

***Discrimination Law Review: A Framework for
Fairness:
Proposals for a Single Equality Bill for Great Britain***

**Response to the Consultation from the
Department for Christian Responsibility & Citizenship
Catholic Bishops' Conference of England & Wales**

We welcome the opportunity to respond to the government's proposals for a *Single Equality Act for Great Britain*.

1. Introduction

In general terms we support the government in its intention to consolidate, and simplify legislation on equality across the areas of *race, sex, disability, religion or belief, sexual orientation and age*. The Church opposes unjust discrimination and fully supports effective efforts to remove it.

We would, however, urge caution in the way in which those intentions are brought into effect. In the area of discrimination there has already been major and recent legislation, for example the Sexual Orientation Regulations and Gender Equality Duty. The Gender Equality Duty has placed requirements upon public authorities which they are currently implementing and the ramifications have yet to be assessed. There is also a danger in an overuse of legislation and over regulation particularly in areas where there is no significant evidence that discrimination exists.

We are also concerned that any further regulation will place additional burdens upon public authorities and business. Whilst the consultation paper does comment about the wish to differentiate between larger public authorities and smaller concerns, such as the not-for-profit sector including charities and schools, we are concerned to ensure that should any further legislation ensue it will not place untenable burdens upon the already overstretched resources of the voluntary sector. We are mindful of the fact that much of the work within that sector is often provided on a voluntary basis by individuals who are not remunerated for that work and recruited without any reasonable expectation of any employment law or human resource background. We would in particular highlight the role of school governors. The valuable work carried out by them is already subject to extensive regulation and we would suggest that further regulation is unnecessary and not proportional in terms of need.

The existing legislation is complex. Whilst the Government's intention to simplify the law should be welcomed that simplification will need to be carefully scrutinised to ensure that the existing protection within the law is at least maintained if not strengthened, in particular the protections in existing legislation pertaining to religious institutions, the right to religious freedom and the right to manifest religious belief. The discrimination law as it impacts upon

the Education legislation must also be borne in mind and any legislation that results from this overview should ensure that the protections for faith schools are retained.

2. The Vision - a culture of *fairness, participation and mutual respect*

The Catholic Church teaches in common with other Christian churches and other religions, the intrinsic dignity and equality of all human beings. “All human beings are endowed with a rational soul and are created in God’s image; they have the same nature and origin and, being redeemed by Christ, they enjoy the same divine calling and destiny...forms of social or cultural discrimination in basic personal rights on the grounds of sex, race, colour, social conditions, language or religion, must be curbed and eradicated as incompatible with God’s design.” (Gaudium et Spes, 29)

The Church supports a culture of fairness, participation and mutual respect. However, it needs also to be noted that the legal basis of these new laws covering the six strands brings together both intrinsic attributes (such as a person’s sex, age, race or disability) and also others which at least in part are a matter of individual lifestyle choice (in civil law, ‘sexual orientation’ has been held to include behaviour or lifestyle^[1]). From a moral point of view these do not give rise to equivalent rights.

The Human Rights Act 1998 sets out clearly the basic rights and freedoms of our society including the rights to privacy and to practice one’s religion. If we wish to counter prejudice and prohibit unjust discrimination, as well as safeguarding the rights of privacy, free expression and religious practice, the new law will have to find the right balance between these sometimes conflicting rights. Each of the six strands, which the new law will attempt to bring together, has unique characteristics. A rigid consistency is inappropriate, and some *exceptions* will continue to be appropriate, if the law is to be *fair and equitable for all*.

3. Promoting compliance with the law (1.1 – 1.8)

We agree that the simplification and harmonisation of equality legislation will promote compliance, making it easier for people in all sectors of society to understand their rights and responsibilities. We do however have concerns that additional legislation may have the effect of diverting organisations, particularly the not-for-profit sector including charities and schools from their core work.

The aim which we all share – the creation of a culture of *fairness, participation and mutual respect* – will best be achieved by legislation which works together with other measures and which will be most effective if it commands a

^[1] See R (Amicus) v. Secretary of State for Trade and Industry [2004] [England and Wales High Court 860 Queens Bench Division (Administrative Court)], para.29 & 119

consensus of support from all sectors of society. We are moving in the direction of such a consensus, but it has not yet been achieved – especially in relation to the rights and obligations of religious groups in our society.

Once the law is passed, compliance will depend partly on the availability of reliable guidance and advice. Faith communities are not well understood, and much work will need to be done to ensure the quality of advice that will be available regarding *religion and belief*.

Finally, it will undermine compliance as well as good relations if we drift towards a culture of litigation. We, therefore, welcome the emphasis in the Consultation Paper in finding effective ways to promote the early resolution of disputes.

Definitions and Tests – Direct Discrimination (1.9 – 1.16)

We would agree that the current requirement for a comparator should be retained. Removal of the requirement to show “less favourable treatment” thus allowing people to bring claims on the basis simply that they have been treated badly is the wrong approach as it is far too subjective. We would suggest that the very nature of discrimination is that there has been a significant difference in treatment.

Perception and Association- (1.19 – 1.25)

We would agree with the cautious approach in extending protection on the basis of perception and association. As stated any extension of existing legislation should be proportionate.

Extending protection against indirect discrimination (1.33 – 1.35)

In accordance with the current legislation a refusal to comply with a request from a transsexual person to alter religious records to reflect their acquired gender would not be unlawful on the basis that amendment to the registers are not permissible and therefore there is no direct discrimination. It is possible that an extension of the protection to indirect discrimination may lead to claims that a transsexual person is placed at a disadvantage by such refusal. Appropriate exceptions would, therefore be required to cover registers kept by religious organisations and ministers of religion. The wording of the exception would need to address a number of concerns, including:

- Keeping and examining of baptismal and confirmation registers and issuing baptismal and confirmation certificates in a variety of situations,
- Permissions to marry, marriage papers, agreement to perform marriages and the while process of annulment,
- Approval for ordination, examining the validity of an ordination, suspending a person from exercising orders or returning a person to the lay state,
- Entry into and dismissal from religious life,
- Other appointments where evidence of Catholic practice is appropriate.

A Single Objective justification test (1.50 – 1.53)

Whilst the logic of a single objective justification test can be seen care must be taken as to how this would work. We would in particular urge caution in

relation to education. Under current legislation schools are not required to alter any physical feature or provide auxiliary aids and services, for example extra equipment or staff. Aids and auxiliary services should be considered within the SEN framework. Under the reasonable adjustment duty schools are not required to remove or alter physical features. Whilst this does not mean that a school should do nothing where there is a physical barrier, and there is a positive duty to make reasonable adjustments to ensure that a disabled pupil is not at a substantial disadvantage, the improvement of the physical environment of schools in order to increase access for disabled pupils is covered by the duties of schools and local authorities to draw up accessibility plans and strategies. In most cases schools would be dependent upon Government funding to carry out necessary works to provide facilities for disabled pupils.

A genuine occupational requirement test for all grounds (1.70)

In general terms we would have no difficulty in accepting the introduction of a genuine occupational requirement test for all the grounds of discrimination provided that any such provisions are clear in retaining the current specific exemptions available in relation to organised religion and for schools with a religious character. Any provisions would need to be carefully scrutinised to ensure that the appropriate safeguards in existing legislation were at least retained if not strengthened.

Genuine service requirement test (1.71 – 1.76)

We would support the introduction of a genuine service requirement test for the provision of goods, facilities or services as a way of ensuring that services can be provided to people of a particular sex where there is a genuine requirement for such service to be provided and with the appropriate exemptions where goods, facilities or services are provided by religious organisations.

Specific exemptions (1.77 – 1.81)

We would agree in broad terms that a unified approach would appear sensible. Again we would apply the caveat that in doing so it will be necessary to ensure that all existing legislative protections are retained. It would also be necessary to give careful consideration as to whether different grounds require the same list of exemptions. In listing the exemptions by reference to specific provisions there may be a risk that some are inadvertently omitted.

The specific exemptions will need to be carefully considered. Whilst we would agree in general with retaining the specific exemptions listed in Table 1 of Annex A we also wish to include Regulation 10(5) of the Employment Equality (Sexual Orientation) Regulations 2003 which applies the exception contained in Regulation 7 in relation to employees of religious organisations to office holders.

4. Harmonising the law

We would agree that it appears sensible to adopt a harmonised approach to the way goods, facilities and services and public functions provisions are

structured across the protected grounds, subject to the exceptions relating to the specific grounds in accordance with Government intention.

Goods, facilities and services, and public functions -Streamlining exceptions (2.12)

As with previous comments any streamlining would need to be carefully approached to ensure that appropriate exceptions are retained in respect of all functions and services.

5. Equal Pay (3.1 – 3.22)

We agree that the distinction between contractual and non-contractual approaches should be retained as to adopt a different approach would place an excessive and unfair burden upon employers for the reasons stated.

Equal Pay – Clarifying and simplifying the law (3.21 – 3.24)

Certainly guidance on the settled legal principles would be helpful. The existing legal position can be confusing, particularly as it relates to comparators. There are increasing areas where there are employees employed by different employers in the same establishment carrying out the same or similar work and this will be particularly true bearing in mind the current proposals for provision of ICT under BSF projects.

Equal Pay – Hypothetical comparators (3.25 – 3.29)

We feel strongly that hypothetical comparators should not be allowed as the use may lead to uncertainty and an increase in litigation without any perceived benefit.

5. Balancing measures (positive action) and meeting particular needs (4.1 – 4.58)

We agree with the Consultation Paper that any new law should not allow *positive discrimination* (eg mandatory quotas of ethnic minorities, women, etc). The experience of the United States in this area is complex; but it suggests that *affirmative action*, when it extends to *positive discrimination*, can become counter-productive. Our own law has moved close to this in the area of *disability* (and we are not suggesting that this should be reversed), but on the whole we consider *positive discrimination* to be a step too far.

At the same time, we agree that the law should allow for balancing measures in certain areas (*positive action*) to address disadvantage and under-representation. Key public institutions such as the police, the civil service and parliament should be representative of the communities they serve or represent. It is important that any proposals in this regard do not place compliance burdens upon the not-for-profit sector that are out of proportion, particularly where there is no evidence that there is a particular need.

Within the churches and faith communities there exists a number of charities and other voluntary organisations that support women, ethnic minorities, people with disabilities and young people. A few examples of Catholic organisations which support groups protected under equalities legislation are:

- Catholic Association for Racial Justice (CARJ)
- Ethnic Chaplaincies (eg Nigerian or Caribbean Chaplaincy)
- Catholic Youth Services (CES)
- Diocesan Deaf and Blind Services
- National Board of Catholic Women

Current equality legislation allows for such organisations to operate relatively freely. It is important that they should have at least a similar freedom under a single equalities act.

Clear guidance in relation to positive action would be welcomed to avoid situations where the “positive action” may become unlawful positive discrimination. We would agree that a role of approving positive action programmes by the CEHR may not be appropriate but an advisory service would be helpful.

6. Promoting equality and good relations – the public sector duty (5.1 – 5.100)

The Macpherson Report, the *Race Relations Amendment Act (2000)* and the introduction of a public sector duty in the area of *race*, represented a watershed in society’s attempt to address institutional racism. Since then, somewhat different forms of the public sector duty have been extended to the areas of gender and disability.

The obligation placed on public bodies to promote equality and good relations in these three areas has been a positive development.

The case for a single public sector equality duty (5.21 – 5.24)

Whilst it might seem sensible to replace the existing race, disability and gender equality duties with a single duty on public authorities for the reasons set out in the consultation paper, each of the separate duties does have different features and the reasons for those differences needs to be considered to ensure that if differences need to be retained then they are. We would also stress the importance of the provision of very clear and accessible guidance to ensure that the requirements of any new legislation can be easily understood.

Consistency might suggest that the public sector duty should be extended; but there are difficulties in extending the public sector duty in particular to the areas of *religion and belief and sexual orientation* which are set out below

The Consultation Paper raises important questions as to the **form** that a single public sector duty might take. There are strengths in each of the existing duties (race, gender and disability) and a single public sector duty should, as far as possible be specific, strategic, include the most disadvantaged (eg Travellers) and involve protected groups in the formulation and implementation of the policy.

The proposed statement of purpose for a public sector duty in the Consultation Paper (5.29) needs careful examination. At present it is stated that a public sector duty should require public authorities to:

- address disadvantage;
- promote respect for the equal worth of different groups and foster good relations;
- meet different needs while promoting shared values; and
- promote equal participation.

The suggested wording of the proposed duty – *to promote respect for the equal worth of different groups* - could be problematic. We welcome the government's assurance that such a duty would not require a public authority to 'promote homosexuality'; but might it require a public authority to treat and promote civil partnerships as equivalent to marriage?

Purpose of a single equality duty (5.28 – 5.30)

We would refer in particular to the four areas set out in paragraph 5.29 and the impact of those areas particularly as they relate to organisations with a religious ethos. We are concerned in particular with the reference to "promoting respect for the equal worth of different groups..." and "promoting equal participation". We would in particular highlight the position in relation to schools with a religious character. By their very nature and trusts their purpose is to promote the religion of the organisation. Specific exemptions in current legislation allow this distinction in employment and provisions relating to the delivery of teaching and the curriculum. In particular the recent "Guidance on New Measures to Outlaw Discrimination on Grounds of Sexual Orientation in the Provision of Goods and Services" makes reference to "Teaching and the Curriculum" and "Conflict with Religious Freedom." The guidance makes it clear that the protection allowing voluntary aided schools to continue to teach in accordance with the tenets of their faith is maintained, and this must be evidenced in any new legislation and its accompanying guidance.

A single public sector duty to promote *equality* would, therefore, have to be fashioned with great care. It must promote greater equality without demanding the unrealistic. It must encourage an inclusive public space, where people of different beliefs and practices can participate fully, sharing some values while disagreeing about others. Finally, it must allow bodies like faith schools and religious charities and voluntary associations to operate in a way that is consistent with their ethos, alongside other similar bodies with a different ethos.

A Proportionate Duty (5.34 – 5.35)

It is important to have regard to the effect that the imposition of a general duty will have upon the wide range of public authorities. We would agree wholeheartedly with the comments in paragraph 5.35 that what is proportionate for a small public authority such as a school will differ hugely from what is proportionate for a large public authority such as a government department. Any legislation must address this distinction to ensure that expectations from the various authorities are clear.

Which public authorities should the duty apply to (5.47 – 5.56)

We would strongly urge that the proposed public sector equality duty should not apply to all public authorities. Any such duty we believe should be restricted to large public authorities with government functions rather than to voluntary and charitable bodies. Again we would particularly refer as an example to voluntary aided schools. Schools already have policies in place to address these issues in relation to areas such as anti bullying. Schools also have a general responsibility in legislation to care for the health and welfare of their pupils. We would question the need to place yet further burdens upon the already overstretched resources of governing bodies when the need may not be there. There is a danger in applying the requirements across the board without taking need into account proportionality and the impact upon voluntary and charitable organisations operating with public funds.

Extending the coverage of the duty (5.57 – 5.72)

We agree that the same level of protection would not be required for all areas of discrimination. Priorities would depend upon the particular circumstances of the particular authority and the identified need.

It is only recently that the public sector duty has been extended to cover disability and gender. There has not been sufficient time to establish the implications and effectiveness of the implementation of these measures.

We are concerned about the possible impact that an extension of a single equality duty may have particularly in relation to sexual orientation and religion or belief. Should public authorities be subject to a general duty of this nature this may conflict with the exemptions currently set out in legislation in relation to religious organisations, in particular schools.

In the field of sexual orientation we have already referred to recent guidance and the confirmation that faith schools can continue to teach in accordance with the tenets of their faith. The existing exemptions in relation to both sexual orientation and religion or belief must be preserved and there must be no danger that any general public sector equality duty would override the specific exemptions. Care must be taken to guard against any unintended impact so that any single equality duty would not upset the existing equality legislation in all areas including employment.

For these reasons there are clear disadvantages in extending the duty further and we would therefore not support any further extension.

7. The Grounds of Discrimination (8.1 – 8.31)

Updating the definition of disability to remove the list of capacities (8.3 – 8.6)

We would agree to consideration of removing the list of “capacities” from the definition of disability. Clear guidance would be required as to how normal day-to-day activities would be measured. This would be particularly relevant in the field of education where behavioural difficulties may or may not be covered depending on, in accordance with the DDA 1995 Code of Practice whether behavioural difficulties arise for a reason other than a disability (e.g. social or domestic circumstances).

Married persons and civil partners

We favour retention of the protection for married persons and civil partners. Whilst the “marriage bar” in employment no longer exists there is no reason to specifically remove this protection as it would clearly be wrong to discriminate on this ground. There should be protection for couples who are married and work together save in circumstances where an employer can show a genuine business need.

Genetic predisposition (8.23 – 8.31)

For the reasons set out in the consultation paper we would agree that there is no present need for extending legislative protection to cover genetic predisposition.

8. Gender reassignment (10.1 – 10.15)

We support the government’s intention to protect transsexual people from unjust discrimination and to enable them to access essential services and to play a full role in society. However, this is an area where the beliefs of protected groups differ and their rights conflict.

Many Christians believe, on strongly held religious grounds, that gender is given before birth and cannot be changed. There are a number of areas of Catholic life and teaching where gender reassignment would be an issue. In many situations the disclosure of a person’s gender history would be necessary or unavoidable, and often a transsexual person would not be accepted in their acquired gender. For instance:

- baptismal records (which can be annotated but not changed) make disclosure unavoidable when one seeks approval for marriage, ordination or entry to a religious order;
- a transsexual person would not be able to marry in a Catholic church or be ordained to the Catholic priesthood in their acquired gender;

- many religious orders are specifically for men or women, and the process of approval for entry into a religious order is lengthy and complex – it would, at the very least, involve disclosure; and it is likely that a transsexual person would not be accepted into a religious order in their acquired gender;
- the formal processes of annulment of marriages, returning an ordained person to the lay state and dispensation from religious vows would all involve disclosure.

These issues were carefully discussed in the consultations for the *Gender Recognition Act 2004* and the *Gender Recognition (Exceptions to the Offence of Disclosure) Order 2005* and exceptions for organised religion are contained in existing legislation. Such exceptions need to be retained.

Schools (10.12)

We would agree that discrimination on grounds of gender reassignment should not be extended to education in schools for the reasons specified in the consultation paper. We agree that such legislation is unnecessary, and would not be proportionate or appropriate.

Organised religions (10.13 – 10.14)

We note that whilst it is the intention that the Gender directive will not extend to goods, facilities or services of the type provided at places for the purpose of organised religions, which is welcomed, we are concerned as to how the Single Equality Act may affect this.

The Catholic Church acknowledges the right of transsexual people to their private and family lives. It also recognises that they are fully entitled to help and support from the Christian community and from society at large.

From the perspective of Catholic teaching, marriage can only be between a man and a woman. In the present state of uncertain knowledge in which there is no clear biological basis for saying otherwise, the gender of a transsexual person is that which they have when they are born, and gender reassignment surgery must therefore be seen as morally questionable. There is no convincing evidence that a gender can really be changed or acquired, much less chosen. Furthermore, the Catholic Church would hold on theological grounds that gender is given before birth and cannot be changed.

We would certainly agree that the Single Equality Act should strike a balance between the rights of transsexual people and freedom of religious expression. How that balance is achieved must be carefully scrutinised. This need to strike a balance has been recognised in existing legislation concerned with gender reassignment and the exemptions included for organised religions. Those existing protections should be safeguarded to ensure that there would be no suggestion that, for example, a minister of religion would be required to solemnize the marriage of a person who had undergone gender reassignment which would be contrary to the tenets of their faith.

9. Pregnancy and Maternity (11.1 – 11.9)

Whilst we would support the intention to make less favourable treatment of a woman on the grounds of pregnancy and maternity unlawful we would agree that it is not appropriate to extend that protection to school pupils and education in schools. As the consultation paper has highlighted the needs of individual pupils will vary and schools need the flexibility to consider pupils on a case by case basis to ensure that the support and education provided to each pupil is appropriate.

10. Private Clubs and associations (12.1 – 12.14)

Any legislation in this area must be carefully considered to ensure that the protection for religious organisations is sufficiently addressed.

11. Harassment (14.1 – 14.31)

We welcome the government's intention to promote a culture of mutual respect, to promote good relations and to protect people from harassment, especially at work.

Some religious groups are particularly vulnerable to prejudice, discrimination, hate crime and harassment. These tend to be groups which are either themselves ethnic minorities (Jews and Sikhs) or which (in the UK) are substantially made up of ethnic minorities (Muslims and Hindus). It is sometimes difficult to disentangle whether the prejudice, discrimination, hate and harassment they suffer is on the grounds of race or religion, but Muslim communities are particularly vulnerable, as they are often targets; and they are not covered by legislation against racial harassment.

Alongside the deeper antipathy experienced especially by Muslim communities, there is also a not uncommon prejudice against religion more generally (especially against the mainstream Christian churches). It can be very divisive, and could undermine attempts to establish a context of mutual respect.

The problem, in attempting to give greater protection to the most vulnerable groups, is that legislation against harassment may too readily conflict with other basic rights. It will be difficult for anyone to be clear where harassment ends and where legitimate free expression or the legitimate practice of religion begins. In the end, the law could become counter-productive, with increased litigation and a worsening of relations.

We would agree with the comment in paragraph 14.27 of the consultation that "...it is not our intention to protect people against merely being offended by the expression or manifestation of differences in beliefs." Presumably it also follows from this comment that there is no suggestion that the public expression of belief, including Christian teaching regarding homosexual behaviour, could of itself be interpreted as harassment.

On balance, if legislation against harassment is to be extended beyond the workplace to areas of *religion and belief and sexual orientation*, great care must be taken to protect the rights of free expression and the free practice of religion.

12. Exceptions (Annex A)

A strong law is not to be equated with a rigid law. Some argue that exceptions to the law should be minimised – that each exception is a derogation from the principle of non-discrimination. We disagree.

We have argued throughout that the law must be *fair for all* and able to cope with the complexities of conflicting rights. Law is always a somewhat blunt instrument, and exceptions in equalities legislation acknowledge particular circumstances where there is a conflict between competing rights.

We broadly agree with the proposals in the Consultation Paper concerning the exceptions that should be retained and those that should be removed.

We would argue, however, that further exceptions should be considered (in relation to the provision of goods, facilities and services) in order to give religious communities the freedom to practice their religion and to participate fully and make their positive contribution to the life of our society.

Government has acknowledged the contribution that religious communities can and do make in a variety of areas, and they have encouraged these communities to participate more fully. However, they cannot be expected to put aside their fundamental beliefs when doing so.

The public debate over Catholic adoption societies is an example of the problems that religious communities sometimes face in offering specific types of services to the general public. Where basic religious teaching is relevant to the service being offered (eg marriage, family and reproduction) there must be some scope in the law for religious communities to make a contribution without sacrificing their integrity. This very specific debate about adoption highlights an area of principle and practice that needs to be further clarified and where further exceptions may be appropriate.

13. Conclusion

We welcome this consultation and hope that the above comments are helpful. However to build on the consensus already achieved in many areas, it is important that there be a further substantial consultation once the draft Bill is published.

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