measures to combat discrimination on the grounds of gender identity. Also ensure independent institutions ie the EHRC are fully mandated to combat this discrimination, and consult fully with trans communities on the adoption and effective implementation of law and policies to achieve this.


The Gender Recognition Act (2004) s.9, ss.1

Sex Discrimination (Gender Reassignment) Regulations (1999)

Bilka-Kaufhaus GmbH v Weber von Hartz (1987) ECJ, ICR 110


A (Respondent) v Chief Constable of West Yorkshire Police (Appellant) (2004 U. K, HL. 21, E.W.C.A. Civ 1584, para 56, meaning the day they commence working in their preferred gender role.

Sarah Margaret Richards v Secretary of State Pensions [2006] ECJ (Case C-423/04) , ECR 1-000

Grant v . United Kingdom [2007] ECHR, 44 EHRR 1

Memorandum submitted by Race on the Agenda (ROTA)

1. ABOUT THIS SUBMISSION

1.1 ROTA is one of Britain’s leading social policy think-tanks focusing exclusively on issues that affect Black, Asian and minority ethnic (BAME) communities. ROTA aims to increase the capacity of BAME organisations and strengthen the voice of BAME communities through increased civic engagement and participation in society.

1.2 As part of ROTA’s work on the Bill, we have formed a national coalition of BAME and other third sector organisations that are generally supportive of our views. The 36 Winning the Race Coalition members can be found at http://www.rota.org.uk/pages/WTRC.aspx

1.3 This memorandum is submitted by Dr. Theo Gavrielides, Chief Executive of Race on the Agenda, tel 020 7902 1966, mobile: 07720057750, theo@rota.org.uk Waterloo Business Centre, Unit 217 & 208 117 Waterloo Road, London SE1 8UL.

2. OPENING STATEMENT

2.1 Race on the Agenda (ROTA) warmly welcomes the Single Equality Bill, and hopes that it can provide the legislative tools to tackle persistent inequalities such as those faced by Britain’s Black, Asian and minority ethnic (BAME) communities. ROTA also hopes that through the Bill a culture of respect for equality and dignity is created and mainstreamed in providers of public services (whether public, private or voluntary) and in society.

3. SCOPE OF THE BILL

3.1 ROTA was disappointed with the limited scope of the Bill and of the Public Sector Equality Duty (Clause 143) in particular. The duty applies to the listed “core public authorities” and to an ambiguous list of “hybrid public authorities”. The former has some obvious omissions such as the Police. The latter is defined as those authorities exercising “public functions” as this is developed under the Human Rights Act 1998.

3.2 After five leading cases,233 a proposed Private Members Bill, pressure from the Parliamentary Joint Committee on Human Rights234 (JCHR) and several promises by government that the legislative confusion and misinterpretation of Section 6(1) of the Human Rights Act will be addressed, the Bill presents a unique opportunity that should not be missed.


In 2004, the JCHR concluded that the test being applied by the courts was “highly problematic” as in many cases it resulted in an organisation “standing in the shoes of the State”, but without the State’s legal responsibilities under the Human Rights Act. That had led to a “serious gap” in the protection that the Act was intended to offer.

Cases such as the latest *YL v Birmingham* (2007) suggest that if the Bill inherits the confusion caused by Section 6(1) of the 1998 Act, some of the most vulnerable sections of British society will remain unprotected. This is not in line with the Equalities Review.

The *YL* case involved an 84-year old lady with Alzheimer’s who remained unprotected due to the limited definition of “public functions” under the 1998 Act. 300,000 older people in care were affected by this case. The numbers of BAME elders receiving social care services that are contracted out by local authorities are rather significant particularly when compared to the White British population. In addition, BAME elders have additional needs which if ignored might run the risk of having their dignity and respect breached (eg cultural, language, dietary, health and lack of family support and friends networks). This also applies to children in care and children and young people in Academies. Again the numbers of Black boys and girls in these services are proportionately higher than the White British population.

We propose an amendment to include the JCHR definition of “public functions” (29th Report 2008).

We understand that the Equality Bill is a Public Bill and that there is intention to consult about how to use procurement as an equality tool. This is welcomed. The amendment in the Health and Social Care Bill was also welcomed. However, the gap created through the Human Rights Act is still not addressed.

We do not believe that consistency can be achieved through guidance or secondary legislation. We are not proposing to list hybrid public authorities, but to provide a clear definition of public functions which is in line with the 29th Report of the JCHR 2008.

We strongly agree with the Chair of the JCHR, Andrew Dismore, who said to the House: “Guidance alone cannot solve the problem; in reality is has proved utterly useless … Guidance can never be a substitute for the direct application of the Act to service providers” (18 Dec 2007: Column 739).

**4. Purpose Clause**

We believe that the Bill would benefit from a purpose clause that will allow courts to easily identify the overriding objective of the statute. The applicability of several provisions of the Act will be seen through test cases, and we are concerned that without purposive interpretation that is based on a clear overriding objective of the statute, the letter of the law might be narrowly applied. There are numerous examples of UK legislation that can be provided as examples eg Criminal and Civil Procedure Rules.

We propose an amendment to include a purpose clause in the Bill.

**5. Enforcement and Secondary Legislation**

Several provisions of the Bill are reliant on secondary legislation and non-statutory guidance. The Equality and Human Rights Commission (EHRC) is mentioned as one of the bodies tasked with enforcement responsibilities. This is welcomed. From our RRA experience, in order to move away from the process focused approach to race equality and equality, and ensure consistency of application, bodies such as the regulators, inspectorates and auditors need also to be clearly identified by the Act. This should include the Audit Commission, the Healthcare Commission, the Commission on Social Care Inspection and OfSted.

We proposed an amendment to include the regulators and inspectorates.

**6. Positive Action Measures**

ROTA is pleased to see provisions which aim to align EU legislation with domestic law. The proposed provisions are modest and could be strengthened. Ten years on from the St Lawrence Inquiry, ROTA has evidence to suggest that the recruitment, retention and promotion of BAME staff particularly within certain sectors is neither proportionate nor within the letter and spirit of equality legislation. We also ask whether Clause 153(4) fully reflects the scope for positive action permitted by EU law and if, in practice, this provision will prevent employers from adopting a general positive action strategy prior to making recruitment decisions.

**7. Multiple Discrimination**

We support the inclusion of provisions to address multiple discrimination. Looking at case law pre 2004 it was possible for someone to bring a case on multiple discrimination grounds. After *Bahl v Law Society* (2004), cases that could only be brought as multiple discrimination claims stopped.

We would argue that limiting the combination to two characteristics is not the best way forward. However, we understand that there are concerns that case law will increase. We agree with the Equality and Diversity Forum that we should not expect an increase of more than 5 per cent of the number of cases brought. We would argue that the limitation to two grounds only should be revisited within two years of this provision being introduced to consider whether the number of grounds should be extended.
8. Faith Schools

8.1 On the issue of school admissions, we also share the JCHR’s concerns regarding public policy detriments especially in relation to religious, racial and social segregation. We would like the government to back up with evidence its argument that discrimination in admissions is necessary to preserve a school’s distinctive religious ethos. We would question the compatibility of a general exclusion and recommend that the matter is regulated in a different way.

9. Socio-economic Duty

9.1 It is our view that the proposed duty is modest and lacks of practical significance particularly in relation to enhancing and promoting human rights for individuals. We are particularly concerned with the exclusion of individuals subject to immigration control. We do not think that a general exclusion clause is the right way forward in this regard.

10. Clause 8 & Marriage/Civil Partnership

10.1 The Bill does not protect people who are in long-term, significant relationships and suffer discrimination or harassment as a result. We believe that this maybe in breach of HRA. We would welcome evidence on the government’s thinking for this exclusion. We are concerned that a significant proportion of BAME groups who chose long-term relationships as opposed to civil partnerships or marriage will be excluded from protection. We have evidence to suggest that this particular life style is preferred among BAME communities particularly LGBT BAME groups and those on low income.

11. Further Resources

- ROTA Memorandum to Equality Bill Committee (2 June 09)

- ROTA Memorandum to Equality Bill Committee (5 June 09—Multiple Discrimination)

- ROTA coalition website http://www.rota.org.uk/pages/WTRC.aspx

Memorandum submitted by the Royal College of Psychiatrists

The Royal College of Psychiatrists wishes to respond to several questions raised in the inquiry.

1. Did the government consider defining disability according to a social rather than medical model, which would be in line with what is increasingly recognized as international best practice?

   1. The Royal College of Psychiatrists strongly supports the social model of disability and the change to the definition of disability that this would involve. The commonly held model of illness, (also called the medical model), emphasises the episodic nature of disorders, which is less appropriate in the present context than a model emphasising the enduring problems associated with some mental illness.

   2. As Dr Boardman has put it “The ‘illness model’ assumes that an episode occurs for which treatment is available and a cure achieved. Such a model may be useful when applied to acute mental illness, especially in the context of acute in-patient services or for many of the problems seen by mental health services”. In contrast, disabled people cannot [necessarily] expect a “cure”, but can adapt to changed circumstances and can increasingly expect adjustments in the world around them to enable them to participate. In this sense, “disability”, unlike “illness”, brings into focus the need to remove barriers in social attitudes, practices, policies and the built environment.

   3. Therefore this “social model of disability” offers a more helpful conceptual basis for understanding and promoting employment opportunities for people who use mental health services and offers more hope of recovery of social roles. It better captures the experience of discrimination and exclusion central to the lives of many mental health service users and addresses the barriers to employment. It is consistent with the views of users and people with disabilities and it assists in achieving dialogue with employers.

   As Thornicroft has put it “Framing the wider social problems associated with having a mental health problem as disabilities, not only highlights many of their own experiences, but also has the advantage that the individuals with these problems have rights to particular benefits rather than considered as the ‘worthy poor’ to receive discriminatory charity”

Discrimination

4. For people with mental health problems it is the prejudice and misinformation which is the main barrier to their social inclusion, to employment prospects and to their access to such social essentials as housing and leisure activities. Common myths around mental illness are that mental illness is self-inflicted, that it is dangerous, that people with mental health problems are out of control and that mental illness is
not something from which a patient can recover, that it is a life sentence. On the contrary as many as two thirds of those who experience mental illness have a complete or partial recovery to the extent that they can actively participate in economic and social life. The myths, perpetuated to an extent by sections of the media, continue to feed prejudice and limit the opportunities of people with a current or previous mental health condition.

EVIDENCE OF CASE LAW

5. Surveys of cases have shown that mental health is the biggest source of problems under the definition of disability in the DDA. These include two major studies of the working of Part II and III of the Act through decided casesii. In the latter, which surveyed all cases between 1996 and 2000, 58 per cent of all cases of physical impairment met the definition and 15.3 per cent of mental impairment met the definition. Put another way, 354 cases of mental impairment failed, 64 succeeded; 229 cases on physical impairment failed, 252 cases succeeded.

6. The Disability Rights Commission also did a case study of all cases on the definition of disability from Employment Tribunals in 1998–99 which concluded that the main problem with the definition was for people with mental health problems.

DEPRESSION

7. The problem with the medical model is aptly illustrated with reference to depression. Under Schedule 1 paragraph 2 of the Equality Bill the “impairment” must have “a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.” Long term is defined to be a past period of at least twelve months or likelihood that the period that an impairment will have substantial effects will be 12 months. These provisions cause real problems for people with depression. Depression is typically severe though relatively short-lived As NICE reports in its 2007 Guidance on Management of Depression, “depression is usually a time limited disorder lasting up to six months”ix.

8. Despite the relatively short period of dysfunction, discrimination against the person with depression is commonplace. Furthermore, once there is a medical record of having had depression in the past; however distant or short-lived, discrimination is common. This is particularly so in insurance and entry into training or occupations. Mind has reported that they regularly have to advise employees who have been dismissed because of a “nervous breakdown” but who are well enough to return to work after several months, that they probably have no protectionx. Reports from the Employment Tribunals also show this to be a consistent problemxi as did cases collected by the Disability Rights Commission in 2004.

“One recent example concerned a man where the tribunal actually were trying to work out if they could tot up the 12 months because, a classic situation, this man had had an episode of depression, had been in perfectly satisfactory employment for many years, went through a period of depression, was off work sick …He satisfied every aspect of the definition except the fact that, within about five months, he started to recover… So, by about six months, he was keen to get back to work and, by about nine months, he was probably ready to be back to work—he was still on medication—but he had been dismissed because he had depressionxii.

9. In addition, those experiencing depression may not seek medical advice at the point at which their symptoms first manifest. This may be due to fear of stigma and/or of the treatment they may be prescribed. This means that whilst applicants to an ET may well have been depressed for the requisite period, there will be no medical record to establish this.

10. In 2004 the College gave evidence to the Joint Scrutiny Committee on the draft Disability Discrimination Billxii. The Committee recommended that the definition of disability be changed in order to accommodate this problem. The House of Lords later passed an amendment to a similar effectxiii but this was not accepted by the government who decided that the issue of the social model of disability needed to await another day.

RECURRENT CONDITIONS AND DEPRESSION

11. Depressive illnesses also have a strong tendency to reoccur. At least 50 per cent of people following their first episode of major depression will go on to have at least one more episodexiv with those experiencing their first episode of depression before the age of 20 being particularly susceptible to relapse.

12. Under Schedule 1 of the Equality Bill if the “substantial adverse effect” of an impairment has not lasted for 12 months but is likely to recur, the person will also be covered. The aim of this provision is to cover impairments whose effect on day-to-day activities fluctuates. However case law has shown that this provision is not effective in the case of depression. There are differences of view within the medical profession as to whether (and when) episodes of depression are manifestations of an underlying condition and when they are discrete episodes.

13. As NICE Guidelines 2007 state “Our understanding of the aitiology and underlying mechanisms of depression remain putative and lacking in specificity”xv. As a result experts often disagree in court on the issues. Furthermore, doctors often, understandably, feel reluctant to testify that a person with a first episode is likely to have a recurrence.
T first suffered from depression in 1993 and then again in 1996. He was treated with medication and counselling until 1998. He was then employed from April to July 1999, at which time he was told his employment would be terminated at the end of his probationary period. On dismissal T experienced episode of depression. Yet T was not covered by the DDA because in intervening periods the applicant did not suffer any substantial, adverse effect on day-to-day activities at the time of the applicant’s employment and at the date of the hearing the applicant was free of any substantial adverse effectsvi.

14. OTHER QUESTIONS ON DISABILITY

Why is discrimination on the basis of association and perception not explicitly prohibited on the face of the bill, in order to provide greater clarity for employers and service providers?

Was consideration given to including carer status as a protected characteristic, or to giving carers a legal right to seek reasonable accommodation? If so, why was it rejected?

The College is disappointed that the crucial role of carers in providing support for disabled people is not expressly covered in the Bill. The role of carers is central to the wellbeing of service users with mental illness, especially at times of crisis. They can play a crucial role in their recovery and as part of a “reasonable adjustment” give ongoing support to a person who is in the workforce. The stigma of mental illness can be readily attached to them as to the service user. They need to be assured that their status is protected.

REFERENCES


iv Clinical Guideline 23 10 May 2007. Depression, full guideline. p. 15 In addition, several studies have supported the observation that, no matter what the triggering event for depression, the duration in a majority of cases is likely to be around six month. [Evidence discussed in Hammen Depression (1998) Psychology Press PP30–31]

v Glozier found that where two job applications, one disclosing a diagnosis of diabetes the other one of depression, were submitted to 200 personnel managers, the “applicant” with depression had significantly reduced chances of employment. Glozier N (1998) “the workplace effects of stigmatization of depression” journal of occupational and environmental medicine 40, 783–800 Manning and White found systematic discrimination by employers against those with mental health problems: Manning C & White P (1995) “attitudes of employers to the mentally ill” Psychiatric Bulletin 19, 541–3]

vi Evidence to the Joint Committee on the Draft Disability Discrimination Bill , Evidence 119

vii For example see Chaudhery v London Borough of Newham EAT/237/02/ILB]

viii Rowena Daw, Joint Committee on the Draft Disability Discrimination Bill, Tuesday 30 March 2004

ix Joint Committee on the Draft Disability Discrimination Bill, Tuesday 30 March 2004

x HL Deb 08 February 2005 vol 669 cc665–92


xii NICE, Guidelines on Management of Depression, December 2007 p. 19

xiii Taylor v Sunterra Europe ltd unreported, DRC Survey 2004

June 2009

Memorandum submitted by the Scottish Human Rights Commission

PRELIMINARY COMMENTS

We are pleased to contribute to the consideration by the Joint Committee on Human Rights (JCHR) of the Equality Bill, which will have significant implications for the realisation of all human rights in Scotland. We echo many of the concerns raised by JCHR in its request to the Solicitor General for further information. In order to be concise, following some preliminary comments, we will make only brief comments on areas where we have additional suggestions.

Equality and non-discrimination are at the core of the realisation of all human rights. They are central to UN and Council of Europe human rights treaties, and form part of domestic human rights law through the Human Rights Act 1998 and the Scotland Act 1998. The UK’s traditional approach to non-discrimination
and equality as distinct from human rights is inconsistent with international law, incoherent in practice and poorly serves those whose rights are most frequently overlooked. Unfortunately the current Equality Bill continues this approach of two parallel and occasionally contradictory standards. It is not surprising, therefore, that the UK has frequently been criticized internationally for its approach to non-discrimination. Most recently, in May this year, the UN Committee on Economic, Social and Cultural Rights (CESCR) expressed its concern, “that the proposed Equality Bill does not provide protection from all forms of discrimination in all areas related to the Covenant rights”.

Since its inception, on 10 December 2008 the Scottish Human Rights Commission has spoken to a wide range of people in public, private and non-governmental bodies across the length and breadth of Scotland in a series of 18 consultation and many other bilateral meetings. We have discovered many examples of good practice where bodies have adopted a human rights-based approach through which they seek to realise equality as well as human rights duties. We are currently evaluating the experience The State Hospital at Carstairs, which has sought to deliver all duties through a human rights-based approach, in order to learn lessons which can be applied elsewhere.

The benefits of a unified human rights-based approach to the delivery of human rights and equality duties are increasingly documented. In our work so far we have been stuck by the high level of good will towards an integrated approach which would ensure simplification and coherence whereas at present there is unhelpful duplication. In relation to mental health, for example, it would link the right to health with discrimination on the grounds of disability or health status, and in relation to social care it would link age based discrimination with the right to freedom from degrading treatment, to provide a more holistic and workable framework for public authorities.

The present proposal for the Equality Bill would create general equality duties for certain listed public authorities in relation to certain internationally recognized grounds of discrimination. Under the Human Rights Act all public authorities, as well as other bodies to the extent that they carry out public functions, must prohibit, prevent and eliminate discrimination in the realisation of human rights for a non-exhaustive and evolving list of grounds of discrimination.

Duplication and uncertainty should be avoided either through amendments of the Equality Bill itself or, at least, in the specific duties and guidance to be developed in the coming months by the UK and Scottish Governments.

RESPONSES TO SPECIFIC QUESTIONS

PART 1—SOCIO-ECONOMIC INEQUALITIES

Question 1.

Discrimination on the grounds of “social origin, property…or other status” is prohibited in international human rights law. CESCR recently clarified that “individuals or groups must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society.” As a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UK is therefore required to immediately take steps to prevent, diminish and eliminate discrimination on this as well as other grounds.

In addition, its general obligations under the ICESCR require the UK to take steps to achieve progressively the full realisation of economic, social and cultural rights for everyone, without discrimination. Such steps may include a duty on public authorities to monitor the realisation of these rights (including through collecting appropriately disaggregated data) and adopting temporary special measures where appropriate (see later under “positive action”). Such a duty, properly constructed, could be an important (although not sufficient) element of ensuring the progressive realisation of economic, social and cultural rights in the UK.

However, we do not believe that the socio-economic duty, as currently proposed, would be an adequate legislative measure either to prohibit discrimination on grounds of social or economic status, or to enhance the realisation of economic, social and cultural rights. The current proposal is vague and the “inequalities” in question are not spelt out and can be defined by public authorities themselves, meaning that implementation will not be uniform.

237 ICESCR Article 2(2) and ICCPR, Article 2(1).
238 UN CESCR, General Comment No. 20, 10 June 2009, UN Doc. E/C.12/GC/20, para 35.
239 Ibid, para 8(b).
PART 2—EQUALITY—KEY CONCEPTS

Other Protected Characteristics

Question 7.

Whereas the Equality Bill includes a limited number of prohibited grounds of discrimination, international human rights law, including the European Convention on Human Rights includes a non-exhaustive and evolving list of prohibited grounds of discrimination in the realisation of human rights. In addition to those grounds recognized in the Equality Bill, other prohibited grounds of discrimination under human rights treaties to which the UK is a party include (but are not limited to): association with/belonging to a national minority, birth, descent, language, marital status, political or other opinion, social origin. Human rights bodies have interpreted “other status” to include, inter alia, gender identity, health status, place of residence, and economic and social situation.240

The “protected characteristics” in the Equality Bill do not encompass all internationally prohibited grounds of discrimination. This is likely to create confusion as bodies look to comply with duties under the Human Rights Act which extend beyond the grounds recognized in the Equality Bill.

PART 11—ADVANCEMENT OF EQUALITY

Public sector equality duty

The Commission is engaging with the Scottish Government to ensure proper consideration of human rights in the development of specific duties of Scottish public authorities. As with all other legislation public authorities must interpret the Equality Bill, so far as possible, in line with the duties under the Human Rights Act 1998. In considering the best way to enable this to happen, we will be holding a workshop with representatives of Scottish public authorities during the Scottish Government’s consultation.

Procurement

Question 65.

The UK Government Equalities Office states that the Equality Bill allows public bodies to use procurement to advance equality, and allows Ministers to set out how public authorities should go about doing this.241

As noted in our submission to JCHR’s consultation on business and human rights, we believe that better use could be made of public procurement law to both prevent the UK’s public sector from purchasing in a way which is detrimental to respect for human rights and to encourage private sector businesses to satisfy the terms of public contracts in compliance with human rights norms. It is our view that the duty of public authorities to protect human rights (including the right to non-discrimination and equality) is obligatory, and not optional. We consider that the development and promotion of guidelines which would enable public authorities to ensure human rights are protected in procurement processes would be a useful step to ensuring this happens.

We feel that the way this is framed in the current Bill and explanatory memorandum is unhelpful. We are concerned that an option to promote equality in procurement could lead to confusion with the obligation to protect human rights (including non-discrimination in the realisation of human rights). In addition, the current draft Equality Bill appears to limit references to equality in procurement largely to labour policies of contractors. Under the Human Rights Act conversely, public authorities should ensure the respect, protection, promotion and fulfillment of human rights in procurement of public services.

Positive action measures

Under international human rights law temporary special measures (or positive action measures) are not prohibited, and in some cases they are required. As the Human Rights Committee has stated in consideration of the obligations under the International Covenant on Civil and Political Rights (ICCPR):

“where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.”242

In giving effect to the duty under the Equality Bill consideration should be given to when such measures may be required, and to the requirement that they be time-bound and cease when the objective is achieved.

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240 Most recently this was authoritatively interpreted in UN CESCR, General Comment No. 20, 10 June 2009, UN Doc. E/C.12/ GC/20
242 Human Rights Committee, General Comment no. 18, para 10 (emphasis added). For a similar view expressed in relation to the ECHR, see D.H. and others v Czech Republic, Grand Chamber, Application no. 57325/00, 13 November 2007.
ADDITIONAL COMMENTS

Definition of direct and indirect discrimination

The definition of discrimination included in the Bill differs from that in international human rights law. While the Bill considers discrimination to be less favourable treatment based on a protected ground, under international human rights law discrimination is “any distinction, exclusion, restriction or preference based on a prohibited ground which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights ...”243

Currently, the explanatory memorandum to the Bill states that, “it is not discrimination to treat a disabled person more favourably than a person who is not disabled”. This statement could give the misleading impression that all favourable treatment of persons with disabilities is permissible. Under international human rights law any preference which is not reasonably and objectively justified is discriminatory.

In addition, it is not currently explicit in the Bill that there is a duty to treat differently people whose circumstances are significantly different. As the International Court of Justice has stated,

“The principle of equality before the law does not mean...absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means...relative equality, namely the principle to treat equally what are equal and unequally what are unequal”.”244

This is an important principle which has been reiterated by the European Court of Human Rights:

“The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”245

“reasonable adjustments” and “reasonable accommodation”

In addition to concerns raised by JCHR in relation to the definition of disability under the Equality Bill, which we echo, we note that the duty to make reasonable adjustments for people with disabilities in the Bill is narrower than the obligation of reasonable accommodation under the CRPD. Under CRPD the UK is required to take all appropriate steps to ensure reasonable accommodation where necessary to ensure the equal enjoyment of human rights by persons with disabilities. Reasonable accommodation relates to appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case.246

The equivalent duty to make reasonable adjustments under the Equality Bill extends only to situations where person with a disability faces a “significant disadvantage in comparison to non-disabled people”. This is a far more limited requirement than the obligation under the CRPD, and reflects a test included in Protocol 14 to the ECHR with the intention of raising the bar for admissibility of petitions to the ECHR.247

FINAl COMMENTS

We hope that these comments are useful and would welcome an invitation to provide oral evidence if the Committee feels that would be valuable.

Memorandum by Unison

PRE-LEGISLATIVE SCRUTINY OF THE EQUALITY BILL

INTRODUCTION

UNISON is Britain’s largest trade union with 1.3 million members. They work in a range of public services. We have the highest membership of any trade union in the health service, local government and education. We also have members in the transport and utilities sectors.

Most of our membership is female and we have members who come from a variety of ethnic and religious backgrounds. Our membership also reflects the proportion of the wider population who are from the lesbian, gay, bisexual and transgender communities. A significant number of our members are disabled.

The Joint Committee on Human Rights (JCHR) has invited interested groups and individuals to submit evidence on:

— The significant human rights issues likely to be raised by the Bill.
— Whether the Bill presents opportunities to enhance protection of human rights.

243 Article 1 of ICERD and ICEDAW; Human Rights Committee, General Comment No. 18, para 6; UN CESCGR General Comment No. 20, para 7.
244 South West Africa Cases (Second Phase), ICJ Rep 1966, p. 6, 305–06.
245 Thlimmenos v Greece, Application No. 34369/97, 6 April 2000, para 44.
246 CRPD, Article 2 and 5(3).
247 Protocol 14 amends Article 34 of the ECHR to include the “significant disadvantage” test in order “…to maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the European Court of Human Rights...”.
It is difficult to respond to these questions at this time because the Government Equalities Office (GEO) has not published to organisations outside government its detailed proposals for the Bill. The White Paper, Framework for a Fairer Future: The Equality Bill, published in June 2008, merely summarised the GEO’s position on five issues, including a new equality duty on public bodies, extended scope for positive action, powers to extend protection against age discrimination, and strengthened enforcement, giving a broad indication of the line the government was intending to take. More helpful was the 208-page document published in July 2008 containing the government’s response to the 2007 consultation on the Discrimination Law Review’s findings and legislative proposals. From this document it is possible to have a clearer view of how the government will approach at least some potentially problematic issues.

However, in the current climate, when there are stronger calls for the relaxation of regulation of private business as employers or as providers of services (other than financial services), as well as possible reductions in funds available for public services, UNISON is concerned that there is a real possibility that aspects of the anticipated Equality Bill may be diluted or postponed.

Nevertheless, working from what the government has indicated, there are human rights issues that the proposed measure could raise as well as ways in which the Bill could enhance human rights.

This submission is organised under the following main headings: civil and political rights; the primacy of discrimination; balancing rights; the right to participation; positive action; children’s rights; multiple discrimination; and harassment.

AN INCLUSIVE APPROACH TO HUMAN RIGHTS PROTECTION

Equality has underpinned human rights since the UN Declaration of Human Rights in 1948. In the UK, there is a perception that “human rights” are concerned primarily with civil and political rights, based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), incorporated into UK law by the Human Rights Act. On the other hand, UK equality and anti-discrimination legislation has focused mainly on economic and social rights. There is nothing to suggest that in its proposals for an Equality Bill the government is intending to deviate from this well-trod path.

Therefore the significant human rights gap, so far as the content of the Equality Bill is known, is lack of reference to discrimination in relation to important civil and political rights. Indeed, if aspects of existing legislation are replicated in the Equality Bill, certain civil and political rights will be explicitly excluded from protection against discrimination and/or for application of the race, disability or gender equality duties.

Currently, the prohibition of discrimination in respect of public functions under some or all of the equality enactments (on all grounds except age) does not apply to any of the security services agencies, judicial functions or anything done on behalf or on instructions of a person exercising judicial functions, anything done to reach a decision not to prosecute, and certain key immigration control functions. Many of these functions can involve civil and political rights protected under the ECHR and other international human rights instruments.

UNISON can see no good reason why on any of the grounds otherwise protected under the Equality Bill challenges under the Equality Bill as well as under Article 14 of the ECHR.

STATUS OF UK PROTECTION AGAINST DISCRIMINATION

Article 26 of the International Covenant on Civil and Political Rights (ICCPR) requires all States Parties to use the law to prohibit any discrimination and to guarantee to all persons equal and effective protection against any discrimination on any ground. While Article 4 of the ICCPR enables States Parties in time of extreme public emergency threatening the life of the nation to derogate from certain of their obligations under that Covenant, this is permitted “provided such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

However, UK anti-discrimination legislation has never given primacy to protection against discrimination over other legislation.

Exceptions to discrimination law

The provisions of the original Race Relations Act (RRA) were subject to any primary or secondary legislation and orders to comply with ministerial requirements passed or made before or after the RRA came into force (s.41). In order to comply with the EC Race Directive 2000/43 Article 14 the RRA was amended so that broad exception applied only in relation to colour and nationality.

Exceptions for primary and secondary legislation, whatever the content, are in s. 51A Sex Discrimination Act 1975 (SDA), s.59(1) Disability Discrimination Act 1995 (DDA) in s. 27 Employment Equality (Age) Regulations 2006 and in s.56 Equality Act and Reg. 12 of the Equality Act 2006 (Sexual Orientation) Regulations 2007.

The government (often ignoring obligations for equality impact assessments) has therefore a relatively free hand to legislate in ways that may conflict with its own anti-discrimination legislation.
EXCEPTIONS—BALANCING DIFFERENT RIGHTS

The Discrimination Law Review included, as Annex A, three and a half pages of exceptions to protection against discrimination that the government considers should be retained. In response to consultation the government will have received comments regarding all or some of these exceptions. To date the only conclusion that is known is that the government intends to have a genuine occupational requirement as the basic exception in relation to employment and a list of specific exceptions outside the field of employment.

Achieving Balance: the example of faith schools

It is not clear whether the Equality Bill will retain, in relation to employment, the further exception relating to the “religious ethos” of the employer. Under current law (Employment Equality (Religion or Belief) Regulations 2003) any employer organisation, which is not of itself a religious organisation but which purports to have an ethos based on religion or belief, is able to make being of a particular religion or belief a “genuine occupational requirement”. Even wider is the exception (Reg. 39) that enables section 58 to 60 of the School Standards and Framework Act 1998 to override prohibition of discrimination on grounds of religion or belief in relation to employment in faith schools. It is also not clear whether the Equality Bill will replicate the equally wide exceptions for faith schools in the Equality Act 2006, section 52(4)(k), in relation to their curriculum (potentially allowing the teaching of prejudice in relation to other faiths or different sexual orientations), admissions, or transport, and for non-commercial organisations which have religion or belief as some part of their purpose (s.57) which may discriminate in relation to participation, provision of goods, facilities or services, or use of premises.

UNISON questions whether the current forms of privileging of religion or belief over equality reflect the right balance between freedom of belief rights and equality rights. This should be re-examined before the Equality Act becomes law.

RIGHT TO PARTICIPATE IN THE CONDUCT OF PUBLIC AFFAIRS

Many international human rights instruments which include rights to equality refer directly or indirectly to the rights of all persons to participate fully in the conduct of public affairs. Case law under the RRA concerning race discrimination in the selection of candidates for political office has established that the main provision in the RRA that applies to political parties is section 25, prohibiting discrimination by organisations with 25 or more members. There are no parallel provisions in all of the other equality enactments. However, there are concerns about inequality, discrimination and under-representation of different groups among elected members of local authorities, UK Parliament and the European Parliament. The government has not indicated any proposal to ensure all activities of political parties are within the scope of the Equality Act’s anti-discrimination provisions. If it were to do so, then positive action provisions could apply to political parties. This could have an effect on the adoption of women-only or ethnic minority-only shortlists.

POSITIVE ACTION IS NOT DISCRIMINATION

Positive action equality measures are contained explicitly or implicitly within all of the major international human rights instruments (see below).

Positive action measures

These are explicit in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD) and ILO Convention 111. They are implicit as interpreted in General Comments on the International Covenant on Civil and Political Rights (ICCPR) (see General Comment 18, 37th Session) and, for example, Fact Sheet No.16 regarding the International Covenant on Economic, Social and Cultural Rights (ICESCR).

All such instruments recognise that special measures will be necessary to overcome historic patterns of discrimination and exclusion and that such measures are not considered discrimination. Special measures should not lead to the maintenance of separate rights for different groups nor should they be continued after their objectives have been achieved.

It is not clear how the government intends to legislate to permit positive action within the Equality Act. It has said it will adopt the approach within the EC directives as well as a “tie-break” provision for employers where there is evidence of under-representation.

Its proposals outside the field of employment appear to be more limited and would fall far short of the approach within the various human rights instruments. It should be noted that under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) not only is positive action permitted and not to be treated as discrimination but States Parties have a duty to take special measures “to
ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms”.

UNISON believes that it may be appropriate to consider a provision along these lines as part of the equality duty that the Equality Act will impose on public bodies.

**Exclusion of Children’s Right to Non-discrimination**

The government has announced that the Equality Bill will empower the Secretary of State to use secondary legislation to prohibit age discrimination in areas outside the field of employment. UNISON is concerned that this will exclude the possibility of amendment or any significant debate on whether any human rights issues arise or are inappropriately excluded from the proposed regulations.

More significant, however, is the decision that such legislation will provide protection against discrimination and harassment in access to goods, facilities and services, education, and exercise of all other public functions only for persons over age 18.

This directly conflicts with all of the international instruments, none of which includes an age bar.

*Children’s rights: international instruments*

Instruments with broad coverage such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) and the ECHR, as well as those focusing on particular grounds such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) or the Convention on the Elimination of Discrimination Against Women (CEDAW) will be interpreted to apply to persons of all ages, while the EU Charter of Fundamental Rights and the Convention on the Rights of Persons with Disabilities (CRPD) specifically address rights of children.

The Convention on the Rights of the Child (CRC) applies to a wide range of civil and political and economic and social rights that are, or should be, within the scope of the Equality Bill, including health, education, treatment as a refugee, non-exploitation, arrest and detention as well as specific prohibition of harassment.

**Multiple Discrimination**

Following consultation the government appears to be willing to consider how complaints of multiple discrimination could be dealt with by a court or tribunal. There appears to be continuing reluctance fully to accept that the Equality Bill should recognise and incorporate discrimination on multiple grounds in its definitions of discrimination and harassment, although this is clearly the reality for many people. The fact that discrimination occurs on more than one ground is clearly recognised in many of the international human rights instruments, for example, CRC, CEDAW and CRPD.

**Protection from Harassment and Freedom of Expression**

Most of the human rights issues that arise in the context of the Equality Bill are related to gaps, omissions or exclusions in anti-discrimination obligations. But there is also the slightly different question of how harassment on grounds of religion or belief should be treated in anti-discrimination legislation.

*Harassment: the current position*

There are blatant inconsistencies. Under the Employment Equality (Religion or Belief) Regulations 2003, harassment within the field of employment is a specific unlawful act. The definition of harassment in these regulations is identical to the definition of harassment in the parallel Employment Equality (Sexual Orientation) Regulations 2003, as well as in the RRA, (as amended by the Race Relations (Amendment) Regulations 2003). These provisions were necessary to bring the UK legislation in line with the EC Employment Framework Directive 2000/78 and the EC Race Directive 2000/43. Within the RRA this definition of harassment applies on grounds of race and ethnic and national origin in relation to all activities within its scope: not only employment, but also in education, management of premises, access to goods, facilities and services and exercise of other public functions.

Discrimination on grounds of religion or belief outside the field of employment was enacted as Part 2 of the Equality Act 2006. However, because of concerns about freedom of expression, this Act does not include a separate unlawful act of harassment on grounds of religion or belief. And the Equality Act (Sexual Orientation) Regulations 2007 similarly lack such a provision. Harassment on grounds of religion or belief or sexual orientation in an area outside of employment and further and higher education can form part of a complaint of unlawful treatment in the form of direct discrimination, but only where a suitable comparator can be identified. In both cases there was no European directive driving the legislation as there had been for the employment-related regulations.

There is now a proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation which, in its current form, would require harassment on all four of these grounds to be explicitly prohibited.
From a human rights perspective, as well as a perspective of rationality or legislative clarity and certainty, the present position is unsatisfactory. UNISON questions why harassment at school, as a passenger or as a hospital patient should be so different from harassment in an office or on an assembly line or at a college. Is the balance between the need to protect individuals from words or acts that violate their dignity or create intimidating, hostile, degrading, humiliating or offensive environments and to protect fundamental right to freedom of expression so different in these different types of situations that legal rights should be differently defined?

UNISON

November 2008

Supplementary memorandum submitted by Unison

HUMAN RIGHTS AND THE EQUALITY BILL

Introduction

UNISON is the UK’s largest public services trade union with more than 1.3 million members. Our members are people working in the public services, for private contractors providing public services and in the essential utilities. They include front line staff and managers working full or part time in local authorities, the NHS, the police service, universities, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector. We have had, from our creation in 1993, structures at all levels for under-represented groups (disabled, black, women and lesbian, gay, transgender and bisexual members, young people and retired members).

Equality Bill

The Equality Bill aims to harmonise and consolidate discrimination legislation and also tackle inequality and discrimination in employment and in the provision of services. Nine major pieces of legislation and around 100 other measures will be replaced by a single Act. But it falls short of doing this within a framework of human rights from which it could have benefited.

Human rights approach

The Human Rights Act remains one of the great achievements of the Labour administration. The Equalities Bill goes some way towards tackling issues of discrimination and harassment, but our contribution to the EHRC Human Rights Inquiry (published on Monday 15 June) showed that our concerns go beyond consolidating legislation. We maintain that the overarching framework of human rights is necessary to provide a context for law and regulation.

UNISON agrees with the point made in the Committee’s letter to Vera Baird that non-discrimination should be recognised as a free standing right.

Tackling inconsistencies

UNISON believes that it would have been useful to include an overarching purpose clause in the bill, to assert its position in relation to other relation and to give guidance in interpretation as to underlying principles and aims.

Some areas of the bill where UNISON believes it falls short of its potential to extend the human rights approach to discrimination and to the provision of public services are set out below.

Public authorities

One of the aspects of the Human Rights Act which is in need of clarification is the definition of a public authority, which is relevant to many other pieces of legislation, including the Freedom of Information Act, and is in urgent need of attention. The Government has embarked on piecemeal attempts to plug some of the gaps, by using the Health & Social Care Act, and the current Health Bill, for instance, to tackle the problem of the two-tier approach to rights which has emerged from the fragmentation of public services over a number of years. The Equality Bill has produced another listing of public authorities where it would have been preferable for the government to set out a clear definition which could be applied across the board.

Disability

The Bill introduces a simplified definition of who is a disabled person. However, it retains the requirement for the impairment to be substantial. This term has excluded some disabled people from protection in law.
Religious schools

UNISON is disappointed that the Equality Bill retains all of the existing exemptions from equality legislation that apply to state funded religious schools.

UNISON supports the view of Accord (the national coalition campaigning for inclusive schools and an end to discriminatory legal provisions for state funded religious schools) that there is no need for specific exemptions for employment in faith schools, since organisations with a religious ethos will in any case be permitted under the Bill (Para 3, Schedule 9) to apply a requirement to be of a particular “religion or belief” if it is (1) an occupational requirement and (2) a proportionate means of achieving a legitimate aim. This test is sufficient and the specific ability given to faith schools to discriminate can and should be removed, and repealed in the School Standards and Framework Act 1998.

Children and young people

Under-18s should be covered effectively by the Bill from a human rights perspective. The Bill was an opportunity to confirm that children have the full protection of the rights set out in the UN Convention on the Rights of the Child.

With regard to young workers, UNISON regrets that the government, rather than using this Bill to end the age discrimination in the National Minimum Wage age bands, has again chosen to grant an exception. UNISON’s position remains that workers should be paid the proper rate for the job, and preservation of this discrimination only serves to underline that young workers are valued less than their older colleagues. The Bill also fails to protect those under 18 from discrimination in the provision of goods, facilities and services.

Older people

For older workers, UNISON continues to stress the importance of the difference between the age when a pension is payable, and the age when someone retires. We believe in the need to protect the concept of pensionable age regardless of people being able to work beyond pensionable age. UNISON is campaigning to keep the pensionable age at 65 or lower.

UNISON notes that the Bill reaffirms the continuation of a Normal Retirement Age (NRA) of 65 and the right to request to continue to work beyond that. However UNISON believes that the individual workers should have the right to work beyond the NRA based on their personal circumstances. Under the Bill employers will have to provide no reason for refusing such a request provided they have undertaken the duty to consider six months before the individual’s NRA.

UNISON welcomes protection from discrimination in the provision of insurance services. With regard to age differences in insurance calculations, we stress that decisions should be based on actuarial evidence rather than assumptions linked to age. The Equality Bill refers to “adequate evidence” and we will be seeking clarity on how this applies.

Equal pay

The gender pay gap is likely to remain stubbornly high and those women who do go to law to seek equal pay are likely to be involved in lengthy and complex legislation. There is a need for a more fundamental reform of equal pay law. Equal pay is the one area of UK discrimination law where claimants are required to identify an actual comparator in the same employment who is being treated differently to themselves. Furthermore, the EU Equal Treatment Directive allows hypothetical comparators. The Bill should therefore allow the use of hypothetical comparators in discrimination cases where no actual comparator exists. Currently it is difficult for women in highly gender segregated employment to point to an actual male comparator.

Harassment

It is completely unacceptable that, under the Bill, harassment has to occur on two previous occasions before there are obligations for an employer to act. This is an ill thought through proposal and one which needs amending.

We also note with disappointment that the Bill does not protect from harassment on grounds of sexual orientation or religion or belief outside the workplace; or protect school students from harassment on grounds of gender reassignment, sexual orientation or religion/belief.

Secondary legislation

UNISON is concerned at the reliance on secondary legislation for some of the future implementation of the Bill, at the expense of full parliamentary scrutiny.
**Memorandum submitted by Young Equals**

**About Young Equals**

1. Young Equals is a group of charities and children who are campaigning to stop age discrimination.

2. The campaign group is coordinated by the Children’s Rights Alliance for England. Members of the steering group include the British Youth Council, The Children’s Society, Families Need Fathers, National Children’s Bureau, the National Youth Agency, NCVYS, NSPCC, Save the Children UK, UK Youth, Youth Access and YWCA England & Wales.

3. 11 MILLION, the Children’s Commissioner for England, and the Equality and Human Rights Commission have observer status.

**Summary**

4. This evidence submission is relevant to questions 25 and 26 in the letter of 2 June 2009 to the Solicitor General Vera Baird QC MP:

   25. Why are children excluded from discrimination on the grounds of age in the provision of services and the performance of public functions?

   26. Does the Government consider that this may prevent children from enjoying full protection of the rights set out in the UN Convention on the Rights of the Child? If not, why not?

5. Young Equals welcomes the Equality Bill as an opportunity to tackle unfair treatment based on age and calls on the Government to:

   5.1 Remove the exclusion of under-18s from protection from unlawful age discrimination by people who supply services (including goods and facilities) or perform public functions

   5.2 Remove the exclusion of schools and children’s homes from the age element of the public sector equality duty

   5.3 Introduce a positive duty on public service providers to make reasonable adjustments for babies and young children travelling with parents and carers

**Age Discrimination against Children is Widespread**

6. In a Department for Children, Schools and Families survey on discrimination, 43 per cent of under-18 year-olds reported that they had been treated unfairly because of their age. Three in 10 (29 per cent) of the under-11s felt they had experienced age discrimination, and nearly two-thirds of older teenagers (64 per cent) reported this. Unfair treatment on the grounds of age was by far the single biggest example of discrimination.

7. Protection from discrimination is a fundamental human right. Not a single human rights treaty includes a minimum age requirement for protection from discrimination in the exercise of rights. As recently as October 2008, the UN Committee on the Rights of the Child urged the UK Government to use the Equality Bill to address negative age discrimination against children.

8. The Young Equals report *Making the case* highlights the systemic nature of age discrimination against children in both public and private spheres, including healthcare, child protection, access to justice, public leisure facilities, shops and restaurants, and public transport. Please refer to the report for further information: http://www.crae.org.uk/protecting/age-discrimination.html

**Children should be Protected from Unlawful Age Discrimination**

9. Clause 26 of the Equality Bill excludes under-18s from protection from age discrimination by people who supply services (including goods and facilities) or perform public functions.

10. Protecting children against unfair age discrimination does not mean children have to be treated the same as children of different ages or the same as adults and, in fact, will often require that they are not treated the same.

11. Including children in the new age discrimination protection would help prevent less favourable treatment occurring in the first instance, by raising awareness of good practice and creating a deterrent against unfair treatment. Where discrimination did still occur, children would have a means of redress.

12. It is sometimes argued that protecting children against age discrimination would make service providers vulnerable to legal action and might discourage them from providing valuable age-specific services. It is also argued that making exceptions for age-specific services would be too cumbersome.

13. We believe such concerns can be overcome by clear and robust legislation and guidance, and public awareness-raising about the meaning of the new law. Existing anti-discrimination legislation creates numerous exceptions in the context of the provision of goods, facilities and services, including exceptions permitting positive discrimination (or targeted services). Understanding of these exceptions and ensuring they are properly applied is promoted by clear and accessible guidance in codes of practice and other non-statutory guidance. The position would be no different in the context of age.
14. Different treatment would be allowed where justifiable. This would include entrance to casinos and pubs and cinema classification; age-appropriate health care screening (such as hearing tests and vaccinations for infants); age-appropriate child protection and safeguarding services; concessionary fares on public transport; and differential pricing in access to leisure facilities.

15. The Australian Age Discrimination Act 2004 outlaws age discrimination in a range of areas beyond employment, including education, housing, goods, facilities and services. Children are explicitly included in this protection. The Act sets out general exemptions permitting positive discrimination on the grounds of age where there is a particular need that is justified and legitimate. Other parts of the Act set out specific exemptions, for example, relating to youth wages.

SCHOOLS AND CHILDREN’S HOMES SHOULD BE INCLUDED IN THE AGE ELEMENT OF THE PUBLIC SECTOR EQUALITY DUTY

16. Clause 143 of the Equality Bill introduces a public sector equality duty to eliminate unlawful discrimination, advance equality of opportunity and foster good relations. Schools (including any services they offer in addition to education) and children’s homes have been excluded from the duty in relation to age for under-18s.

17. Whilst we welcome elements of the public sector duty (including positive duties to improve participation in public life, tackle prejudice and promote understanding in relation to age), we are concerned that excluding children from full age discrimination protection and excluding schools and children’s homes from the provisions on age will significantly weaken the duty as a whole.

18. Schools and children’s homes should not be excluded from the age element of the public sector equality duty. It is now widely accepted that inequalities are formed and become entrenched in childhood. Schools and children’s homes consequently are uniquely placed to lead the public sector’s drive towards advancing equality of opportunity and fostering good relations between people of all ages. Exempting these services from the age element of the duty would send a strong negative message to children about their status in society.

19. Schools in particular can contribute greatly towards developing intergenerational projects that foster greater tolerance, understanding and respect between old and young people. Research carried out by CRAE found that children believe that more needs to be done to develop respect between generations. Children believed that tensions between generations were in part caused by negative stereotypes about young people. Schools would also benefit directly from improved relations between staff and students.

20. The age element of the public sector equality duty would have a direct impact on children living in children’s homes. Children in residential care can be moved, regardless of whether it is in their best interests, for no other reason than their age. This practice leads to gratuitous moves of children in care and denial of opportunity for stability in their lives, for living with their siblings whilst in care and for the chance of a settled education. Good relations between staff and children are also essential components in providing successful residential care.

PUBLIC SERVICE PROVIDERS SHOULD MAKE REASONABLE ADJUSTMENTS FOR BABIES AND YOUNG CHILDREN TRAVELLING WITH PARENTS AND CARERS

21. There is currently a lack of safe and comfortable seating for infants and young children and inadequate space for prams on public transport. Adults travelling with young children often experience problems getting on and off public transport and feel that they and their child are frequently treated less favourably than others. There are also difficulties with access to, and use of, public buildings such as local authority leisure centres and town halls, including a lack of family-friendly changing facilities and toilets. (Please see Making the case for further information).

22. The Equality Bill offers an excellent opportunity to place a positive duty on public transport providers to make reasonable adjustments to ensure the safety and comfort of very young passengers. A similar duty should be placed on public service providers to make reasonable adjustments to public buildings in order to ensure access for families with babies and children under the age of five. Protection against discrimination by association should be included, for the benefit of parents and carers accompanying children. We believe that these measures would gain widespread public support and would be consistent with the Government’s commitment to family-friendly policies.

REFERENCES


4 References to “children” relate to children and young people under the age of 18.
5 For example, Race Relations Act 1976 Section 35.
6 Australian Age Discrimination Act 2004 Section 33.
7 Ibid. Section 39(2).

Memorandum submitted by Age Concern England and Help the Aged

KEY POINTS
1. We welcome the Equality Bill as a groundbreaking piece of legislation that will give older people the protection that they urgently need against age discrimination.
2. The Equality Bill offers an opportunity to promote and protect the human rights of older people.
3. However, until there is a firm commitment to implementation of the provisions relating to age and a clear and appropriate timetable we are concerned that the promise that the Bill offers will not be delivered.

INTRODUCTION
4. Age Concern and Help the Aged welcome the opportunity to comment on the compatibility of the Equality Bill with the UK’s human rights obligations.
5. Age Concern and Help the Aged have joined together to improve the lives of older people.
6. We have collected a vast quantity of evidence of the pernicious effects of age discrimination on the human rights of older people. These demonstrate that at its worst age discrimination can be a matter of life and death.
7. In October 2008 Help the Aged responded to the JCHR’s earlier call for evidence on the, as then unpublished, Equality Bill. The response said:

— The Equality Bill would enable the principles of non-discrimination to be enshrined in domestic legislation.
— The Equality Bill would present an opportunity to significantly improve the provision of health and social care services to older people.
— Prohibiting age discrimination on goods, facilities and services can significantly improve older people’s enjoyment of their human rights.
— It was concerning that in sectors that were already covered by age discrimination legislation discrimination was allowed to continue, for example through the use of mandatory retirement ages.
— Not enough was being done to meet the housing needs for older people and to ensure respect for the homes of older people.
— The Equality Bill should reflect the judgment of the European Court of Justice in Coleman and extend protection to carers.
8. With the benefit of the published Bill Age Concern and Help the Aged are pleased to comment further on some of these points.

GOODS, FACILITIES AND SERVICES
9. We welcome the extension of age discrimination legislation to cover the provision of Goods, Facilities and Services (GFS). However, there is an absence of clarity and certainty with respect to implementation. The Government has proposed that the new age GFS provisions should be commenced in 2012—with health and social care possibly following later. We understand the argument for giving services providers time to adapt. However a delay would only be acceptable if there is a cast iron guarantee that the new laws will come into force. To achieve this we recommend that the bill includes clear deadlines for the age GFS provisions to come into effect.
10. In order to ensure that the spirit and intent of the Equality Bill is not defeated we believe that it is vital that the exacting test for justifying direct age discrimination should not be supplemented by a wide range of open-ended exemptions. Clause 190 introduces a strong power allowing ministers to amend the Equality
Bill through Orders in Council to allow for exemptions to the prohibition on age discrimination in GFS. Until there is clarity with respect to the use of this power older people cannot be certain that the forms of discrimination they worry about most will be outlawed and that their human rights will be protected. As a minimum we propose two steps:

— Ministers should be required to publish draft orders during the parliamentary stages of the bill for parliamentary scrutiny and consultation;
— Clause 190 should be amended to include a deadline, so that orders must be laid for the first time within a reasonable period.

11. Alternatively, we see no reason why the scope of exemptions should not be determined by the autumn and included on the face of the bill.

12. We welcome the recently commenced work led by the Chief Executives of the South West Strategic Health Authority and Bristol City Council to determine what exemptions are needed in the fields of health and social care. The review will report in October. We are keen that the process for defining exemptions in other sectors, especially financial services, reaches conclusions over the same timescale to ensure clarity during the passage of the bill. This would enable ministers to either publish draft orders or place exemptions on the face of the bill in the House of Lords.

**Disability Related Discrimination**

13. Age Concern and Help the Aged have previously expressed concern about the effects of the House of Lords decision in *Malcolm*.

**Discrimination Against Carers**

14. We believe that it is vital that the Bill reflects the decision of the European Court of Justice in *Coleman* and extends protection to carers who are discriminated against because of their association with someone they are caring for, whether that is an elderly person or a person with a disability. We are pleased to see that the Government believes that the Bill does adequately reflect *Coleman*.

**Multiple Discrimination**

15. Older people can be the subject of discrimination on multiple grounds. For instance, older women can encounter difficulties in the workplace that do not affect either older men or younger women. Age Concern and Help the Aged believe that it is important that the Equality Bill provides protection for people in this position. We are pleased to see that the Government Equalities Office has consulted on a possible amendment to the Bill that will provide some protection to those people who suffer discrimination due to a combination of protected characteristics. We look forward to seeing a suitable provision tabled as an amendment to the Bill.

**Premises**

16. Age Concern and Help the Aged are very concerned that Part 4 of the Bill, which covers premises, contains a blanket exemption for age. We believe that this leaves older people’s human rights at risk in relation to their housing.

17. While the European Convention of Human Rights does not provide a right to housing, we note that the JCHR recommended that such a right should be included in any new Bill of Rights for the UK. Age Concern and Help the Aged are concerned that the otherwise powerful message that the Equality Bill sends that age discrimination is wrong is undermined by such an exemption. If there are legitimate reasons for continuing to use age as a factor when making some decisions relating to premises then these should be covered either by the objective justification test, or by carefully drawn and specific exemptions.

**Volunteers**

18. We note that in its letter to Solicitor General Vera Baird QC the JCHR asked whether “volunteers receive adequate protection against discrimination or is additional specific provision to this effect required in the Bill?” Age Concern and Help the Aged support the extension of protection from discrimination to cover volunteers.

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251 London Borough of Lewisham v Malcolm [2008] UKHL 43; Help the Aged and Age Concern, Response to Consultation on Improving Protection From Disability Discrimination (2009)
252 Case C-303/06 Coleman v Attridge Law [2008] 3 CMLR 27
253 Although Article 11 of the International Covenant on Economic, Social and Cultural Rights does; there are also examples of discrimination in relation to housing that would engage Article 8 of the Convention
254 Joint Committee on Human Rights, “A Bill of Rights for the UK?” (2007–08) HL165-1 [191]
19. Older retired people have been described as the glue that binds communities together. Age Concern and Help the Aged believe that older volunteers make a substantial contribution—not only to the organisations they support but also to their local community, as well as to wider society and the country’s economy. Their skills and loyalty are often valued and respected, but those who contribute their time to the community still come up against arbitrary age barriers.

20. Older volunteers can encounter age barriers that deny them access to volunteering opportunities or force them to leave their positions. This is a real and serious problem particularly within parts of the voluntary sector. The Equality Bill is the ideal opportunity to address this unjustifiable discrimination.

21. We would argue that enjoying the benefits of volunteering should be treated as a “facility”, thus falling within the scope of the GFS discrimination measures. The Bill should outlaw all age-based rules and practices including upper age limits for volunteering, except when these can be objectively justified. Other types of age-based unfair treatment by host organisations should also be outlawed, such as a reduction in responsibilities based on ageist attitudes.

22. To achieve consistency across all discrimination grounds, a similar approach should be taken for unfair treatment of volunteers based on their race, gender, disability, sexual orientation, religion or belief.

23. We understand that this view is supported by a number of leading disability charities.

FORCED RETIREMENT

24. Age Concern and Help the Aged believe that the new Equality Bill is a missed opportunity to tackle the unfairness of the National Default Retirement Age (NORA). The NORA was introduced by Regulation 30 of the Employment Equality (Age) Regulations 2006. Jobseekers over the age of 64 $\frac{1}{2}$ can be discriminated against by virtue of regulation 7(4)(b). The Regulations were introduced to transpose Directive 2000/78 into domestic law. We are currently challenging the lawfulness of the Regulations in the High Court.

25. Schedule 9, paragraphs 8 and 9, of the Equality Bill maintains the NDRA and the associated exemption for recruitment over the age of 64 $\frac{1}{2}$. The effect of these provisions is not just to deny a right to work to those older than 65, but to encourage all older workers to be viewed as less worthy of employment.

26. In its recent report on the Equality Bill the Work and Pensions Committee recommended that the NDRA should be removed as it “contradicts the Government’s wider social policy and labour market objectives to raise the average age and allow people to continue to work and save for their retirement.” We wholeheartedly agree and further suggest that abolishing the NDRA will help to promote older people’s human rights.

27. Although there is no right to work guaranteed by the European Convention of Human Rights, Article 6 of the International Covenant on Economic, Social and Cultural Rights does recognise such a right. We therefore submit that removing this injustice is relevant to the JCHR’s work.

PUBLIC SECTOR EQUALITY DUTY

28. Age Concern and Help the Aged warmly welcome the extension of the public sector equality duty to cover age. This will help public authorities to spread best practice in achieving equality amongst people of different ages. It will lead to the differing needs of different age groups being taken into account by public authorities in the planning and delivery of services. We believe that this will be an important way of promoting equality and ensuring the protection of older people’s rights.

29. We look forward to this Duty coming into force and the changes that it will help to bring. However, we are concerned that in two areas the Duty proposed in the Equality Bill needs to be strengthened.

30. We note that the Equality Duty will be a “due regard” type duty. While we agree that this has the potential to deliver significant improvements in the delivery of public sector services, we believe that a stronger duty would bring greater improvements to the lives of older people sooner.

31. We are also worried that uncertainty about the extent of the duty may frustrate its effectiveness.

32. In Help the Aged’s previous submission to the JCHR we said:

For a positive duty on public bodies to be effective it is important that there is clarity around both the content of the duty and those bodies that it will apply to. It is vital that the confusion that has surrounded s. 6 of the HRA does not hamper the effectiveness of the Equality Bill.

Help the Aged echoes the Joint Committee on Human Rights in calling for the Government to settle the uncertainty surrounding the meaning of public authority within the HRA. We believe that the Equality Bill represents an ideal time to undertake this important work and clarify which bodies will be tasked with promoting equality and protecting human rights.

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255 Employment Equality (Age) Regulations 2006 (SI 2006/1031)
257 Help the Aged, Help the Aged Submission to the Joint Committee on Human Rights on Equality Bill (2008) [37]-[38]
33. It is therefore disappointing that clause 144(5) relies entirely on the Human Rights Act, without any attempt being made to clarify the uncertainty and confusion that has surrounded this aspect of the Act.

Letter from the Chairman to Rt Hon Harriet Harman QC MP, Secretary of State for Equality

DISCRIMINATION LAW REVIEW—A FRAMEWORK FOR FAIRNESS: PROPOSALS FOR A SINGLE EQUALITY BILL FOR GREAT BRITAIN

My Committee has considered the Government’s Discrimination Law Review. This Committee and its predecessors have long been advocating the introduction and enactment of unified and comprehensive single equality legislation. The Committee sees respect for equality and non-discrimination principles as integral to the protection and promotion of human rights in the UK. Effective and comprehensive anti-discrimination legislation is necessary to give effect to the core human right to equality and non-discrimination. We therefore welcome the Government’s commitment to introducing a single Equality Act. However, our consideration of the Discrimination Law Review (DLR) Green Paper raises a number of questions or concerns which we set out below. We would be grateful for your clarification of these matters.

Q1. Will the Government publish an analysis of the responses to the consultation paper and, if so, when?
Q2. Is it intended to publish a draft Equality Bill and if not, why not?
Q3. When it is anticipated that legislation based upon the consultation exercise will be introduced?

The DLR contains no proposals to link the proposed single equality legislation with wider legal protection for equality rights.

Q4. Was consideration given as part of the DLR to the possibility of signing and ratifying Protocol 12 European Convention on Human Rights, or any of the Optional Protocols to the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination or the Convention on the Rights of Persons with Disabilities?

Q5. Was consideration given to the possibility of enhancing discussion of equality and non-discrimination principles in Parliament, perhaps for example via the use of some form of statement of compatibility similar to that provided for in s. 19 Human Rights Act 1998 which would refer to the free-standing equality right contained in Article 26 ICCPR and other human rights instruments?

Extending the scope of discrimination law

The DLR suggests that the existing position on discrimination based on perception and association should be maintained, except for an extension of protection against discrimination on the grounds of association with a transsexual person. The DLR’s proposals would mean that different standards of protection would exist across the different equality grounds.

Q6. Why is it not proposed to extend protection against discrimination based on perception to the grounds of disability, gender or being a transsexual person, and protection against discrimination based on association to the grounds of age, disability and gender?
Q7. What justifications exist for not extending anti-discrimination law to prohibit discrimination on the grounds of caring responsibilities?

The DLR does not discuss whether other grounds should also be covered by anti-discrimination law.

Q8. Has consideration been given to extending anti-discrimination legislation to cover the grounds of family status, political opinion, “spent” criminal convictions, socio-economic status and caste discrimination?
Q9. If so, why were these grounds not included within the DLR?
Q10. What is the Government’s assessment of the extent of caste discrimination in the UK?

Part 3 of the consultation paper contains a proposal to remove the protection against discrimination on the grounds of marital status (originally provided for in the Sex Discrimination Act 1975) and entry into a civil partnership (introduced by the Civil Partnership Act 2004). The DLR suggests that this protection no longer serves any real social need and that it can lead to unintended and artificial consequences.
Q11. What is the justification for removing the prohibition of discrimination on the grounds of marital and civil partnership status? What negative consequences did the DLR identify as potentially resulting from the prohibition of discrimination based on the grounds of marital or civil partnership status?

There is currently no protection against discrimination on grounds of genetic predisposition in British law. The Human Genetics Commission (HGC) suggests that genetic testing may be used to assess long-term health prospects in pre-employment health checks in the future. The DLR concludes that there is no current need to legislate to prohibit discrimination on grounds of genetic predisposition. It considers this an issue that could be revisited later, if necessary. The HGC, in its response to the DLR, argues that there is “anecdotal evidence of genetic discrimination, which constitutes an adequate justification for legislating now to prohibit genetic discrimination.”

Q12. In light of the response of the HGC to the consultation, does the Government now consider that a case exists for the introduction of legislation to prohibit genetic discrimination?

The DLR proposes to prohibit less favourable treatment of a woman on grounds of pregnancy and maternity by public authorities in the exercise of public functions, but to exclude schools from the scope of any strengthened protection. This exception may in certain circumstances result in less than effective protection of the rights of children (who are also mothers) to education under Article 2 of Protocol 1 ECHR, taken together with Article 14 ECHR.

Q13. Why did the Government consider it necessary to exclude schools from the proposed extension of protection against discrimination on the basis of pregnancy and maternity?

Q14. How will it ensure that the rights of young mothers to access education are protected?

The DLR queries whether there is any need to retain an exception to allow insurers to treat people differently on grounds of sexual orientation, where supported by sound actuarial evidence, beyond the end of 2008.

Q15. Are there grounds for considering that an extension of the exception permitting insurers to treat people differently on grounds of sexual orientation, where supported by sound actuarial evidence, is necessary after 2008?

Balancing measures

The DLR expresses concern about the slow rate of progress towards giving everyone in society an “equal chance of participation”. It suggests that steps should be taken to permit employers, public authorities and other organisations greater scope to take “proportionate” positive action to benefit under-represented groups, provided that such action is based on a “sound analysis of the issues” and does not “inadvertently introduce new and unjustifiable inequality or disadvantage”. The DLR does not propose to set out in detail in legislation the “balancing measures” that will be permitted, but instead it proposes to clarify the purposes for which such measures can be taken (para. 4.46).

Q16. Please provide more detail as to the type of permissible balancing measures that it may be possible to implement if the approach suggested in the DLR is introduced into legislation.

Political parties and candidate selection

The DLR proposes to extend the scope of the provisions of the Sex Discrimination (Election Candidates) Act 2002. The Committee considered the provisions of the original Sex Discrimination (Election Candidates) Bill (4th Report of Session 20001/02, HL 44/HC 406, 30 November 2001) and concluded that they appeared to be in general conformity with human rights principles, partially because the legislation contained a “sunset clause” and was therefore time-limited. The proposals contained in the DLR appear to be similar in nature to the provisions of the 2002 Act, except that they would apply to ethnic minorities.

Q17. Please provide further detail of the type and nature of the positive action measures that it may be possible to implement if legislation is introduced to permit political parties wider scope in taking voluntary positive action to ensure greater participation in elections by candidates from ethnic minority communities.

Positive equality duties

Perhaps the most significant proposals in the DLR relate to the positive equality duties that have since 2000 been gradually imposed upon British public authorities. At present, positive equality duties involving the grounds of race, disability and gender require public authorities to eliminate unlawful discrimination and promote equality of opportunity in the performance of their functions. The positive duties can be seen as important tools for giving effect to positive obligations under international and regional human rights instruments. The DLR makes extensive proposals as to how the duties could be expanded, enhanced and restructured. Elements of these proposals have attracted some very sharp criticism in some responses to the DLR.

Q18. If the positive equality duties are restructured in the manner proposed by the DLR:

a) Will public authorities no longer be required to take action to eliminate unlawful discrimination and promote equality of opportunity in the performance of all of their public functions?

b) Will public authorities be able to select by themselves which of their activities would be subject to the full requirements of the duties?

c) Will conferring sole enforcement powers in respect of the duties on the Equality and Human Rights Commission mean that individuals could no longer bring judicial review proceedings to secure implementation of the duties?

d) Will the public sector inspectorates continue to have a role in monitoring how the duties are applied?

Public procurement, private sector equalities duties and equal pay

The DLR suggests that specific equality duties should not be imposed upon public authorities to promote equality through public procurement, as was recommended in the final report of the Equalities Review. Instead, the DLR recommends that public authorities should be provided with clearer guidance on this issue. Some respondents have argued that imposing precise duties on public authorities in respect of public procurement could be a very influential method of promoting equality of opportunity, and therefore of giving effect to the positive obligations to take steps to eliminate unjustified discrimination imposed by the international human rights law instruments discussed in the previous section. Similar criticism has also been directed by these respondents against the DLR’s proposals for promoting good equality practice in the private sector. Certain respondents have called for the imposition of “employment equity” duties upon parts of the private sector or for companies over a certain size to report on their progress towards achieving greater equality of opportunity. Others have argued that employers over a certain size should be subject to a requirement to conduct equal pay audits.

Q19. Was consideration given to designing a system of employment equity, company reporting, and/or pay audit requirements which might be suitable for British employers?

Q20. What reasons might exist for not introducing such employment equity, reporting or pay auditing requirements?

Access to justice and effective dispute resolution

For protection to be effective, victims of discrimination must be able to access courts and tribunal systems that can provide a remedy.

Q21. Does the Government consider that existing dispute resolution procedures in anti-discrimination cases are sufficient to ensure adequate access to justice for victims of discrimination?

Q22. Was consideration given to initiating a comprehensive review of the entire system of dispute resolution as it applies to anti-discrimination cases?

Multiple discrimination

There is no provision in law for “multiple discrimination” claims. The DLR notes that it does not have any evidence that people are “losing or failing to bring cases because they involve more than one protected ground, and would therefore welcome information about instances of this happening. We will then consider whether there is a need to develop a proportionate approach to any practical problems identified.”

Q23. What evidence has been received in response to the DLR’s request for information on this issue and what is the Government’s view in the light of any such evidence?

Q24. In your view, do potential difficulties exist in accommodating multiple discrimination claims within the current anti-discrimination law framework? Was consideration given to any specific proposals which might have addressed any difficulties which might arise with such multiple discrimination claims?

Extending age discrimination

The DLR seeks views on whether protection against age discrimination should be extended to cover the provision of goods, facilities and services, premises, education or the exercise of public functions. The Committee indicated its support for such an extension in our recent report on The Human Rights of Older People in Health Care (18th Session, HL 156-I/HC 378-I, 14 August 2007, para. 64).
Q25. What specific exceptions does the Government consider need to be made to any extended prohibition on age discrimination, and why?

Q26. What is the justification for the proposed total exclusion of children under 18 from the scope of any extended legislation?

Gender reassignment

In addition to implementing the requirements of the Gender Directive (2004/113/EC) the DLR proposes to prohibit direct and indirect discrimination on grounds of gender reassignment in the exercise of public functions, subject to certain exclusions. It proposes to retain the existing definition of gender reassignment.

In its scrutiny of the Gender Recognition Bill, the Committee concluded that consideration should be given to amending the sex discrimination legislation to make it unlawful to discriminate against people in the fields of education, housing and the provision of goods, facilities and services on the ground that they have undergone, are undergoing or plan to undergo gender reassignment (19th Report, Session 2002–03, HL 188-I, HC 1276-I, 20 November 2003, paras. 96–104).

Q27. Why may it be necessary to make provision for exceptions for organised religion from the extension of protection against discrimination on the grounds of gender reassignment?

Q28. Might the request for views in the DLR on this issue result in the revision of existing exceptions that apply to the activities of organised religions?

Q29. Why was it considered unnecessary to include education in any extension of protection against discrimination on the grounds of gender reassignment?

Q30. Was any consideration given to alternative ways of defining gender reassignment?

Harassment

The DLR asks for views on the extension of explicit harassment controls. It seeks views on what specific exceptions, if any, should be included in any legislation that did extend harassment controls, and whether harassment on grounds of religion or belief should be treated differently from the other protected grounds.

In its report on the Sexual Orientation Regulations, (6th Report, Legislative Scrutiny: Sexual Orientation Regulations, Session 2006–07, paras. 57–58), the Committee welcomed the inclusion of harassment as a separate instance of unlawful discrimination within the Northern Ireland Regulations, but called for the use of a more precise and narrow definition of harassment, to reduce the risk of incompatibility with the rights to freedom of speech and freedom of religion and belief. These conclusions were cited in the recent Northern Irish decision of Re The Christian Institute and Others. In this case, guidance was given as to how such harassment provisions could be interpreted to comply with the requirements of Articles 9 and 10 ECHR.

Q31. What are the Government’s views on defining and prohibiting harassment on the grounds of religion or belief, in light of the judgment of Weatherup J. in Re The Christian Institute and Others?

The DLR also raises the question of whether a distinction should be drawn between harassment in a “closed” environment where there is a special relationship (for example, an employer-employee relationship or in the context of core public service provision and public functions such as prisons), and harassment in an “open” environment where there is an element of choice as to whether to enter that environment in the first place (eg a shop, pub, club etc).

Q32. Why should a distinction be made between “open” and “closed” environments in defining the scope of the explicit prohibition of harassment?

Exceptions

Annex A lists specific exceptions that the DLR proposes to retain. We have particular concerns from a human rights perspective about the exceptions which permit discrimination on nationality grounds.

Q33. Was consideration given to repealing the exceptions to immigration functions that permit immigration authorities to discriminate on the grounds of nationality and ethnic/national origins? Are these exceptions still justified?

Q34. Was consideration given to limiting the existing circumstances where Civil Service “nationality rules” permit discrimination on nationality grounds?


We note that these Regulations are due to be implemented on 21 December 2007. Draft Regulation 4(b) contains an exemption to the prohibition on indirect discrimination for goods, facilities and services provided “at a place (permanently or for the time being) occupied or used for the purposes of an organised

religion”. These terms are not replicated in the Gender Directive (EU Council Directive 2004/113/EC, 13 December 2004), although the Preamble mentions the importance of respecting the right to freedom of religion. The Committee is concerned at the potential for this exception to undermine the human rights protection that the Directive is intended to give, although it notes Baroness Andrews’ statement that the Directive “will apply to organisations that provide goods, facilities, services or premises to the public, including any that may do so in a way that reflects the tenets of a particular faith or belief, and to religious organisations, such as churches, where the service or facility is provided to the public but the nature of the service is not directly related to religious observance or worship. Generally it will be unlawful for such organisations to discriminate against a person of their sex or on grounds of gender reassignment.” (25 June 2007, HL, Col WA87)

Q35. We should be grateful if you would confirm precisely what this exemption is intended to cover, given that it is not explicitly contemplated by the Directive.

14 November 2007

Letter from Barbara Follett MP, Parliamentary Under Secretary of state, Government Equalities Office 
to the Chair of the Committee, dated 17 December 2007

DISCRIMINATIONS LAW REVIEW—A FRAMEWORK FOR FAIRNESS: PROPOSALS FOR A SINGLE EQUALITY BILL FOR GREAT BRITAIN

Thank you for your letter of 14 November which raises a number of questions about the Discrimination Law Review consultation and the proposals for a new Equality Bill. I am sorry that I was unable to respond earlier.

I am pleased that we received a large number of responses to the consultation—more than 4,000—from a wide range of organisations, including the former equality Commissions and the Equality and Human Rights Commission; representatives of the age lobby and of gay men, lesbians and transsexual people; religious bodies and organisations; business representatives and individual businesses; discrimination law specialists; public authorities; charities and others. This reinforces the fact that people take equality seriously.

TIMING

We will be publishing an analysis of the responses when we publish the Government’s proposals in response to the consultation. I hope that we will be in a position to do so as soon as possible in the New Year. I have made clear, at business questions, that a draft Bill will not be possible if there is a change of policy that needs consideration and discussion. There simply would not be time to work up substantive new proposals for a draft Bill in this session. Instead, it is our intention that we will be able to include the Bill in the proposed legislative programme for the next session starting November 2008. Our manifesto commitment was to introduce such a Bill during this Parliament. This answers your first three questions. Of the remaining questions, the answer to a large number will need to await our published response and I have indicated where this is the case. As you will appreciate, these are complex issues and we need to reflect upon the responses that we have received.

INTERNATIONAL

On your Q4, the Discrimination Law Review did not consider the question of whether the UK should allow individual petition under the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights or the Convention of the Rights of Persons with Disabilities (which the Government has not, of course, yet ratified). The Government remains to be convinced in each case of the practical value to the citizen of rights of individual petition to the United Nations. The UN committees that consider petitions are not courts, and they cannot award damages, or produce a legal ruling on the meaning of the law. One of our reasons for acceding to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women in 2004 was to enable us to consider on a more empirical basis the merits of the right of individual petition under the other UN treaties. A separate review of the UK’s experience under that optional protocol is now under way. The Government continues to have major concerns about the text of Protocol 12 of the European Convention on Human Rights because it allows an unacceptably open ended and uncertain range of issues to be brought before the European Court of Human Rights for a binding decision. Its text provides that the enjoyment of “any right set forth by law” shall be secured without discrimination. But it is not clear whether this includes international as well as national law. In addition, its text does not state categorically that differential treatment which has an objective and reasonable justification (for example, positive action permissible under the Race Relations Act 1976) is allowed. For these reasons the Government has decided not to sign the Protocol. However, it has undertaken to keep the matter under careful consideration and to take account of the jurisprudence of the European Court of Human Rights with regard to Protocol 12 as it develops.
EQUALITY RIGHT

On your Q5, the possibility of some form of statement of compatibility was raised during the consultation and the Government will address this when it publishes its response.

EXTENDING THE SCOPE OF DISCRIMINATION LAW

An explanation of the Government’s proposed approach to the issues raised in your Q6 is provided in paras 1.22 to 1.25 of the consultation document, and chapter 8 (paras 8.13–8.20) deals among other things with a discussion of the rationale for not proposing to extend discrimination protection to carers—your Q7. We will address this in our published response.

On your Q8-Q9, while the consultation document did not specifically address these issues, it was open to respondents to suggest extending anti-discrimination law in any particular way. The Government will address this in its published response.

On Q10, Communities and Local Government (CLG) conducted a scoping exercise in 2006 to identify the views of Hindu and Sikh stakeholders. A broad range of opinion was expressed, but the overwhelming response was that caste based discrimination has little or no relevance in today’s Britain—and that any cases of caste discrimination in the area of employment should be resolved through mediation and consultation rather than legislation. CLG subsequently issued a questionnaire in August 2007 to various identified interested parties in order to learn more about the extent to which they believe caste is a continuing social phenomenon within British society—and whether they are aware of any existing evidence that individuals or communities in the UK have been discriminated against on these grounds. The questionnaire is not intended to be a formal consultation exercise—the question of whether (and if so how) Government should seek to engage interested parties more formally on this issue will be considered in light of the responses received to this initial request for views. Hindu community organisations have requested—that they be given sufficient time (until after the New Year) to consult the wider Hindu community.

On Q11, as made clear in the consultation document (paras 8.21, 8.22) we are considering whether there remains a need for this provision. This is under further consideration in the light of consultation responses and we will address this in our published response.

On Q12, we will address the issue of genetic predisposition in our published response—it is covered in some detail in the consultation document paras 8.23–8.31.

On your Q13 and Q14, we will address this issue in our published response. The consultation document itself sets out our proposal with reasoning (paras 11.7, 11.8 and 11.9). It is already the case, of course, that everyone under the age of 16 has a legal right to a school place; and schools have a duty to differentiate what they do to meet different needs, including those of young mothers, as explained in para 11.9 of the consultation document.

As you note in your Q15 (relating to para 1.85 of the consultation document), the DLR asked respondents to the consultation for evidence of any need to retain the existing exception for differential treatment in the provision of insurance on grounds of sexual orientation. We are currently considering the responses to this question and will address this in our published response.

BALANCING MEASURES/POSITIVE ACTION

On your Q16, the consultation document in chapter 4 (eg paras 4.44 and 4.47) gives a number of examples of the type of additional positive action that would be available to employers or service providers and the consultation asked people to indicate others. We will address this in our published response.

On your Q17 (see also paras 4.52–4.58 of the consultation document), we are considering entirely permissive measures that political parties could adopt, similar to those introduced through the Sex Discrimination (Election Candidates) Act 2002. I have commissioned a report from Operation Black Vote to provide further information on how; for example, a BME-only shortlist would work in practice. The information from the report will enable us to address this fully in our published response.

PUBLIC SECTOR EQUALITY DUTIES

On your Q18, chapter 5 of the consultation document spelt out very clearly a number of restructuring proposals concerning the public sector duties. As you indicate, the restructuring element of our proposals came under strong criticism from some quarters, though there was a more favourable response to the basic idea of integrating the three existing duties and a variety of views on the proposal to extend the duties to cover other equality strands. We will address all these issues in our published response.

PUBLIC PROCUREMENT, PRIVATE SECTOR EQUALITY DUTIES AND EQUAL PAY

On your Q19 and Q20, we are considering the response to our proposals, particularly on equal pay, and will address in our published response our position on the role of public sector procurement and equality, as well as whether there is scope for ensuring greater transparency about equal pay in the public and private sectors. This includes consideration of the range of voluntary approaches that have been taken or are being developed, the need to avoid unnecessary burdens on business, and the need to focus on outcomes rather than processes.
ACCESS TO JUSTICE AND EFFECTIVE DISPUTE RESOLUTION

On your Q21 and Q22, a number of respondents raised questions concerning access to justice through the courts and tribunals which are dealt with in chapter 7 of the consultation document. Issues of dispute resolution in the tribunals were also dealt with in a separate consultation by the former DTI. We will set out our position on enforcement and compliance issues, in our published response.

MULTIPLE DISCRIMINATION

On your Q23 and Q24, a number of respondents addressed the issue of multiple discrimination though little further evidence was provided some people said it was not possible to provide evidence of a negative ie of possible claims where no such grounds existed. We are considering whether there is a case for enabling people to bring claims on more than one ground and whether this is a feasible proposition and will set out our position in our published response.

EXTENDING PROTECTION AGAINST AGE DISCRIMINATION

On your Q25 and Q26, the consultation document indicates a number of areas where there would need to be exceptions if the Government legislated to prohibit discrimination on grounds of age outside the workplace, see for example para 9.9 and 9.31 to 9.33. Paras 9.26 and 9.27 set out why the Government did not propose to include children under 18 from the scope of any intended legislation. We will of course indicate our proposed way forward in our published response.

GENDER REASSIGNMENT

On Q27 and Q28, where protection is being provided against discrimination on the grounds of gender reassignment, it is necessary to carry out a balancing exercise between the rights of transsexual people and the freedom of people to hold and manifest religious views. In the context of our proposal to extend such protection to the exercise of public functions, this would inevitably lead to a review of existing exceptions and consideration of the need for new ones.

On Q29, the consultation document sets out in para 10.12 why the Government considers that the prohibition against discrimination on grounds of gender reassignment does not need to be extended to schools.

On Q30, para 10.15 of the consultation document set out why we proposed using the existing definition of gender reassignment in the Equality Bill and sought views. A number of respondents to the consultation suggested alternative definitions of gender reassignment. We are considering these responses and will set out our position in our published response.

HARASSMENT

On harassment and your Q31 and Q32, the Government has noted the judgment of Weatherup J in re the Christian Institute and others. We also recognise—as indicated in the consultation document—that there are difficult issues in extending protection on grounds of religion or belief, as became apparent during the debates on Part 2 of the Equality Bill in the House of Lords. Para 14.29 of the consultation document set out the arguments for a distinction between “open” and “closed” environments in defining the scope of the explicit prohibition of harassment and asked for views. We will set out our position in our published response.

EXCEPTIONS

On your Q33 and Q34, the consultation was open to considering suggestions as to which exceptions should be retained or repealed and we will make our position clear on this in our published response.

SEX DISCRIMINATION ACT 1975 (AMENDMENT) REGULATIONS 2007 (ANNEX B OF DLR)

You ask in Q35 what precisely the exemption to the prohibition on indirect discrimination for goods, facilities and services provided “at a place (permanently or for the time being) occupied or used for the purposes of an organised religion” in draft regulation 4(b) is intended to cover. However, regulation 4(b) of the draft Regulations upon which we consulted relates to insurance, and there is no regulation 4(b) in the draft Regulations laid before the House on 28 November. It would seem that your query is in relation to draft regulation 12 of the version laid before the House (http://www.opsi.gov.uk/si/si2007/draftluksidsi9780110801285.en), but we would be grateful for confirmation that this is the case, before we can fully respond to your query.
Memorandum submitted by the Archbishop’s Council Board of Education and the National Society

BACKGROUND

The JHCR’s work programme for 2008–09 includes consideration of recent school guidance documents issued by the DCSF as they relate to Articles 8 and 9 of the European Code of Human Rights. The documents cover aspects such as admissions, discrimination on grounds of religious belief and school uniform policies. In the main, two documents underpin the commentary. They are:

— The Schools Admissions Code (2009); and

This paper provides a commentary on these and related issues as they affect the day to day work of Church of England Schools.

GENERAL COMMENTS

We (the Board of Education and The National Society) support the tenets and aspirations of equality legislation and frameworks that establish fairness. Our general approach is outlined in the Church of England’s response to proposals for a Single Equality Bill for Great Britain (2007). Our schools seek to achieve full legal compliance and to recognise that legislation is only part of what is needed to address all aspects of sensitive and complex issues. In addition, therefore, we endeavour to establish working arrangements which achieve both Christian distinctiveness and clarity of values. The former are regularly assessed through the SIAS inspection arrangements and the latter are described clearly via a new website to be launched in May 2009.

We view the various pieces of legislation and ensuing guidance as supportive of, and complementary to, our rationale for the Church of England’s role as a major provider of schools. The current practice of describing all schools with a religious ethos as ‘faith schools’ tends unnecessarily to polarise the distinction between different kinds of publicly funded schools and to gloss over the very significant differences which exist even among schools with a religious ethos. On the first point it obscures the fact that schools are all subject to the national curriculum, to inspection by OFSTED and to a wide range of requirements set down by the Department of for Children Schools and Families. On the second it does not do justice to the variety of approaches taken by the various faiths and denominations in relation to the balance between distinctiveness and inclusiveness.

The Church of England is committed to providing schools that are distinctive and inclusive. That is why our schools continue to be for those of no faith, those of other faiths and those of the Christian faith. We remain determined to operate fairly, inclusively and with full regard to human rights.

SPECIFIC ASPECTS

We welcome the opportunity to comment on some aspects of current operational practice as they affect the 4,800 Church of England schools. These are:

1. Admissions

We regard the Code as a significant and valuable improvement on previous unregulated practice. We fully support its propositions and procedures. The Schools Adjudicator recently noted that there was no wilful non compliance with the Code in our schools. We nevertheless recognise that there are still some features in a minority of admissions policies that need to be addressed.

Practical issues usually revolve around oversubscription criteria and definitions of faith membership. These matters place significant responsibility on “religious authorities” (ie the Dioceses) and, whereas we have no difficulty with the underpinning concept of fairness, we would welcome greater clarity and definition. This will help to resolve the unease arising from the fear of litigation.

2. Education in Accordance with Religious Belief

We strongly support the right of parents to choose, and for pupils to have access to, schools of a religious character that matches their beliefs and faith. This assertion is based on a) our historical/cultural heritage (the Church of England has been a major provider of schools with a Christian distinctiveness for centuries) and b) the “right” established under Article 9 of ECHR.

We recognise that in a multi-cultural and multi faith society there is a need to accommodate other faiths and religions and so we are active partners in cross faith ventures such as ‘Faith in the System’. We do, however, assert and defend the nation’s Christian background. This leads to the desire to expand, develop and improve the C of E school sector. The main thrust of expansion is currently in the secondary sector where we aspire to create a secondary place for all families who want one. This is not a stance against equality but a definite move towards fair access as a right.
3. **Popularity of C of E Schools**

Our schools are undoubtedly popular and highly regarded both among Christians and non-Christians. This is in part due to their distinctive ethos and general success in teaching and learning. It also suggests that there is a thirst for diversity and genuine choice. We will continue to support this appetite and view it as a key component of a culturally rich and diverse society.

We also note that our schools often serve whole communities (e.g., inner city wards) and areas where real choice cannot be exercised (e.g., rural villages) and so we are constantly mindful of the challenge to achieve genuine inclusivity and respect for wide-ranging cultural and family norms.

4. **Direct and Indirect Discrimination**

We are mindful of the fine line that our schools need to tread in balancing the rights of individuals and families with the right of organisations to express clear values and principles. The current guidance and codes provide a good framework and we endeavour to support our schools in exercising good judgement on sensitive matters.

5. **Faith Schools**

As noted above, although this term is now widely used in codes and guidance documents we do not find it helpful. It is too wide and vague in meaning and has fuelled an unhelpfully polemical debate. We continue to refer to our schools as "Church Schools" or "C of E Schools", terms which, though traditional, are entirely compatible with equality and human rights concerns.

6. **Exceptions for Schools of a Religious Character**

Section 49 of part 2 of The Equality Act 2006 defines exemptions for schools of religious character. The associated guidance document elaborates on these in practice. We positively note that the guidance says “it was never the intention of part 2 of the Equality Bill to undermine [the role played by distinct religious ethos and character and the part they play in diversity of provision]”.

The provisions made in this section were strongly and correctly argued for at the time of the legislation and we see no case for reviewing them, still less changing them after such a short period of time. We recognise, of course, that exceptions can, unless handled wisely prompt schools to become inward looking. Our thrust is to ensure that Church of England schools continue to be outward looking. We support them in achieving this through practical support guidance and training.

7. **Curriculum Issues**

Similar comments apply to those made in paragraph 6 above. The guidance provided results from a strongly argued case at the time of the legislation and meets our requirements. It enables schools to strike the right balance between their distinctiveness and the needs of the national curriculum. Schools are becoming increasingly adept at this and it would be wrong to consider changing the guidance at this early stage, particularly when such criticism as there is appears to derive from ideological objections rather than practical examples of difficulties.

8. **Collective Worship**

We fully support the provisions which require, under other legislation, pupils to participate in a daily act of collective worship which should be broadly Christian in nature. We accept the right of parents to withdraw their children from this activity. We recognise the additional features associated with independent schools and Academies.

Taken as a whole we feel that the current arrangements remain fit for purpose. We would oppose attempts to change them.

9. **Exclusions**

We support the guidance on exclusions which regards this as a tool of last resort. We endorse entirely the legislation making it unlawful to exclude on the basis of religious belief (or lack of it).

Exclusion of one pupil often involves a judgement about protecting the right of others to learn. Schools exercise this difficult judgement on a daily basis and we feel strongly that guidance and legislation must take an all-round perspective on this issue. Both the best interests of the miscreant and the best interests of the whole school community must be protected, and this is implicit in the human rights code.
10. **School Uniform**

The current guidance is sensible and we advocate strongly to our schools that observance of the mores of various religious, social or racial groups is essential.

We note, however, the need for pragmatism in this respect. If a pupil's dress puts at risk safety, or the ability to fully identify a pupil, a judgement must be made on priorities and we feel more guidance on interpretation would be beneficial.

11. **Victimisation, Harassment and Bullying**

Our stance on these aspects is unequivocal and entirely in line with current guidance. These characteristics are not acceptable in a community based on Christian principles.

We would not wish to see any change here, except to note that guidance and clarification would be helpful in the difficult cases where the accuser irrationally embellishes or uses false or exaggerated claims to achieve their own ends. Anecdotal feedback from schools suggests this form of reverse accusation is on the increase.

12. **Employment**

We fully support and provide guidance for our schools on current legislation and good employment practice.

We are currently exercised by attempts in the new draft Code of Conduct for Teachers (GTC 2009) to enable school managers to discipline staff who may be acting out of conscience. This is a difficult area where the drive for community cohesion and equality may clash with issues of conscience. How, for example, should a teacher who on grounds of religious conviction is opposed to sexual relationships between people of the same gender be expected to handle such a subject in the course of teaching? Clearly with sensitivity and respect for the law. But to place such a person, of whatever faith or denomination they may be, in a position where they might be expected to promote a viewpoint that conflicted with their religious conviction is unnecessary and unwise.

We would be happy to work with others to provide clear guidance on difficult ethical issues which can affect employment discipline.

13. **Disability, Race, Gender, Sexual Orientation**

We fully endorse current guidance on all these matters and suggest that they also encompass some of the difficult ethical balancing acts suggested in the paragraphs above.

Balancing human rights requirements with legislative perspectives and guidance often leads to complex ethical dilemmas. We urge that more thought and guidance is required and would be pleased to contribute to discussions on this.

14. **Monitoring**

There is a need for increasing levels of “light touch” monitoring and evaluation of the issues described above. The current model of SIAS inspections used in Church of England Schools could be further developed to provide more information. Likewise, inspection techniques currently being developed by OFSTED to gauge the effectiveness of community cohesion policies could be developed for the purpose.

**Conclusion**

Our experience and commentary is largely supportive of the current position and we feel the tension between the Code of Human Rights (articles 8 and 9) and current guidance is reasonable. The issue is one of practical management and wise judgement.

We do feel, however, that at central level more work needs to be done to ensure parity of understanding between our schools, dioceses and the local authorities in which they sit. All too often we find on issues related to the special character of our sector, particularly for the voluntary aided schools, that local authorities act without due regard for the special provisions. This can have a significant impact on aspects covered in this paper which leads to misunderstanding and unnecessary conflict.

April 2009

Memorandum submitted by the Catholic Education Service for England and Wales (CESEW)

The Catholic Education Service for England and Wales (CESEW) has been asked to provide a submission to the Joint Committee on Human Rights on The Draft Legislative Programme: JCHR priorities for 2008–09 on the subject of schools and religion and in particular in relation to the following area:

— Whether organisations are content with the provisions of the School Admissions Code and the Equality Act 2006 which permits schools to prefer one applicant for admission over another on
the grounds of their religion. The Committee is interested in whether this is compatible with the right not to be discriminated against in the enjoyment of the right of access to education (Article 14 European Convention on Human Rights in conjunction with Article 2 Protocol 1);

— Whether organisations believe that the requirement under the Equality Act not to discriminate on grounds of religion or belief should apply to the school curriculum (currently this is an exemption); and

— Any other relevant issues organisations wish to comment on.

The CESEW does not consider that preference for applicants for admission to Catholic schools on the grounds of their religion is incompatible with Article 14 European Convention on Human Rights in conjunction with Article 2 Protocol 1. Canon Law expects Catholic parents to provide their children with a Catholic education and the Catholic Church has established its schools to enable Catholic parents to fulfil their duty under Canon law, allowing Catholic parents to manifest their religion and beliefs in accordance with Article 9 European Convention on Human Rights. It is entirely within the provisions of Article 2 Protocol I which provides that the State shall in exercising its functions in relation to education and teaching “respect the right of parents to ensure such education and teaching in conformity with their own religion and philosophical convictions”. The requirement not to discriminate on grounds of religion or belief must be excluded in relation to the curriculum for Catholic schools to be able to fulfil their mission and uphold the objects of the charitable trusts under which they are founded and under which they continue to operate. One of the primary objects of those charitable trusts is for the provision of Catholic education for Catholic families.

It must be remembered that Article 9 enshrines the freedom to manifest one’s religion or belief subject only to such limitation prescribed by law and as necessary for the protection of, inter alia, the protection of the rights and freedoms of others. The priority given to Catholic applicants to Catholic schools, we would submit, does not interfere with the right of other members of society to also manifest their religion or belief.

The right to expression of faith should not be diminished by issues of relativity and comparison between separate pieces of legislation, nor subjugated to other competing rights.

We would submit that nothing is values free and that not all values can be equally respected. Some values are for the common good but others may not be, e.g. historically the experience of the values of the Nazi party and currently questions about the values of BNP. Schools with a religious character are certainly not free of values; indeed those values are proclaimed and are available to all. It is those values which are the bedrock of a school’s ethos and an important basis upon which parents select a school for their children’s education. It is important that parents are aware of the values a school holds so that they can select an environment for their children’s education which is compatible with their own beliefs and values.

As part of their ministry as parents the Code of Canon Law requires parents to seek a Catholic education for their children, wherever possible:

“Parents are to send their children to those schools which will provide for their Catholic education. If they cannot do this, they are bound to ensure the proper Catholic education of their children outside the school”.260

Catholic schools were established by the Catholic Church to provide a Catholic education to baptised Catholic children in a local area and are seen by the Church as the “principal means of helping parents to fulfil their role in education”261 in accordance with their parental duties set out in Canon Law.

This remains the primary function of the schools but many increasingly serve the wider local community in a variety of ways, whilst maintaining a strong Catholic ethos and responding to changing demographics.

Catholic schools were established in England and Wales for many years prior to the introduction of the state maintained education system. Catholic schools are almost without exception Voluntary Aided (VA).

VA schools were a product of the 1944 Education Acts when agreement was reached between the Churches and the State to bring the Church schools within the state maintained sector. This agreement for the Churches to “gift” their schools into the State’s education system was made in return for a number of undertakings from the State to ensure that the religious ethos of the schools was maintained, including, inter alia, the rights to provide religious education according to the schools religious character and the right for the governing body of a VA school to control its own admissions to the school. The right of governing bodies of Catholic schools to control their own admission procedures is enshrined in the 1944 Education Act and 1998 School Standards and Framework Act. The School Admissions Code and the Equality Act 2006 continue to reinforce that right.

In return for being allowed these rights, whilst the day-to-day running costs of the school would be met by the State the Churches agreed to contribute towards building costs. In 1944 the contribution made by the Churches to the cost of building a new VA school, or for building repairs to such premises was 50%. Over time that has reduced and the contribution paid by the Churches is now 10%. As can be seen the Churches have contributed substantial amounts of capital towards the upkeep of the maintained school estate and

260 Canon 798, Code of Canon Law.
261 Canon 796.1 Code of Canon Law by the authority of Pope John Paul II, 25th January 1983.
continue to do so paying 10% of building costs in relation to all VA schools. The contribution of the Churches to state maintained education remains high as does the Government’s confidence in the valuable contribution of the Churches through their schools and the supporting diocesan infrastructure.

Service to those who are amongst the most deprived and underprivileged in our society has also always been central to the mission of Catholic education and continues to be so today, with the Churches goal of a preferential option for the poor. Many Catholic schools were established in the 19th Century to meet the needs of poor Catholic immigrants from Ireland but the mission remains strong today, with Catholic schools frequently receiving newly disadvantaged from the new immigrant population. Catholic dioceses today remain conscious of their responsibility to meet the needs of established local Catholic families, Catholic traveller children and Catholic immigrants from other parts of the world, especially Eastern Europe and parts of Africa and Latin America. Dioceses and governing bodies, as the admission authorities of voluntary aided schools, work to ensure there is sufficient provision wherever possible for these groups whilst reaching out to children and young people of other faiths and none in ways appropriate to local circumstances.

There were 362 Catholic VA secondary schools and 1,781 Catholic VA primary schools in England and Wales in 2007 according to the Catholic Education Service for England and Wales: Digest of 2007 Census Data for Schools and Colleges (CESEW 2007 Census Digest). The distribution of Catholic schools reflects the demography of the Catholic population in England and Wales. Typically, a Catholic VA school was situated in its present location with the agreement of the local education authority at the time it was established in an urban area to draw from a wider than average catchments area, based on parish boundaries. Changes in demographic patterns have impacted on these historical catchment areas in different ways, with implications for the schools’ admission policies. Inevitably a “local” area for a Catholic school will generally be larger than for a community school as Catholic schools take from further afield to serve Catholic children and parents. This would not therefore reflect priority for children from particular areas or neighbourhoods, which may lead to reflecting advantage or disadvantage, as much is dependent on the school’s location.

Catholic VA schools are racially and ethnically diverse institutions which reflect the racial and ethnic profile of their communities. Catholic education in England and Wales has a culture of religious tolerance and pupils are encouraged to understand and respect faiths other than their own. The Catholic vision of the human person demands respect for others and their faith. This is lived out through all the activities of a school, including the curriculum, teaching and learning and all aspects of school life. There are strong indications which suggest that this is one reason why Muslim parents chose a Catholic school, where available, rather than a community school as they know that faith will be viewed as important. Some Catholic schools have a large proportion of Muslim pupils arising from factors including demographics and local negotiation.

In relation to ethnicity of pupils the CESEW 2007 Census Digest reports the following:

“The national school census for 2007 shows that all maintained primary schools in England about 23% of pupils were from minority ethnic groups (this excludes the white British category) and in secondary schools about 20%. Catholic schools were rather more mixed: the national census shows that in Catholic primary schools in England 24.5% of pupils were from minority ethnic groups and in secondary schools the figure was 23%. In both phases, Catholic schools were in fact the most ethnically mixed category of schools in the DCSF lists (apart from academies which are a special case)”

The outcomes of the CESEW Census were closely consistent with the national figures from DCSF.

In relation to Catholicity the CESEW 2007 Census Digest reports that in 2007 Catholic maintained schools in England and Wales educated over 779,000 pupils with 27% of pupils of other faiths and none being educated in Catholic schools.

The CESEW 2007 Census Digest also shows that the average rate of withdrawal from collective worship was very low indeed, at 0.02% of pupils. In light of the high proportion of pupils from other faiths within Catholic schools ie 27%, this figure is indicative of the fact that parents wish their children to take full part in the life of the school in keeping with the school’s religious ethos, notwithstanding the fact that they are of a different faith or none.

The CESEW 2007 Census Digest also confirms the national data which shows that an analysis of the economic background of pupils demonstrates that pupils at Catholic schools are drawn from all sections of the community and Free School Meals indicators are generally comparable to the national average. Of particular interest is that, in so far as secondary education is concerned when issues of priority in school admissions are more marked, the figures show that Catholic schools are extremely close to the national average. The Catholic Church would take very seriously any suggestion that there may be selection taking place which may disadvantage those most in need as this would be contrary to the Churches preferential option for the poor.

The diversity of the pupil populations in Catholic schools in terms of racial, ethnic and social mix, working in an atmosphere of mutual respect, empathy and with an appreciation of faith and religion, provides a strong foundation for Catholic schools to contribute to community cohesion in the school and by extension in the wider community in the areas where they are situated.
The CESEW believes that the admission procedures should be transparent and equally understandable to all. Indeed the CESEW lobbied for the phasing out of the use of interviews as a means of selection in the admissions process and for the promotion and inspection of Community Cohesion in schools. The CESEW has continued to express its support for a school admissions system that is fair and transparent, for Catholic schools as well as all other types of schools, and will continue to do so.

Government recognizes that parents are the primary educators of children. Indeed one of the five principles set out in *The Children’s Plan: Building Brighter Futures* is that “government does not bring up children—parents do—so government needs to do more to back parents and families”

Current Government policy promotes choice and diversity for parents and children and young people. 21st Century Schools: A World-Class Education for Every Child requires that schools will “actively engage parents (fathers as well as mothers) and carers; listen to children and young people to ensure that their needs and choices are taken into account”

There are over 6,000 schools with a religious character in this country, accounting for one third of all schools. They have proved their success both in terms of personal development and high academic standards which is evident from their popularity. Faith in the System, published in 2007 confirmed the strong commitment of the faith communities, with Government backing, to come together to support one another and their ongoing commitment to schooling nationally. That commitment is ongoing. Their constituent faith communities made up of tax payers like any other continue to contribute financially to all the nation’s schools. In fact these parents as taxpayers contribute substantially more. For example, Catholic parents contribute from their taxed income to the payment of the Churches 10% capital contribution which the Church pays from money raised through its parishes and which the Church uses to support the state maintained education system.

In February 2008 the CESEW published guidance for Catholic schools to assist them in reflecting upon and reviewing their current practice in order to build on what they were already doing to promote community cohesion. In that document the CESEW referred to the challenges facing society:

“The journey towards building a truly cohesive, sustainable community is undoubtedly a matter that challenges British society today . . . we continue to work towards an harmonious society; one where all feel valued and respected irrespective of background and personal circumstances”.

In October 2008 the CESEW published further guidance responding to requests from those within our schools for a “good practice paper” covering the life of the Catholic school and the place of children and young people of other faiths therein. The Chairman of the CESEW, Archbishop Vincent Nichols referred in his foreword to the fact that:

“Dialogue with other faiths is a consistent theme in the life of the Catholic Church . . . The fruits of such dialogue are many: increased understanding and mutual respect; an exploration of shared concerns and values; and joint action in response to the challenges of life today.”

As can be seen the faith communities are working together towards their vision of an harmonious society. It is to be hoped that the strong values shared by those faith communities are respected too, so that those communities can continue to make their invaluable contribution to the maintained education system for the benefit of their own, the wider community and for society.

February 2009

Memorandum submitted by the Christian Schools’ Trust

The Christian Schools’ Trust represents just fewer than 50 independent Christian schools across the UK. Each school is autonomous but they have come together for mutual support and benefit and to further and develop the aims of Christian education. These schools have been started by churches or parent groups over the past 30 years or so, with the intention of providing an education for their own children from the perspective of an evangelical, Christian worldview. Currently CST schools educate in the region of 3,000 pupils between the ages of three and 16.

Selection is not based on academic ability and many schools have a high number of children from families who do not profess the Christian faith (up to 40% in some cases) as well as significant proportions of children with learning difficulties. As there is no central funding, except for some nursery aged children and a handful of individuals with statements of educational need, the schools are maintained by parental contributions, typically 1/3 of the average independent school fee. Many schools have systems to ensure that families of limited income are not unduly penalised.

Academic results from these schools are consistently above the national average. Ofsted reports are good and current research suggests that the all-round wellbeing of pupils surpasses average national trends. CST together with The Association of Muslim Schools UK has recently established the Bridge Schools Inspectorate, which now conducts inspections for some independent faith schools on behalf of DCSF and Ofsted.
Whilst CST does not represent maintained faith schools to any degree, it is hoped that the following observations will aid the Committee in its deliberations.

The evidence for the efficacy of maintained faith schools seems incontrovertible and the general public perception, as evidenced by the existence of over-subscription, would appear to reinforce this. It seems clear that the core of the issue is this: to what extent can a secular government responsibly allow and fund faith schools to operate within their own faith criteria and maintain the ethos which lies behind their effectiveness?

Those who lead, manage or teach in faith schools will recognise that the struggle to develop and maintain a credible and distinctive ethos concomitant with their beliefs and practices is not an easy one; particularly in a largely secular society. The very concept of distinctiveness requires that schools operate counter to the flow of the prevailing culture. Despite this difficulty, faith communities continue to show a commitment to engage in education in order to allow their children and young people the fullest opportunity to discover faith for themselves.

A school admissions policy is of very significant importance in establishing, developing and maintaining the ethos of any school community; no less so for faith schools. If such schools are to have freedom to continue to be effectively distinctive, they should have the opportunity to maximise attendance possibilities for those in the faith community. In addition families who do not share the same conviction of faith should clearly demonstrate a long-term willingness to work closely with the principles on which the school is built. To do otherwise would be counter-productive for both school and family. The current arrangements allow for this to be possible. Any significant interference with these regulations is likely to further erode any overall benefit that these schools give to the community.

Similarly with the curriculum, faith schools should retain the freedom to develop creative ways of showing the relevance of their beliefs to contemporary society. It is commonly believed that education, particularly in religious matters, can best take place from a position of neutrality. The implication of this premise for the school curriculum is that any approach which does not aim to treat all views as equally plausible, especially religious views, is philosophically and morally corrupt. The flaw in such reasoning is that a truly neutral position is impossible to attain. Every curriculum, every teacher, every educational institution has an underlying worldview which colours the truth that it seeks to convey. Is it not a more honest approach to be completely clear and open about the bias that any curriculum material has in order to help develop discernment with regard to matters of faith and morality? Those involved with faith schools would argue strongly that respect for other beliefs comes very readily from a position of firm belief. Far from being threatened, those of different faiths are safe in an environment where faith is valued. Furthermore, there are surely sufficient checks and safeguards already in place to ensure that schools do not abuse the privilege of such a freedom in the curriculum?

Once again, the current arrangements give not only a fair and common sense approach but allow faith schools to operate with integrity and honesty in matters of belief.

Opponents of this situation may raise objections based on the belief that there is the potential for an individual’s right to the education of their choice to be infringed. The fact is that complete freedom of educational choice is not universally available; it is impracticable to act otherwise. Some freedoms have to trump others. If indeed an individual’s rights appear to be disregarded, should the assertion of those rights be allowed to override the freedom for a whole community of faith adherents to provide sound education for their own children according to the tenets of their faith? Is not the logical extension of enforcing the absolute freedom of all individuals with regard to education a gradual dilution of distinctive schools of any character? All schools descending to the lowest common denominator in matters of belief.

Other objections focus on the concern that faith schools promote sectarianism and mitigate against community cohesion in the UK. The argument being that public money is being misused in a manner that works against the general interests of society. This fear seems unfounded. There is no evidence, hard or anecdotal, to add credence to such concerns. In fact the opposite would appear to be the case. The Committee will be aware that something like 25% of the nation’s children are educated in faith or church schools. If sectarian indoctrination is taking place to the degree that it is purported to, would it not be evident across the community to a much higher degree? In addition, if faith schools, particularly Christian ones, were as successful in the cause of such indoctrination, intentionally or otherwise, surely church attendance would be higher and Christian militancy a more obvious force in the nation as a whole. Clearly, the Christian faith is not the influence that it once was and so the charge of promoting sectarianism seems somewhat empty.

Perhaps this discussion is an opportunity to consider what the real influence of faith in education is? Perhaps the members of the Committee would like to examine the extent to which community cohesion is being strengthened by schools with no clear faith basis? Faith schools have become popular scapegoats for some of the nation’s social difficulties but they are rarely given the opportunity to demonstrate or have public acknowledgment for any good that they do. CST has for some years been studying the attitudes of its former pupils to attempt to gauge what difference they may be making to their communities. Early indications are very positive and encouraging. The Emmanuel Foundation, based in the north east of England is due to open a new school in the next year or so. They are taking the risk of commissioning an ongoing study of the
area in which the school is placed so as to be able to assess the impact over a number of years. Studies such as these should be welcomed and the results brought into the public arena to aid those involved in decision making.

In conclusion there is no need to change the system as it currently operates. To do so would threaten any beneficial contribution that is made to the community by faith schools.

January 2009

Memorandum submitted by Christian Education Europe

Executive Summary

(i) Article 9 of the European Convention on Human Rights and Article 2 of Protocol 1 of the ECHR allow for educational diversity in line with parents’ religious and philosophical convictions. This diversity can only be provided by distinctive schools which embody such convictions and this distinctiveness is only possible if such schools can preferentially admit pupils from families with their beliefs. Hence the current exemptions should continue.

(ii) Given the known diversity of belief and practice, to conform to Article 9 of the European Convention on Human Rights and Article 2 of Protocol 1 of the ECHR different curricula will be needed. To prevent suppression of diverse beliefs, the current exemption of these curricula should continue.

(iii) In the tolerant, diverse and pluralist society of Britain there will not be agreement or conformity; but dissent, disagreement, disapproval or occasionally offence are not the same as discrimination, and Articles 9 and 10 of the ECHR maintain the right to free practice and expression of belief.

1. Christian Education Europe (CEE) is a limited company with a board of five directors. My role is as a consultant on home education issues and also legal matters. The company has four parts:

—— The European Academy for Homeschooling (TEACH) which has about 800 families enrolled. It offers regional and national support, parent training, events and conferences and test moderation. Membership of TEACH confers eligibility for the International Certificate of Christian Education (ICCE).

—— Schools. There are some 59 schools with an annually renewable contract. CEE provides training for school staff, an annual Assistance Visit, an annual Educators Conference and access to the ICCE.

—— Curriculum. CEE distributes the Accelerated Christian Education (ACE) curriculum, with discounts for contracted schools and TEACH member families. Originating in America, ACE is currently used in 7,000 schools and many home schools in over 100 countries. CEE has an ongoing programme of producing UK alternatives to supplement areas of the curriculum which have a specifically American bias. CEE is part of the ACE Global Support team.

—— European Student Convention (ESC). This is an annual four-day residential Convention for students from the UK and Europe to meet and compete in over 120 events in eight categories. Success at ESC entitles the student to attend and compete at the International Student Convention held annually in the USA.

2. The first issue is whether we are content with the provisions of the School Admissions Code and the Equality Act 2006 which permit schools to prefer one applicant to another on the grounds of their religion. These provisions are found in Section 50 of the Equality Act 2006 which allows schools of a religious character, or with a religious ethos, or schools conducted in the interests of a church or denominational body, to preferentially admit children of that faith.

3. The first point we wish to make is that it is extremely unlikely that anyone not of the faith would apply to send their children to an independent Christian school using an explicitly Christian curriculum. The schools and home educating organisation of CEE offer a Christian alternative for Christian families and hence need to be able to preferentially accept the children from Christian families. To maintain a credible Christian education, a school requires the support and agreement of the parent, which implies selection of those families which will provide that support. The rights of those not seeking a Christian education are not affected, nor are they denied access to other educational provision. A Christian education here means an education based on the conviction that Christianity is true.

4. Another issue for many is the tendency in some circles to confuse neutral with secular or non-religious. The Norwegian educationalist Signe Sandsmark, writing in 2000 said “Christian teachers, and believers within other theistic faiths, are supposed not to talk about God in a way that implies He exists . . . But what, then, should the agnostic, liberal humanists try to say, and avoid saying, if they want to be neutral, not to reveal their own view?” Secular or non-religious is not neutral, but is a worldview and value system in itself. In the pluralist and diverse society of Britain, it has a place, but should not be the only option available in education.
5. Article 2 of Protocol 1 of the European Convention on Human Rights (ECHR) asserts a right not to be denied education. It also maintains that the parents have a right to such education as being in conformity with their own religious and philosophical convictions. This can only be achieved by a diversity of provision allowing different distinctives in education and school ethos. Maintaining the distinctiveness of the education provided can only be effectively achieved by ensuring that most, if not all, pupils in a school come from families which accept and support this distinctiveness, and this does not deny others access to other educational provision.

6. Further, Article 9 of the ECHR maintains the right to freedom of thought, religion and conscience; it also maintains the freedom to manifest religion in worship, teaching and practice. Our experience is that there are Christians who consider giving their children a Christian education part of the practice and observance of their religion, and seek to exercise the right to practice their religion by home educating or sending their children to an independent Christian school which supports their belief. This in no way denies access to other educational provision for others.

7. Regarding the continued exemption of curriculum from the Equality Act. Clearly, the most important issue in a school is what is taught—what the curriculum lays down as needing to be known. This involves not only what is positively taught by commission, but also what is negatively taught by omission. Now, Article 2 of Protocol 1 of the ECHR maintains the right of parents to have their children educated in accordance with their own religious and philosophical convictions. This clearly involves the content of the curriculum, both positively and negatively. As Sir Walter Moberly, vice chancellor of Manchester University, noted in his 1949 work *The Crisis in The University*, “If in your organisation, your curriculum, and your communal customs and ways of life, you leave God out, you teach with tremendous force that, for most people and at most times, He does not count.”

8. In England, the diversity of belief and religious and philosophical convictions in the sense given by the Equality Act 2006 need and require a diversity of *curricula* to provide for the rights of parents to ensure that their children are educated in accordance with their own religious and philosophical convictions, as no one curriculum could accommodate the diversity that exists. This diversity requires protecting from attempts by those who disagree with one or the other religious or philosophical conviction to suppress any curriculum they disagree with.

9. Article 9 of the ECHR means that no one religious or philosophical conviction has the right to suppress any other religious or philosophical conviction. This applies even if the adherents of one religion or belief consider the tenets of another discriminatory, as, for example, an adherent of a religion or belief which allows polygamy may consider Christian teaching on monogamous marriage discriminatory. This is not a reason for suppressing a Christian curriculum which asserts that monogamous marriage is to be followed. Other examples will no doubt spring to mind. The exemption for curriculum from the Equality Act 2006 prevents attempts to suppress any curriculum which provides an education in accordance with a distinctive religious and philosophical belief.

10. The second paragraph of Article 2, Protocol 1 supplies reasons for applying legal limitations to the practice of a belief. These are the interests of public safety, the protection of public order, health or morals and to protect the rights of others. These reasons for limitation of the practice of a belief apply to the behaviour of the believer, not the behaviour of those who disagree, so that disorder generated by a belief’s opponents is not a reason for limiting the belief, but a reason for limiting the opponents.

11. Other issues. The Guidance for Schools published by the Government refers a number of times to “diversity” and also “diversity of provision”. Conservative evangelical Christians have been a part of that diversity in this country for more than 400 years and remain part of the diversity of British life, and Christian schools remain part of the diversity of provision acknowledged by the Guidance. The Guidance also speaks of “tolerance”, that is, not insisting on agreement or conformity, but allowing ideas and behaviour which you do not agree with to remain a full part of national culture. This clearly allows, even recommends, tolerance of Christian and other faith schools.

12. It is inevitable, in a pluralist and diverse society such as in Britain, that free expression of belief will mean dissent, disagreement and disapproval, as well some being offended. Dissent, disagreement and disapproval, however, are not discrimination. Articles 9 and 10 of the ECHR maintain the right to believe or change belief, and also to freely teach and practice it, and also to express it publicly and freely. For example, Professor Richard Dawkins can discuss religious belief as a “virus of the mind” without discrimination occurring; and therefore a believer can be equally critical of Professor Dawkins’ ideas, or those of another belief or practice, without discrimination occurring. Freedom of expression can occasionally mean people are offended: but again, being offended does not mean being discriminated against.
RECOMMENDATION

We are convinced the current exemptions work well in preventing discrimination against differing, dissenting or minority beliefs and should continue.

January 2009

Memorandum submitted by the United Synagogue Agency for Jewish Education

The JCHR, in calling for evidence, has asked “whether organisations are content with the provision of the School Admissions Code and the Equality Act 2006 which permit schools to prefer one applicant for admission over another on grounds of their religion. The Committee is interested in whether this is compatible with the right not to be discriminated against in the enjoyment of the right of access to education (Article 14 of the European Convention on Human Rights (ECHR) in conjunction with Article 2 Protocol 1).”

It further asked “Whether organisations believe that the requirement under the Equality Act not to discriminate on grounds of religion or belief should apply to the school curriculum (currently this is an exemption).”

In looking at the ECHR, I was particularly concerned to examine the first protocol of Article 2 which notes that: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” This would seem to directly infer that there is the opportunity for positive discrimination, in that it clearly notes that States shall (my italics) respect the rights of parents to ensure education and teaching in conformity with their own religious and philosophical convictions. In producing the Guidance for Schools, under Part 2 of the Equality Act 2006, the DCSF has made enormous strides to ensure that schools and, by extension, faith school providers, understand their rights and responsibilities, in particular with reference to Sections 44 and 45. Indeed, it can be fairly said that the United Kingdom has been regarded internationally as a leader in the provision of faith school education to such an extent that probably 20 million people in this country today have either direct experience of, or experience at one generation removed, faith schooling. When discussing the level of commitment to state education with a religious underpinning in England, many colleagues from around the world are amazed and impressed.

Turning to the provisions of the School Admissions Code, I would submit that the, now revised, School Admissions Code is a document which seeks to reconcile the specific requirements for faith schools with the general legal duties to ensure the equity and fair access to education, embodying as it does the underlying provisions of Every Child Matters. It would seem to me that selection by ability, still retained in Section 39 of the Education and Inspections Act 2006 for grammar schools or schools with partial selective arrangements which already had such arrangements in place during the 1997–98 school year, could be held to be far more discriminatory than membership of a religious body, which cannot confer any academic ability or aptitude. Certainly, within the Jewish community, there are no schools which employ any selection—whether total or partial—on academic ability, save for fair banding arrangements. One of the particular concerns of faith schools, and certainly of Jewish schools, is to ensure that the distinctive ethos of the school is maintained by those wishing to attend. Indeed, this could be perhaps fairly be said for all schools, whether they are sport academies, specialist schools, or faith schools. It was of a particular disappointment to me that the original provisions of paragraphs 2.30 and 2.31 of the Code have now been significantly abandoned and this is undoubtedly a source of concern to those running schools with a distinctive ethos of any sort. The first protocol of Article 2 of the ECHR requires that “no person shall be denied the right to education”. Undoubtedly, I would uphold this right as fundamental, but I also contend that it is similarly undeniably fundamental that such education and teaching shall be in conformity with the religious and philosophical conviction of parents. Provided that there are sufficient options in any one local authority, then I cannot see how the Admissions Code can be in any way incompatible with Article 14 of the ECHR. That there have been local difficulties, where there are local authorities in which there is only one type of provision, is a matter for regret. This could perhaps be seen to be discriminatory, unless the local authority was prepared to pay for sufficient school transport to take children of another or no faith to their nearest appropriate school, or to open schools with different or no faith provision.

The development of the Faith in the System document in 2007 cemented the links between the faith school community and the wider school community. It noted: “the dual system of voluntary schools supported by faith organisations and schools without a religious character is therefore at the heart of the schools system in England.” It further states: “The government continues to support the benefits to society that this system brings for parental choice and diversity and we recognise that with the changes in society it is only fair that pupils of all faiths and none have the opportunity to be educated in accordance with the wishes of their parents.” It goes on to say: “The government and providers of schools with a religious character also recognise that many parents who are not of the faith of a particular faith school seek places in those schools because they value the ethos and character of the schools.” Some faith schools open a number of places each year for children whose parents are of other or no faith, but many feel that they are fully able to discharge...
Turning to exemptions under the Equality Act for the content of curriculum, I am delighted that this has been designed to ensure that all schools can continue to deliver the broad based and inclusive curriculum to which all children are entitled. There are undoubtedly particular issues concerning Sexual & Relationship Education, PSHE and other subjects where it is possible that religious teaching and ethos may not necessarily accord with the law of the land. This has particular resonance in teaching about same sex relationships and the use and misuse of drugs and alcohol. The advice notes wisely that, where there are cases where parents believe that aspects of the school curriculum conflict with their own religion, belief or philosophy or, indeed, lack of it, schools should always discuss the matter with parents first in order to reach a compromise with which both parties are happy. I am always firmly of the belief that a discussion with parents is far better than resorting to legal remedy, unless all avenues for discussion have been exhausted. However, parents should always be able to maintain the right to withdraw children from any SRE lessons where these conflict with their religion, belief or philosophy.

I note that the JCHR has not asked for views on collective worship, but this is, perhaps, an area where there could be more difficulties. As the Committee will know, Circular 1/94 requires all pupils in maintained schools to participate in a daily act of collective worship, the majority of which in any term must be wholly or mainly of a broadly Christian character. Parents have always had the right to withdraw children from this activity; a right originally enshrined in the Education Act 1944. I speak from personal experience with both myself and my children that schools have always complied with this request and, indeed, have made opportunities available where there are significant numbers of pupils from non-Christian faith background to worship in their own ways. Whether it is appropriate now, in the multi-cultural Britain of the 21st century, to require the daily act of collective worship to be “mainly of a broadly Christian character” is not one on which I would wish to comment. It is, of course, impossible for non-Christian faith schools to adhere to this requirement, but has never created any form of difficulty as far as I am aware, as such schools can obtain from their local SACREs a determination to modify the worship arrangements. It is further noted that Section 50 of the Equality Act 2006 allows for collective acts of worship to be exempted from the prohibition of discrimination.

In short, I do not believe that there is any evidence to show that there are adverse implications for individual pupils or their family’s rights to freedom of religion, thought or belief in the School Admissions Code, the Guidance for Schools on the Equality Act 2006 Part 2, or the general desire of the government to provide the best possible education for our children for the next generation in an increasingly multi-cultural and diverse Britain.

February 2009

Memorandum submitted by the British Humanist Association: Human Rights: Schools, Religion, Thought and Belief

The British Humanist Association (BHA) is the national charity representing the interests of the large and growing population of ethically concerned non-religious people living in the UK. It exists to support and represent such people, who seek to live good lives without religious or superstitious beliefs. Humanism is a “belief”, within the meaning of the ECHR, the Employment Equality (Religion or Belief) Regulations 2003 and the Equality Act 2006.

The BHA is committed to equality, human rights and democracy, and has a long history of active engagement in work for an open and inclusive society, and an end to irrelevant discrimination of all sorts. Education has always been an important issue for the BHA and the organisation continues to campaign for an end to exemptions from equality laws for faith schools and for an RE curriculum that is objective and balanced. The BHA takes a human rights approach in its education and other campaigns work.


The guidance for schools on the Equality Act is striking as it gathers together all of the exceptions afforded to faith schools from the requirements of the religion and belief sections of the legislation. While these exceptions are repeatedly referred to as “limited” in the guidance, “wide-ranging” would be a more accurate description. As the guidance states, faith schools “are not subject to the provisions relating to admission and pupils’ access to benefits, facilities and services”.

By granting such broad exceptions to state funded religious schools in admissions and the curriculum, and all school in the matter of collective worship, the Act has fallen well short of its aim of tackling discrimination on the grounds of religion or belief. The intention of the Act not to undermine the position
of religious schools is insufficient justification for such continued discrimination and, in any case, we dispute the argument that these schools would be undermined by following the same rules as other educational institutions and public services.

The fact that some religious schools have long existed is no reason to allow them to continue to discriminate in their admissions, any more than the long history of other forms of discrimination should be considered a suitable defence. The Human Rights Act recognises the right of parents to educate their children “in conformity with their own religious and philosophical convictions”. However, this does not mean that any religious or belief group have the legal right to their own state funded schools, or that the right of faith schools to discriminate on religious grounds in their admissions is protected by the Act.

By no means all schools with a religious character discriminate in their admissions. There are many religious voluntary controlled schools and academies, and some voluntary aided schools that have broadly inclusive admissions arrangements. Consequently, this discrimination cannot be considered a necessary component or prerequisite of a religious ethos. Although schools are now under a duty to promote community cohesion, this has not been applied in any meaningful way to admissions. The guidance on the duty to promote community cohesion states that “it is important that schools do not present themselves in a way that might deter parents from particular communities”. We question how this injunction has been extended to admissions arrangements that effectively ban some communities from attending certain schools.

We have sympathy with the JCHR suggestion that children of sufficient maturity should be able to withdraw themselves from collective worship. However, we are concerned that this measure would be difficult to implement. Furthermore, we believe that the opt out is itself divisive and that the priority should be the abolition of collective worship and its replacement with inclusive assemblies.

We are also concerned that parents who choose to withdraw their children from collective worship or RE frequently find the school to be unfeeling towards the needs of the child. In one case a child of eight was set “lines” as his work to do during RE and collective worship, despite the fact that his mother had told the school that she could not work to do if they would not give him anything appropriate. It is currently very hard for parents to challenge the poor treatment of such children withdrawn since Circular 1994 places few requirements on schools as to providing appropriate alternatives. Schools are left the option of organising or allowing RE and collective worship according to other religious faiths or denominations (paragraphs 44.1, 44.2, 88), but are only required to remain legally responsible for children on school premises (Paragraphs 45 and 84). While it is understandable that schools should not be expected to go to undue effort or expense for the benefit of one or two pupils, it is unacceptable that children are expected to sit in silence or write lines, activities that seem more like punishments than education.

We agree with the provisions in the Act that exempt the content of the curriculum from the remit of the Act as there will always be a very small minority of families who take issue with elements of the mainstream curriculum, such as evolution or some works of literature. We also agree that local authorities should not be beholden to demands of every religious group that wishes to start its own school and therefore should be granted an exemption. Notwithstanding this, a better way to maintain fairness between religion and belief groups would be to ensure that all schools are inclusive.

We have serious concerns about the way that many local authorities administer free and subsidised school transport. The regulations state that religious and non-religious beliefs should be treated the same with regard to the provision of free and subsidised transport, so that a non-religious family could claim free transport if all of the state schools in their locality were faith schools. This would be fair were it not for the asymmetry between the admissions and other policies of religious and non-denominational schools.

Whereas a Catholic whose nearest schools are non-religious would have the option of attending any of these, the same may not be true for a child who is non religious or of a minority religion whose nearest schools are Catholic, or other faith schools. Not only are these schools allowed to discriminate in their admissions, but they are also able to promote religious beliefs instead of adopting a neutral position. For this reason, free and subsidised bus travel reinforces the already serious situation whereby people professing particular religious beliefs frequently have a greater choice of schools. Some families may feel that going to a school that reflects their religious beliefs is an overriding imperative, whether or not that school has good results or behaviour. Others simply find that their religious beliefs enable them to send their children to better achieving schools than their neighbours.

THE SCHOOL ADMISSIONS CODE

The primary purpose of the School Admissions Code is to tackle practices that disadvantage the poorest or most vulnerable students in their attempts to find a suitable school place. Although the new Code clarifies and strengthens prohibitions on certain unfair practices by schools with control of their own admissions (for example, asking for voluntary donations at the time of application will be explicitly forbidden) it does not challenge the principle of religiously selective admissions arrangements. We believe that this means it fails to deal with one of the key causes of separation by social class in state schools, but although this should be a cause for concern for those who want the code to succeed on its own terms, social stratification in schools is not the issue currently before the JCHR.
The relevance of the School Admissions Code to the topic under consideration is therefore as much about what it fails to say, as what it does say. We believe that admissions that discriminate according to the religion of the applicant are a major human rights issue, yet this discrimination is accepted by the Code. The extent of the exemptions from anti-discrimination law afforded to faith schools is clear from the Guidance for Schools on Part 2 of the Equality Act 2006. The consequences of the current system are serious for many thousands of families.

Not only does the Draft School Admissions Code fail to tackle the issue of religious discrimination in faith school admissions, we believe that the proposal that parents should sign ethos statements could further disadvantage parents. While the code is clear in stating that no practical support for the code will be required from parents, there are certain to be religious and non-religious people who will, for example, feel uncomfortable signing a statement that they “support a Christian ethos”. This is not because any of these parents would seek to undermine the ethos of the school to which they are applying. Rather, it is because signing up to support a Christian ethos seems very similar to signing up to support Christianity, which would go against their fundamental beliefs.

It is for this reason that current guidance on home-school agreements suggests that denominational schools should “consider using” the phrase “the school will promote moral behaviour” rather than “the school will promote Christian values” to describe their ethos, so as not to exclude some families. However, the DCSF has not made clear whether the guidance on the wording of ethos statements will be stronger (ie forbidding such exclusive descriptions) or weaker (ie explicitly allowing them) than that which exists for home-school agreements.

It is worth pointing out that oversubscribed faith schools can usually already put in place religious admissions criteria. However, religious ethos statements could also be used at voluntary controlled schools and at rural voluntary aided schools that claim to be open to the whole community. Undersubscribed faith schools bound by law to accept non-religious applicants would also be able to use religious ethos statements.

THE HUMAN RIGHTS ACT AND SCHOOL ADMISSIONS

While there are the exemptions for faith schools in the Equality Act, the anti discriminations provisions of Article 14 (with Article 2, Protocol 1) still apply. Article 2, Protocol 1 protects the right of parents to educate their children “in conformity with their own religious and philosophical convictions”. Consequently, many conviction-based criteria can be seen as a way of meeting Article 2, Protocol 1 and do not therefore breach Article 14. However, the religious admissions criteria of some faith schools are based on religious membership, not religious conviction. Although this is in accordance with the School Admissions Code, we believe it conflicts with the Human Rights Act.

Paragraph 2.41 of the School Admissions Code states that schools with a religious character may “give higher priority in admissions to children who are members of, or who practise, their faith or denomination” and that (2.43) “it is primarily for the relevant faith provider group to determine how membership or practise is to be demonstrated”. Examples of school admissions criteria that require religious membership rather than religious conviction include those that require Catholic baptism certificates or proof of Jewish matrilineal descent in place of proof of religious conviction or practise.

Membership-based admissions criteria should therefore be open to the full force of Article 14 provisions against discrimination, without the defence that they are a means of meeting the Article 2, Protocols 1 right of parents to educate children in conformity with their own convictions. Earlier this year the BHA intervened in a case between the JFS (formally the Jews’ Free School) and a family who could not get a place at the school because the admissions criteria prioritise matrilineal descent, not religious conviction. The claimant was unsuccessful but the case has gone to appeal.

SCHOOL UNIFORM GUIDELINES

We broadly agree with the non-statutory guidance on school uniform. We agree that it is the place of individual schools to create their own school uniform policies and that this should be done in consultation with the different groups who attend the school. It is important that schools balance the need to respect the beliefs of students with the need for a uniform that protects children from social pressures to dress in a particular way (either from peers or families) and promotes cohesion within school. We feel that most schools successfully balance these requirements and we see no need for significant change to the guidance or to legislation. We have been encouraged that in those cases where school uniform rules have been challenged in court the judges involved have taken care to assess each case on its merits.

Andrew Copson