THE DISCRIMINATION LAW ASSOCIATION

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GETTING THE MOST OUT OF THE EQUALITY ACT 2010

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HOW CAN THE EQUALITY ACT

PROMOTE PARTICULAR NEEDS

AND BALANCE RIGHTS BETWEEN DIFFERENT GROUPS ?

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Introduction

1. My task is to consider positive action and exceptions including genuine occupational requirements. These provisions in the new Equality Act 2010 interact to address the issues set out in my title – promoting particular needs and balancing rights between different groups. I shall start with positive action.

Positive action

2. Simple equal treatment, without consideration of the context in which the treatment takes place, can easily perpetuate disadvantage since not everyone starts from the same position. This is perhaps most obvious in the context of disability and it is in relation to this ground that the most far

[1] Head of Cloisters Barristers' Chambers, 1 Pump Court, Temple, London EC4Y 7AA United Kingdom. Telephone: 020 7827 4000; Fax: 020 7827 4100; DX LDE 452; Email: ra@cloisters.com Much of this paper is based on chapter 11 of Blackstone's Guide to the Equality Act 2010, OUP 2010. (eds Wadham, Robinson, Ruebain and Uppal), which I wrote with Rachel Crasnow of Cloisters and to whom I must express my thanks and acknowledgement.

reaching positive action steps have been permitted so far.[2] However this recognition has led to specific provisions across domestic law that has enabled some more limited positive action to be taken in relation to other grounds. It is also in part a basis for the development of protection against indirect discrimination.

Full equality in practice

3. These are all concerned with 'full equality in practice' which is now an explicit aim of European equality law. It was introduced first in relation to gender as an amendment to the equal pay provisions of the EC Treaty by the Treaty of Amsterdam, as Article 141(4) TEC (which is now Article 157(4) TFEU).

4. It is now also found in the Race Directive,[3] the Employment Equality Framework Directive,[4] the Gender Goods and Services Directive,[5] and the Re-cast Sex Equality Directive[6] which replaced and strengthened the old Equal Treatment Directive.

5. The aim of full equality in practice closely relates to the principle of equal treatment. It has long been recognized that to achieve full equality in practice, disadvantaged groups may require different treatment because they are not similarly situated.[7] In European law the principle of equal treatment prohibits different situations from being treated in the same way just as much as it prohibits the same situations from being treated differently. The difficulty lies in determining when situations are not the same and to what extend different treatment is justified. One limiting factor may be the point at which it can no longer be said that there is equality of opportunity. However even this limit may be set aside where

[2] See the discussion in the HL in *Archibald v Fife Council* [2004] IRLR 651 at [57]–[60] and in the ECJ in *Coleman v Attridge Law* [2008] IRLR 722 at [42].
[3] See Art. 5 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
[4] See Art. 7 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
[5] See Art. 6 of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.
[6] Art. 3 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).
[7] See, for instance, the Opinion of AG Sharpston in Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, citing Aristotle's Nicomachean Ethics, V.3. 1131a10-b15 and Politics, III.9.1280 a8-15, III. 12. 1282b18-23.

it is shown that special measures are necessary to remedy past disadvantage.

European limits on positive action

6. The last government had been committed to extending the power to take positive action in the Equality Act 2010 (the Act). It had made it clear that it wished to go as far as possible consistently with European and international law.[8] So it is important to understand these constraints first.

7. There have been a series of cases decided by the European Court of Justice (ECJ) which have addressed positive action steps. The most recent is Case C-319/2003 *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation Nationale and Ministre de la Justice*[9] which provides both a good review of the prior case law and also the present thinking of the ECJ.

8. In *Briheche* the ECJ had to consider whether a French law, which prohibited recruitment to employment in the Civil Service for anyone aged over 45, unless the applicant was a widow or an unmarried man with child care responsibilities, was unlawful positive action. As the Recast Sex Equality Directive had not yet been enacted, the ECJ first reviewed the weaker provisions of Article 2(4) of the Equal Treatment Directive.[10] However it then considered the nature of the obligation of 'full equality in practice' in Article 141(4) EC and held that whilst this provision and Article 2(4) looked beyond formal equality to substantive equality, it was not possible to say how far this goal could be achieved where positive action for a woman might create a claim of unlawful discrimination by a man.

9. The ECJ went on to hold that the French provision in question was not consistent with the limits to permissible positive action as the automatic

[8] See para. [531] of the Explanatory Memorandum to the Bill which, while noting that there 'are existing positive action provisions in current legislation, [and that] these apply to different protected characteristics in different ways and in some cases are specific about the types of action they permit', added the Bill 'extends what is possible to the extent permitted by European law…'. This is repeated in paras. [525] and [529] of the Explanatory Memorandum to the Act.

[9] [2004] ECR I-8807.

[10] See Council Directive 76/207/EEC of 9 February 1976 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 which was replaced with strengthened positive action provisions by Directive 2006/54/EC; see n. xx supra.

and unconditional disapplication of the relevant conditions to certain women was insufficient on the facts to justify the step taken (see paragraphs 27–28 of the judgment).

10. In his Opinion in the case, Advocate General Maduro considered whether positive action measures under European law could be extended by looking at compensatory forms of positive discrimination on equality of opportunities, rather than on equality of results (which in the form of quotas and set targets has been deemed disproportionate to date), see paragraphs 48–51. Practitioners should make use of this case as an excellent guide to an understanding of what constitutes legitimate positive action under Community law.

The old law

11. Prior to the new Act, UK domestic law was much more limited and essentially only permitted training and encouragement to be offered on a limited and targeted basis to under-represented groups.[11] This kind of action enhanced access to job and services opportunities, but the law did not permit selection for substantive benefits such as recruitment or promotion to take place, merely because of under-representation.

12. The most recent example of a positive action provision was regulation 29(1) of the Age Regulations which said -

> 29 Exceptions for positive action
> (1) Nothing in Part 2 or 3 shall render unlawful any act done in or in connection with—
> (a) affording persons of a particular age or age group access to facilities for training which would help fit them for particular work; or
> (b) encouraging persons of a particular age or age group to take advantage of opportunities for doing particular work;
> where it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to age suffered by persons of that age or age group doing that work or likely to take up that work…

13. The basis for action under this provision enacted in 2006 was less stringent than that enacted in relation to the race provisions. All the persons providing the positive action needed to show was that it 'reasonably appeared' to them that the action was appropriate as set out in the provision. In earlier legislation such as, in sections 37 and 38 of the RRA, it was necessary to have a more statistical basis for the positive action.

[11] See, e.g., Race Relations Act 1976 (RRA) ss. 35–38 and Sex Discrimination Act 1975 (SDA) s. 47.

Thus it had to be shown that at any time in the last year at the workplace in question there were no or only a small proportion workers of the relevant racial group in relation to the local population or to the entire workforce (section 38(2)(a) and (b)) of the RRA).

14. It will be seen that the new Act was built on this earlier approach to positive action but permits a broader range of action.

Outline of the new provisions

15. Chapter 2 in Part 11 of the Act contains the key positive action provisions.[12] There are two sections which permit positive action though in neither case do they override other statutory provisions.[13] Section 158 covers positive action generally but does not apply when section 159, which covers positive action at work, applies.[14] Section 158 also does not apply when section 104 applies; that section applies to the selection of candidates for political parties and is discussed below.

16. Section 159 applies specifically in the work context covered by Part 5 of the Act. It is inevitable that the section will give rise to a number of questions of interpretation, which may undermine its utility. It is also inevitable that, since it is a permissive provision and does not impose any obligations, such questions could deter employers from putting it to use. This would be unfortunate; in fact if a little time is taken to understand it, employers should have more confidence in their ability to use this provision effectively.

17. At present only section 158 will be brought into effect on the 1st October according to the Government Equality Office website. However it makes some sense to see what section 159 does first before considering section 158.

Preferential appointments

18. The kind of action that the new legislation contemplates is preferential appointments on specified grounds. This is a new and radical development from the previous provisions outlined above. The limits and context in which such appointments are likely to be permissible are developed further below.

19. Section 159 is concerned solely with the substantive benefits of recruitment or promotion and does not extend more widely than that,

[12] See paras. [519]–[529] of the Explanatory Memorandum to the Act.
[13] See ss. 158(6) and 159(3).
[14] See s. 158(4).

though these concepts are widely defined. It can be seen below that section 159(1) defines the basis on which positive action can be taken and in section 159(4) sets out the limits to that action -

159 **Positive action: recruitment and promotion**

(1) This section applies if a person (P) reasonably thinks that—

(a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, or

(b) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) Part 5 (work) does not prohibit P from taking action within subsection (3) with the aim of enabling or encouraging persons who share the protected characteristic to—

(a) overcome or minimise that disadvantage, or

(b) participate in that activity.

(3) That action is treating a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not.

(4) But subsection (2) applies only if—

(a) A is as qualified as B to be recruited or promoted,

(b) P does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it, and

(c) taking the action in question is a proportionate means of achieving the aim referred to in subsection (2).

20. The basis which must be established for action under this section has similarities with that in the Age Regulations. The section does not specifically require a statistical analysis, provided there is a reasonable basis to conclude that there is a connection between a protected characteristic and disadvantage, or the fact of disproportionately low participation.

21. In those circumstances it enables positive action, with the aim of enabling or encouraging persons who share the protected characteristic, to overcome or minimize that disadvantage, or participate in the relevant activity. Subject to limitations, this can include more favourable treatment of those who have a specific protected characteristic.

22. Two questions arise: is it necessary to prove that the disadvantage is generally recognized and related to that, a causation issue: how does an employer go about proving that a disadvantage is connected to a characteristic? In the public sector, equality auditing under the equality duties is likely to provide an answer. However it is clear that the legislation expects other employers as well to be aware of the diversity of their workforce and to wish to address any apparent deficiencies.

23. In the second part of section 159(1) it is necessary to consider how to determine whether participation is disproportionately low. For instance it might be that the proportion of older people working in the fashion industry is disproportionately low compared to those in the population at large, but would such a generalized comparison be sufficient for the positive action (in the form of the proposed selection) to be legitimate? Unfortunately the Explanatory Memorandum to the Act does not seek to answer these questions. Clearly some evidence is vital—without it the measure cannot be shown to be adequate or proportionate to the aim pursued.

24. Some answers to these questions can be obtained by reference to the case law of the ECJ. For instance in Germany the 1990 Bremen Act on Equal Treatment for Men and Women in the Public Service provided that women who are 'underrepresented' could be given priority over men for public sector appointments if they had the same qualifications. The legislation stated that there was underrepresentation if -

> women do not make up at least half of the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within a department.

25. Since the Bremen scheme had given unconditional preference to the underrepresented candidate, the ECJ decided it was unlawful on grounds of lack of proportionality. However, the Court did not criticize the German legislation's approach to underrepresentation.[15]

[15] Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

26. Nevertheless it is not certain whether merely rough inequality between the proportions would be sufficient. Such statistics might be unreliable by reason of the numbers, or the time frame, which they represent. They may simply show random events and not disadvantage. The better view is that the level of participation needs to be shown to be low when compared with other groups or with the expected level of participation. Practitioners should also note that section 159 of the Equality Act 2010 makes the test more subjective than the requirement under the said German legislation by providing: 'if a person P (who is the person who will take the positive action) *reasonably* thinks that …' However whether the UK courts will demand hard statistical data seems doubtful, but will have to be tested.

27. A further question is whether the under-representation must be specific to the workforce and community, locally or nationally? Again a proportionate consideration of the context will be necessary. Under-representation in a certain employment market is unlikely to justify positive action measures in a different area. On the other hand the geographical spread of a labour market for some work may be quite large, and it may be wrong to look at it on too narrow a basis.

28. It might seem that the Act expects section 159 to be used relatively rarely and that it is concerned essentially with a tie–break context. This is because there cannot be 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. However the prohibition on having a policy to prefer persons having a particular protected characteristic does not have quite that effect. The purpose of this prohibition is to ensure that whenever the section is applied there is a *specific* consideration of the candidates for recruitment and promotion and their competitors.[16] Thus an unthinking purported application of section 159 is likely to be unlawful.

29. Secondly, candidates in respect of whom employers can take positive action must be equally suitable for the job. It is quite clear, for instance that a woman cannot be given an automatic preference over a man simply by reason of her gender: see Case C-158/97 *Badeck v Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] IRLR 432 ECJ.

30. The consequence of this is that there must be an objective selection process that assesses specific skills, qualifications and abilities, but does this mean that candidates have to be qualified or suitable in *exactly* the same way

[16] The Explanatory Memorandum to the Act says at para. [526], 'each case must be considered on its merits'.

before a choice based on under-representation is legitimate? The present view is probably not.

31. The Act uses the phrase 'as qualified as' and it was suggested by the government in 2009 that whilst this does not authorize in any way the use of quotas, it will cover situations where candidates meet the minimum qualifications or the particular requirements for the post, in contrast to a scenario where the applications in question are *identical* in their qualifications, skills and abilities.

32. Thus even if a candidate from a protected group had some weaknesses in areas where his/her competitor was strong, if those related to desirable rather than essential aspects of the job specification, s/he may be considered as qualified for the post. Not all recruitment exercises divide the desired characteristics of the post into necessary and preferred. So the answer to this question may require a more specific examination as to how important the skills in question are for the job.

33. There are no fixed rules as to how such an assessment must operate. The Explanatory Memorandum to the Act says at paragraph [528] that the section allows 'the maximum flexibility to address disadvantage and under-representation where candidates are as good as each other…'. While it seems inevitable that some litigation will arise from the use of positive action measures in recruitment exercises, it is also certain that the more demonstrably objective an assessment of the candidates has been, the less open to challenge the ultimate selection will be.

34. For instance, it would normally be straightforward to assess the qualifications required for the post of a legal secretary; by contrast, there would be a high degree of subjectivity in the value judgment involved in determining who is qualified to be a senior partner or even to perform a management role. So the meaning of the word 'qualified' will surely be the subject of future debate, and will require to be developed by either Codes of Practice, or possibly judicial determination.

35. It is certain that automatic preferences or quotas will be unlawful as they do not include the requisite exercise in proportionality by prioritizing under-represented groups in an unconditional fashion. Hence the Swedish Equality Act 1991 which permitted employers to appoint a member of one sex over the other (even though the appointee was the worse candidate) where the appointment served to promise equality between men and women in the workplace, was held to be held unlawful by the ECJ in Case C-407/98 *Abrahamsson v Fogelqvist* [2000] IRLR 732.

36. However the ECJ has not made this condition for positive action impossibly difficult to meet. In *Abrahamsson* the ECJ ruled that Article 2 of the Equal Treatment Directive did not preclude granting a preference to a candidate belonging to the under-represented group (here women), over a competitor of the opposite sex -

> provided that the candidates possess equivalent or *substantially equivalent* merits and the candidatures are subjected to an objective assessment which takes account of [all their] specific personal situations (emphasis added)

37. Thus so as long as there is a substantive degree of objective assessment, EU law does not demand that candidates be *identically* qualified for a tie-break to be permitted.

38. The House of Lords added an amendment to section 159 to make it explicit that -

> any positive action measure taken in recruitment and promotion has to be a proportionate means of achieving the aims set out in subsection (2), that is helping people overcome a disadvantage or participate in an activity.

39. A proportionality requirement is also added to section 104.

40. Fortunately the sections in the Act are not the only basis upon which employers need operate. The Codes of Practice issued by the Equality and Human Rights Commission should provide practical assistance in relation to the issues discussed above.

41. Possible models as to how the assessment process for positive action should take place are available from other jurisdictions. For example in *Badeck*, the German state of Hesse utilized an innovative means of assessing skills and abilities of candidates in underrepresented fields. The national legislation included the provision that -

> When qualifications are assessed, capabilities and experience which have been acquired by looking after children or persons requiring care in the domestic sector (family work) are to be taken into account, in so far as they are of importance for the suitability, performance and capability of applicants … Part-time work, leave and delays in completing training as a result of looking after children …must not have a negative effect on official assessment and not adversely affect progress in employment … Seniority, age and the date of last promotion may be taken into account

> only in so far as they are of importance for the suitability, performance and capability of applicants.

42. This approach was also considered by the European Free Trade Association Court in *EFTA Surveillance Authority v Kingdom of Norway*[17] where the Court stated that -

> giving weight to the possibility that in numerous academic disciplines female life experience may be relevant to the determination of the suitability and capability for, and performance in, higher academic positions, could enhance the equality of men and women.

43. Such an approach to the objective assessment of candidates could have a significant impact on the under-representation of women in management posts in the UK in the future, should employers embrace these voluntary measures. Barriers to equal opportunity experienced by black and ethnic minority communities might also start to be overcome with an innovation that recognizes more fully the value of different backgrounds. Whilst most of the ECJ case law to date in this area has been concerned with gender imbalance, it is expected that the positive action measures legitimized by the Act will be particularly useful in attempts to create greater race equality in the workforce. They may also be important in securing greater intergenerational fairness.

Positive Action In Relation To Political Parties

44. By section 104 of the Act positive action is permitted (short of shortlisting on a particular protected characteristic) in the process of selection of candidates for election. This, and the next sections, are discussed in the Explanatory Memorandum to the Act at paragraphs [344] to [348]. Only in relation to sex does the Act permit shortlisting criteria that are specifically linked to a protected characteristic: see section 104(7). This section therefore continues the effect of the Sex Discrimination (Election Candidates) Act 2002. In all other cases the Explanatory Memorandum at paragraph [345] notes that there can be reserved places on the shortlists for those having a protected characteristic, such as race or disability, etc.

45. Additionally the Act contains a new sunset clause for single sex shortlists. Section 105 limits the effect of section 104(7), and the 2002 Act so as to

[17] [2003] IRLR 318.

permit single sex shortlists to be lawful up to 2030 by which time it is to be hoped they will no longer be necessary.

46. The House of Lords added an amendment to section 104 containing a proportionality test for positive action taken in the selection of candidates for relevant elections. This aims to clarify that the only action permitted is that which is a proportionate means of achieving the objective of reducing inequality in the party's representation. This does not apply to women only shortlists.

All women shortlists

47. Still only 19 per cent of MPs are women, whereas women make up 51 per cent of the population. As stated above section 105 of the Act will extend the permission for political parties to use women-only shortlists for election candidates to 2030. This exception to the norm of treating candidates equally had been due to expire in 2015 and the government consulted about whether to extend this. More than 90 per cent of respondents agreed this was important to do until a gender balance was achieved in Parliament.

48. Given that 2.3 per cent of MPs are from non-white backgrounds compared with 8 per cent of the UK population, it may be asked: why there has been no decision to legislate for black and ethnic-minority only shortlists, or indeed for other candidates beyond gender? One reason appears to be the complexity of simply legitimizing non-white shortlists for the purpose of increasing the representation of people from ethnic minority groups. The CRE has stated[18] that -

> the low representation of people from minority ethnic groups as councillors or MPs was a more complex issue than might be presumed. …the activities of political parties generally should be brought within the scope of discrimination law; … various measures were already available to political parties to encourage increased representation, such as mentoring or shadowing, and that these did not require new or additional measures, just commitment and leadership.

49. The CRE and other bodies had questioned how a black and minority ethnic group would be defined for the purpose of a shortlist, and so, rather than agreeing with the suggestion of the introduction of legislation permitting black and minority ethnic-only shortlists, they have recommended the adoption of a full programme of positive action.[19]

[18] Para. 5.31 of the Government's Response to the Consultation 2008 at <http://www.equalities.gov.uk>.
[19] *ibid*.

50. Of course there are other positive action measures within the boundaries set by the Act that could allow political parties to enhance non-white participation in the democratic process. These include setting targets for increasing the proportion of politicians and staff from under-represented groups, and running mentoring and leadership programmes. Moreover section 106 imposes monitoring duties political parties to publish diversity information so far as possible.

Positive Action Outside The Fields Of Recruitment And Promotion

51. In circumstances where neither section 159 nor 104 apply then section 158 is potentially engaged. This section is discussed in the Explanatory Memorandum to the Act at paragraphs [519] to [525]. Section 158 says -

> 158 **Positive action: general**
>
> (1) This section applies if a person (P) reasonably thinks that—
>
> (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
>
> (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
>
> (c) participation in an activity by persons who share a protected characteristic is disproportionately low.
>
> (2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—
>
> (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
>
> (b) meeting those needs, or
>
> (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.
>
> (3) Regulations may specify action, or descriptions of action, to which subsection (2) does not apply...

52. These provisions are very similar to those in section 159 and it is to be assumed that they will be interpreted in a very similar way. Whilst this section largely examines their use in the non-employment context, it is

important to note they will be relevant in relation to aspects of employment such as training.

53. Section 158 extends the scope for positive action in all areas covered by the Act. The pre-requisites are that the body applying the measure must reasonably think one of three factors -

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

54. The width of scope permitted can be seen from the broad spectrum of permitted aims set out in section 158(2):

> (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
>
> (b) meeting those needs, or
>
> (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.

55. It is vital to remember that the measures will only be legitimate if it is a proportionate means of achieving the aims set out above. Proportionality under section 158 will be applied in the same way as it will for recruitment questions under section 159: see the discussion above. The government's Explanatory Notes in connection with proportionality under section 158 provided -

> 520. The extent to which it is proportionate to take positive action measures which may result in people not having the relevant characteristic being treated less favourably will depend, among other things, on the seriousness of the relevant disadvantage, the extremity of need or under-representation and the availability of
>
> other means of countering them. This provision will need to be interpreted in accordance with European law which limits the extent to which the kind of action it permits will be allowed.[20]

[20] See <http://www.opsi.gov.uk/acts/acts2010>.

56. The breadth of possible measures permitted under section 158 could be extremely wide, as can be seen by the disparate examples given in the Explanatory Notes to the Act -

> 525…Having identified that its white male pupils are underperforming at maths, a school could run supplementary maths classes exclusively for them.
>
> An NHS Primary Care Trust identifies that lesbians are less likely to be aware that they are at risk of cervical cancer and less likely to access health services such as national screening programmes. It is also aware that those who do not have children do not know that they are at an increased risk of breast cancer. Knowing this it could decide to establish local awareness campaigns for lesbians on the importance of cancer screening.[21]

57. A key challenge in relation to the measures provided in section 158 is how to make these provisions work. Professor de Schutter has commented that this may be difficult [22] -

> …The identification of general criteria would be all the more difficult if, as in the cases of the allocation of scholarships or social housing illustrate, social goods have to be distributed according to a combination of criteria (need, family situation and academic merit as regards scholarships, for example; need, family situation and date of application in the case of social housing), rather than according to one single metric.

58. It is certain that the reliance on an objective assessment of qualifications or (standard criteria in good and services cases) could serve only to maintain the status quo rather than challenging negative stereotypes which have aided underrepresentation in the first place.

59. In *Badeck* and the *EFTA v Norway* cases, the Court looked afresh at the life skills that had been developed outside the workplace, and revisited the supposedly neutral concept of merit. So, also in non-employment cases, criteria such as academic qualifications for scholarship applications, should be carefully examined to ensure they are not tainted by past obstacles to equal opportunities in education. A similar approach could be taken across the full range of non-employment benefits

60. Likewise when service-providers take positive action measures to redress the balance of ethnic minorities in a housing application, proximity to the

[21] *ibid*.
[22] See de Schutter, *Non-Discrimination Law* (Hart Publishing, 2007), p. 824.

proposed site might not be a neutral factor to take into account, if data demonstrates that a particular ethnic group is historically unlikely to be able to afford to live in a certain postal district.

61. A third possible example when considering positive action in the provision of public services, is one which could arise when looking at the under-representation of religious Muslim or Jewish women in their use of a local sports centre. Here, factors such as demonstrating a previous use of, or interest in the swimming pool, should not be taken into account without an appreciation of a possible antipathy to mixed swimming sessions.

62. Accordingly fixed criteria in the area of access to or provision of goods and services, may not assist in leading to substantive equality. The best advice is that even in the most commonly visited field of gender equality at work, the concept of factors such as *qualifications* will need to be 'unpacked' in order to affect more than superficial change.

Positive Action And Human Rights: Temporary Measures

63. In any case in which positive action is taken there is always a question as to how long the action can be maintained. The jurisprudence of the ECHR recognizes that positive action may be necessary but also establishes that is ought to be time limited. The ECHR permits the treatment of groups differently to ameliorate the inequalities between them.[23] This will be essentially a political assessment although there are obvious limits. It should be noted that both the ICERD and the CEDAW indicate that positive action should not be continued after the objectives for which they were taken have been achieved.

64. Accordingly in *Hooper v Secretary of State for Work and Pensions* [2005] UKHL 29 (2005) 1 WLR 1681, the House of Lords debated the question of the duration of special treatment for a particular group and said at [32] -

> Once it is accepted that older widows were historically an economically disadvantaged class which merited special treatment but were gradually becoming less disadvantaged, the question of the precise moment at which such special treatment is no longer justified becomes a social and political question within the competence of Parliament.

[23] See e.g. *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 284 para. 10 and *Willis v UK* no. 36042/97 2002.

65. Under Article 14 of the ECHR, the question of phasing out positive action measures is a key element of the concept of proportionality. Member states are given a broad margin of appreciation as to the moment when measures such are not longer justified. Yet if the aim of positive action is a move towards greater equality, the suspension of temporary measures before the action in question is operating effectively would be inappropriate, just as their suspension when real change has been effected will be necessary.

Work related exceptions

66. Part V of the Act applies to work and by section 83 Schedule 9 to the Act is applied to make provision for exceptions to the prohibitions set out in Part V. The first matter dealt with in Schedule 9 is genuine occupational requirements.

Genuine Occupational Requirements

67. Since the Sex Discrimination Act 1975 there has been some provision in equalities legislation for genuine occupational requirements. In effect in some circumstances it is recognised that it may be justifiable for some jobs that a person has a particular protected characteristic. This approach is also seen in European law and now of course that law directs what are the limits of such provisions in domestic law in the context of work for most grounds and in relation to race and gender on a wider basis.

68. An example of such a provision is Article 4 of the Race Directive which says as follows -

> **Article 4 Genuine and determining occupational requirements**
>
> … Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

69. Now Paragraph 1 of Schedule 1 says -

> **OCCUPATIONAL REQUIREMENTS**
> **General**

1(1)A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work—

(a)it is an occupational requirement,

(b)the application of the requirement is a proportionate means of achieving a legitimate aim, and

(c)the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

(2)The provisions are—

(a)section 39(1)(a) or (c) or (2)(b) or (c);

(b)section 41(1)(b);

(c)section 44(1)(a) or (c) or (2)(b) or (c);

(d)section 45(1)(a) or (c) or (2)(b) or (c);

(e)section 49(3)(a) or (c) or (6)(b) or (c);

(f)section 50(3)(a) or (c) or (6)(b) or (c);

(g)section 51(1).

(3)The references in sub-paragraph (1) to a requirement to have a protected characteristic are to be read—

(a)in the case of gender reassignment, as references to a requirement not to be a transsexual person (and section 7(3) is accordingly to be ignored);

(b)in the case of marriage and civil partnership, as references to a requirement not to be married or a civil partner (and section 8(2) is accordingly to be ignored).

(4)In the case of a requirement to be of a particular sex, sub-paragraph (1) has effect as if in paragraph (c), the words from "(or" to the end were omitted.

70. This provision largely mirrors the approach taken in earlier domestic legislation and it should not cause too many problems. There are a few points to note however.

71. Firstly paragraph 1(1)(b) makes it clear that a proportionality test will be applied to any asserted genuine occupational requirement. This is accordance with European law and is really a harmonising provision.

Secondly it is quite clear that the requirement cannot be a sham or bogus reason.

72. The explanatory memorandum gives some useful examples as to how it might apply at [789] -

Examples

The need for authenticity or realism might require someone of a particular race, sex or age for acting roles (for example, a black man to play the part of Othello) or modelling jobs.

Considerations of privacy or decency might require a public changing room or lavatory attendant to be of the same sex as those using the facilities.

An organisation for deaf people might legitimately employ a deaf person who uses British Sign Language to work as a counsellor to other deaf people whose first or preferred language is BSL.

Unemployed Muslim women might not take advantage of the services of an outreach worker to help them find employment if they were provided by a man.

A counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress.

73. The next paragraph of the Schedule relates to certain religious requirements and states -

Religious requirements relating to sex, marriage etc., sexual orientation

2(1)A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to employment a requirement to which sub-paragraph (4) applies if A shows that—

(a)the employment is for the purposes of an organised religion,

(b)the application of the requirement engages the compliance or non-conflict principle, and

(c)the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

(2)The provisions are—

(a)section 39(1)(a) or (c) or (2)(b) or (c);

(b)section 49(3)(a) or (c) or (6)(b) or (c);

(c)section 50(3)(a) or (c) or (6)(b) or (c);

(d)section 51(1).

(3)A person does not contravene section 53(1) or (2)(a) or (b) by applying in relation to a relevant qualification (within the meaning of that section) a requirement to which sub-paragraph (4) applies if the person shows that—

(a)the qualification is for the purposes of employment mentioned in sub-paragraph (1)(a), and

(b)the application of the requirement engages the compliance or non-conflict principle.

(4)This sub-paragraph applies to—

(a)a requirement to be of a particular sex;

(b)a requirement not to be a transsexual person;

(c)a requirement not to be married or a civil partner;

(d)a requirement not to be married to, or the civil partner of, a person who has a living former spouse or civil partner;

(e)a requirement relating to circumstances in which a marriage or civil partnership came to an end;

(f)a requirement related to sexual orientation.

(5)The application of a requirement engages the compliance principle if the requirement is applied so as to comply with the doctrines of the religion.

(6)The application of a requirement engages the non-conflict principle if, because of the nature or context of the employment, the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

(7)A reference to employment includes a reference to an appointment to a personal or public office.

(8)In the case of a requirement within sub-paragraph (4)(a), sub-paragraph (1) has effect as if in paragraph (c) the words from "(or" to the end were omitted.

74. This provision is built around the concept of a "compliance principle". It recognise that a religion may have doctrinal rules and that it is compliance with those rules that makes the religion what it is. This recognition seeks to address the obligation imposed on the United Kingdom under Article 9 of the European Convention on Human Rights to permit freedom of religion absolutely and to provide freedom to manifest religion subject only to necessary and defined constraints.

75. The Explanatory Memorandum describes this provision in this way at [790] – [791]-

Effect

790. This specific exception applies to employment for the purposes of an organised religion, which is intended to cover a very narrow range of employment: ministers of religion and a small number of lay posts, including those that exist to promote and represent religion. Where employment is for the purposes of an organised religion, this paragraph allows the employer to apply a requirement to be of a particular sex or not to be a transsexual person, or to make a requirement related to the employee's marriage or civil partnership status 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 meets the requirement is a proportionate way of avoiding conflict with a significant number of the religion's followers' strongly held religious convictions.

791. The requirement must be crucial to the post, and not merely one of several important factors. It also must not be a sham or pretext. Applying the requirement must be a proportionate way of meeting either of the two criteria described in paragraph 790 above.

76. Paragraph 3 continues the exemptions as they apply to religion-

Other requirements relating to religion or belief

3 A person (A) with an ethos based on religion or belief does not contravene a provision mentioned in paragraph 1(2) by applying in relation to work a requirement to be of a particular religion or belief if A shows that, having regard to that ethos and to the nature or context of the work—

(a)it is an occupational requirement,

(b)the application of the requirement is a proportionate means of achieving a legitimate aim, and

(c)the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

77. This provision replicates previous provisions and the Explanatory Memorandum says at [794] – [795] -

> **Other requirements relating to religion or belief: paragraph 3**
>
> *Effect*
> 794. This paragraph 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 requirement for the work (this requirement must not be a sham or pretext); and
> applying the requirement is proportionate so as to achieve a legitimate aim.
>
> 795. It is for an employer to show that it has an ethos based on religion or belief by reference to such evidence as the organisation's founding constitution.

78. Paragraph 4 of the Schedule makes provision for combat effectiveness to a justified condition for discrimination in relation to work in the armed forces. While this provision is consistent with European law in principle it is worth commenting that in both Iraq and Afghanistan women have played a forward role in the armed forces and it is not obvious that the old exclusions of them could be maintained. The provision also raises interesting questions as to whether it could be applied in the context of a transsexual in the armed forces. Being disabled may be more relevant for this provision.

More general exceptions

79. The Act makes provision for more general exceptions which are to be found in Part 14. These exceptions apply to national security issues, charities, sport and age matters. The Part also refers to various schedules.

80. National security is dealt with summarily in section 192 which says -

> A person does not contravene this Act only by doing, for the purpose of safeguarding national security, anything it is proportionate to do for that purpose.

81. The provisions dealing with charities are in section 193 – 194. They state -

> 193 Charities
> (1)A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic if—

(a)the person acts in pursuance of a charitable instrument, and

(b)the provision of the benefits is within subsection (2).

(2)The provision of benefits is within this subsection if it is—

(a)a proportionate means of achieving a legitimate aim, or

(b)for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.

(3)It is not a contravention of this Act for—

(a)a person who provides supported employment to treat persons who have the same disability or a disability of a prescribed description more favourably than those who do not have that disability or a disability of such a description in providing such employment;

(b)a Minister of the Crown to agree to arrangements for the provision of supported employment which will, or may, have that effect.

(4)If a charitable instrument enables the provision of benefits to persons of a class defined by reference to colour, it has effect for all purposes as if it enabled the provision of such benefits—

(a)to persons of the class which results if the reference to colour is ignored, or

(b)if the original class is defined by reference only to colour, to persons generally.

(5)It is not a contravention of this Act for a charity to require members, or persons wishing to become members, to make a statement which asserts or implies membership or acceptance of a religion or belief; and for this purpose restricting the access by members to a benefit, facility or service to those who make such a statement is to be treated as imposing such a requirement.

(6)Subsection (5) applies only if—

(a)the charity, or an organisation of which it is part, first imposed such a requirement before 18 May 2005, and

(b)the charity or organisation has not ceased since that date to impose such a requirement.

(7)It is not a contravention of section 29 for a person, in relation to an activity which is carried on for the purpose of promoting or supporting a charity, to restrict participation in the activity to persons of one sex.

(8)A charity regulator does not contravene this Act only by exercising a function in relation to a charity in a manner which the regulator thinks is

expedient in the interests of the charity, having regard to the charitable instrument.

(9)Subsection (1) does not apply to a contravention of—

(a)section 39;

(b)section 40;

(c)section 41;

(d)section 55, so far as relating to the provision of vocational training.

(10) Subsection (9) does not apply in relation to disability.

194 Charities: supplementary
(1)This section applies for the purposes of section 193.

(2)That section does not apply to race, so far as relating to colour.

(3)"Charity"—

(a)in relation to England and Wales, has the meaning given by section 1(1) of the Charities Act 2006;

(b)in relation to Scotland, means a body entered in the Scottish Charity Register.

(4)"Charitable instrument" means an instrument establishing or governing a charity (including an instrument made or having effect before the commencement of this section).

(5) The charity regulators are—

(a)the Charity Commission for England and Wales;

(b)the Scottish Charity Regulator.

(6) Section 107(5) applies to references in subsection (5) of section 193 to members, or persons wishing to become members, of a charity.

(7)"Supported employment" means facilities provided, or in respect of which payments are made, under section 15 of the Disabled Persons (Employment) Act 1944.

82. The provision is largely self – explanatory. However it is worth noting what the Explanatory Memorandum says -

Effect
608. This section allows charities to provide benefits only to people who share the same protected characteristic (for example sex, sexual orientation or disability), if this is in line with their charitable instrument and if it is objectively justified or to prevent or compensate for disadvantage. It remains unlawful for them to limit their beneficiaries by

reference to their colour – and if they do their charitable instrument will be applied as if that limitation did not exist.

609. Charities must not restrict benefits consisting of employment, contract work or vocational training to people who share a protected characteristic, except that the section does allow people to provide, and the Government to agree, arrangements for supported employment only for people with the same disability, or disabilities of a description to be set out in regulations.

610. The section also allows certain charities to make acceptance of a religion or belief a condition of membership, and to refuse members access to benefits if they do not accept a religion or belief where membership itself is not subject to such a condition, if they have done so since before 18 May 2005. It also allows single-sex activities for the purpose of promoting or supporting a charity (such as women-only fun-runs), and allows the charity regulators to exercise their functions in a charity's interests, taking account of what is said in its charitable instrument, without contravening the Act.

83. It gives various examples in [611] -

Examples

It is lawful for the Women's Institute to provide educational opportunities only to women.

It is lawful for the RNIB to employ, or provide special facilities for, visually impaired people in preference to other disabled people.

A charitable instrument enabling the provision of benefits to black members of a community actually enables the benefits to be provided to all members of that community.

It is lawful for the Scout Association to require children joining the Scouts to promise to do their best to do their duty to God.

Race for Life, a women-only event which raises money for Cancer Research UK, is lawful.

84. It is not necessary to set out the provisions in relation to sport since they will be largely uncontroversial. They are described in the Explanatory Memorandum in this way at [614] - [615] -

Section 195: Sport

Effect

614. This section allows separate sporting competitions to continue to be organised for men and women where physical strength, stamina or physique are major factors in determining success or failure, and in which one sex is generally at a disadvantage in comparison with the other. It also

makes it lawful to restrict participation of transsexual people in such competitions if this is necessary to uphold fair or safe competition, but not otherwise.

615. In addition, this section allows the existing selection arrangements of national sports teams, regional or local clubs or related associations to continue. It also protects "closed" competitions where participation is limited to people who meet a requirement relating to nationality, place of birth or residence.

85. The exceptions in relation to age are concerned principally with provisions which there is no present intention to bring into force – outlawing discrimination on grounds of age in relation to the provision of goods facilities and services.

86. Schedule 22 to the Act provides for the situations in which statutory provisions will trump the requirements of the Act. The Explanatory Memorandum says at [976] and ff. -

Statutory authority: paragraph 1
Effect
976. Paragraph 1 of this Schedule provides exceptions from several Parts of the Act, in relation to the protected characteristics of age, disability, religion or belief, sex and sexual orientation, for things done in accordance with what is, or may in future be, required because of some other law.

Background
977. Paragraph 1 replaces the separate exceptions for statutory authority in previous legislation. However, the exception in section 41(1) of the Race Relations Act 1976, which excused certain race discrimination done under statutory authority in areas with which European law is not concerned, has been removed but not replaced.

Examples
An employer can lawfully dismiss a disabled employee if health and safety regulations leave him with no other choice.
An employer can lawfully refuse to employ someone to drive a large goods vehicle who is not old enough to hold a LGV licence.

Protection of women: paragraph 2
Effect
978. This paragraph allows differential treatment based on sex or pregnancy and maternity at work which is required to comply with laws

protecting women who are pregnant, who have recently given birth or against risks specific to women.

Background

979. The paragraph replaces separate exceptions for the protection of women in the Sex Discrimination Act 1975 and in the Employment Act 1989.

Examples

A care home cannot lawfully dismiss, but can lawfully suspend, a night-shift worker because she is pregnant and her GP has certified that she must not work nights.

It may be lawful for a road haulier to refuse to allow a woman lorry driver to transport chemicals that could harm women of child-bearing age.

Educational appointments, etc: religious belief: paragraphs 3 and 4
Effect

980. Paragraph 3 provides an exception from the provisions on sex or religious discrimination for certain posts in schools or institutions of further or higher education where their governing instrument requires the head teacher or principal to be of a particular religious order, or that a particular academic position must be held by a woman, or where the legislation or instrument which establishes a professorship requires the holder to be an ordained priest. In the case of academic positions reserved to women, the exception only applies where the governing instrument was made before 16 January 1990.

981. There is an order-making power conferred on a Minister of the Crown to withdraw the exception either in relation to a particular institution or a class of institutions.

982. Paragraph 4 provides that it is not unlawful discrimination for schools which have a religious character or ethos (often referred to as faith schools) to do certain things which are permitted by the School Standards and Framework Act 1998. This includes:

allowing teachers who have been appointed to give religious education to be dismissed if they fail to give it competently;

allowing a faith school to take account of religious considerations when appointing a head teacher; and

allowing a voluntary aided school or an independent school to take

account of religious considerations in employment matters.

Background
983. Paragraph 3 is designed to replicate the effect of provisions in section 5 of the Employment Act 1989.

984. Universities restrict Canon Professorships to certain religions since such posts can only be held by ordained Ministers.

985. Paragraph 4 is designed to replicate the effect of regulation 39 of the Employment Equality (Religion or Belief) Regulations 2003.

Examples
Voluntary controlled and foundation schools with a religious ethos may appoint a head teacher on the basis of his ability and fitness to preserve and develop the religious character of the school.
Voluntary aided schools with a religious ethos can restrict employment of teachers to applicants who share the same faith. For example most Catholic schools may require that applicants to teaching positions be of the Catholic faith.

87. Paragraph 5 deals with cases where nationality discrimination is permissible for the purposes of Crown Employment.

88. Schedule 23 makes provision for further exceptions as a result of acts of Parliament or certain administrative decisions. The most notable of these relate again to religion. The Explanatory Memorandum states at [990] and ff. -

Organisations relating to religion or belief: paragraph 2

Effect

990. Paragraph 2 provides an exception for religious or belief organisations with regard to the provisions in the Act relating to services and public functions, premises and associations.

991. The types of organisation 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;
- promote good relations between people of different religions or beliefs.

Organisations whose main purpose is commercial cannot use this exception.

992. The exception allows an organisation (or a person acting on its behalf) to impose restrictions on membership of the organisation; participation in its activities; the use of any goods, facilities or services that it provides; and the use of its premises. However, any restriction can only be imposed by reference to a person's religion or belief or sexual orientation.

993. 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 whom the organisation represents.

994. 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. However, if an organisation contracts with a public body to carry out an activity on that body's behalf then it cannot discriminate because of sexual orientation in relation to that activity.

995. The exception also enables ministers of religion to restrict participation in the activities that they carry out in the performance of their functions as a minister and access to any goods, facilities or services they provide in the course of performing those functions.

Background

996. This paragraph replicates the effect of similar provisions in Part 2 of the Equality Act 2006 and the Equality Act (Sexual Orientation) Regulations 2007.

Examples

A Catholic seminary can restrict places for students to those of the Catholic faith. This would not be unlawful religion or belief discrimination.

A Church refuses to let out its hall for a Gay Pride celebration as it considers that it would conflict with the strongly held religious convictions of a significant number of its followers. This would not be unlawful sexual orientation discrimination.

A religious organisation which has a contract with a local authority to provide meals to elderly and other vulnerable people within the

community on behalf of the local authority cannot discriminate because of sexual orientation.

89. Other provision is made for communal accommodation, and training provided to non-EEA residents.

Robin Allen QC

Cloisters

10th September 2010