



**MURRAY STABLE
and
LEGAL SERVICES AGENCY**

**SEMINAR ON EDUCATION LAW
DISCRIMINATION AND EDUCATION LAW
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1 Introduction

- 1.1 Discrimination law is rather complex. It has developed bit by bit over the last 44 years becoming increasingly tangled and detailed as the years have passed, especially with the advent of EU legislation and human rights law. There are now nine major pieces of discrimination legislation, around 100 statutory instruments and over 2,500 pages of statutory guidance and codes of practice, to say nothing of the European aspects.
- 1.2 The legislation affecting education includes the Sex Discrimination Act 1975 (SDA), the Race Relations Act 1976 (RRA), the Disability Discrimination Act 1995 (DDA), the Equality Act 2006 (EA) and the Equality Act (Sexual Orientation) Regulations 2007 (SOR).
- 1.3 The legislation imposes a large number of duties on education authorities and others providing education. They include various duties on public authorities to positively promote equality¹, to develop

¹ See RRA section 71(1), SDA section 76A; DDA section 49A, EA section 84

strategies to improve access to education for those with disabilities². It also provides for detailed rights for those in education³ and various means of enforcement of those rights⁴.

- 1.4 Despite, or perhaps because of, the breath and detail of the statutory provisions, there is a paucity of Scottish cases involving education and claims of discrimination. A search of the Scottish Courts website reveals less than 40 cases concerned with education at all. Of these, a number are reparation actions and other cases only tangentially related to education. I have found just three cases on the site concerning both education and discrimination being *Mackay-Ludgate v Lord Advocate*, a decision of Lord Philip, 21 December 2001; *Parent A v East Ayrshire Council*, Sheriff Ireland 21 September 2006 (reported as 2006 FamLR 112) and the only appellant decision being that of (Temporary) Sheriff Principal Colin McKay, in *ES as parent and legal representative of LS v K School*, 8 May 2009. In addition, there is the unreported decision (not available on the Scottish Courts Website) of Sheriff Totten in *Taylor v Glasgow City Council*, 16 November 2006 concerning the provision of a pupil support assistant and whether provision of that assistant was covered by DDA. There is also the reported case of *Dove v Scottish Ministers* 2002 SLT 640 and 1296 concerning a challenge on human rights grounds (including article 14) to a decision to end the grant aided status of a primary school in Dunblane.
- 1.5 Of course, there may well be other cases which are not reported anywhere. And there may well be cases that have commenced but have been settled. Nonetheless, the almost complete absence of Scottish cases in the education and disability field is perhaps surprising especially

² Education (Disability Strategies and Pupil's Educational Records) (Scotland) Act 2002, s. 1

³ Such as the right not to be discriminated against in education on the grounds of one's disability: DDA section 28B

⁴ Enforcement is dealt with in more detail below.

when one considers the vast amount of caselaw in the employment field, both north and south of the border. It may be that lack of access to specialist help and resources is at least in part responsible. Perhaps the enforcement mechanisms play a part. The very complexity of discrimination law may play a part together with a lack of readily available authoritative legal guidance and analysis in this area. Of course, it may be that the almost total absence of litigation in this field reflects near universal good practice among education authorities and others providing education.

- 1.6 It would be quite beyond the scope of this paper in the limited time that we have available today for me even to give a general overview of the law in relation to education and discrimination. Instead, I will seek to comment on just three areas. First, the terms of the Equality Act 2006, one of the most recent pieces of new equality legislation affecting education. Second, a look at enforcement. Finally, a look at the future in the shape of the Equality Bill.

2 **Equality Act 2006**

- 2.1 This Act established the Commission for Equality and Human Rights, which promptly changed its title for working purposes to the Equality and Human Rights Commission. It replaced the former equalities commissions being the CRE, EOC and DRC and, as the name suggests, expanded its remit to cover other equality 'strands' and human rights, *including* those defined by the HRA 1998. Its powers and duties are now greater than its predecessors: see Part 1 of the Act. The Commission is now taking a more active role in intervention and investigations than its predecessors. It has the power also to fund worthy cases.

2.2 The 2006 Act also introduced a new prohibition on discrimination on the grounds of religion or belief in non-employment areas⁵. These key concepts are as follows.

44 Religion and belief

In this Part—

- (a) “religion” means any religion,
- (b) “belief” means any religious or philosophical belief,
- (c) a reference to religion includes a reference to lack of religion, and
- (d) a reference to belief includes a reference to lack of belief.

45 Discrimination

(1) A person (“A”) discriminates against another (“B”) for the purposes of this Part if on grounds of the religion or belief of B or of any other person except A (whether or not it is also A’s religion or belief) A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).

(2) In subsection (1) a reference to a person’s religion or belief includes a reference to a religion or belief to which he is thought to belong or subscribe.

(3) A person (“A”) discriminates against another (“B”) for the purposes of this Part if A applies to B a provision, criterion or practice—

- (a) which he applies or would apply equally to persons not of B’s religion or belief,
- (b) which puts persons of B’s religion or belief at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances),
- (c) which puts B at a disadvantage compared to some or all persons who are not of his religion or belief (where there is no material difference in the relevant circumstances), and
- (d) which A cannot reasonably justify by reference to matters other than B’s religion or belief.

(4) A person (“A”) discriminates against another (“B”) if A treats B less favourably than he treats or would treat another and does so by reason of the fact that, or by reason of A’s knowledge or suspicion that, B—

- (a) has brought or intended to bring, or intends to bring, proceedings under this Part,
- (b) has given or intended to give, or intends to give, evidence in proceedings under this Part,
- (c) has provided or intended to provide, or intends to provide, information in connection with proceedings under this Part,
- (d) has done or intended to do, or intends to do, any other thing under or in connection with this Part, or
- (e) has alleged or intended to allege, or intends to allege, that a person contravened this Part.

⁵ Discrimination on the grounds of religion or belief was outlawed in the field of employment by the Employment Equality (Religion or Belief) Regulations 2003 (S.I. 2003/1660) although section 77 of the 2006 Act amends those Regulations by substituting the broader definition of religion or belief in the 2006 Act and amends the definition of discrimination therein.

(5) Subsection (4) does not apply where A's treatment of B relates to B's making or intending to make, not in good faith, a false allegation.

2.3 Thus, the 2006 Act attempts broadly to replicate the existing familiar concepts as regards the meaning of discrimination while at the same time providing a very broad definition of religion or belief. The Act specifically applies to education authorities. See section 49 as follows (English provisions excepted):

49 Educational establishments

(1) It is unlawful for the responsible body of an educational establishment listed in the Table to discriminate against a person—

- (a) in the terms on which it offers to admit him as a pupil,
- (b) by refusing to accept an application to admit him as a pupil, or
- (c) where he is a pupil of the establishment—
 - (i) in the way in which it affords him access to any benefit, facility or service,
 - (ii) by refusing him access to a benefit, facility or service,
 - (iii) by excluding him from the establishment, or
 - (iv) by subjecting him to any other detriment.

.....

(3) In the application of this section to Scotland, an expression also used in the Education (Scotland) Act 1980 (c. 44) has the same meaning as in that Act.

<i>Establishment</i>	<i>Responsible body</i>
SCOTLAND	
Public school.	Education authority.
Grant-aided school.	Manager.
Independent school.	Proprietor.

2.4 At first sight then, the Act would appear to prohibit selection of pupils on the basis of religion. In Scotland of course, given the number of denominational school (mostly Catholic), such a provision, without exceptions, would have the effect of radically altering the status quo which has been in place for nearly a century whereby EAs operate within the State system denominational schools and where although there is usually no bar on those with a religion or belief different from that of the school, nonetheless, the selection criteria usually prioritises those with a particular religion over those without it so that for example, all other things being equal, a baptised Catholic child will be

more likely to be allocated a place at a Catholic school than a non-Catholic.

- 2.5 The existence of this dual system of school provision on the basis of religion has been criticised by some in the past on the grounds that such education tends to perpetuate sectarian tendencies. In Scotland, there are a total of about 2,720 primary, secondary and special schools in the public sector of which about 392 (14%) are denominational (all bar a few Catholic)⁶. (By contrast, within England and Wales, there are said to be around 22,000 schools of which 7,000 are faith-based, mostly Christian, the next largest category being Jewish⁷).
- 2.6 Some attempts have been made to alleviate the perceived problem by the encouragement of shared campus whereby non-denominational and denominational schools share the same campus while maintaining their distinctive ethos. According to the Sunday Herald⁸ however, the take up of such shared campuses has been low. Since 2005, 22 EAs have not opened any such schools. Only two local authorities have opened more than one such campus since 2005 and 75% of EAs said they have no plans to open any such campuses. Twinning arrangements were urged on EAs by the Scottish Government in 2006 leading to a number of such arrangements. However, more than 50% of EAs have none.
- 2.7 What then, if anything does the 2006 Act have to say about these arrangements? Section 50 provides in part, as follows (English provisions excepted).

50 Section 49: exceptions

(1) Section 49(1)(a), (b) and (c)(i) and (ii) shall not apply in relation to—

.....

(c) a school transferred to an education authority under section 16 of the Education (Scotland) Act 1980 (transfer of certain schools to education authorities) which is conducted in the interest of a church or denominational body,

⁶ (Scottish Government) Statistical Bulletin 2008 : Education Series Edn/B1/2008/1

⁷ Times Educational Supplement <http://www.tes.co.uk/article.aspx?storycode=373619>

⁸ 17 May 2009

(d) a school provided by an education authority under section 17(2) of that Act (denominational schools),

(e) a grant-aided school (within the meaning of that Act) which is conducted in the interest of a church or denominational body, or

(f) a school registered in the register of independent schools for Scotland if the school—

(i) admits only pupils who belong, or whose parents belong, to one or more particular denominations, or

(ii) is conducted in the interest of a church or denominational body.

(2) Section 49(1)(c)(i), (ii) or (iv) shall not apply in relation to anything done in connection with—

(a) the content of the curriculum, or

(b) acts of worship or other religious observance organised by or on behalf of an educational establishment (whether or not forming part of the curriculum).

.....

2.8 Thus, the effect is that for most if not all schools, whether public or private, where the school is established in some form as a denominational school, most, but not all of the prohibitions against discrimination on the grounds of religion or belief are disapplied. In particular, selection on the basis of religion or belief is not prohibited. In addition, a pupil has no right to complain about the content of the curriculum on matters relating to religion or belief. Thus, a pupil whose religious belief includes creationism may not object to lessons on Darwinism. The school may discriminate among pupils when it comes to arrangements for acts of worship etc. What is prohibited however, even in denominational schools, is exclusion or other detriment on the grounds of religion or belief (apart from the section 50(2) exclusion areas).

2.9 Correspondingly of course, where the school in question is non-denominational, then the exemptions do not apply. Thus, a pupil may not be discriminated against, say in relation to admission to a non-denominational school, on the ground of his religion. While it is of course unlikely that any EA or school would directly discriminate on the grounds of religion in the case of such a school, there may be room for argument that certain types of admission or allocation policies, which give preference in relation to denominational schools to those

pupils from a particular religion, may inadvertently or indirectly disadvantage those pupils in relation to admission to a non-denominational school. In such cases, the claim may be cast as an indirect discrimination claim in which case there would be a defence of reasonable justification. If however, the claim were brought as a direct discrimination claim, no such defence is available.

2.10 The exclusions go further. While section 51(1) provides that it is unlawful for a local education authority (in England and Wales) or an education authority (in Scotland) in the exercise of their functions to discriminate against a person, Section 51(3) provides as follows as regards Scotland:

(3) In its application to education authorities the prohibition in subsection (1) shall not apply to—

- (a) the exercise of an authority's functions under section 17 of the Education (Scotland) Act 1980 (c. 44) (provision etc. of schools),
- (b) the exercise of an authority's functions in relation to transport,
- (c) the exercise of an authority's functions under section 1 of that Act, section 2 of the Standards in Scotland's Schools etc. Act 2000 (asp 6) and sections 4 and 5 of the Education (Additional Support for Learning) (Scotland) Act 2004 (asp 4) (duties in relation to provision of education) in so far as they relate to a matter specified in paragraph (a) or (b) above,
- (d) the exercise of an authority's functions under section 50(1) of the Education (Scotland) Act 1980 (education of pupils in exceptional circumstances) in so far as they consist of making arrangements of the kind referred to in subsection (2) of that section, or
- (e) the exercise of functions as the responsible body for an establishment listed in the Table in section 49.

2.11 So once again, the general prohibition on discrimination is subject to large exceptions being, firstly, all those contained in section 50 and secondly, certain ancillary functions such as the provision of transport.

2.12 Additional provision is made by section 59 provides as follows:

59 Faith schools, &c.

(1) Nothing in this Part shall make it unlawful for an educational institution established or conducted for the purpose of providing education relating to, or within the framework of, a specified religion or belief—

- (a) to restrict the provision of goods, facilities or services, or
- (b) to restrict the use or disposal of premises.

(2) But subsection (1) permits a restriction only if imposed—

- (a) by reason of or on the grounds of the purpose of the institution, or
- (b) in order to avoid causing offence, on grounds of the religion or belief to which the institution relates, to persons connected with the institution.

(3) In this Part a reference to the provision of facilities or services shall not, in so far as it applies to an educational institution, include a reference to educational facilities or educational services provided to students of the institution

- 2.13 The purpose of this section is to deal with other ancillary activities of schools in the field of provision of goods and service and the disposal of premises which are areas covered elsewhere by the 2006 Act (and by the other discrimination statutes). Again, exclusions from the obligation not to discriminate are made in these areas in the circumstances described therein. So, for example, a denominational school, selling off surplus land, may be entitled to refuse to sell it to a non-denominational body or person if either of the grounds in section 59(2) applies. Subsection (3) is intended to avoid an argument that the provision of education is a provision of a service and thus not caught by the exceptions that I have noted above.
- 2.14 It should also be noted that section 52 of the 2006 Act makes it unlawful for any public authority to do any act which constitutes discrimination. That includes local authorities of course. However, that general provision is subject to a wide range of exclusions including a number relating to education and also any act which is otherwise rendered specifically unlawful by other provisions in Part II of the 2006 Act⁹. It seems then that in the education field at least, section 52 adds little to the legal matrix.
- 2.15 In conclusion then, it appears that the present arrangements for denominational schools are relatively unaffected by the 2006 Act. It is noteworthy that unlike the fields of sex, race and disability discrimination where public authorities are placed under a positive duty to eliminate unlawful discrimination and harassment, (including the duty to carry out equality assessments) there is no equivalent in

⁹ See section 52(4)(k) and (m)

relation to the types of discrimination introduced outside the employment field by the 2006 Act¹⁰. Accordingly, at present, there is little reason why EAs need to be concerned about legal action by individuals regarding the continued provision of denominational schools or why they should take steps either to measure any inequality that results from them or to take the type of steps mentioned earlier in this talk to improve community cohesion and understanding among those in schools.

- 2.16 However, the Equality Bill does propose one important change in the statutory position, about which, more in due course. In addition, the Commission of the European Communities has published a draft Directive which would prohibit discrimination *inter alia* on the grounds of religion and belief in the areas *inter alia* of education. That draft is currently subject to negotiation. The final draft will of course influence the final version of the Equality Bill.
- 2.17 Furthermore, the powers of the Commission do relate *inter alia* to improving good relations between various groups. See more below.

3 **Discrimination law: enforcement and remedies in the education area**

- 3.1 The equality statutes take a similar position in relation to enforcement of the discrimination statutes by individuals. They provide that an individual who claims that s/he has been discriminated against may bring proceedings in the sheriff court by way of reparation for breach of statutory duty. That is, the statute creates a statutory delict. That means that the litigation is commenced and the litigation proceeds in the same way as any other claim in reparation for breach of statutory duty¹¹. That means also that the procedure to be adopted is the small claim,

¹⁰ See section 76A and 76B of the SDA as inserted by section 84 of the 2006 Act; section 71 of RRA and section 49A of DDA.

summary cause or ordinary cause procedure, depending on the remedy sought (see below)¹². It also follows in my view that raising such an action by means of summary application is inept. While there are certain discrimination proceedings that may be brought under the summary application procedure (such as certain applications following action by the Commission: see for example section 21 of the 2006 Act), those in relation to claims by individuals that they have been unlawfully discriminated against should be taken under one of the three procedures noted above.

- 3.2 It also follows that a claim of discrimination may not be raised as an adjunct to other proceedings which are properly raised as summary applications (for example as an adjunct to an appeal against the placing decision by an EA¹³). The complexity of many discrimination claims may result in a case being remitted to ordinary procedure even if initially raised under another procedure (although it should be noted that employment tribunals routinely deal with very complex discrimination cases without the depth of procedures in ordinary cause and formal written pleadings, often using instead effective case management techniques).
- 3.3 The remedies¹⁴ do vary to some extent according to the type of claim that is made. In general, the claimant may claim damages including damages in relation to injury to feelings¹⁵. No damages however may be awarded in DDA cases. No damages may be awarded in a case of indirect discrimination where the defender proves lack of intention to

¹¹ Section 66 SDA; section 57 RRA, section 28N DDA, section 66 2006 Act.

¹² See amendments to the sheriff court rules made by SSI 2006/5091

¹³ An attempt to do so was dismissed at debate in one Scottish placing appeal last year (no written decision was made).

¹⁴ In relation to procedure and remedies, the relevant provisions are found as follows: SDA sections 62 to 76; RRA section 57 to 68; DDA sections 28N and schedule 3; 2006 Act section 65 to 70; SOR regulation 20 to 22

discriminate and where the discrimination was other than on the grounds of sex¹⁶, race¹⁷ and disability. Declarator may be sought.

- 3.4 Claims in general must be made within 6 months of the date of the alleged wrongful act. In sex discrimination cases, the claimant must first notify the Scottish Ministers that a claim is to be made and the time limit is extended to 8 months. In the case of race claims and religion and other belief claims and sexual orientation claims in an education case, the pursuer must also notify the Scottish Ministers that a claim is to be brought, but the time limit is still six months and the pursuer is not required to wait for a response. Under section 27 of the 2006 Act, the Commission can offer conciliation arrangements as an alternative to litigation. Where that occurs, in sex, race and disability claims, the time limit is extended by three months. In all cases, the court has a general power to allow the claim to proceed out of time, although the test is not exactly the same in all cases: in most cases, the test is “just and equitable”, a relatively low threshold. A copy of the summons or writ must be sent to the Commission at the same time that it is lodged in court.
- 3.5 Before action is commenced, the statutes provide for a questionnaire procedure. The content of the questionnaires is admissible in evidence and the court may draw conclusions from evasive or untrue answers. The questionnaire procedure poses great risks for the respondents in these cases. The risk is that answers may be given which are incorrect or misleading owing to inadequate investigation or inattention to the terms of the questionnaire. That may imperil a defence. It is suggested that the answering of such questionnaires is treated with the same attention to

¹⁵ Section 66, SDA; section 57 RRA; section 28N DDA, section 68, 2006 Act; Sexual Orientation Regulations regulation 22.

¹⁶ Section 1(1)(b) indirect discrimination only

¹⁷ Section 1(1)(b) indirect discrimination only

detail as court pleadings would be and that even if legal staff do not draw up the answers, that legal staff check the answers before the questionnaire is sent to the questioner. In some cases, a well drawn answer may prevent litigation commencing. Equally, for the potential pursuer, the questionnaire may be an excellent source of information about what the respondent did in his/her case and well drafted questions may reveal useful points.

- 3.6 Curiously, in race cases, the sheriff must sit with two assessors¹⁸. In other cases, the sheriff may choose to sit with one assessor¹⁹.
- 3.7 The commission has various powers and duties, including enforcement powers, of its own: see sections 13 to 32 of the 2006 Act. To some extent these replicate the powers that the old Commissions had, but they have been extended and teeth have been added.
- 3.8 It may carry out inquiries in relation to any of its duties in sections 8 to 10 of the Act. The duty under section 8 is to, generally speaking, promote and encourage good practice in relation to equality and diversity, using its powers under the Act. The duty under section 10 of the 2006 Act is, generally speaking, to promote good relations and good practice between members of different groups (defined by reference *inter alia* to groups sharing a common attribute in relation to religion or belief), by exercising its powers under the Act. The Commission is empowered under section 16 to make enquiries in relation to any of these duties, and that enquiry may concern matters relating to human rights, whether or not “a necessary implication arises in relation to the equality enactments”. In other words, the inquiry power is wide ranging and is not limited to matters which concern an alleged breach of any of the equality enactments.

¹⁸ Section 67(4) RRA

¹⁹ See OCR 44.3 and equivalent in the other rules of procedure.

- 3.9 By contrast, section 20 is concerned with whether a person may have committed an unlawful act or has failed to comply with an 'unlawful act notice' under section 21. The Commission is empowered to require a person (in practice, a company of government body) to prepare an 'action plan' to remedy deficiencies in policies or practices. The Commission also has the power to seek interdict under section 24 against a person likely to commit an unlawful act, to institute legal proceedings, or intervene in legal proceedings in terms of section 30.
- 3.10 Furthermore, the Commission has the power to assess the extent to which public authorities have complied with their positive general duties to eliminate discrimination etc under section 31. Where the public authorities are found wanting, they may be served with a compliance notice under section 32.
- 3.11 It is understood that the Commission has begun exercising its new powers with regard to certain Scottish local authorities recently. Inevitably though, the resources of the Commission are finite and it is thought that the Commission would seek to exercise its powers sparingly, preferring instead to achieve change by persuasion and exhortation where possible.

4 The Equality Bill

- 4.1 As I have noted above, discrimination law has now turned into a complex morass of legislation, caselaw, Codes of Practice and Guidance. It has become increasingly difficult, even for practitioners in the field, to keep up to date with the changes and to make sense of the inter-relationships between the different statutes, especially since many of them contain similar, but different provisions in relation to the very

definition of discrimination, exceptions, means of enforcement and remedies. In practice, the law is quite inaccessible to the ordinary person. Furthermore, employers and providers of services and education are often in some doubt as to what exactly they require to do to stay within the law. Furthermore, it is thought by some that the present legislation does not go far enough in some areas and that identifiable persistent discrimination needs yet more legislation to deal with it.

- 4.2 The Government's response to this was the publication of the Equality Bill on 27 April 2009²⁰. The intention is to consolidate all equality legislation and amend it in certain ways. The second reading was on 11 May and it goes to the committee stage on 2 June 2009. It is huge. It is published in two volumes, one for the 205 clauses and one for the 28 schedules. The Government expects that the Bill will obtain the Royal Assent in the Spring of 2010, with the majority of the Bill coming into force in the autumn of 2010.
- 4.3 The Bill is too large to analyse here. However, some features of the Bill are of interest.

Socio-economic disadvantage

- 4.4 The Bill proposes a new public sector duty in relation to socio-economic inequalities: (class in old-speak?). Clause 1(1) provides that

An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.

- 4.5 The explanatory notes suggest:

The duty could lead a local education authority, when conducting a strategic review of its school applications process, to analyse the impact of its campaign to inform parents about the applications process, looking particularly at different neighbourhoods. If the results suggest that parents in more deprived areas are less likely to access or make use of the information provided, the authority could decide to carry out additional work in those neighbourhoods in future campaigns, to ensure that children from deprived areas have a better chance of securing a place at their school of choice.

²⁰ The full text is available at <http://services.parliament.uk/bills/2008-09/equality.html>

- 4.6 It seems to me however that such a duty may be exercised more widely so that not only information about the applications process is made more widely available, but that the terms of the scheme itself may be altered so as to, say, enable more deprived pupils to get places in the best schools. The duty is potentially quite wide (though weakly expressed) and in effect brings in a brand new target for inequality, that based not on sex, race, religion, sexual preference etc, but based on socio-economic disadvantage, that is to say, poverty or perhaps class.
- 4.7 It is not envisaged that this duty would apply to Scotland: Clause 1(6). Although not explained, it is probably because while discrimination law is reserved to the UK Parliament, that reservation, as defined, does not apply to this novel ground. Nonetheless, it may be thought that it would be unlikely that if the UK Parliament were to legislate in this way for England and Wales, the Scottish Parliament would be content that there was no such duty in Scotland. The Scottish Parliament of course would have the legislative competence to enact such a duty, and perhaps even extend it. Given the importance of education in everyone's lives, and the way in which educational provision and choice is often constrained by socio-economic factors, it might be thought likely that at least some parties in the Scottish Parliament may be keen to see some form of equivalent duty enacted, with potentially interesting effects on the provision of state education in Scotland.

Discrimination in schools

- 4.8 Clauses 79 to 84 deal with prohibition of discrimination in schools. For the most part, they replicate existing law or extend the scope of existing law. For example, the exclusion of the curriculum from the ambit of the 2006 Act is extended to all forms of discrimination: a girl may not complain about lessons around 'The Taming of the Shrew'. New provisions include the protection from victimisation of children based

on the conduct of the parents: clause 81. This is intended to encourage parents not to be deterred from making complaints, in good faith, that their child has been discriminated against for fear that the child will somehow be treated worse as a result. The protection flies off if the child was in bad faith, even if the parent acted in good faith. It is an extension of protection presently found in DDA only. Clause 80 prohibits discrimination against, harassment or victimisation of a pupil or prospective pupil. Oddly however, the prohibition against harassment of pupils and prospective pupils does not cover *inter alia* religion of belief.

4.9 Schedule 11 deals with the exceptions to the general prohibition on discrimination in schools. Paragraphs 1 to 4 deal with single sex schools etc. Paragraph 5 deals with faith schools and contains similar exclusions to those found in the 2006 Act as discussed above. The explanatory notes give the following examples:

- A Muslim school may give priority to Muslim pupils when choosing between applicants for admission (although the Admissions Code will not allow it to refuse to accept pupils of another or no religion unless it is oversubscribed). However, it may not discriminate between pupils on other prohibited grounds, such as by refusing to admit a child of the school's own faith because she is black or a lesbian.
- A Jewish school which provides spiritual instruction or pastoral care from a rabbi is not discriminating unlawfully by not making equivalent provision for pupils from other religious faiths.
- A Roman Catholic school which organises visits for pupils to sites of particular interest to its own faith, such as a cathedral, is not discriminating unlawfully by not arranging trips to sites of significance to the faiths of other pupils.
- A faith school would be acting unlawfully if it sought to penalise or exclude a pupil because he or she had renounced the faith of the school or joined a different religion or denomination.

4.10 Paragraph 6 deals with the curriculum and acts of worship and similarly excludes such areas from the ambit of the legislation. That exclusion applies to all schools and not just faith schools. The explanatory notes give the following example:

Schools are free to organise or to participate in ceremonies celebrating any faith, such as Christmas, Diwali, Chanukah or Eid, without being subject to claims of religious discrimination against children of other religions or of none

4.11 Whether that provision will be sufficient to prevent over-zealous attempts at equality promotion, or stem the tide of Daily Mail editorials, remains to be seen.

Overturing Lewisham v Malcolm

4.12 Clause 14 deals with the definition of disability discrimination. It provides a new definition in order to overturn the effect of *London Borough of Lewisham v Malcolm* [2008] UKHL 43. In that case (a housing case²¹), the House of Lords overturned the then universal understanding of who was to be the comparator in a case based on alleged 'disability related discrimination'. Previously it had been understood, by reference to Court of Appeal authority, that the comparator was another person, without that disability, who had not been subject to the same treatment. The threshold was therefore very low. In *Malcolm*, the House of Lords held that that understanding was mistaken. The correct comparator was another person who had done exactly the same thing but who was not disabled. Thus, on the facts of *Malcolm*, if the defendant could show that it would have evicted a non-disabled person who had unlawfully sub-let, the claim of disability discrimination would fail (leaving aside the question of reasonable adjustments). It was on this rock that part of the pursuer's case in *ES as parent and legal representative of LS v K School* (citation above) foundered as the *Malcolm* decision was made during the course of the proceedings.

4.13 The new test focuses on the disability of the person claiming the discrimination while providing a defence to the alleged discriminator if it can show that the treatment complained of was a proportionate means of achieving a legitimate aim.

Public sector duty

4.14 Clause 143 restates and extends the public sector equality duty.

143 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to.

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to.

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to.

- (a) tackle prejudice, and
- (b) promote understanding

4.15 The public sector duty is extended to *all* the protected characteristics, including religion and belief. Thus, public authorities will be under a duty to promote equality and so on as regards sectarian issues which may mean that local authorities and EAs re-consider the arrangements made for denominational education and other matters which may lead to or foster bigotry and bias or at least misunderstandings between different religious communities and groupings. A tall order perhaps. Clause 143 allows more favourable treatment of one group rather than another in pursuance of that duty, as long as that favouritism is not itself unlawful under the Bill.

²¹ Although the *Malcolm* decision was based on the premises provisions of DDA and not the education of employment provisions of DDA, it has been subsequently universally held in other cases that the HL

Positive action

- 4.16 Clauses 152 and 153, controversially, will permit positive action in cases where a person believes reasonably that persons with a 'protected characteristic' suffer a disadvantage connected with that characteristic, those persons have different needs from others not sharing that protected characteristic and who have a disproportionately low participation in a given activity. In such cases, the Bill permits proportionate action to help redress the balance. Clause 152 is of general application, including the education field.
- 4.17 In the employment field, in terms of Clause 153, an employer would be entitled to favour someone with the protected characteristic over another: if the candidates were otherwise equally qualified, if there was under-representation in that area of work, if that action would assist in encouraging people sharing that characteristic to move into that field and if, oddly, the employer does not have a policy that people with the protected characteristic will be treated more favourably in connection with recruitment than others. It is said by the government that positive action is not the same as positive discrimination, which of course is unlawful...

5 Conclusion

- 5.1 This paper can do no more than merely scratch the surface of existing discrimination law and the proposed changes to it. There have been very limited challenges to existing arrangements in the education field on the grounds of alleged unlawful discrimination. Whether that reflects the generally satisfactory state of current arrangements of some other factors is unclear. Major changes in the equality law are afoot. A sound working knowledge of the law, procedures and the various essential

concepts concerned with discrimination law is of some importance whether one is advising EAs, parent or pupils, in all areas of education law. The effect of recent changes in the law in this area and proposed changes may well lead to increased activity in this field.

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