

# The Future of Equality



Why it is time to review the Equality Act  
2010

Paul Yowell

Foreword by Lord Faulks QC





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# Foreword

Lord Faulks QC  
Formerly Minister of State for Justice

The Equality Act came into force on the 1st of October 2010. It brought together 116 pieces of legislation into a single Act and its avowed purpose was to provide a law that would protect individuals from discrimination and promote a fair and more equal society. Such a laudable aim always ran the risk of unforeseen consequences once institutional administrators and the courts began to interpret the scope of the new equality law.

It was inevitable that in 10 years attitudes would change significantly. For example, would an Employment Tribunal in 2010 have concluded, as it did just last year, that Ms Forstater's views, namely that a person's biological sex is objective and that neither sex nor gender can be changed, were incompatible with human dignity and therefore not to be protected under the Act? Were such views really to be regarded as not "worthy of respect in a democratic society"? But the employment tribunal judge was applying the law as he believed it to be, based on the Court of Appeal's decision in *Grainger v Nicholson*.

Fortunately, the Employment Appeal Tribunal reversed the decision in Ms Forstater's case giving a much wider definition of the beliefs that will be protected under the Act. It is welcome, too, that the Equality and Human Rights Commission, under its new chair Baroness Falkner, supported the appeal and said: "it was clear to us that the Employment Tribunal had got this case wrong." What is concerning – and raises questions about the *Grainger* test itself – is that the judge below could have thought otherwise.

In this new paper for Policy Exchange, Paul Yowell looks closely at the Equality Act's first ten years. In the context of Ms Forstater's case, he points out that it may be necessary for there to be decision of the Court of Appeal or the Supreme Court before there can be confidence that the Act will provide real protection for unfashionable or controversial views. As the Employment Appeal Tribunal observed: "the potential for offence cannot be a reason to exclude a belief from protection altogether". This is surely a sensible interpretation of the Act, although I would have preferred the omission of the word "altogether".

Yowell identifies a number of other areas where the interpretation of the Act has enabled the creation of new orthodoxies to take root. In the name of preventing unfair discrimination, there has been widespread adoption of "unconscious bias" courses and training, although these course are increasingly regarded as of questionable value. The requirement for candidates in all sorts of contexts to demonstrate commitment to "diversity, inclusion and providing opportunity for all" risks producing

(at least a notional) ideological conformity rather than true diversity.

At the heart of his analysis lies the need to protect free speech, academic freedom, and true diversity of opinions, however unfashionable and however upsetting some may regard the expression of such opinions to be. None of this should be controversial to those who promoted the Act. And yet Yowell has identified a number of ways in which the legislation should be amended so that Act's true intentions can be protected rather than subverted by those who, while espousing the case for diversity, advance a rather narrow view of the opinions which merit protection under the Act.

Even if you do not think that amending the Act is the way forward, I recommend this paper as an extremely valuable contribution to an important debate and as a vivid illustration of how aspirational legislation can so easily be blown off course.



# Introduction

The Equality Act 2010 was adopted with the primary aim of consolidating, harmonising and clarifying numerous separate laws on employment discrimination and related matters. Beginning in the 1960s, the UK introduced legislation forbidding discrimination in employment and other contexts on the basis of race and sex. The protected characteristics were expanded over the years and other wrongs, including harassment, were added to a growing array of laws that also embraced matters such as a duty on public sector organisations to consider the impact of decisions on equality and diversity. In addition to the aim of consolidating and simplifying this set of laws, the Equality Act had a further ‘transformative’ aim, in the words of a leading commentator on it, Bob Hepple. It raised awareness of certain provisions—in particular the public sector equality duty—and extended them in such a way as to amount to what Hepple called a ‘reinvention’ of this subject area as ‘equality law’. Although most of its main provisions were already present in existing legislation, consolidating them under the single title of ‘Equality Act’ won a new prominence for these laws, enhancing their significance for the broader culture and leading to a greater focus on equality within both public and private institutions.

The ten-year anniversary of the Act fell on 1 October 2020, providing an occasion for evaluation and considering whether parts of it are in need of reform. This report does not provide a comprehensive evaluation of the Act or its overall effects, but it analyses key provisions, assesses how certain features have operated in practice, and proposes amendments and review on specific points. While the Act, considered together with its precursor legislation, has had a beneficial impact in many areas, some of its provisions have been applied in unexpected and over-reaching ways that seem to be at odds with sound policy and, in some cases, Parliament’s intent in enacting the Act.

The application and interpretation of the Act occur not only in courts and employment tribunals but in public and private institutions of all kinds. Organisations have appointed officers, personnel, and committees with a remit of monitoring equality issues and advancing the general goals of the Act. This is in part due to the transformative character of the public sector equality duty for public institutions, as well as to incentives the Act creates, for public and private organisations alike, to avoid litigation, liability, and complaints that can harm reputations or create a public relations crisis. Thus the locus of application of the Act is frequently to be found among institutional administrators rather than in litigation or

judicial interpretations.

A general theme that emerges from reviewing the application and interpretation of the Act in various contexts is that there has been a tendency to consider discrimination not as something that someone intends to do but as a product of unconscious or subconscious bias. The wrong of harassment is likewise not defined as conduct that is necessarily intentional, but rather includes the subjective perception of the claimant in a way that sometimes reduces the place of objective assessment in determining whether the perception is reasonable. This approach to discrimination and harassment has occurred alongside the growing use of unconscious bias testing and training in various institutions, which is often undertaken as a way of fulfilling the public sector equality duty. In some cases, it seems that the result of that duty has been not to produce true diversity and equality of treatment but rather to incentivise ideological uniformity. Other aspects of the Act can contribute to this, by elevating the importance of offences to feelings and desire for safety and comfort, leading on occasion to excluding expression or ‘de-platforming’ speakers that someone might claim is harassing. This same concern to avoid offence has led to decisions denying claims by individuals whose beliefs on controversial issues were deemed to be not worthy of respect in a democratic society. The Act has been used not just as a shield against discrimination and harassment, but in some cases as a sword in battles over what ideas and expressions are permissible in the workplace and educational and other public institutions.

After providing an overview of the background of the Equality Act and its main provisions, this report offers an analysis of four key areas and with some proposals for reform:

1. The Public Sector Equality Duty (PSED) should be amended so that the requirement to promote diversity includes **diversity of political opinion**, and to stress the need for tolerance of differing political, philosophical, and religious opinions, especially in educational institutions. Furthermore, the Equality Act should be amended to adopt as part of the PSED **a principle of reasonable accommodation** that aims to promote mutual cooperation among individuals with differing opinions and beliefs.
2. The prohibition on discrimination in the Act should be amended **to clarify the conditions under which direct discrimination can be found**. Current case law rules out looking to a defendant’s intent while allowing for liability on the basis of subconscious bias. The lack of clarity over mental state has led to unsatisfactory results in some cases.
3. The Act should be amended so that the issue of whether conduct amounts to prohibited harassment is judged by a standard of **objective reasonableness**. Further, the prohibition on harassment should be amended to clarify the relationship between the Equality Act and legal protection of freedom of speech, **in order to ensure**

**that the right to free speech (in universities and elsewhere) is not defeated by claims that speech will cause offence or discomfort.**

4. The Act should be amended to counter the effect of *Grainger v Nicholson* (2010), which adopted a test for what counts as a 'belief' under the Act that has led to exclusion of beliefs that should have been protected.

A decade on from the enactment of the Equality Act, it is time to consider whether it needs reform to meet the challenges of the new millennium. Discussions about reform should be informed by what has happened during the ten years of the Equality Act, which in some cases is tied up with developments of interpretative trends and approaches that had begun even before the Act. This report aims to contribute to that discussion.

# 1. Overview and Background of the Equality Act 2010

The Equality Act 2010 was enacted on 1 October 2010 under the Labour government and the guidance of Harriet Harman as Minister for Women and Equality. Bob Hepple, an advocate for discrimination law reform and the author of the leading monograph on the Act, described it as ‘the outcome of over 13 years of campaigning by equality specialists and human rights organisations’.<sup>1</sup> According to Hepple, the Act had three main purposes. The first was to provide a comprehensive framework of laws on discrimination, harassment and other aspects of equality, which came under the enforcement powers of the Equality and Human Rights Commission that had been established under the Equality Act 2006.<sup>2</sup> The second was to harmonise, clarify and extend the prior patchwork of laws, providing for more uniformity across the different protected characteristics.<sup>3</sup> Thirdly, the Act ‘contains some measures, described as transformative equality, extending positive duties on public authorities to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between different groups’.<sup>4</sup>

Hepple considers this third aim sufficiently important to amount to a ‘reinvention’: ‘The shift of focus from negative duties not to discriminate, harass or victimise, to positive duties to advance equality, justify the reinvention of this branch of the law as *equality law*, of which discrimination law is an essential but not exclusive part.’<sup>5</sup> The third aim is chiefly expressed in the public sector equality duty of section 149, but this section was not itself an innovation of the Equality Act 2010. Rather, the Act gave the duty a new prominence and added language that, as we will see below, broadened the definitions of certain terms.

## The central provisions on prohibited conduct

The Equality Act consolidated more than a hundred pieces of legislation.<sup>6</sup> The result is a single Act with 218 sections running to 134 pages in its main part, with another 116 pages of schedules, for a total of 251 pages. Despite the length, the central provisions of the Act can be described as a simple scheme.

Prior to the Act separate pieces of legislation were enacted between 1975 and 2007 providing for protection from discrimination and other wrongs on the basis of sex, race, disability, religion, age, and sexual orientation. While there were broad similarities between the various acts, there were also differences and inconsistencies. The Equality Act 2010

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1. B Hepple, *Equality: The Legal Framework* (Hart Publishing, 2nd edn, 2014) 2.

2. *ibid* 1.

3. *ibid*.

4. *ibid*.

5. *ibid* 1-2.

6. This principally include the following: Equal Pay Act 1970; Sex Discrimination Act 1975; Race Relations Act 1976; Disability Discrimination Act 1995; Employment Equality (Religion or Belief) Regulations 2003; Employment Equality (Sexual Orientation) Regulations 2003; Employment Equality (Age) Regulations 2006; Equality Act 2006, Part 2; Equality Act (Sexual Orientation) Regulations 2007.

provides one unified scheme in place of the prior Acts, increasing the clarity and simplicity of the law and making it easier for businesses and institutions to understand its requirements.

The principal scheme of the Act operates as follows. The first chapter of the Act provides a general list of ‘protected characteristics’, defined in section 4 as:

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

Further sections in chapter 1 give more detailed definitions of each characteristic.

Chapter 2 concerns prohibited conduct in relation to the protected characteristics and categorises it into three main types: *discrimination*, *harassment*, and *victimisation*. The last category involves victimising someone for exercising rights under the Equality Act 2010. *Discrimination* includes *direct discrimination* and *indirect discrimination* as well as several more narrowly defined kinds of discrimination that apply in particular situations.<sup>7</sup> In the day to day operations of the Act, the most prevalent categories of prohibited conduct are (i) direct discrimination, (ii) indirect discrimination and (ii) harassment.

Direct discrimination is defined in section 13:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.<sup>8</sup>

Direct discrimination generally cannot be justified, though certain exceptions are discussed in the schedules (e.g. schedule 9 which applies to cases where a protected characteristic is an occupational requirement). When the protected characteristic is age or disability, A can treat B differently if the different standard is a ‘proportionate means of achieving a legitimate aim’ (sections 13(2) and (3)).

Indirect discrimination was designed to capture situations in which there is no overt, explicit attempt to discriminate but when some practice, for example the use of a neutral criterion for selection, has a disparate impact on individuals with a protected characteristic. Indirect discrimination is defined as follows in section 19:

A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in

7. These are: combined discrimination (section 14), which concerns claims that a person has suffered discrimination because of two different protected characteristics; discrimination arising from disability (section 15); gender reassignment discrimination—cases of absence from work (section 16); pregnancy and maternity discrimination—non-work cases (section 17); and pregnancy and maternity discrimination—work cases (section 18).

8. Emphasis added.

relation to a relevant protected characteristic of B's.

For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.<sup>9</sup>

According to subsection (d), a practice or criterion that is alleged to cause discrimination is justified if it can pass a test of proportionality, just as direct discrimination based on age or disability.

The third principal category of prohibited conduct is *harassment*. A main definition of this is given in section 26:

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of—
  - (i) violating B's dignity, or
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

For purposes of harassment, the protected characteristics are not as broad as for discrimination. The list in section 26(5) includes all of the standard categories listed above in section 19 but excludes gender reassignment and marriage and civil partnership. In addition to the general definition of harassment above, subsections 26(2) and (3) specifically target 'unwanted conduct of a sexual nature' and treating someone who resists sexual advances less favourably than others.

Section 26(4) sets out how to determine what amounts to harassment. In order to conclude that A's conduct has the purpose or effect of 'violating B's dignity' or creating 'an intimidating, hostile, degrading, humiliating or offensive environment,' the following must be taken into account:

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

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9. Emphasis added.

It is worth noting here that while the reasonableness of B's perception is a factor that should be taken into account, there is no statutory requirement that the perception be reasonable in order to support liability for A. Part 4 of this report will consider whether, in practice, harassment is applied in a way that is too broad and too subjective.

### Further provisions

The above main provisions on prohibited conduct are laid out in 28 sections that cover the first seven pages of the Act. Most of the remaining sections and schedules contain provisions on how to apply the main provisions in specific contexts such as schools and higher education and the bar, or in specific premises. There is some variation in how the Act applies in work settings that differ from employment, such as contract work and in partnerships. There are specific provisions on sex and maternity equality, and on reporting about gender pay gaps. There are rules on procedures in employment tribunals and civil courts. While a few of these further provisions have a broad reach or impact, many are narrow or technical, such as sections 168 to 171, which cover when taxis and private hire vehicles must allow assistance dogs and when they are exempt.

### Public duty and positive action

Chapter 11 of the Act, entitled 'Advancement of Equality', includes the 'public sector equality duty' (PSED) in section 149 and provisions on 'positive action' in recruitment in sections 158 and 159.

The public sector equality duty (PSED) has possibly been the most transformative feature of the Equality Act. Its main provision in section 149(1) provides as follows:

(1) A public authority must, in the exercise of its functions, have due regard [emphasis added] 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.

The original legislative precursor to the PSED was section 71 of the Race Relations Act 1976 (RRA), which imposed the following duty on local authorities: 'to make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need: (a) to eliminate unlawful racial discrimination; and (b) to promote

equality of opportunity, and good relations, between persons of different racial groups.’<sup>10</sup> The 2000 Race Relations (Amendment) Act, following adoption of an amendment proposed by Lord Lester, extended the duty to public bodies generally. In announcing the government’s support for the amendment, Home Secretary Jack Straw said that it would leave ‘room for consultation on how the duty will operate in practice and how it will be enforced’.<sup>11</sup> In 2006 and 2007 respectively, amendments to the Disability Discrimination Act and Sex Discrimination Act adopted an equality duty modelled on the RRA and applicable to all public authorities. The PSED in the Equality Act 2010 was extended to all protected characteristics include in the main list in section 19 except for marriage and civil partnership.

The Equality Act also adopted an expansive definition of ‘due regard’. Section 149(3) provides:

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) take steps to 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.

Section 149(5) adds:

- (5) 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.

No specific enforcement mechanism was ever adopted for the PSED either under its RRA precursor or the Equality Act 2010. The duty, however, was held to be subject to judicial review in 2005.<sup>12</sup> Two cases decided in 2008 have established the framework for reviewing decisions. In *R (Baker & Others) v SSSCLG*,<sup>13</sup> Dyson LJ held that the PSED does not impose ‘a duty to achieve a result, namely to eliminate unlawful racial discrimination or to

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10. A McColgan, ‘Litigating the Public Sector Equality Duty’ (2015) *Oxford Journal of Legal Studies* 455.

11. *ibid.*

12. *R (Elias) v Secretary of State for Defence* [2005] EWHC 1435 (Admin), [2005] IRLR 788.

13. [2008] EWCA Civ 141.



promote equality of opportunity and good relations between persons of different racial groups' but rather 'a duty to have due regard to the need to achieve these goals'.<sup>14</sup> It is ultimately a matter for the judgment of the relevant official(s) to determine what weight to give to factors such as 'the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function the decision maker is performing'.<sup>15</sup> The second case, *R (Brown) v SSWP*,<sup>16</sup> followed *Baker*'s holding that obligation applies to a decision-making process rather than outcomes, describing 'due regard' in expansive terms. They are summarised by Aileen McColgan as follows:

(1) that decision-makers must be aware of the duty of due regard;

(2) which 'must be fulfilled before and at the time that a particular policy...is being considered by the public authority in question', a process which 'involves a conscious approach and state of mind' rather than *ex post facto* justification;

(3) that the duty 'must be exercised in substance, with rigour and with an open mind' and must be 'integrated within the discharge of the public functions of the authority' (it is not a question of 'ticking boxes', and failure to mention the PSED as such is not fatal);

(4) that the duty is non-delegable though practical steps to fulfil it may be taken by others under proper supervision;

(5) that it is continuing; and

(6) that it is good practice to keep records on PSED compliance.<sup>17</sup>

These are known as the six *Brown* principles.

Lastly, with regard to this overview of the Equality Act, sections 158 and 159 allow for 'positive action' in regard to persons who, because of a protected characteristic, suffer disadvantage, have different needs from others, or have disproportionately low rates of participation in an activity. Generally speaking, these sections allow employers and other recruiters to encourage participation by those with protected characteristics, for example by targeted advertisement or outreach.

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14. *ibid*; see McColgan at 458.

15. *Baker* [31]; see McColgan at 459.

16. [2008] EWHC 3158 (Admin).

17. McColgan at 459.

## 2. The Public Sector Equality Duty

The goals of the PSED, as can be seen in the sections quoted above in part 1, include eliminating harassment and discrimination; advancing equality of opportunity; fostering good relations through, inter alia, tackling prejudice and promoting understanding; and removing disadvantages for those with protected characteristics and encouraging their participation in public life and areas where they are underrepresented. Notwithstanding its lack of a dedicated enforcement mechanism, the PSED has been an effective tool in prompting public bodies toward critical self-examination that can help them to avert failure to reach these goals, and encourage them to adopt measures that advance equal opportunity. It is likely that the increasing diversity in a number of institutions and sectors in the UK is due in part to the PSED, though it is difficult to attribute causality since in society generally the idea of discriminating on grounds of race, sexuality or sex has become increasingly unacceptable; and due to increased immigration and the passage of time, more ethnically diverse recruits become more senior. It may be that the public culture that gave rise to the Equality Act has done more to increase diversity than change induced by the PSED itself.

In any event, there are reasons to be concerned that certain practices that public bodies have adopted to promote the PSED could have negative effects and, paradoxically, prove to be counter-productive with regard to its stated goals. I discuss three below. Each stems, perhaps, from an essential difficulty in applying the PSED: it is a set of aspirations rather than rules, and the aims it asks public bodies to further are of great scope. Given that public bodies are already required not to discriminate against their service users or their staff, and should already be avoiding policies that cause minorities to feel shut out, there is an assumption that the PSED requires something more. One answer has been workplace training: while a public body itself may not take discriminatory decisions, it may worry that members of its workforce harbour biased habits, attitudes or beliefs that could be reduced through education. A second is to make the environment more welcoming to minorities by exercising control over what they may experience, attempting to prevent uncomfortable encounters by restricting speech by those whose opinions might be offensive to minorities. A third has been to investigate the commitment of candidates for recruitment or promotion to the aspirations of the PSED itself: making the workplace more welcoming by preferentially promoting

those who demonstrate a commitment to eliminating harassment and discrimination, tackling prejudice and so forth.

### Unconscious bias testing and training

Public bodies have increasingly promoted the use of unconscious bias training and testing designed to help people discover whether they have hidden biases and prejudices not known to their conscious mind. This is often understood and presented as a way of complying with the PSED and an effective or even necessary means of achieving its goals.

The most commonly used test is the Implicit Association Test (IAT) hosted by Harvard University's 'Project Implicit', led by Anthony Greenwald, Mahzarin Banaji, and Brian Nosek. The first version of the test was launched in 1988. By 2018, more than 20 million people had taken the online test at the website of 'Project Implicit'.

In their 2013 book *Blindspot: Hidden Biases of Good People*, Greenwald and Banaji claim that the test reveals unconscious racial preferences and 'predicts discriminatory behaviour even among research participants who earnestly (and, we believe, honestly) espouse egalitarian beliefs'.<sup>18</sup> They say it is an 'empirical truth' that 'among research participants who describe themselves as racially egalitarian', the IAT 'has been shown, reliably and repeatedly, to predict discriminatory behaviour'.<sup>19</sup> Greenwald and Banaji further claim that widespread unconscious bias causes discriminatory decisions and disadvantages certain races: 'Given the relatively small proportion of people who are overtly prejudiced and how clearly it is established that automatic race preference predicts discrimination, it is reasonable to conclude not only that implicit bias is a cause of Black disadvantage but also that it plausibly plays a greater role than does explicit bias.'<sup>20</sup>

These claims have been called into question by several studies during recent years. A growing body of scholarly literature contends that IAT results do not accurately predict racist behaviour and that its use in organisations does not affect outcomes.<sup>21</sup> Moreover, some studies have suggested that the IAT can be counter-productive, creating a danger of reinforcing stereotypes. In a paper co-authored by Greenwald and Banaji a year after *Blindspot* was published, they acknowledge that IAT tests have 'properties that render it problematic to use them to classify persons as likely to engage in discrimination', and that attempts to 'use such measures diagnostically for individuals therefore risk undesirably high rates of erroneous classification'.<sup>22</sup> They argue, however, that the problems decrease as sample size increases, and that the IAT test is useful for diagnosing 'system-level discrimination'.<sup>23</sup>

In an interview last year, Anthony Greenwald himself acknowledged that there is no solid evidence to support the effectiveness of unconscious bias training programmes:

I'm at the moment very skeptical about most of what's offered under the label of implicit bias training, because the methods

18. M Banaji & A Greenwald, *Blindspot: Hidden Biases of Good People* (Delacorte Press 2013) 47.

19. *ibid.*

20. *ibid.* 209.

21. See H Blanton et al, 'Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT (2009) *Journal of Applied Psychology* 567; G Mitchell & P Tetlock, 'Antidiscrimination Law and the Perils of Mindreading' (2006) *Ohio State Law Journal* 1023; T Bartlett, 'Can We Really Measure Implicit Bias? Maybe Not' *The Chronicle of Higher Education* (5 January 2017); and A Kale et al, 'Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies', (2006) 71 *American Sociological Review* 589.

22. M Banaji, A Greenwald & B Nosek, 'Statistically Small Effects of the Implicit Association Test can Have Societally Large Effects' (Draft 2 September 2014) [https://faculty.washington.edu/agg/pdf/GB&N\\_Consequential%20small%20IAT%20effects.JPSP\\_final.2Sep2014.pdf](https://faculty.washington.edu/agg/pdf/GB&N_Consequential%20small%20IAT%20effects.JPSP_final.2Sep2014.pdf)

23. *ibid.*

being used have not been tested scientifically to indicate that they are effective. And they're using it without trying to assess whether the training they do is achieving the desired results. I see most implicit bias training as window dressing that looks good both internally to an organization and externally, as if you're concerned and trying to do something. But it can be deployed without actually achieving anything, which makes it in fact counterproductive. After 10 years of doing this stuff and nobody reporting data, I think the logical conclusion is that if it was working, we would have heard about it.<sup>24</sup>

As one commentator noted recently: 'Looking at the meteoric rise of unconscious bias training, it's hard not to suspect that its ascent was directly related to its relatively low cost. For businesses and other big organisations, having something to point to when a PR response is needed is highly useful, even if that "something" is a brief quiz administered online. At the same time, it averts the need for more costly interventions examining what – if anything – might need to be done in the way of genuine reform.'<sup>25</sup>

The UK Equality and Human Rights Commission launched an inquiry into unconscious bias training and testing that reported in 2018.<sup>26</sup> The main conclusion was that the evidence is uncertain and further research is required. While the report found some evidence that the IAT can increase awareness and reduce implicit bias, that evidence is unclear. In particular the evidence of the potential to change behaviour is limited; moreover, most studies 'did not use valid measures of behaviour change'.<sup>27</sup> The report also found that 'there is potential for back-firing effects when UBT participants are exposed to information that suggests stereotypes and biases are unchangeable'.<sup>28</sup>

In December of 2020, the UK government announced that it would phase out unconscious bias training in the Civil Service.<sup>29</sup> A Cabinet Office statement cited a new evidentiary report that relied on the 2018 EHRC report noted above as well as more recent studies,<sup>30</sup> and concluded that there was scant evidence for the effectiveness of such training and 'emerging evidence of unintended negative consequences'. The statement urges 'other parts of the public sector, including local government, the police, and the NHS, to review their approaches in light of the evidence and the developments in the Civil Service.' The Cabinet Office also stated that the government will publish a reformed strategy that will 'integrate principles for inclusion and diversity into mainstream core training and leadership modules in a manner which facilitates positive behaviour change'. This is a welcome development, which could have a positive impact not only in the public but also in the private sector. Although the private sector is not subject to the PSED, other features of the Equality Act provide incentives to demonstrate commitment to equality. Too often this is a tick-box exercise, using unconscious bias training provided by the large industry that supplies it, with no discernible impact.<sup>31</sup> We recommend that in devising its reformed approach, the government consider how that

24. B Mason, 'Curbing Implicit Bias: What Works and What Doesn't', *Knowable Magazine* (5 June 2020) <https://www.discovermagazine.com/mind/curbing-implicit-bias-what-works-and-what-doesnt>.

25. S Ashworth-Hayes, 'Why Unconscious Bias Training Doesn't Work', *Coffee House, The Spectator* (14 February 2021) <https://www.spectator.co.uk/article/why-unconscious-bias-training-doesnt-work>

26. EHRC Research Report 113, 'Unconscious bias training: An assessment of the evidence for effectiveness'.

27. *ibid.*

28. *ibid.*

29. Written Ministerial Statement on Unconscious Bias Training <https://www.gov.uk/government/news/written-ministerial-statement-on-unconscious-bias-training>

30. 'Unconscious bias and diversity training – what the evidence says', (15 December 2020) <https://www.gov.uk/government/publications/unconscious-bias-and-diversity-training-what-the-evidence-says>.

31. See Ashworth-Hayes, 'Why Unconscious Bias Training Doesn't Work', n25 above.

approach could serve as a model for public and private sectors generally, and that training programmes emphasise the core principles of equality of treatment and opportunity as required under the Equality Act.

### Protecting people from upsetting speech or ideas

Schools and universities face growing pressures to adopt positions or exclude debate on controversial issues related to equality. Such pressures can be motivated by the PSED and, as we will see in more detail below in part 4, a subjective understanding of harassment. It is possible that well-meaning efforts to achieve the goals of the PSED can have the effect of promoting ideological conformity and depriving educational institutions of the freedom of thought and debate that is crucial to the diversity of viewpoint that they should value.

There is increasing evidence that universities and student unions feel that that debate on certain topics should be excluded and speakers or groups barred from stating their views in order to protect others from being offended or feeling alienated. In 2017, the Balliol College Junior Common Room banned the collegiate Christian Union from having a booth at its freshers' fair. A Christian Union representative was told by the JCR vice president: 'We ... are concerned that there is potential for harm to freshers who are already struggling to feel welcome in Oxford. ... Our sole concern is that the presence of the CU alone may alienate incoming students. This sort of alienation or micro-aggression is regularly dismissed as not important enough to report, especially when there is little to no indication that other students or committee members may empathise, and inevitably leads to further harm of the already most vulnerable and marginalised groups.'<sup>32</sup>

The College Historical Society of Trinity College Dublin, on similar grounds as the Balliol JCR but this time directed toward an atheist speaker, withdrew an invitation to Richard Dawkins because of comments he had made regarding Islam and Muslims. Known as 'the Hist' and founded in 1770, it is the oldest student society in the world. The auditor of the Hist explained: 'I was not previously aware of the harmful statements made by Richard Dawkins. ... The comfort of our membership is paramount and we will not be proceeding with [the] address. I apologize for any distress caused by this announcement, and the Hist will continue to listen and adapt to the needs and comfort of students.'<sup>33</sup>

Although the PSED was not publicly cited in either of these cases (Ireland has legislation similar to the UK Equality Act that includes a public sector equality duty<sup>34</sup>), the link between issues of free speech and concerns about falling foul of principles in the Equality Act is clear. In section (4) on harassment below, we will see more evidence of this, including a report of the Joint Committee on Human Rights which has found that both atheist and religious groups have faced efforts to exclude them in universities.

32. J Hunter & F Pope, 'Christian Union banned from Balliol freshers' fair', *The Cherwell* (8 October 2017) <https://cherwell.org/2017/10/08/christian-union-banned-from-balliol-freshers-fair/> (emphasis added).

33. C Watson and M Maguire, 'The Hist Will "Not Be Moving Ahead" With Richard Dawkins Address', *The University Times* (27 September 2020), <http://www.universitytimes.ie/2020/09/the-hist-will-not-be-moving-ahead-with-richard-dawkins-address/> (emphasis added).

34. Ireland Department of Justice, 'Our Public Sector Equality and Human Rights Duty', <http://www.justice.ie/en/JELR/Pages/Our-Public-Sector-Equality-and-Human-Rights-Duty>

## Recruitment for employment and appointments

There is an increasing tendency for public appointments to include a candidate's understanding of and commitment to diversity issues as part of the criteria for appointment. Many positions currently advertised in the civil service, heritage sector, and National Health Service require candidates to have 'a strong commitment to diversity, inclusion and providing opportunities for all' (or a similarly worded requirement) and often to demonstrate that commitment through evidence or a written diversity statement. In some cases this may be appropriate as it is part of what a candidate needs to understand to work effectively in a particular position. But there is a danger that this can slide into evaluating candidates on their general values and seeking evidence of particular commitment, opening the door to discrimination on grounds of political opinion. As a result of reforms instituted in 2006, applications for Queen's Counsel now consider a candidate's 'diversity competency'. The aim of this is explained as follows: 'The purpose of the diversity competency is to ensure that all those recommended for appointment have a good understanding of diversity issues, that they demonstrate appropriate behaviours in their professional life, and that they are proactive on diversity matters.'<sup>35</sup> If this sort of engagement is required to show that one is worthy of being appointed QC (which is not a role that involves any management of public funds, or provision of public services, but is supposed to represent excellence in a particular skill, advocacy) this seems to extend understanding of diversity into something that looks in danger of being a preferred set of moral sympathies and political opinions.

Such requirements—and the potential for applying them in order to screen candidates on the basis of their views—are not limited to recruitment for senior roles. The Norfolk Constabulary told a woman who had inquired about a job listing that because of her 'gender critical' views she would not be 'suitable' for the job on the basis of a 'behavioural competency test'.<sup>36</sup> The reason she was not considered suitable is that, in her job inquiry, she had acknowledged that that 'whilst I am firmly against abuse and discrimination to trans people, I do not believe you can change your biological sex'.<sup>37</sup>

This approach to recruitment, as well as the trend to exclude and 'de-platform' offensive expression, present problems beyond immediate discrimination against those with unpopular beliefs. A conversation with a potential candidate about his or her values in itself presents a risk of bias, where those values are not a core (or measurable) part of the job being recruited for.<sup>38</sup> If appointments are made based on how well candidates fit in with the selection panel's general moral sentiments and priorities, and whether they can talk about equality and related issues in the right way, then those who are good at fitting in have the same advantages that they would when, in a previous era, they might casually mention rowing in the college boat in the knowledge that this could secure an advantage. Similarly, speech codes at universities or workplaces, which impose penalties on those who involve themselves in controversy without

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35. Queen's Counsel Competition for England and Wales 2020 Guidance for Applicants, <https://qcappointments.org/wp-content/uploads/2020/03/FINAL-Guidance-for-Applicants-2020.pdf> (emphasis added).

36. I Lyons and M Evans, 'British police forces not welcoming "gender critical" job applications', *The Daily Telegraph* (15 August 2020) <https://www.telegraph.co.uk/news/2020/08/15/british-police-forces-not-welcoming-gender-critical-job-applications/>

37. *ibid.*

38. The 'Commission Recruitment Principles' of the Civil Service require staff appointments to be based on merit, after fair and open competition.

using approved terminology, have effects beyond immediate belief discrimination. They create an environment where those who are unsure about where they stand, or how they are supposed to talk, are encouraged to keep silent, and where those who adapt quickly to speech codes and pick up the unwritten rules about which opinions can't be uttered are at an advantage. That will be those with the social capital to negotiate these codes, whose families are familiar with how lawyers or professors or civil servants talk (and what can and can't be said). Restrictions apparently imposed to make minorities feel comfortable can in practice work to keep outsiders excluded.<sup>39</sup>

## Conclusion and recommendations

When the PSED is understood and applied in manner outlined above, it has the potential to promote ideological conformity rather than true diversity in settings such as recruitment and education. The view that equality requires the exclusion of viewpoints that may cause offence or discomfort is corrosive of the mission of universities to educate students to consider and debate, and to test by argument, a wide range of ideas and theories.

An effective way to counter these concerning trends would be to amend the PSED to clarify that respect for the protected characteristic of 'religion or belief' requires tolerance of differing political opinions<sup>40</sup> and religious and philosophical worldviews, and that a mark of a healthy institution is diversity of such opinions and worldviews. Especially in educational institutions and professions, such diversity should be valued. Uniformity of opinion, and an atmosphere that stifles, marginalises or discourages dissenting views, should be avoided. Such an amendment to the PSED would help to promote the right to private life, freedom of thought and belief, and expression under the Human Rights Act (ECHR articles 8, 9, 10).

A second amendment we recommend is to adopt a principle of reasonable accommodation as part of the PSED. Public bodies should be aware that (1) conflicts may arise over understandings of what equality requires and what counts as discrimination or harassment; and (2) that some of these conflicts will involve persons who have religious or other beliefs that are in tension with or incompatible with majority views. In any such situation of a conflict of views, public authorities should act on a principle of reasonable accommodation, the aim of which is to minimise exclusion and to promote solutions that would enable individuals of differing views to cooperate within public institutions with mutual respect. A prominent proponent of the principle of reasonable accommodation is Professor Chris McCrudden,<sup>41</sup> professor of human rights and equality Law at Queen's University Belfast, who has pointed to this statement by Justice Abbie Sachs in *Christian Education South Africa*:

The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with

39. See A Woolridge, 'The elite is woke not out of self-flagellation, but out of self-preservation', *The Telegraph* (24 July 2021) (arguing that using 'woke' terminology 'is a way of holding onto elite status that might be threatened by the rise of new groups'). Michael Lind has traced this phenomenon in the United States, where in elite institutions it is now common to use terms such as 'Latinx' and to insist on 'enslaved persons' rather than 'slaves'. See 'The New National American Elite', *The Tablet* (20 January 2021), <https://www.tabletmag.com/sections/news/articles/new-national-american-elite> Lind writes: 'Constantly replacing old terms with new terms known only to the oligarchs is a brilliant strategy of social exclusion. The rationale is supposed to be that this shows greater respect for particular groups. But there was no grassroots working-class movement among Black Americans demanding the use of "enslaved persons" instead of "slaves" and the overwhelming majority of Americans of Latin American descent ... reject the weird term "Latinx." Woke speech is simply a ruling-class dialect, which must be updated frequently to keep the lower orders from breaking the code and successfully imitating their betters.' The recent instructions by a NHS trust to use terms such as 'chest-feeding' and 'chest-milk' and avoid 'breast-feeding' can be evaluated in this light. See E Gill & N Shaw, 'Hospital tells staff to use terms "chestfeeding" and "human milk" to become more inclusive', *The Manchester Evening News* (11 February 2021) <https://www.manchestereveningnews.co.uk/news/parenting/hospital-tells-staff-use-terms-19809496>.

40. In article 14 of the European Convention of Human Rights, 'political or other opinion' is specified as prohibited ground for discrimination. The Equality Act does not specify political opinion in the list of protected characteristics (though it does include the broad term 'belief'). To add political opinion to the list would be to provide grounds for legal claims of discrimination and other wrongs on that basis, and we do not propose this change. However, the aim set out in the main text above could be accomplished by amending section 149 to provide that for the particular purposes of the PSED—the duty to promote equality of opportunity, foster good relations between persons, etc—'belief' should be understood to encompass political opinion.

41. C McCrudden, *Litigating religions. An essay on human rights, court and beliefs* (Oxford University Press 2018), chapter 8.

appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.<sup>42</sup>

One reason that the principle of reasonable accommodation is needed is the broad and open-ended nature of the PSED, which calls for having due regard for how individuals with protected characteristics are treated but does not specify clear rules on this. This can lead authorities to treat conflicts as a zero-sum game in which one group is preferred over another, or even to adopt a hierarchy in which certain protected characteristics are implicitly understood to outrank others. Consider the incident mentioned above involving the Balliol JCR's exclusion of the Christian Union from the fresher's fair. The concern that the CU might make unspecified individuals feel alienated or suffer micro-aggressions does not appear to have been considered alongside any concern that the officers and members of the CU, or other Christians sympathetic to the CU, might feel marginalised. The principle of reasonable accommodation calls on authorities to be aware of potential conflicts and avoid privileging one group over another.

In part 4 below, we will propose that such a principle of reasonable accommodation should also be adopted as part of the law on harassment.

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42. *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).



## 3. The uncertain meaning of direct discrimination

The most basic type of wrong prohibited in the Equality Act is direct discrimination. To prevent such discrimination on grounds of race, sex, and other characteristics may be considered the fundamental aim of the Act. It is clear that the Equality Act and precursor anti-discrimination legislation have done much to diminish the incidence of discrimination and to promote more open, unbiased attitudes among society at large. Such success would be difficult to measure or quantify, but the Act has no doubt helped to increase opportunities and to open doors that would otherwise been effectively closed to individuals on the basis of their race, sex, and other characteristics. Nonetheless, a problematic feature of the current case law under Act is that there is no clear definition of direct discrimination, particularly with regard to the state of mind required to impose liability on a defendant. Hepple calls this the ‘vexed question of the defendant’s mental state’.<sup>43</sup>

Let us return to the definition of direct discrimination in the Act in section 13:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.<sup>44</sup>

The phrase ‘because of’ replaced the formulation ‘on grounds of’, which had been used in pre-Equality Act anti-discrimination legislation. The Explanatory Memorandum for the Act, however, stated that ‘this change in wording does not change the legal meaning of the definition, but rather is designed to make it more accessible to the ordinary user of the [Act]’.

In cases predating the Equality Act, the House of Lords rejected the need to consider a defendant’s intent in direct discrimination cases. In *R v Birmingham City Council, ex parte EOC* [1989]<sup>45</sup>, there were fewer places for girls than boys in selective grammar schools, which meant that girls had to score higher on entrance tests than boys to gain admission. The council was held liable for discrimination, and the House of Lords rejected the council’s argument that testing standards were the result of a benign rather than hostile motive. In the leading speech Lord Goff stated that ‘the intention or motive of the defendant to discriminate ... is not a necessary condition of liability’.<sup>46</sup> He held: ‘There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but

43. Hepple, n1 above at 75.

44. Emphasis added.

45. [1989] AC 1155.

46. *ibid.* (emphasis added).

for their sex'.<sup>47</sup> Endorsing an argument of Anthony Lester (a proponent of equality legislation who influenced the Equality Act), Lord Goff rejected Birmingham council's argument that a finding of intent is necessary for liability: 'Indeed, as Mr. Lester pointed out in the course of his argument, if the council's submission were correct it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy'.<sup>48</sup> Lord Goff's and Lester's reasoning on this point is wrong: as explained below, excluding women on the basis of the cited grounds would clearly constitute intentional discrimination.

The 'but for' test Lord Goff proposed in *Birmingham* was deployed again by him one year later in *James v Eastleigh Borough Council*.<sup>49</sup> The council had decided to waive with respect to pensioners a 75 pence per day fee for swimming in the municipal pool. At that time the pensionable age was 65 for men and 60 for women. The House of Lords held that the council was liable for discrimination on grounds of sex, regardless of whether it had any intent to discriminate against men, by applying the 'but for' test: 'would the complainant have received the same treatment but for his or her sex?'<sup>50</sup>

The issue of the definition of discrimination arose again in *R (E) v Governing Body of JFS*.<sup>51</sup> JFS, formerly known as the Jews' Free School, reserved a certain number of places for Jewish students, and considered someone to be a Jew if he or she (i) had a Jewish mother or (ii) underwent conversion to Judaism in the manner approved by the Orthodox Chief Rabbi. The claimant's son was an applicant for a reserved place whose mother was an Italian Catholic who converted to Judaism before his birth. Her conversion, however, was not under Orthodox auspices. Thus, the son's application was rejected because he was not considered Jewish according to the criteria of the Office of the Chief Rabbi. The claimant sued, alleging both direct and indirect discrimination on grounds of race. A divided Supreme Court agreed with the direct claim 5-4; two justices in the minority thought there was indirect discrimination.

Interpreting the pre-Equality Act formulation 'on grounds of', Lord Phillips held that that the term 'grounds' is ambiguous between 'the motive for taking the decision or the factual criteria applied by the discriminator in reaching his decision'.<sup>52</sup> In the context of the statute it should be understood not as 'motive' but as the 'factual criteria that determined the decision'.<sup>53</sup> He found Lord Goff's 'but for' formulation unhelpful but endorsed the underlying reasoning and conclusions in *Birmingham* and *James*:

This 'but for' test was another way of identifying the factual criterion that was applied by the Council as the basis for their discrimination, but it is not one that I find helpful. It is better simply to ask what were the facts that the discriminator considered to be determinative when making the relevant

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47. *ibid.*

48. *ibid.* (emphasis added).

49. [1990] 2 AC 751.

50. *ibid.*

51. [2009] UKSC 15.

52. *ibid* [13].

53. *ibid.*

decision.<sup>54</sup>

Lord Phillips and four other justices (Hale, Hope, Walker, and Mance) found that the criteria used to define Jewishness were criteria based on ethnic origin and thus amounted to racial discrimination. Thus, the defendant's 'motive' did not matter.

According to Baroness Hale, one can ask two types of 'why' questions in a case like *JFS*, one which is relevant and one which is not: 'The irrelevant one is the discriminator's motive, intention, reason or purpose. The relevant one is what caused him to act as he did.'<sup>55</sup> Hale described the motive of the Chief Rabbi as 'trying to do what he believes that his religion demands of him'.<sup>56</sup> But this was irrelevant since it was 'absolutely plain' that the criterion applied was 'ethnically based'. This was what 'caused' the decision. Hope and Walker agreed with Hale on this point, and Mance offered a similar analysis. Hale said that in cases where it is not clear that the factual criteria for a decision are inherently based on a protected characteristic, the court will explore the question of what caused the decision further. At this point, the court will inquire into a defendant's 'mental processes'. Hale draws this phrase from Lord Nicholls's speech in *Nagarajan v London Regional Transport*.<sup>57</sup> Following his reasoning in that case, Hale states that an alleged 'discriminator may consciously or unconsciously be making his selections on the basis of race or sex'.<sup>58</sup>

The result of the above line of cases is unsatisfactory. Their instruction to set aside, at the outset, any inquiry into a defendant's intent or reasoning processes overlooks the basic aim of the Act of prohibiting the wrong of intentional discrimination. While judges might eventually come to consider the defendant's 'mental processes' if other factors are unclear, at this point the defendant's conscious reasoning is somewhat confusingly assimilated to unconscious processes in some cases.<sup>59</sup> After the initial resort to the 'but for' test proved unsatisfactory, the courts adopted the test of whether the factual criterion for a decision is inherently based on a protected characteristic. But this has also proven difficult to apply,<sup>60</sup> and it can lead to questionable results. In *JFS* the majority justices stressed that that, despite finding that the defendant engaged in racially discriminatory conduct, they did not think the defendant was 'racist' in the ordinary sense or that the Chief Rabbi had acted in a blameworthy manner. He 'is honestly and sincerely trying to do what he believes that his religion demands of him', as Baroness Hale put it.<sup>61</sup> Nonetheless, they found the defendant liable for racial discrimination, and the implicit logic is that Judaism itself structurally discriminates on ethnic grounds because membership is determined by matrilineal descent. Lord Phillips said that 'there may well be a defect in our law of discrimination', since it does not allow for justification for direct discrimination as in some jurisdictions.<sup>62</sup> Baroness Hale noted that the rule of matrilineal descent had enabled the Jews to survive centuries of persecution and raised the question whether Parliament, in order to avoid results such as the one in *JFS*, should amend the law (noting that the Equality Bill was then under consideration).<sup>63</sup> Hale also noted that in *James, Eastleigh Council's* decision to waive fees for

54. *Ibid.* [16] (emphasis added).

55. *ibid* [62] (emphasis added).

56. *ibid* [65].

57. [1990] UKHL 36.

58. *JFS* [64] (emphasis added).

59. *Nagarajan* is the leading case on subconscious discrimination, and as discussed below some of its language regarding this concept is ambiguous.

60. In *Bull v Hall*, where an innkeeper who limited double-bedded rooms to married couples was found liable for direct discrimination based on sexual orientation (at time before same-sex marriage had been legally recognised), three majority justices agreed that marriage was a discriminatory criterion for slightly different reasons, while two justices in the minority disagreed. All five agreed that the practice was indirect discrimination. See *Bull v Hall* [2013] UKSC 73 and Hepple, n1 above, 72-3. Hepple argues that the differences between the justices could have been avoided by using the 'but for' test.

61. *JFS*

62. *ibid* [9].

63. *JFS*[70].

pensioners was based on the ‘best of motives’.<sup>64</sup>

The problem in this line of cases can be traced back to the decision in *Birmingham* to discard the element of intent. The decision was based on a confusion between the concepts of *intent* and *motive*. In *Birmingham* Lord Goff had suggested that an inquiry into ‘intention or motive’ would allow an employer to discriminate against women ‘because of customer preference, or to save money, or even to avoid controversy’. But this is mistaken. *Intent* should be understood to include one’s direct aim and the necessary means chosen to accomplish it—as that term is used, for example, in the law of intentional torts and crimes. *Motive*, on the other hand, refers (inter alia) to the further aims of one’s intentional actions, for example when one chooses a plan of action not for its own sake or value but in order to escape controversy or embarrassment. A similar usage is when investigators consider whether a suspect had a motive (revenge, jealousy, etc) to carry out a crime. It is possible for an intentional crime to be committed for a benign motive: ‘stealing from the rich to give to the poor’. Such a motive might be relevant to assessing the moral character of someone trying to emulate Robin Hood, but it would not figure in a defence against the intentional crime of theft.

As Lord Lowry said in his dissenting speech in *James*, the phrase ‘on grounds of’ refers to an action having a *deliberate* quality: ‘An action may be deliberate without being malicious. Most acts of discrimination are both, but the only *essential* quality is deliberation.’<sup>65</sup> Lowry argued that the Equality Act provides that a decision to discriminate can only be understood as deliberate or intentional: ‘Putting it another way, a “ground” is a reason, in ordinary speech, for which a person takes a certain course. He knows what he is doing and why he has decided to do it. In [this context] the discriminator knows that he is treating the victim less favourably’.<sup>66</sup> Lord Hope made a similar point in *JFS*. Although he found that the school discriminated on ethnic grounds, he disagreed with justices who said that a defendant’s state of mind is not at issue. In his view, a court must consider this and determine whether the defendant acted for a discriminatory reason; if so, the further question of whether the underlying motive was benign is irrelevant.<sup>67</sup>

Lord Goff’s concern about defendants claiming that they acted for the sake of customer preferences can be assessed by considering hypothetical cases. If a security services company refuses to consider applications from women to work as security guards in order to satisfy company preference for males in this role, the company has clearly acted with the intent to treat female applicants less favourably than men. Lord Lowry gives two similar examples: ‘If a men’s hairdresser dismisses the only woman on his staff because the customers prefer to have their hair cut by a man, he may regret losing her but he treats her less favourably because she is a woman, that is, on the ground of her sex, having made a deliberate decision to do so. If the foreman dismisses an efficient and co-operative black road sweeper in order to avoid industrial action by the remaining (white) members of the squad, he treats him less favourably on racial grounds.’<sup>68</sup>

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64. *JFS* [59].

65. *James* [1990] UKHL 6; [1990] 2 AC 751 at [57] (citing *Armagh District Council v Fair Employment Agency* [1983] N.I. 346) (emphasis in original).

66. *ibid.* 16.

67. *JFS* [193-198].

68. *James* [66].

The 'but for' or 'causative' construction used in *Birmingham* and *James* is one way of excluding such reasoning, but as Lord Lowry argued, '[T]he causative construction not only gets rid of unessential and often irrelevant mental ingredients, such as malice, prejudice, desire and motive, but also dispenses with an essential ingredient, namely, the ground on which the discriminator acts.'<sup>69</sup> The same is true for the test in *JFS* of whether the factual criterion used for selection is inherently discriminatory.

It should be emphasised that construing direct discrimination to require intent would not prevent complaints under the Equality Act for the cases discussed in this section. Lord Lowry argued that the defendants in *Birmingham* had engaged in intentional direct discrimination. In cases where it is alleged that a certain criterion for selection or exclusion leads to disparate impact on individuals with protected characteristics, then a claim for indirect discrimination can be made. This would apply both to the use of Orthodox criteria for determining Jewishness in *JFS* and the use of pensionable age in *James*. Indeed, in *JFS*, a complaint was made for indirect discrimination, and Lords Hope and Walker found in favour of the claimant on this ground. A majority of justices, however, found that the school's policy was justified under this claim.

The issue in an indirect discrimination claim under section 19 of the Act is whether the defendant has relied on 'a provision, criterion or practice' that is discriminatory in relation to a relevant protected characteristic of B's, which is defined as follows:

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

In short, if the defendant employs a practice or criterion that puts individuals with a protected characteristic at a disadvantage in comparison to others, then the defendant must justify that practice or criterion under a proportionality test. The availability of a general defence of justification marks an important difference between indirect and direct discrimination. In the latter, justification defences are allowed for the protected characteristics of age and disability, but otherwise excluded save for certain specified circumstances.<sup>70</sup>

The absence of a general justification defence for direct discrimination is an indication of the moral gravity of treating some individuals worse than others because of their race, sex, or other protected characteristic. In many cases this involves targeting individuals for unfair treatment; they

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69. *James* [67]

70. The position of the UK law on this point is different from other jurisdictions, as noted by Lord Phillips in *JFS*. A broader range of justification defences is available in the US, Canada, and South Africa, as Tarun Khaitan observes: 'The overall consensus seems to allow limited justification of direct discrimination; it also requires that, when allowed, the standard of review for justifying direct discrimination is higher than that for justifying indirect discrimination'. *A Theory of Discrimination Law* (Oxford University Press 2015) 73).

are considered as members of an undesirable class rather than treated as individuals to be evaluated on their own merits. Aside from the damaging effect on individuals, such behaviour results in alienation of minorities generally and fosters division in society. Since the injustice of this is not ameliorated by ‘having a good reason’, it is appropriate not to allow a justification defence. There are more benign forms of direct discrimination, such as positive discrimination in which the motive is to provide greater representation for minorities in settings where they have historically been at a disadvantage. In some jurisdictions, some forms of this kind of decision-making can be justified. The Equality Act, however, does not allow a defendant to justify deliberate discrimination that treats individuals differently due to their belonging to a particular group. This is presumably because of the importance Parliament has placed on the principle of equal opportunity for all individuals regardless of their race, sex, or other protected characteristic. The category of indirect discrimination carries less (if any) sense of moral wrongdoing because the injustice at issue is often not knowingly caused. Indirect discrimination recognises that even innocent behaviour may cause some groups in society to be held back. This is a problem of a different nature from direct discrimination, though the two can overlap and the behaviour that causes indirect discrimination might not be fully innocent.

In *James*, Eastleigh Council did not selectively target men in order to charge them higher fees. In *JFS*, the school did not intend to exclude any applicant on racial grounds. As Lord Rodger pointed out, for anyone who goes through an Orthodox conversion process, race is irrelevant.<sup>71</sup> The appropriate question in such cases, where the defendants’ use of criteria lead to disadvantages for those with protected characteristics, is whether the use of the criteria is objectively justified. This should be treated under the rubric of indirect discrimination. The question of whether a practice such as that in *JFS* is justified may be difficult to answer; judges might prefer to avoid weighing the different values at stake in the school’s interest in following its religious practice and the interests of applicants outside that faith. There is a danger that a broad or unclear definition of direct discrimination will incentivise judges to classify cases under that rubric in order to avoid dealing with the complex issues a justification defence might raise.

### Conclusion and recommendations

We recommend the adoption of a clarificatory amendment that aims to overrule the holdings in *Birmingham*, *James* and *JFS* insofar as they exclude the defendant’s intent as a consideration in liability under section 13. The existing statutory language is capable of being understood as having an intentional element; indeed that is natural reading of the older language of ‘on grounds of’ (as Lord Lowry argued in *James*) as well as the newer language of ‘because of’:

A person (A) discriminates against another (B) if, because of a

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71. *JFS* [228].

protected characteristic, A treats B less favourably than A treats or would treat others.<sup>72</sup>

Section 13 should be amended to add a subsection providing that ‘because of’ should be understood to include the following intentional state of mind:

(1) A is consciously aware that B has a protected characteristic; and

(2) A treats (or would treat) B less favourably than others because of that protected characteristic; and

(3) Such less favourable treatment is an end that A aims to achieve or a necessary means to such end.

Section 13 should be further clarified to address two further matters. First, in cases such as *JFS* and *James*, where intent as defined in the proposed amendment above is lacking but a defendant uses criteria that place individuals with protected characteristics at a disadvantage, claims should be treated as cases of indirect discrimination where the defence of justification is allowed.

Second, for cases like *Nagarajan* that recognise possible liability for ‘subconscious’ discrimination, there should be a clarification regarding the state of mind required for liability. In these cases, the allegations generally do not concern a defendant who is acting on the basis of purely subconscious bias, that is, a phenomenon of the subconscious mind of which the defendant is wholly unaware.<sup>73</sup> Rather, it is usually alleged that the defendant was aware that the claimant has a protected characteristic and acted on the basis of *stereotypical assumptions* (or prejudices, preconceptions, etc) that the defendant associates with the protected characteristic.<sup>74</sup> In *Nagarajan*, Lord Browne-Wilkinson reasoned as follows: ‘The defendant cannot be heard to say that his discrimination was not racial just because it was based upon a stereotype view of racial or gender characteristics. You cannot avoid liability for discriminating against X by saying that my reason for not choosing X was not because he was of a particular race but because all of that race are not good at time-keeping or, in the case of women, will put their children before their job in a way that men will not do. Such stereotypes provide no excuse for what would otherwise be racially discriminatory.’<sup>75</sup> Lord Nicholls’s analysis was to a similar effect: ‘Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination. Balcombe L.J. adverted to an instance of this in *West Midlands Passenger Transport Executive v. Singh* [1988] I.R.L.R. 186, 188. He said that a high rate of failure to achieve promotion by members of a particular racial group may indicate that “the real reason for refusal is a conscious or unconscious racial attitude which involves stereotyped assumptions” about members of the group.’<sup>76</sup> It seems that what Lord Nicholls means by ‘unrecognised prejudice’ is a ‘stereotypical assumption’ where the person who holds it

72. Emphasis added.

73. Although there is language in *Nagarajan* and other cases that could be read to suggest that liability may be based solely on a subconscious mindset, the better view is capture by Lord Hope’s statement in *JFS*: ‘Everything that may have passed through his mind that bears on the decision, or on why he acted as he did, will be open to consideration.’ *JFS* [197] (emphasis added). Judges, however, should not try to assess something that never passed through the defendants’ mind.

74. See cases discussed in *Commerzbank AG v Raput* [2019] UKEAT/0164/18/RN.

75. *Nagarajan v London Regional Transport* [1999] UKHL 36.

76. *ibid* (emphasis added).

does not consciously recognise it as sexist, racist, or otherwise invidious. In one recent case, for example, the defendant was alleged to have treated the claimant less favourably because of 'stereotypical assumptions based on her gender - i.e. that women are not breadwinners'.<sup>77</sup>

In order to accommodate and clarify the holdings in this line of cases, the amendment to section 13 suggested above should be further specified (or clarified by explanatory note) to indicate that treating someone less favourably because of a protected characteristic includes acting on the ground of a stereotypical assumption associated with that characteristic.

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77. *Geller v Yeshurun Hebrew Congregation* [2016] ICR 1028.



## 4. Harassment and the dangers of an overly subjective test

Besides direct and indirect discrimination, the most common type of wrong claimed under the Equality Act 2010 is harassment. In the context of the Act, the understanding of harassment is important not only for purposes of civil actions under section 26 of the Act but also because harassment is referred to in the PSED of section 149 as something that public institutions must aim to reduce and eliminate. Both public and private institutions have adopted a range of approaches toward achieving this goal.

This can create tension with other values such as freedom of expression. In its 2018 report on freedom of speech in universities, the Parliamentary Joint Committee on Human Rights noted this tension:

Where speech leads to unlawful harassment of individuals or groups protected by the Equality Act 2010, then this is contrary to the institution's duty to have due regard to the need to eliminate discrimination, and would be unlawful. Mutual respect and tolerance of different viewpoints is required to hold the open debates that democracy needs. Nonetheless the right to free speech includes the right to say things which, though lawful, others may find offensive. Unless it is unlawful, speech should normally be allowed.<sup>78</sup>

Similarly, the Equality and Human Rights Commission, in guidance discussing freedom of speech in universities, said, in regard to the PSED, that when a university allows a debate on a divisive topic to go ahead, 'it must consider the potential impact on students who may feel vilified or marginalised by the views expressed. They should think about how to ensure those students feel included and welcome within the [higher education] environment.'<sup>79</sup> In another section, the EHRC guidance states: 'The harassment provisions [of the Equality Act] cannot be used to undermine academic freedom. Students' learning experience may include exposure to course material, discussions or speaker's views that they find offensive or unacceptable, and this is unlikely to be considered harassment under the Equality Act 2010.'<sup>80</sup> Citing European Court of Human Rights caselaw, the EHRC states that freedom of speech extends to views or opinions that may 'offend, shock or disturb' others.<sup>81</sup> Considering the tension between these various statements, it is understandable that university officials might be unclear about the extent of their duty to avoid harassment.

78. JCHR, Fourth Report of 2017-19, 'Freedom of Speech in Universities', para 54.

79. 'Freedom of expression: a guide for higher education providers and students' unions in England and Wales' (2 February 2019), at p.26.

80. *ibid* 18.

81. *ibid* 8 (citing *Delfi AS v Estonia* (2015) ECtHR 64669/09)

It was anticipated that such confusion might arise in the ‘Discrimination Law Review’, a 2007 government consultation paper published during the lead up to enacting the Equality Act. The paper noted that there had been ‘significant debate’ about extending the statutory harassment beyond the employment sphere, and that the ‘debate has focused on the importance of balancing the right to freedom of speech and expression with the need to protect against acts which violate a person’s dignity’.<sup>82</sup> The paper noted that the definition of harassment in British law at the time did not require it to be intentional but stressed the importance of applying a test of objective reasonableness: ‘in the absence of intention, conduct is only regarded as having the effect of harassing the claimant if, taking into account all the circumstances, including in particular the claimant’s perception of the conduct, it should reasonably be considered as having that effect’.<sup>83</sup> The paper terms this the ‘reasonable consideration’ test. While it has both subjective and objective elements, ‘It is for the court or tribunal to decide, on the facts of each case, whether conduct should reasonably be considered as having the effect of harassing the claimant’.<sup>84</sup> This description of the test was derived from *Driskel v Peninsula Business Services Ltd*,<sup>85</sup> which required ‘an objective assessment by the Tribunal of all the facts’ while considering the following factors: ‘the applicant’s subjective perception of that which is the subject of complaint and the understanding, motive and intention of the alleged discriminator.’

Let us return to the definition discussed above in part 1 of this report. Harassment occurs when A ‘engages in unwanted conduct related to a relevant protected characteristic,’ with the ‘purpose or effect’ of ‘violating B’s dignity’ or ‘creating an intimidating, hostile, degrading, humiliating or offensive environment for B’ (section 26(1) (emphasis added)). To conclude that A’s conduct has this purpose or effect, the following must be ‘taken into account’: (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect (section 26(4)).

While the listing of factors in section 26(4) is drawn from *Driskel*, section 26 as a whole does not reflect the necessity for an overall, objective assessment to determine whether the conduct should be reasonably considered to have the effect of harassing the claimant. Such a test was stressed by the ‘Discrimination Law Review’ as vital for achieving balance with values such as freedom of speech. Section 26(4), by its listing of ‘whether it is reasonable for the conduct to have that effect’ as simply one of the factors, could be read as a subtle tweak that takes the definition in a more subjective direction. A recent employment tribunal decision on 26(4), while citing *Driskel*, describes a test that focusses more on the subjective element: ‘It is for the recipient of the conduct to determine what is acceptable to them and what is not. There may be a difference between what the Tribunal would regard as unacceptable and what the claimant was prepared to tolerate.’<sup>86</sup> A claimant should not be dismissed simply, wrote the tribunal, simply because its ‘own threshold’ might be crossed at a different level.<sup>87</sup> This could be read as pitting the claimant’s subjective understanding against the Tribunal’s subjective understanding.

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82. Department for Communities and Local Government, ‘Discrimination law review. A framework for fairness: proposals for a Single Equality’ (12 June 2007), para 14.15.

83. *ibid* para 14.22 (emphasis added).

84. *ibid*.

85. [2000] IRLR 151.

86. *Campbell v Permateelia (UK) Ltd and Verolini* (5 April 2019), UKET 2205197/2018.

87. *ibid*.

The approach set forth in the ‘Discrimination Law Review’ and Driskel, however, is to require the Tribunal to make an overall assessment of objective reasonableness.

We believe that section 26 could be improved by making it a two-part test requiring a finding that B has subjectively experienced conditions that constitute harassment, and that B’s understanding of the circumstances is objectively reasonable. Moreover, section 26(4) could be helpfully expanded by specifying that the intention of A is a factor to consider (current wording refers to the perception of B but not the intention of A), and by adding the term ‘context’ to ‘the other circumstances of the case’. Suggested wording for a revised section 26(4) is included below.

The JCHR report noted above described the rise of ‘safe spaces’ in universities as potentially giving rise to suppression of freedom of speech. Safe spaces ‘aim to encourage an environment free from harassment and fear by restricting the expression of certain views or words that can make some groups feel unsafe’.<sup>88</sup> The JCHR states:

While the intention behind safe spaces is understandable and whilst there must be opportunities for genuinely sensitive and confidential discussions in university settings, we received evidence which showed that safe space policies, when extended too far, can restrict the expression of groups with unpopular but legal views, or can restrict their related rights to freedom of association.<sup>89</sup>

The JCHR found that ‘pro-life and humanist and secular groups appear to have been particularly affected by the student unions’ desire to build inclusive campuses free from harassment and fear’.<sup>90</sup> There was evidence that these groups faced difficulties in being represented at freshers’ fairs and were sometimes banned entirely.<sup>91</sup> The report also referred to a more general concern of a student who said that the lack of guidance from the university on what constitutes harassment lead to suppression of legitimate freedom of expression.<sup>92</sup>

### Conclusion and recommendations

Considering the uncertainties regarding the definition of harassment, and the dangers of an overly subjective test not only for civil actions under the Equality Act but also in other contexts such as the PSED and freedom of expression in universities, we recommend amending the definition to clarify the need for a test of objective reasonableness. This could be achieved by adding to section 26 a form of words similar to the principle endorsed by the ‘Discrimination Law Review’: ‘It is for the court or tribunal to decide, on the facts of each case, whether conduct should reasonably be considered as having the effect of harassing the claimant.’ This is in keeping with the concerns raised in part 3 above about the ambiguity of the state of mind element in the definition of discrimination, and concerns about imposing liability for subconscious states of mind. We suggest a dual test: that liability for harassment arises when (1) B

88. JCHR, Fourth Report of 2017-19, ‘Freedom of Speech in Universities’, para 55.

89. *ibid* para 56.

90. *ibid*.

91. *ibid*.

92. *ibid* para 41.

subjectively experiences the circumstances defined as harassment above and (2) it is reasonable for such circumstances to have that effect. Section 26(4) could be improved by requiring the following to be taken into account in determining whether both the subjective and objective tests are met:

- a) the perception of B;
- b) the intention of A; and
- c) the context and other circumstances of the case

The wording of the former subsection (c) ('whether it is reasonable for the conduct to have that effect') is no longer needed as a factor if it is specified as part of the necessary ground for liability as suggested above.

We further propose that the Act should include a new section applicable to higher education providers in order to clarify the relationship between harassment and freedom of expression. The section should specify that universities:

- a) must have particular regard to the duty to ensure freedom of speech; and
- b) must have particular regard to the importance of academic freedom.

This language is taken from section 31 of the Counter-Terrorism and Security Act 2015.

Section 26 should also be amended to provide that there is a presumption that the exercise of (i) academic freedom (of academic staff, as specified in the Education Reform Act 1988)<sup>93</sup> or (ii) the right to freedom of speech (of students and all higher education providers, in particular as recognised by section 43 of the Education Act 1986) does not constitute harassment under section 26(4). Such presumption should be able to be overcome only with clear and convincing evidence. This amendment would help resolve the tension discussed above that surrounds the duty of universities in relation to harassment under the PSED.

Lastly, section 26 should be amended to include the principle of reasonable accommodation proposed in part in relation to the PSED.

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93. Section 202 of the Act aims to 'ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions.'

## 5. Grainger and the exclusion of controversial beliefs

The concerns raised in section (2) about interpreting the PSED in such a way as to promote ideological conformity rather than diversity can be also be seen in how some courts and tribunals have approached the definition of the protected characteristic of religion or belief. While section 10 of the Act gives an apparently wide definition of ‘belief’ as ‘any religious or philosophical belief ... [or] lack of belief’, some courts and tribunals have held that the beliefs to be protected are in fact rather more restricted.

In *Grainger v Nicholson*<sup>94</sup> the Court of Appeal set out five limitations on the scope of protection for philosophical beliefs:

- (i) The belief must be genuinely held. (ii) It must be a belief and not ... an opinion or viewpoint based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others ... .<sup>95</sup>

Recent cases have shown how the fifth criterion in particular can be used to exclude certain controversial ideas while favouring others, in a way that goes against the basic purpose of the Act in protecting people from being discriminated against because of their belief. Implicit in the idea of providing such protection is that it will apply to minority, unpopular and controversial beliefs.

In *Forstater v CGD Europe and others*, the Employment Tribunal (Judge Tayler) found that Ms Forstater’s belief that biological sex is objective and cannot be changed was incompatible with human dignity and therefore not protected by discrimination law:

The Judge described Ms Forstater’s belief as follows:

[S]ex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female; or that is a person is neither male nor female. ... It is sex that is fundamentally important, rather than ‘gender’, ‘gender identity’ or ‘gender expression’. She will not accept in any circumstances that a

94. [2010] 2 All ER 253.

trans woman is in reality a woman or that a trans man is a man... .’

Judge Tayler held that this belief is ‘incompatible with human dignity and fundamental rights of others.’ In another recent case, *Mackereth v DWP* [2019],<sup>95</sup> the Employment Tribunal found that Dr Mackereth’s ‘belief in Genesis 1:27, lack of belief in transgenderism and conscientious objection to transgenderism are incompatible with human dignity and conflict with the fundamental rights of others, specifically here, transgender individuals.’<sup>96</sup> The verse from Genesis in question reads: ‘So God created man in his own image, in the image of God created he him; male and female created he them.’ It is remarkable to hold that believing in a particular scriptural passage common to the Jewish and Christian faiths is per se unreasonable and thus does not qualify under the protected characteristic of ‘religion or belief’. In contrast to these two cases, in *Conisbee v Crossley Farms* [2019],<sup>97</sup> the Tribunal’s reasoning on *Grainger* limb five is confined to a single sentence, ‘Clearly, the practice of vegetarianism is worthy of respect in a democratic society and is not incompatible with human dignity.’<sup>98</sup> The Tribunal has also found that opposition to fox-hunting and hare-coursing<sup>99</sup> and a belief in the ‘higher purpose’ of public service broadcasting<sup>100</sup> are philosophical beliefs protected by the Equality Act.<sup>101</sup>

Together these cases reveal a tendency in the Employment Tribunal of taking a broad approach to what counts as a generally qualifying belief but sometimes applying the fifth limb of *Grainger* in a way that excludes certain controversial views, thus narrowing the protection of the Equality Act in a way that is inconsistent with its basic intent.

The Employment Appeal Tribunal now seems to have rejected this trend in its recently decided decision in *Forstater*. Reversing Judge Tayler’s decision on the application of *Grainger*, the EAT held that Ms Forstater’s beliefs about sex and gender fall within section 10 of the Equality Act. The EAT gave a wide interpretation of the scope of protected beliefs:

In our judgment, it is important that in applying *Grainger* V, Tribunals bear in mind that it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. However, the manifestation of such

beliefs may, depending on circumstances, justifiably be restricted under Article 9(2) or Article 10(2) as the case may be.<sup>102</sup>

Regarding the specific content of Ms Forstater’s views, the EAT relied on *R (Miller) v The College of Policing and The Chief Constable* (2020),<sup>103</sup> which was decided after Judge Tayler’s decision in *Forstater* and concerned the alleged transphobic tweets of police officer Harry Miller. In *Miller*, Mr Justice

95. UKET 1304602/2018.

96. *ibid.*

97. UKET 3335357/2018.

98. *ibid.*

99. *Hashman v Milton Park (Dorset) Limited t/a Orchard Park* (2011) ET 3015555/09.

100. *Maistry v BBC* (2011) ET 1313142/10.

101. See A Hambler, ‘Beliefs unworthy of respect in a democratic society: a view from the Employment Tribunal’ (2020) *Ecclesiastical Law Journal* 234.

102. UKEAT 01015/20/JOJ, para 79.

103. [2020] EWHC 225 (Admin).

Julian Knowles held that the tweets in question (despite the use of crude language) were within the range of reasonable debate on a controversial topic:

[Miller's] tweets were either opaque, profane, or unsophisticated. That does not rob them of the protection of Article 10(1) [ECHR]. I am quite clear that they were expressions of opinion on a topic of current controversy, namely gender recognition. Unsubtle though they were, the Claimant expressed views which are congruent with the views of a number of respected academics who hold gender-critical views and do so for profound socio-philosophical reasons. This conclusion is reinforced by [evidence] which shows that many other people hold concerns similar to those held by the Claimant.<sup>104</sup>

Among the academics whose testimony Justice Knowles reviewed in the case is Kathleen Stock, professor at the University of Sussex. In her witness statement Professor Stock said:

In my work, among other things I argue that there is nothing wrong, either theoretically, linguistically, empirically, or politically, with the once-familiar idea that a woman is, definitionally, an adult human female. I also argue that the subjective notion of gender identity is ill-conceived intrinsically, and a fortiori as a potential object of law or policy. In light of these and other views, I am intellectually 'gender-critical'; that is, critical of the influential societal role of sex-based stereotypes, generally, including the role of stereotypes in informing the dogmatic and, in my view, false assertion that – quite literally – 'trans women are women'. I am clear throughout my work that trans people are deserving of all human rights and dignity.<sup>105</sup>

In *Forstater*, the EAT noted that while views such as those of Professor Stock or Ms Forstater will be offensive to some, 'the potential for offence cannot be a reason to exclude a belief from protection altogether.'<sup>106</sup>

### Conclusion and Recommendations

The EAT's decision in *Forstater* represents a welcome course correction in the application of *Grainger*. In contrast to a series of cases in the Employment Tribunal that had construed section 10 of the Equality Act broadly but then narrowed the protection of beliefs through an expansive interpretation of the fifth limb of the *Grainger* test, the EAT has held that offensiveness is not a reason to exclude beliefs and that only extreme beliefs fall outside of section 10 (giving Nazism as an example). However, it is unknown how this issue will be treated by the higher courts, and there is a remaining danger in the breadth of the formulation of the fifth limb of *Grainger*. It requires that a belief 'must be worthy of respect in a democratic society,

104. *ibid* [251].

105. *ibid* [241].

106. UKEAT 01015/20/JOJ.

be not incompatible with human dignity and not conflict with the fundamental rights of others'. It is not obvious that the EAT's decision that this applies only to extreme beliefs such as Nazism is consistent with the requirement that a belief be 'worthy of respect'. It would be preferable for the Court of Appeal or Supreme Court to change the *Grainger* test itself by adopting a different formulation. There are beliefs that may not be 'worthy of respect' but nonetheless fall within the Equality Act's protection of belief. Likewise, the requirement that a belief 'does not conflict with the fundamental rights of others' is problematically vague. Someone might hold a belief that opposes certain individual rights that are recognised by statute or a court judgment and considered to be 'fundamental'—anything can be considered fundamental if it is seen as instance of a right protected in the Human Rights Act or similar instrument. That a belief has this character does not mean that it should necessarily fall outside protection of the Equality Act, but such belief might be construed, for purposes of *Grainger*, to 'conflict with the fundamental rights of others'.

In the absence of a decision by the Court of Appeal or Supreme Court in the near future that narrows the formulation of the fifth limb of the *Grainger* test, the government should propose an amendment to the definition of 'belief' in section 10 of the Act that aims to ensure that only extreme beliefs—in line with the EAT's decision in *Forstater*—should be excluded.



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# Conclusion

The Equality Act, together with its precursor legislation, was adopted to protect individuals against discrimination by the state, employers and other institutions, and thereby to afford everyone the equal opportunity to succeed and to flourish regardless of race, sex, and other protected characteristics. In this basic aim, the Act has furthered the success of early anti-discrimination legislation in helping to remove barriers to entry and advancement in employment and other settings and to foster a society that is more inclusive and tolerant of differences. Discriminatory attitudes are far less common than in the past. As the recent report from the Commission on Race and Ethnic Disparities concluded, however, there is still progress to be made in several areas of life in the UK.<sup>107</sup>

Over the years, legislation concerning equality expanded the list of protected characteristics and added to the basic wrong of direct discrimination, incorporating, *inter alia*, indirect discrimination, harassment, and the public sector equality duty. Bringing all this legislation under the umbrella of the single Equality Act, with an enhanced public sector duty, has had a ‘transformative’ effect, as noted in the Introduction and as seen in the examples discussed in this report drawn from a large variety of settings and circumstances. This report has argued that in certain contexts, the Act has been interpreted to have a reach or effects that go beyond the intent of Parliament, which in some cases has been counter-productive to the Act’s proper aims. One theme has been the focus on subconscious bias. This can be seen in the widespread use of implicit bias tests and unconscious bias training, which are often undertaken as a way of complying with the public sector equality duty. Moreover, in the context of direct discrimination, courts have avoided asking whether the defendant had an intent to discriminate, while at the same time suggesting the possibility of liability for the defendant’s subconscious mindset. Another theme has been an overly subjective understanding of harassment, which, as argued in part 4, can be especially problematic when universities use the reference to harassment in the PSED as a reason to protect people from offence, with the result that freedom of speech and academic freedom are curtailed. A final theme is that the Act can be interpreted in such a way that, paradoxically, it ends up working against unpopular minorities and favouring ideological conformity. People have realised that the Act can be used not just to protect against discrimination by the state or their employer, but also to police the boundaries of acceptable speech and belief and to prompt institutions to act to the disadvantage of individuals seen to be difficult or to hold unpopular views. This kind of conflict is currently most obvious in the context of the debate over transgender issues, where

107. See Commission on Race and Ethnic Disparities: The Report (16 March 2021), p.9: ‘We do not believe that the UK is yet a post-racial society which has completed the long journey to equality of opportunity. And we know, too many of us from personal experience, that prejudice and discrimination can still cast a shadow over lives. Outright racism still exists in the UK, whether it surfaces as graffiti on someone’s business, violence in the street, or prejudice in the labour market. It can cause a unique and indelible pain for the individual affected and has no place in any civilised society.’

concrete discrimination (e.g., refusing employment or refusing to do business with someone<sup>108</sup>) is sometimes justified in the name of producing a more welcoming environment for transgender individuals. As discussed above, Maya Forstater was refused employment because of her opinions: her employers clearly thought they were doing this to further equality.

Some of the above themes came together during recent events at the University of Essex that culminated in the University apologising to two professors who had been disinvited from speaking engagements, following an independent investigation and report ('the Reindorf report').<sup>109</sup> Professor Jo Phoenix of the Open University and Professor Rosa Freedman of Reading University had been invited to speak at seminars in late 2019 and early 2020. Both had their invitations rescinded after accusations that the professors held gender critical views (similar to those of Professor Kathleen Stock discussed in part 4 above) that were 'transphobic', and that their appearance could amount to 'hate speech' targeting transgender individuals. Professor Freedman's invitation was reinstated after she wrote to her MP and the Universities Minister and gave a newspaper interview. Professor Phoenix was 'blacklisted' (as the report put it) by the Department of Sociology, which voted not to invite her to a future seminar. The Reindorf report concluded that these actions amounted to a violation of the university's free speech policy as well as its legal obligations to secure free speech for visiting speakers. The report considered the argument that the university was acting in furtherance of the PSED but concluded that its decisions were 'more likely to be in contravention of the PSED. Excluding and silencing individuals does not foster good relations; that can only be achieved by resolving disputes through peaceful dialogue in an environment which supports and protects those who are distressed by the discussion of challenging issues.'<sup>110</sup> A theme of the report is that the University had construed the concept of harassment too broadly in aiming to avoid it, and that some of its internal policies made incorrect, overly expansive statements about the definition of harassment prohibited by the Equality Act.<sup>112</sup>

Following the report, Vice-Chancellor of the University issued a formal apology to the two professors, saying that while there is a need to 'manage the balance between freedom of speech and our commitment to diversity, equality and inclusion', university members must be prepared to 'encounter ideas or arguments which may be experienced as objectionable or offensive'.<sup>113</sup> The Reindorf report is, among other things, a lesson in what can go wrong in interpretation of the Equality Act; it deserves careful consideration by policy makers. The recommendations in the present report are in part an attempt to articulate general solutions that would help avoid the kind of situation that was the focus of the Reindorf report and would help to achieve the appropriate balance between the competing values identified by the Vice-Chancellor.

108. Jess de Wahls, an artist, was told by the Royal Academy that they would no longer stock her work after they received complaints that she was a 'transphobe': after coming under press scrutiny they apologised to her. See Laura Bakare, 'Royal Academy of Arts apologises to Jess de Wahls in transphobia row' *The Guardian* (23 June 2021) <https://www.theguardian.com/artanddesign/2021/jun/23/royal-academy-of-arts-apologises-to-jess-de-wahls-in-transphobia-row>

109. Report of Akua Reindorf (17 May 2021) [https://www.essex.ac.uk/-/media/documents/review/public\\_version\\_-\\_events\\_review\\_report\\_-\\_university\\_of\\_essex---17-may-2021.pdf?la=en](https://www.essex.ac.uk/-/media/documents/review/public_version_-_events_review_report_-_university_of_essex---17-may-2021.pdf?la=en)

110. *Ibid.* 247.

111. *Ibid.* paras 225-26 & 243.11.

112. *Ibid.* paras 225-26 & 243.11.

113. Professor Anthony Forster, 'Review of two events involving external speakers' (17 May 2021), at <<https://www.essex.ac.uk/blog/posts/2021/05/17/review-of-two-events-with-external-speakers>>



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