**Adopting (in)equality in the UK: the Equality Act 2010 and its impact on charities**

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Abstract:

This article considers the relationship between the Equality Act 2010 and the Charities Act 2011 (in Scotland, the Charities and Trustee Investment (Scotland) Act 2005) in the context of adoption by same-sex couples and the complex exceptions to the Equality Act that charities may be able to rely upon in order to continue to discriminate. It concludes that the law is confusing to the point of opacity, to the detriment of those seeking to exercise their rights and those called on to adjudicate conflicts.

**Keywords:** charities; Equality Act 2010; adoption; discrimination

# Introduction

The Equality Act 2010 encompasses nine ‘protected characteristics’ (age; sex; race; disability; sexual orientation; religion or belief; gender reassignment; marriage and civil partnership). As the protected characteristics have expanded so the potential for a ‘conflict of rights’ has also increased. Nowhere has this been more apparent than in the disputes that have arisen where people of faith have argued that they should be wholly or partly exempt from the legal requirement not to discriminate against those whose sexual orientation (or at least its manifestation) contradicts their deeply held religious beliefs. The authors recently completed the first study of the impact of the Equality Act on charities and found dissatisfaction and confusion among religious charities, with a perception that there is a ‘hierarchy of rights’, with religion at the bottom (Morris, Morris and Sigafoos, 2013).

Although the Equality Act contains numerous, complex provisions that seek to balance the fundamental requirement of equal treatment with the need to accommodate carefully circumscribed exceptions, including those based on respect for religious doctrine, these have not always satisfied those seeking to access goods and services free from discrimination or, conversely, to manifest religious beliefs by denying such access. An example is *Bull v Hall* [2013] UKSC 73 in which the Supreme Court held that Christian hoteliers were not entitled to deny a double bed to civil partners (c.f. *Black v Wilkinson* [2013] EWCA Civ 820). Likewise, in***Eweida and Others v United Kingdom* [2013] ECHR 37** the European Court of Human Rights (ECtHR) **grappled with the right of an employee to manifest religious beliefs. In one of the combined cases, the ECtHR held that the London Borough of Islington had not unlawfully discriminated against Ms Ladele, a civil marriage registrar, by requiring her to officiate at same-sex civil partnerships. As the non-discrimination policy she challenged was designed to protect rights guaranteed under the European Convention on Human Rights, it fell within the wide margin of appreciation granted to states.** Such cases have reignited debates about whether the law should be amended to allow for a ‘conscience clause’ that would exempt religious individuals or organisations from the laws requiring equal treatment and more generally how a modern equality framework should manage the competing demands of different protected characteristics.

The legal, practical and ethical complexities inherent in this area are exacerbated when disputes involve disparate pieces of legislation. This article considers the relationship between the Equality Act 2010 and the Charities Act 2011 (in Scotland, the Charities and Trustee Investment (Scotland) Act 2005) in the context of adoption by same-sex couples and concludes that the law is confusing to the point of opacity, to the detriment of those seeking to exercise their rights and those called on to adjudicate conflicts. The cases originate in England: *Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC) and in Scotland: *St Margaret’s Children and Family Care Society (SC028551) v Office of the Scottish Charity Regulator*, EHRC intervening App 02/13. Like *Bull v Hall* and *Eweida and Others v United Kingdom,* the cases highlight some of the most intractable consequences of the equality framework.

**The legal framework**

Since 2005 same-sex couples, unmarried heterosexual couples and single people may be considered as adoptive parents (Adoption and Children Act 2002, ss 50, 51 and s 144(4)). The position is the same in Scotland under the Adoption and Children (Scotland) Act 2007 (s 29). In the year ending March 2013, 230 children in England (6 per cent of all adoptions) were adopted by same-sex couples (either in a civil partnership or not). This was up from 160 children (4 per cent) in the previous year. In Scotland 14 adoptions (3 per cent) registered in 2013 were by same-sex couples (<http://www.baaf.org.uk/res/stats>). The adoption agencies that process applications may be part of local authority children’s or social services or they may be voluntary organisations with charitable status.

The Equality Act (Sexual Orientation) Regulations 2007/1263 prohibited discrimination on the grounds of sexual orientation in the provision of goods, facilities, services, education, management and disposal of premises and the exercise of public functions, thereby extending the protection already in place in employment and vocational training. The Regulations prompted debate about the extent to which special exceptions should be made for religious belief both for individuals and organisations and some of these arguments were rehearsed in *Bull v Hall*. The Bulls are devoutly Christian hoteliers and allow only married couples the benefit of a double bed. Unmarried heterosexual couples may not share a double bed. Neither, it goes without saying, may same-sex couples, whether or not they are civil partners. The majority of the Supreme Court held that this was unlawful direct discrimination based on sexual orientation but the sometimes tortuous reasoning underlines the legal complexities of distinguishing between direct and indirect discrimination as well as the sensitivities involved in religious freedoms.

The 2007 Regulations did contain several exceptions and significantly, their scope did not extend to discrimination on grounds of marital status. It was decided, however, that there should be no specific sexual orientation exception for faith-based adoption agencies although there was a transitional period until 31 December 2008 during which agencies wishing to avail themselves of the transitional arrangements would have to refer gay, lesbian and bisexual potential adopters to other agencies (reg 15). Beyond that date, all agencies, including those with a religious ethos opposed to same-sex relationships would have to treat all applicants equally. The Catholic Care charity (see below) was the only Catholic agency in England to have continued to try to offer adoption services after the transitional period. The rest either stopped their adoption work or severed ties with the Catholic Church.

***Direct and indirect discrimination***

The Equality Act 2010 largely consolidates pre-existing laws including the Equality Act (Sexual Orientation) Regulations 2007. The Act covers a wide range of activities including employment, education, and access to goods and services. Although the scope of the protection and the myriad exceptions differ according to context, the general principles relating to equal treatment are the same. The Act operates by identifying prohibited conduct and this includes direct and indirect discrimination. Under section 13 of the Equality Act 2010, a person (A) directly discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Absent specific exceptions there is no defence to direct discrimination (except where the prohibited characteristic is age (s 13(2)). Indirect discrimination occurs where an employer or service provider (for example) applies to all a provision, criterion or practice which puts, or would put, persons with a particular protected characteristic at a particular disadvantage (section 19). The discrimination is unlawful only if the application of the provision, criterion or practice cannot be shown by the person applying it to be a proportionate means of achieving a legitimate aim. Unlike direct discrimination, therefore, indirect discrimination may be justified (s 19(2)(d)). The distinction between direct and indirect discrimination is crucial given the lack of defence to direct discrimination but unfortunately it is often unclear. This is apparent in *Bull v Hall* where the Supreme Court was divided as to whether refusing civil partners access to services amounts to direct or indirect discrimination (although the minority who found indirect discrimination also held that it was not justified).

Because there is no defence to direct discrimination, the fact that less favourable treatment springs from a ‘good’ motive, including religious belief, is irrelevant. If the less favourable treatment is ‘because of’ sexual orientation the conduct is unlawful. Consequently, an individual or organisation wishing directly to discriminate must be able to bring themselves within an exception. In the context of this discussion, the principal relevant exceptions are those concerning religious organisations and charities.

***Exceptions for religious organisations***

Schedule 23 of the Equality Act 2010 contains a range of ‘general exceptions’ and Schedule 23(2) applies to non-commercial ‘organisations relating to religion or belief’. The non-commercial organisation must have as its purposes one or more of the following: to practise, advance or teach a religion or belief; to allow people of a religion or belief to participate in any activity or receive any benefit related to that religion or belief; or to foster or maintain good relations between people of different religions or beliefs. Such an organisation may impose restrictions in relation to two protected characteristics: a person’s religion or belief, or their sexual orientation and those restrictions may apply to: membership; participation in activities; use of any goods, facilities or services that it provides; and use of its premises. In relation to discrimination based on sexual orientation, the exception applies only where it is necessary to comply with the doctrine of the organisation, or in order to avoid conflict with the strongly held convictions of members of the religion or the followers of belief that the organisation represents.

Whilst some charitable providers of services may be able to bring themselves within Schedule 23(2), they also need to be aware of Schedule 23(10) which states:

This paragraph does not permit anything which is prohibited by section 29 [provision of services], so far as relating to sexual orientation, if it is done—

(a) on behalf of a public authority, and

(b) under the terms of a contract between the organisation and the public authority.

In effect, therefore, the Schedule 23(2) exception is not available to religious organisations in relation to the provision of any service where they have contracted to provide such services on behalf of a public authority.

***Charities and public benefit***

Many providers of adoption services are voluntary organisations with charitable status. Public benefit has always been inherent in the concept of charity, and is now enshrined in statute (Charities Act 2011, s 2 and 4 in England and Wales; Charities and Trustee Investment (Scotland) Act 2005, s 8). In England and Wales, decisions about whether a particular charity meets the public benefit requirement continue to be determined by the charity regulator, the Charity Commission, on the basis of case law, and ultimately by the courts. The Scottish legislation contains a definition of public benefit, rather than wholly relying on case law and guidance from the Office of the Scottish Charity Regulator (OSCR). It is also notable by comparison, that, in Scotland, section 7 states that: ‘a body meets the charity test if (a) its purposes consist only of one or more of the charitable purposes, and (b) it provides … public benefit in Scotland or elsewhere’. This means that a charity’s activities are the yardstick by which to measure public benefit: ‘In Scotland, public benefit is assessed on the basis of how a body exercises its functions; in England and Wales, the issue is whether a particular charitable purpose is for the public benefit’ (Office of the Scottish Charity Regulator, 2011, p. 4).

***Exceptions for charities***

Section 193 of the Equality Act 2010 has a specific exception for charities. It provides:

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

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

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

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

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

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

This replaces and narrows previous exceptions that applied to charities. Because section 193 applies only to charities, it is inevitable that any appeal to its protection will raise questions about the charitable status of the organisation concerned, including the question of whether it is operating for the public benefit.

The interaction between the Equality Act 2010 and the Charities Act 2011 (or its Scottish equivalent) provides the basis for the examination of the two adoption cases, *St Margaret’s* and the lengthy *Catholic Care* litigation.

**The Catholic adoption cases**

The circumstances that gave rise to *Catholic Care* in England and to *St Margaret’s* in Scotland are similar enough for it to be remarkable that the outcomes were diametrically opposite. The former was found to be in breach of the Equality Act 2010 in wishing to turn away same-sex couples, the latter was found not to contravene the law by its stipulation (at a time when same-sex marriage was impossible) that applicants should have been married for at least two years. The inconsistency raises many questions, including those concerning the definition of a ‘religious’ charity; the test to be applied in deciding whether discrimination may be justified; and the relationship between discriminatory purposes and public benefit.

***Catholic Care***

Catholic Care is a Roman Catholic charity that was involved in the provision of adoption services. Until the end of 2008, the charity operated a practice (which was not initially an explicit restriction in its charitable objects)of screening only heterosexual potential adoptive parents and only placing children with adoptive parents who were heterosexual and would constitute what was termed a ‘Nazarene family’ of mother, father and child. The exclusion of potential adoptive same-sex parents was said to be required for reasons of Roman Catholic religious doctrine. The charity had been willing in the past to consider adoptive parents from other denominations and other faiths, provided that they would constitute a Nazarene family.

When the 2007 Regulations outlawed sexual orientation discrimination, the charity believed that in order to meet the pre-Equality Act 2010 exception for charities it needed to change its Memorandum of Association to make explicit that it would only provide adoption services to heterosexual adoptive parents. The charity needed Charity Commission consent for this change to its objects (Charities Act 1993, s 64(2); now Charities Act 2011, s 198). In November 2008, the Charity Commission refused to authorise the change on the grounds that the proposed explicit restriction was misconceived, being aimed at the adopting *parents*, rather than the *children* who were the charity’s beneficiaries (Charity Commission for England and Wales, Decision on whether or not to grant section 64 consent for Catholic Care (Diocese of Leeds) and Father Hudson’s Society to amend their objects, 24 November 2008 (unreported). Father Hudson’s Society later withdrew its appeal. Under procedures then in place, the charity appealed to the Charity Tribunal, which ultimately held that the charity’s intended means of operation in reliance upon its proposed amended objects would have been unlawful within the Regulations. The appeal was therefore dismissed (*Father Hudson's Society and another v Charity Commission (Equality and Human Rights Commission intervening)* [2009] PTSR 1125).

On further appeal, however, Briggs J in the High Court (to which appeals then went) held that the question of whether the charity should be permitted to change its objects should be remitted to the Charity Commission for it to decide (*Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] EWHC 520 (Ch), [2010] 4 All ER 1041). He instructed the Commission to consider whether the proposed discrimination could be justified in light of the public benefit thereby to be achieved. The test to be applied was whether this was a proportionate means of achieving a legitimate aim under Article 14 of the European Convention on Human Rights (ECHR).

The Charity Commission again decided that the charity could not change its objects to limit its activities to heterosexual adopters but revised its reasons (Charity Commission for England and Wales, Catholic Care (Diocese of Leeds), decision made on 21 July 2010, Application for consent to a change of objects under s 64 of the Charities Act 1993). It considered that the charity could only fall within the exception if this was a proportionate means of achieving a legitimate aim. The charity had not provided ‘sufficiently convincing and weighty reasons’ to persuade the Charity Commission to authorise the discrimination.

The charity appealed again to what was now known as the First-tier Tribunal (Charity), (Tribunals Courts and Enforcement Act 2007) by which time the Equality Act 2010 was in force, so that the second Tribunal decision (in the form of a re-hearing: Charities Act 2011, s 319(4)) was based on the new section 193 exception. Once more, the charity was not able to convince the Tribunal that the exclusion of same-sex couples from their adoption services amounted to a proportionate means of achieving a legitimate aim (*Catholic Care (Diocese of Leeds) v Charity Commission* [2011] UKFTT B1 (GRC)).

In November 2012 the case was finally dispensed with when Sales J in the [Upper Tribunal](http://www.justice.gov.uk/about/hmcts/tribunals) upheld the decision of the First-tier Tribunal (*Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC)). There must be ‘particularly weighty’ reasons to justify discrimination on the basis of sexual orientation. Although the charity argued that donors would stop supporting it if it allowed same-sex couples to use its adoption service, the Tribunal ruled that the charity had not demonstrated that this would be the case. Catholic Care decided not to appeal this decision and is no longer providing adoption services.

***St Margaret’s***

St Margaret’s Children and Family Care Society (St Margaret’s) was set up in 1955 by the Catholic Church. It is a company incorporated under the Companies Acts and limited by guarantee. It is on the Scottish Charity Register; is an adoption agency within the Children (Scotland) Act 2007 and a professional social work agency registered with the Care Inspectorate. St Margaret’s objects, as amended in 2008, were set out in its memorandum of association:

The society is established to promote (irrespective of creed) the welfare of children, whose interests are paramount, to foster the stability of family relationships and to assess the suitability of applicants as adoptive parents all in accordance with the teachings of the Catholic Church.

Prior to 2008, the charity’s objects read: ‘The Society is established to promote the welfare of children and families irrespective of creed, but particularly those of the Roman Catholic faith …’ St Margaret’s ‘policies and procedures document’ stated that among its aims and objectives were: ‘to provide a Catholic, comprehensive, independent adoption service to birth parents, babies and children and adoptive parents … especially those who wish to do so within the framework of their faith’; ‘to offer an adoption service which has a concern for the spiritual care of the service users, rooted in the Catholic tradition’ and ‘to prepare and assess prospective adoptive parents and to make decisions on their suitability and prospective adopters, with an emphasis on providing Catholics and others adoption and family support services within the framework of the Catholic faith.’ The charity was funded partly by the Catholic Church and its followers, but at the time of the case, the bulk of its income (£301,056) came from ‘Inter-Agency’ fees paid by adoption agencies when the charity placed an adoptive child. Most adoptions involved Scottish local authorities: in effect, the charity was finding suitable adoptive parents for the children in the care of the local authorities. The chair of the charity trustees was a Roman Catholic priest and the president and vice-presidents of the charity (who were not charity trustees) were the Archbishop and Bishops of the contributing Dioceses.

In carrying out its function as an adoption agency (which the charity estimated as being approximately 90% of its activities) the charity at that time had ‘preferred criteria’ for adoptive parents. Its policies and procedures document stated that it would give preference to:

1. Catholic couples who wish to adopt within the framework of their faith.
2. Couples, where one of the parties is Catholic and they wish to adopt within the framework of the Catholic faith.
3. Other couples who wish to adopt within the framework of the Catholic faith.
4. An individual who may wish to adopt within the framework of the Catholic faith…

The document also provided guidance for staff in dealing with enquiries and stated that ‘Applicants should be couples within a stable, loving relationship and have been married for at least two years.’ As far as the general public were concerned, at the relevant time the web page (St Margaret’s Children and Family Care Society website) stated: ‘We will accept applications from married couples. … We expect applicants to have been married for at least two years.’ It is apparent that this was inconsistent with the preferred criteria since the requirement of marriage would (presumably) rule out not only couples who were civil partners but also single people (clearly referred to in (4) above).

In 2011, the Office of the Scottish Charity Regulator (OSCR, established under Charities and Trustee Investment (Scotland) Act 2005) received a complaint from the National Secular Society that St Margaret’s was acting in a discriminatory manner in its assessment of the suitability of potential adopters. Specifically, by stating that it preferred couples who had been married for at least two years, it was unlawfully discriminating on grounds of sexual orientation. After an inquiry, OSCR found that St Margaret’s was operating in breach of the Equality Act 2010 by directly discriminating against same-sex couples who could not then meet its preferred criterion of marriage. That unlawful discrimination led OSCR to conclude that the charity also failed to meet the charity tests set out in the Charities and Trustee Investment (Scotland) Act 2005, (above and c.f., in England and Wales, Charities Act 2011, s 2(1)). OSCR issued a Direction under section 30 of the 2005 Act requiring the charity to amend its criteria in order to comply with the Equality Act. St Margaret’s applied for a review of the decision. On review, the original decision was confirmed:

… the charity does not provide public benefit because the way it provides benefit involves unlawful discrimination, which causes detriment to the public and to particular groups of people, the effect of which outweighs the other positive effects of the charity’s work. … [A]ccess to the benefits the charity provides is unduly restricted … [T]he charity fails the charity test …. (OSCR, 2013a)

St Margaret’s appealed OSCR’s decision to the Scottish Charity Appeals Panel (Charities and Trustee Investment (Scotland) Act 2005, s 76). OSCR can make a range of decisions about charitable organisations and the Act makes provision for organisations to appeal under certain circumstances about such decisions to the Panel. There were two principal threads to St Margaret’s arguments: first that it does not, in fact, discriminate but offers its services to anyone who approaches it. Second, if it does discriminate, then it is allowed to do so. In January 2014, the Panel allowed St Margaret’s appeal, and quashed the decision of OSCR.

**Complexities and clashes**

In these charity adoption agency cases, the deciding body (be it the Tribunal, in England and Wales, or the Panel, in Scotland) was faced with two discrete and occasionally opaque pieces of legislation, one relating to charities, overseen by the Charity Commission or OSCR and one relating to equality issues, which fall within the remit of the Equality and Human Rights Commission (EHRC). Both pieces of legislation also had to be interpreted in the light of the Human Rights Act 1998. It is perhaps unsurprising that both sets of litigation caused problems. *St Margaret’s* was certainly dealt with swiftly by the Panel. Nevertheless, the decision lacks clarity in places, being described as ‘not easy to follow’ by the EHRC (EHRC, 2014), and as difficult to follow by OSCR (OSCR, 2014), and fault may well be found with its reasoning or lack thereof. *Catholic Care*, on the other hand, taxed the Panel’s equivalent body in England and several appellate bodies for four years.

While the precise facts of either case may not be repeated, these issues are of more general application. The arguments and the findings are of interest to both equality and charity lawyers and, of course, to those dealing with adoption services. These are concerns that will continue to test those called on to adjudicate in an area that remains unsettled.

#### Distinguishing direct and indirect discrimination in practice

In *Catholic Care,* Sales J held that absent a defence of justification being made out under section 193, the Charity could not lawfully offer adoption services to heterosexuals while refusing to provide them to homosexuals. In *St Margaret’s*, the Panel held that there was no direct discrimination, observing that no homosexual couple had ever *applied* to the agency. Although the Panel did not pursue this point, other than to suppose that same-sex couples would go elsewhere (presumably having been discouraged by the criteria), it is worth noting that a finding of *direct* discrimination does not depend on the identification of an actual victim. The (then) European Court of Justice (ECJ) addressed this issue in *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*C-54/07, [2008] ICR 1390, [2008] 3 CMLR 22. The director of a Belgian company stated publicly that it would not employ workers of Moroccan origin. The ECJ ruled that there could be direct discrimination, despite there being no identifiable complainant, since such public declarations are likely to dissuade those targeted from applying in the first place. By analogy, therefore, the use of published criteria for selection amounts to discrimination, whether or not an individual has tried to access the service and been refused. The lack of a victim would not by itself have prevented a finding of direct discrimination.

St Margaret’s had asserted that they would allow civilly partnered couples to adopt on the same basis as any married couple but this is complicated by the evidence presented to the Panel by Monsignor Magee that adoption by same-sex couples is inconsistent with Catholic teaching (lines 1061-1062). Nevertheless, the Panel found that: ‘The appellant has not banned and does not have an absolute ban against those of same-sex orientation it would e.g. allow a same-sex couple in a civil partnership to adopt on the same basis as any other married couple’ (sic) (lines 1494-1497). If this is true there is a distinction between *St Margaret’s* and *Bull*. In the latter, civil partners were not allowed a double bed whereas married couples were. The Panel also distinguished *Catholic Care* on this point as, in that case, the charity had wished ‘to have a complete ban on homosexuals using their services’ (line 1502).

Based on the Panel’s finding of fact that, ‘In principle [St Margaret’s] would consider an application to be considered as adoptive parents from a couple in a civil partnership’ (lines 340-341), the EHRC issued a statement noting that it had written to St Margaret’s ‘advising it to ensure that its published policies and practices properly reflect its stated position that adoption applications from couples in civil partnerships will be considered in the same way as those from married couples; and to ensure that such applications are indeed considered equally’ (EHRC, 2014). It is of course difficult to understand why, if St Margaret’s was indeed so amenable to considering prospective applicant parents in civil partnerships, the charity resisted OSCR’s initial Direction calling for it to amend its policies to be compliant with the Equality Act 2010.

On the evidence presented by *St Margaret’s* the only discrimination was to *prefer* married and civilly partnered couples to single people: this would not be unlawful. This insistence by the charity that they would not discriminate purely on the grounds that a couple were civil partners must be taken at face value given that the Panel accepted the evidence before them, but it raises questions as to why its internal guidance and its website did not make this clear. Adoption agencies in Scotland are required by law to publish a statement of the general criteria applied to determine whether a person may be accepted for assessment as an adoptive parent. They are also required to apply those criteria (Adoption Agencies (Scotland) Regulations 2009 SSI 2009/154). The Panel took the view that the published criteria were well considered and transparent. This is despite the fact that, in OSCR’s review, OSCR concluded that ‘in discussions with the charity it was not possible to achieve clarity and certainty as to how the charity acts in practice in response to individual enquirers’ (OSCR, 2013a). At the time, the general criteria did refer to ‘couples’ rather than *married* couples but the guidance for staff stated that couples should have been married for at least two years. On its web page, the charity made two references to ‘married’ couples. This is either at worst incorrect, or at best misleading. In no case can it be described as transparent. If the criteria are taken at face value, (i.e. preference given to married couples) they discriminate against civil partners on the basis of sexual orientation (per *Bull v Hall*). The Panel deliberated prior to the publication of the Supreme Court decision in *Bull* and would thus have been relying on the Court of Appeal decision, which had also found unlawful direct discrimination on grounds of sexual orientation (*Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83, [2012] 2 All ER 1017). Nevertheless, it was agreed that the parties would have the opportunity to present argument to the Panel in the light of the Supreme Court decision. In the event, the Panel concluded that the Supreme Court decision did not alter its decision to allow the appeal (and also noted that, in any event, it was not bound to follow the decision as *Bull* did not originate in Scotland).

The question of the criteria used by St Margaret’s is, of course, important in the context of indirect discrimination. It is clear that the published criteria indicated preferences in deciding on suitability of adoptive parents. There was some discussion in the Panel hearing about how, when, and indeed whether, these criteria were in fact used. The Panel accepted evidence from the charity that the criteria were not used at point of enquiry: ‘prospective adopters are able to go much further down the road of discovery before they were applied if at all’ (line 1565 and see also line 1360).

Given that this was the factual basis on which the Panel proceeded, they then had to address the question of whether there had been indirect discrimination, and if so whether it could be justified. The Panel held that St Margaret’s preferred criterion of marriage ‘does discriminate against same-sex couples and homosexuals each of whom has protected characteristics in the Equality Act’ (line 1574). This was held to be indirect discrimination. The first point to note about this is that it contradicts the finding in relation to direct discrimination, where it was held that there was no discrimination against civil partners since they were allegedly treated in the same way as married couples. Of course, if the Panel is choosing to read the criterion as being that applicants should preferably be married *or* in a civil partnership (despite it not saying so) then the groups discriminated against are all single people (which is not a protected characteristic) and same-sex couples not in a civil partnership (but that too would be discrimination on grounds of ‘marital/civil partnership’ status, and thus not covered in this context).

Leaving aside this confusion, there are other problems with the findings in relation to indirect discrimination. Once indirect discrimination is found, the tribunal should go on to consider whether it is a proportionate means of achieving a legitimate aim. The Panel did not do this in the context of section 19, although it did find that under section 193 (‘the charity exception’) the preferred criteria satisfied the test (below).

Having found that St Margaret’s criteria did not amount to direct discrimination and having decided, by inference at least, that the indirect discrimination was justifiable, the Panel considered whether the charity was, additionally, entitled to take advantage of the exceptions potentially available to it under the Equality Act. It looked at the exceptions only *because* it had found that any discrimination was indirect. Indeed, there is a wrong assumption made on several occasions that the exceptions only apply to cases of indirect discrimination. If, however, any of the exceptions *do* apply, it is irrelevant whether the discrimination is direct or indirect: the legislature has decided that discrimination, including direct discrimination, is permitted in limited circumstances and these are to be interpreted restrictively. The confusion exhibited by the Panel extends to its interpretation of the reasoning in *Catholic Care*, since it is stated that, as a result of the finding that there was direct discrimination in that case, Catholic Care could not use the ‘religious exemption’ which is ‘open only where the organisation is required to show that the discrimination is to be a proportionate means of achieving a legitimate aim’ (lines 1511-1512). If this is a reference to Schedule 23, this test is irrelevant to the religious exception (below). This is perhaps a mistaken reference to section 193, but if so it is doubly mistaken, as this section allows for a defence to *direct* discrimination.

***When does the exception for religious organisations apply?***

If a religiously based adoption charity qualifies as a religious organisation, it may restrict access to its services by same-sex couples under Schedule 23(2) of the Equality Act 2010 on the basis that allowing adoption by such couples would contravene religious doctrine. There was little discussion of this exception in isolation in the *Catholic Care* case, but it did feature heavily in *St Margaret’s*. It should be remembered that, in that case, the Panel noted Monsignor Magee’s evidence, which ‘highlighted that adoption by homosexuals is not consistent with Catholic teaching’ (line 1061).

At first glance, it might be supposed that an organisation involved for 90 per cent of its time in placing children for adoption is not obviously a ‘religious’ organisation and that is what was argued by OSCR before the Panel. This argument was rejected and in fact OSCR’s own review had conceded:

that its purposes bring it potentially within the scope of the exception, since one of its purposes is to enable persons sharing the Catholic faith to receive benefits and engage in activities within the framework of that belief. We also accept the charity’s view that the preferred criteria comply with the doctrine of the Catholic Church (OSCR, 2013a).

The objects of the charity clearly link its purposes to the Catholic faith and the promotion of the Catholic view of family life. OSCR took the view, however, that the religious exception is unlikely to apply ‘where a religious organisation is providing services to the public or carrying out functions of a public nature’. This interpretation appears to be overly narrow. OSCR felt that the exception ‘may apply where organisations are conducting activities such as acts of worship or devotion’. Given that the Equality Act 2010 does not cover acts of worship or devotion, such a restriction empties the exception of content. The exception must extend beyond worship. The Charity Commission in England and Wales, in its Guidance gives as an example of a Schedule 23 exception a charity whose purpose is to provide a care home for the people of a particular religion, including the provision of facilities in an environment that adheres to the particular religious doctrines and practice (Charity Commission, 2013a, para 8.5). In its written intervention before the Panel, the EHRC stated:

the Commission considers that the charity’s activities would most likely fall within category (d) [of Schedule 23, para 2(1)], i.e. organisations which enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief. It would, however, be useful to have information on the actual religious affiliations of prospective adopters assisted by the charity (EHRC, 2013, para 5.2).

Assuming, therefore, that St Margaret’s qualifies as a religious organisation for the purposes of Schedule 23, it appears that it may lawfully discriminate on grounds of sexual orientation in allowing access to its services. It is notable, however, that part of the argument on behalf of the charity was that it does *not* discriminate. The exception can apply only where it is necessary to comply with doctrine or avoid conflict with strongly held convictions. If the charity does discriminate against same-sex couples because of doctrine, then the criteria should not be preferences but absolutes. If it does *not* discriminate, then Schedule 23 is irrelevant.

***The religious organisation exception and public sector contracts***

Importantly, the Schedule 23 exception is not available to a religious organisation when contracted to provide services on behalf of a public authority. There is thus a further inquiry. Do adoption charities such as St Margaret’s or Catholic Care act on behalf of a public authority or have a contract with a public authority? St Margaret’s, for example, worked with local authorities in placing children with families. It received a considerable part of its income (see above) from inter-agency fees paid by local authorities:

LAs [Local Authorities] place children for adoption with their own approved prospective adopters (an ‘internal placement’) or with approved prospective adopters provided by another local authority or by a VAA [voluntary adoption agency] (an ‘external placement’). … Where an external placement is made, an inter-agency fee is charged. This fee enables the agency, which has recruited and approved the prospective adopters to recoup their costs. (Selwyn, Sempik, Thurston and Wijedasa, 2009, p. 1).

In the view of the Panel, not only was the charity not acting ‘on behalf of’ a public authority, there was no contractual arrangement underlying these payments. The Form H1 that was used to record the payments was held to be merely a receipt for the money passed by the local authority as agent for the child to the charity as agent for the family. If there were a contract (which they doubted) it would be between disclosed principals, the child and the family. If the charity was to take advantage of the Schedule 23 exception it was, of course, necessary to exclude the possibility that there was a contractual arrangement. With respect, the Panel does seem to be ignoring the fact that the fee – which does not go to the ‘disclosed principal’ but to the charity – is incontrovertibly payment for services rendered. As Selwyn et al. (2009) note above, it is money that the charity needs to recoup its costs. The Panel notes that the charity was not contracted to take a fixed number of children for adoption. In other words, it had not entered a commissioning arrangement with a local authority. That does not mean, however, that *each* placement for which a fee was paid could not amount to a contract. The Consortium of Voluntary Adoption Agencies (CVAA) notes on its website (CVAA website) that ‘the fees charged by CVAA members for interagency placements have been set at a level which recognises the cost of maintaining a professional placement service. Other services may be commissioned by agreement’ (CVAA website. See also Scotland’s Adoption Register website). Absent a commissioning agreement, the situation resembles a unilateral contract: the local authority undertakes to pay for services rendered should the voluntary agency choose to make a placement. St Margaret’s is under no obligation to place a child with a family, but if it does so it is paid a fee. If this is the correct interpretation then a religious charity such as St Margaret’s loses the right to rely on the Schedule 23 exception. It would then be forced back on an alternative defence, such as that of the charities exception in section 193 (discussed below).

The relationship between charities and the public sector raises a further question. In *Catholic Care* the EHRC, in its early intervention in this case (see *Father Hudson's Society and another v Charity Commission (Equality and Human Rights Commission intervening)* ruling on preliminary questions, 13 March 2009) submitted that the adoption services provided were of an inherently public nature so that, the relevant regulations providing exceptions (pre Equality Act 2010) could not be relied upon to permit them to continue. The Tribunal later concluded ([2009] PTSR 1125) that the nature of the activities, taken together with the proposed receipt of public funding for them, also made them unlawful by virtue of regulations 8 and 14(8) of the Equality Act (Sexual Orientation) Regulations 2007/1263, because of the public character with which they are imbued. This argument did not feature heavily in later decisions in the *Catholic Care* case, which were focused on the charity exception.

***Are human rights relevant?***

These adoption cases raise several issues directly or tangentially connected to the European Convention on Human Rights (ECHR). For example, in his judgment in *Catholic Care*, Briggs J interpreted the charity exception provision in the Regulations (reg 18) as a provision which implemented Article 14 of ECHR (prohibition of discrimination), so as to permit justification of differential treatment of heterosexuals and homosexuals only if undertaken for a legitimate aim and in a manner where the means employed are proportionate to the aim sought to be realised (*Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] EWHC 520 (Ch) [72]-[74], [78], [84] and [104]).

More specifically, in *St Margaret’s* case, the Panel considered whether the charity had rights to freedom of thought, conscience and (specifically) religion under Article 9 of the ECHR and if so, what the effect of those rights might be. While OSCR took the view that Article 9 was not engaged because the charity was not a religious organisation, the Panel disagreed, possibly influenced by the fact that the charity identified the advancement of religion as one of its objects (line 162). Even assuming this to be correct, there is still the question of whether Article 9 would apply to a religiously affiliated charity. Most churches and other religious groups are charities, and many provide additional services, ranging from poverty relief to childcare. However, a distinction may be able to be made between entities whose primary charitable purpose (or activities, in Scotland) is religious teaching and celebration, and entities whose primary purpose or activity is to provide some other service, even if they are informed by a religious motivation.

The European Court of Human Rights (ECtHR) has held on a number of occasions that churchesand other religious communities may claim the protection of Article 9 (see e.g., *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria* (Application no. 40825/98); *Church of Scientology Moscow v Russia* [2007] ECHR 258). Moreover, Article 9 has a collective as well as an individual aspect and this applies to both the private and the public sphere (Murdoch, 2012, p. 23). Not allowing religious organisations to register as legal entities violates the freedom of association under Article 11, as without this the ‘right would be deprived of any meaning’ (Case of the Moscow Branch of the Salvation Army v. Russia [2006] ECHR (No.72881/01), at 71). The Salvation Army is a difficult case because it provides religious worship and other services under one large organisation (Personal communication with Frank Cranmer 2015). ECtHR case law has not, however, directly addressed whether these rights extend to affiliated religious charities. *The Church of Jesus Christ of Latter-Day Saints v the United Kingdom* (Application no 7552/09) 4/3/2014 provides support, however, for the idea that religiously affiliated charities are distinguishable from churches themselves under Article 9.

Even if an adoption agency should fall under Article 9’s scope, states may decide with which churches they collaborate in relation to public services, provided that those decisions are based upon neutral criteria. In *Magyar Keresztény Mennonita Egyház and Others v Hungary* (Application nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12) the ECtHR held that the Hungarian Church Act, which deregistered some churches but not others, was a violation of Article 9. However, in terms of state subsidies and other benefits:

States must be left considerable liberty in choosing the forms of cooperation with the various religious communities, especially since the latter differ widely from each other in terms of their organisation, the size of their membership and the activities stemming from their respective teachings. This is particularly so in selecting the partners with which the State intends to collaborate on certain activities. The above prerogative of the State assumes even greater importance when it comes to public, societal tasks undertaken by religious communities but not directly linked to their spiritual life (that is, not related to, for example, charitable activities flowing from their religious duties). In this context, States enjoy a certain margin of appreciation when shaping collaboration with religious communities (para 108).

Any attempt by the state to distinguish between different religious communities in terms of outsourcing public tasks requires that the state remain neutral and make its determinations based upon ‘ascertainable criteria’ (para 109). St Margaret’s cannot claim that it has been treated other than neutrally by OSCR. Rather, it is claiming the right to be treated preferentially to other charities by allowing a restriction not allowed to other adoption agencies. The provision of adoption services is sufficiently removed from the religious duties of the Catholic Church that it seems an overly generous interpretation of Article 9’s scope to include an adoption agency as a church or religious community capable of holding and exercising Article 9 rights. In the same way that states are permitted a wide margin of appreciation when it comes to striking a balance between competing Convention rights, states must also be allowed a sufficient margin of appreciation to balance the rights of protected groups.

St Margaret’s also claimed in its appeal that the OSCR decision was ‘disproportionate (and hence Convention incompatible and so ultra vires OSCR) as it would entail closure of the Applicant’ (line 541). The Panel found that both OSCR’s decision and its investigation were disproportionate. While it was accepted that one of OSCR’s functions is to investigate apparent misconduct among charities, its actions were not proportionate to the scale of the complaint or targeted where action was needed. This seemingly ignores the fact that investigations into charities are frequently triggered by public complaints or media outcry (Charity Commission, 2013b). The charity regulator must be able to react where there are risks that might call the charitable sector into disrepute. The Panel also decided that the Direction itself was a disproportionate regulatory measure based on the consideration that if St Margaret’s had followed OSCR’s initial Direction then it would have lost the support of its Catholic supporters and members and ultimately been forced to close (lines 2006-11). Of course, if St Margaret’s were indeed operating in a discriminatory manner, that would be the correct result as was the case in *Catholic care*. It is difficult to see what the Panel would have considered to be a proportionate regulatory measure other than allowing the charity to continue to discriminate.

The view that the charity regulators are obliged to ensure compliance with the Equality Act 2010, and with the Human Rights Act 1998, is supported by the EHRC. Although its intervention in *St Margaret’s* is described as only a submission to clarify equality law for the Panel, in *Catholic Care (Leeds) v Charity Commission* [2010] EWHC 520 it argued that as a public authority, the Charity Commission must consider the Human Rights Act 1998 in making decisions on charity applications. This argument was accepted by Briggs J [70]. Indeed, were the charity regulator not to investigate and act where appropriate, it would arguably be failing its own Public Sector Equality Duty by allowing a charity that is discriminatory to remain on the register.

***When will the charities exception be satisfied?***

Section 193 recognises that many charities exist to benefit particular groups – the young, the old, women, minority ethnic groups et cetera. It allows what would otherwise be unlawfully discriminatory conduct but only where the charity can satisfy the conditions laid down – it is not simply a ‘get-out’ clause for charities. It requires a close examination not only of the charity’s stated aims but also of whether the discrimination can be justified. The ease with which the Panel in *St Margaret’s* found that section 193 was satisfied belies its complexity as evidenced in the more nuanced judgments in *Catholic Care*.

In *Catholic Care* the charity argued that the discrimination proposed was proportionate to the achievement of a legitimate aim, which was ‘the prospect of increasing the number of children (particularly “hard to place” children) placed with adoptive families’. The charity argued that, if it did not discriminate against same-sex couples, it would lose funding from its Catholic supporters, which would lead to the closure of its adoption service. It was argued that the harm to those children whom the charity would therefore be unable to assist would be greater than the harm suffered by same-sex couples who could not adopt through Catholic Care. The Tribunal concluded that the charity’s stated aim was in principle a legitimate aim for the purposes of the Equality Act. However, the evidence presented to it did not make out the charity’s case. Whilst it was accepted that it would be a loss to society if the charity’s skilled staff were no longer helping potential adopters, the risk of closure (which was uncertain) of the service had to be measured against the detriment to same-sex couples and the detriment to society generally of permitting the discrimination proposed. The Tribunal ruled that the charity’s case was of insufficient weight to tip the balance in its favour and therefore did not justify discriminating against same-sex couples. Sales J in the Upper Tribunal was in broad agreement.

In St *Margaret’s*, the Panel found that one of the tests in section 193 was easily satisfied since the charity’s objects clause requires the charity to act in accordance with the teaching of the Catholic Church. This is problematic on a number of levels. First, if the charity were to act strictly in accordance with Catholic teaching, it would not consider adoption by same-sex couples, contrary to some of the evidence presented. Second, the EHRC had noted in its written intervention that the charitable instrument referred to ‘family relationships,’ which is not necessarily a reference to heterosexual family relationships, and had suggested that:

If the charity in fact restricts benefits on religious grounds (to Catholic prospective adopters), it could be said to be acting in pursuance of its memorandum; it is less clear that its memorandum requires such a restriction in relation to sexual orientation (EHRC, 2013, para 4.4).

Turning to sections 193(1)(b) and 193(2)(a), the Panel discussed, briefly, the charity’s aim and asked itself whether it is legitimate and, confusingly, whether it is proportionate. It considered whether the *charity’s* aim is legitimate, not whether the provision of benefits according to the preferred criteria is *a* legitimate aim of the charity. It accepted that the charity’s aim is to be a ‘faith based organisation and to manifest that faith *inter alia* in an adoption service and to ensure that Catholic Adoption is available to Catholic Children.’ This was held to be ‘consequently’ a legitimate aim, with no further discussion (lines 1618-1621. C.f. the EHRC’s view in its written intervention in thiscase: ‘the aim which the charity relies upon is to provide adoption services within the framework of the Catholic faith … such an aim is discriminatory in itself, and hence not legitimate’ (EHRC, 2013, para 4.6)). Puzzlingly, the Panel also decided that the *aim* was proportionate, since if the charity ‘was not carrying out the adoption service, then there would be no Catholic Adoption Agency providing an adoption service for Catholic Children who in terms of the Adoption Act are entitled to be brought up in the Catholic faith’ (lines 1621-1625). Effectively, the Panel seems to overlook, or not to appreciate, that the question is whether the discriminatory *criteria* are proportionate, not whether the discriminatory *effect* is proportionate (see *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704, [2012] 3 All ER 1287 [23] (Lady Hale). In *Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC) Sales J held that while seeking to place ‘hard-to-adopt’ children with adoptive families was a legitimate aim, the means proposed were not proportionate. Addressing the issue of whether the fact that same-sex couples seeking to adopt could have gone elsewhere was a relevant factor, Sales J held, ‘whilst the availability of adoption services to same-sex couples from other sources could not of itself justify a practice of discrimination ... it is something which could in some circumstances be relevant to the question of objective justification’ [28]. He then went on, however, to state that the fact that same-sex couples could access adoption services elsewhere, while it may have tended to reduce the detrimental effect,

did not remove the harm that would be caused to them through feeling that discrimination on grounds of sexual orientation was practised at some point in the adoption system nor would it remove the harm to the general social value of promotion of equality of treatment for heterosexuals and homosexuals – a value endorsed by Parliament in assessing and responding to the needs of society by legislating general rules to promote equality of treatment for homosexuals [66].

If St Margaret’s *did* (despite its denials) discriminate against civil partners, it is hard to see how the cases can be distinguished on this point, particularly since St Margaret’s was in an area poorly served by other agencies (line 511). Moreover, the argument that if St Margaret’s did not operate criteria in line with Catholic doctrine it would lose church funding and would have to cease operations had been rehearsed in *Catholic Care* and did not persuade the court that it would be a proportionate response.

Of course, St Margaret’s claimed that it did not actually apply the criteria (often or at all?). If that is so, it would be difficult, if not impossible, to argue that the criteria were nevertheless justifiable. The House of Lords has held in *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] 3 All ER 1287 that, ‘To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so’ [22] (Lady Hale). If the criteria were less than regularly or rigorously applied, how could they be said to be ‘necessary’? They *were* necessary to comply with Catholic doctrine (and evidence was presented that adoption of children by homosexuals is inconsistent with Catholic teaching - line 1061) but if the criteria are not applied the issue of justification becomes extremely problematic.

Section 193, which taxed the Scottish Panel’s equivalent body in England and several appellate bodies over a period of some four years, was deserving of greater additional discussion. Specifically, whether the restricted provision of benefits – by way of the preferred criteria – was a proportionate means of achieving a legitimate aim merited further consideration.

#### What is the impact of equality law on charity law and the public benefit test?

In its guidance on the Equality Act, the Charity Commission for England and Wales on several occasions conflates equality law requirements with the public benefit test (Charity Commission, 2013a). For example, it states that, where charities want to limit benefits to people who share a protected characteristic, if section 193 is not satisfied, the Commission may not be able to register the organisation ‘as it is unlikely to be able to show that it is for the public benefit’ (para 4.2). A similar statement is made in relation to *all* the charity exceptions, ‘If it is difficult to apply either Test A or Test B [meaning section 193(2) or (b)], and no other exception applies, the charity’s purposes may no longer be capable of being carried out for the public benefit’ (para 6.1). Later in the guidance, the same sentiment is repeated more strongly, this time only in the context of the section 193 exception, when it is stated that if section 193(2)(a) or (b) is not satisfied and benefits are nevertheless restricted, such an organisation ‘will not be able to show that it is for the public benefit and cannot therefore be a charity’ (para 7.2).

The EHRC, in its statutory code of practice on Services, Public Functions and Associations (EHRC 2011), also comments on the interrelationship between equality law and public benefit law, stating that the charity regulator will consider the likely impact of any restriction on beneficiaries in the charitable instrument, and whether such restriction can be justified, in assessing whether the aims of a charity meet the public benefit test (para 13.35). The extent to which public benefit can be shown where a charity’s services exclude those with one or more protected characteristics is therefore questionable and was considered in the charity adoption cases.

In the course of the *Catholic Care* litigation, the EHRC, in its early intervention (*Father Hudson's Society and another v Charity Commission (Equality and Human Rights Commission intervening)* [2009] PTSR 1125) argued that a charity that discriminates on grounds of sexual orientation and does not fall within the section 193 exception would fail the public benefit test and so not be charitable. The Tribunal was disinclined to accept that submission, although it did not find it necessary finally to rule upon it in its preliminary decision. Briggs J also considered it unnecessary finally to decide whether a discriminatory purpose could ever be for the public benefit and whether a body which existed for the pursuit (inter alia) of such a purpose could be charitable. He did suggest that any discriminatory treatment by a charity beyond that allowed by the exception in what is now section 193 would likely give rise to ‘large public dis-benefit’ and we can presume that this would not allow a charity to satisfy the public benefit test:

Thus, a charity which proposed to apply differential treatment on grounds of sexual orientation otherwise than as a proportionate means of achieving a legitimate aim might thereby fail to achieve charitable status (or lose it, if it sought to pursue such activities by amendment of its objects) (*Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] EWHC 520 (Ch) [97]).

The Charity Commission applied the approach laid down by Briggs J when it came to re-considering (and again denying) Catholic Care’s request to change its objects (Charity Commission for England and Wales, Catholic Care (Diocese of Leeds), decision made on 21 July 2010, Application for consent to a change of objects under s 64 of the Charities Act 1993). In the charity’s later appeal, the Charity Commission once more argued that a charity that discriminated on grounds of sexual orientation that were not justified under Article 14 of the ECHR could not meet the public benefit requirement (*Catholic Care (Diocese of Leeds) v Charity Commission* [2011] UKFTT B1 (GRC) [13]). Again, the point was not specifically dealt with in the Tribunal’s decision, which was very fact-based, focusing on whether the charity’s activities amounted to a proportionate means of achieving a legitimate aim. On further appeal to the Upper Tribunal, Sales J made no mention of the complex interrelationship between justification of what would otherwise be discriminatory treatment and the public benefit test for charities.

The Scottish legislation, with its ‘definition’ of public benefit also requires OSCR and the courts to have regard, under section 8(2) to:

(a) how any—

(i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and

(ii) disbenefit incurred or likely to be incurred by the public,

in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

(b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

‘Disbenefit’ is not defined. According to OSCR, ‘Disbenefit is the opposite to benefit. It is therefore more than the mere absence of benefit, and, [OSCR’s] view is that it is equivalent to detriment or harm’ (OSCR, 2011, p. 21). In England and Wales, on the other hand, whilst there is no statutory definition of ‘public benefit’, it is accepted that in deciding whether a purpose is for the public benefit, a court must balance the benefit of a purpose with any detriment that results (Charity Commission, 2013c, p. 13 citing *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 [70]). In *Catholic Care*,in carrying out the required balancing act, Briggs J held in the High Court ([2010] EWHC 520 (Ch)) that a weighty and considerable justification would be required to shift the element of public disbenefit.

In *St Margaret’s*,OSCR argued that the charity’s failure to comply with the Equality Act 2010 gave rise to a disbenefit to society and that therefore the public benefit test had not been satisfied. St Margaret’s response, which was accepted by the Panel, was that the charity’s entire public benefit (which went beyond the ‘tangible’ benefit of placing adopted children, to the ‘intangible’ benefit of the propagation of religion to society) had not been taken into account when weighing up the balance of benefit and disbenefit. The charity went further and argued effectively that a mere breach of equality law did not affect its public benefit, in the same way that it would not be relevant to a charity’s public benefit if it had breached health and safety law and had been prosecuted by the Health and Safety Executive (lines 707-711). This may not be a very good example as arguably health and safety rules exist for good reason and for the benefit of society. A better example might be failing to comply with some other technical rule, such as where charity trustees have acted in the best interests of their charity, but beyond their legal powers, as specified in the trust instrument that established it, thereby acting (technically) in breach of trust. It would be more acceptable here to say that this does not impact on the charity’s public benefit.

Despite the views of the EHRC and the Charity Commission (see above), in *St Margaret’s*, the Panel stated that OSCR should not be considering equality issues when considering public benefit, unless breaches of equality law have been found to exist by the court or relevant regulator. It held that OSCR should have referred any equality issues to the EHRC, rather than take them into account itself when considering public benefit. OSCR subsequently confirmed, however, that where a charity’s compliance with charity law involves Equality Act issues or other issues which fall within the role of another regulator, whilst it may refer the case to the other regulator, or consult with it, ultimately, OSCR is the charity regulator, and it is its duty to ensure that non-compliance with charity law is dealt with appropriately where it is found (OSCR, 2014). In any event, the Panel’s criticism does seem rather unfair in light of the correspondence between OSCR, the Government Equalities Office and various Scottish discrimination law teams, made public through a freedom of information request. The correspondence reveals that OSCR did, in fact, seek expert assistance on equality law issues. Among other pieces of information, they were sent an opinion by Aidan O’Neill, QC, counsel for the charity before the Panel in *St Margaret’s,* on ‘The implications for freedom of conscience and religious liberty arising from redefining marriage in Scotland’ (OSCR, 2013b). None of the responses suggested that the EHRC was the appropriate regulator, or that OSCR did not have a duty to investigate. The Memorandum of Understanding between OSCR and EHRC, signed in January 2013, states that where OSCR becomes aware of possible breaches of the Equality Act through the exercise of its functions, these cases will be dealt with by OSCR (OSCR, 2013c, para 6.2.1)

The Panel further held that the public benefit test had been incorrectly applied to the charity since OSCR had taken the view that any type of discrimination that breached the Equality Act 2010 amounted to disbenefit, which would mean that the public benefit test was not satisfied. In the view of the Panel, ‘it is not as simple to say that if The Equality Act is breached then the Public Benefit Test is not met and any guidelines contrary to that view should be revised by the Respondent’ (lines 804-806). This is presumably a reference to the guidance issued by OSCR in which, in terms of the existence of unduly restrictive conditions which would mean that the public benefit test were not satisfied (in accordance with section 8(2)(b) of the Charities and Trustee Investment (Scotland) Act 2005) OSCR states, ‘Where conditions or restrictions on access to charitable benefit would not be allowable under anti-discrimination law … then OSCR will consider such a condition unduly restrictive’ (OSCR, 2011, p. 24). The Panel considered that this is simply something that should be taken into account in weighing up all the factors to consider whether the public benefit test is satisfied or not. In its response to the decision of the Panel, in addition to noting that OSCR would not be appealing to the Court of Session, OSCR stated, ‘the Note of Reasons supplied by the Appeals Panel with its decision includes a number of comments on wider aspects of charity regulation which OSCR finds difficult to follow, and which require to be clarified’ (OSCR, 2014).

OSCR remains adamant that, in assessing whether an organisation provides public benefit, OSCR will determine on the basis of the evidence available to it what benefit to the public arises through an organisation exercising its functions, and conversely what disbenefit (that is detriment or harm) to the public, or private benefit to individuals arises. Importantly, if it appears that unlawful discrimination arises or will arise from an organisation’s activities, this is a disbenefit to which OSCR may be entitled to assign considerable weight, depending on the particular facts and circumstances of the organisation. OSCR has reiterated (OSCR, 2014) that where a body operates a restriction on the provision of benefit which breaches the Equality Act this will ordinarily be regarded by OSCR as an undue restriction.

## Concluding comments

The Catholic adoption cases illustrate the problems that arise where two protected groups are vying for priority in the assertion of their equality rights. They also raise complex questions around the intersection of charity law and the Equality Act 2010. Sadly, neither case provides much clarity. The English *Catholic Care* litigation was extremely protracted, with several long and complex judgments. The Scottish *St Margaret’s* case, on the other hand, was dealt with swiftly, with one long and often opaque judgment. The different outcome in *St Margaret’s* is explicable on the basis that the Panel accepted that, despite evidence to the contrary, St Margaret’s *was* willing to provide its services to couples in civil partnerships and therefore there was no direct discrimination. It is arguable that it would have been better if the Panel had ended its judgment there, given that its subsequent conclusion that there *was* indirect discrimination (albeit justified) contradicts this. Perhaps it is unsurprising that the EHRC is of the view that in the *St Margaret’s case* ‘[the Panel] is mistaken in its understanding of the meaning of direct and indirect discrimination’ (EHRC, 2014). Much of the judgment in *St Margaret’s* displays confusion in relation to equality provisions. Since the judgment, St Margaret’s has amended its stated criteria to refer to ‘married couples’, with no mention of civilly partnered couples. However, as legislation allowing same-sex marriage in Scotland took effect in December 2014, these preferential criteria are no longer a bar on their face to married same-sex couples. Whether they are a bar in practice is a different matter.

These decisions reveal a potential for differences in how the Charity Commission in England and Wales and OSCR in Scotland might deal with the impact of failure to comply with the Equality Act by a proposed or existing charity. The Charity Commission’s view is that such a failure will have a negative impact on a public benefit determination. In advance of *St Margaret’s*, OSCR had stated that it would be taking a rigorous approach when considering whether charities comply with equality law, and whether they meet the requirement to provide public benefit, developing a more proactive approach to its regulation of charities’ compliance with the requirements of equality legislation (OSCR, 2012). The Panel in *St Margaret’s* clearly did not share OSCR’s view of its role. It would be unfortunate if this presaged a divergence in practice between the two regulators, but any difference may be more apparent than real given that OSCR has reiterated that it will continue to consider the existence of any unlawful discrimination as a ‘disbenefit’ that may well be given considerable weight when assessing a charity’s public benefit.

Although the authors are aware of the budgetary constraints under which the charity regulators operate, it seems appropriate that they continue to take a robust approach to consideration of discriminatory practices. We have predicted that it is most likely that the specific tensions between charity law and equality law will be picked up by a charity regulator (Morris et al., 2013, p. 90). A charity seeking a discriminatory restriction that cannot bring itself within one of the exception in the Equality Act will, in addition to being in breach of that Act, be very likely to fail a public benefit test and therefore lose or never receive charitable status. The numerous exceptions in the Equality Act that might at first sight appear helpful to a charity wishing to place a discriminatory restriction will only be of use if that charity can still meet the public benefit requirement. The charity regulators are best placed to spot charities of particular concern and have expertise in the complexities of considerations of public benefit. In addition to the scrutiny that can be expected as part of the registration process, in England and Wales charities are obliged to file a public benefit statement as part of their annual return, and in Scotland trustees must report annually on how their activities support their charitable objects. The regulators, if adequately resourced have the means to determine if charities are continuing to act in the public benefit. The consideration of public benefit could subsume any enquiry into whether a charity is compliant with the Equality Act. This would offer assurances to charities that they need only meet one test – are they operating for the public benefit – and this will also mean that they are operating within the limits of equalities law.

It was an unhappy coincidence that for both the newly established English Charity Tribunal and the Scottish Charity Appeals Panel, these cases were amongst the first substantive cases that each had to adjudicate upon. Whilst the members of these bodies have experience of charity law, it is unlikely that they were well versed in the complexities of the Equality Act and the interaction between the two areas of law. The composition of the Panel hearing the *St Margaret’s* case was also unfortunate, since it has emerged that the panel chair was a secretary of a Baptist Church that had previously stated its strong opposition to civil partnerships and same-sex marriage. The authors have previously stated that religious charities would be wise to ensure that their practices are strictly compliant with equalities legislation as they are among the charities most likely to face challenges (Morris et al., 2013). In addition to the difficulties in prioritising competing rights, there are secularist groups, such as that in the *St Margaret’s* case, who may be motivated to bring challenges. Where other charities might feel that they are unlikely to be noticed amid the over 164,000 in England and Wales (Charity Commission 2014) or over 23,000 in Scotland (<http://www.oscr.org.uk/>), religious charities should assume that they are operating under a more focused spotlight.

It seems inevitable that the courts will continue to be called upon to acts as arbiters in cases involving competing rights. Parliament has indicated the extent to which it considers religious doctrine and practice should be explicitly and specifically exempted from the equality legislation but there is some way to go before the scope of these exceptions is authoritatively established. Where section 193 to the Equality Act allows for a defence to direct discrimination, the test for justification should be more stringent than that required for indirect discrimination. The lack of a defence to direct discrimination illustrates that to treat a person less favourably because of a protected characteristic is regarded as legally and morally unjustifiable. When the body responsible for discriminating is a charity (benefitting from the various privileges that such a status brings) it is important that the law is seen to be applied strictly within the limits allowed. Few might criticise a charity that seeks to discriminate in *favour* of a group with a particular need, but might feel differently where the charity is discriminating *against* a disapproved of group.

At this point it is crucial that the balancing required by both the exceptions and by indirect discrimination is handled well. This patently did not happen in *St Margaret’s*, and those responsible for advising in this area might consider it unfortunate that OSCR chose not to appeal to the Court of Session. There is a small chance that a further rehearsal of the arguments at a higher judicial level may have provided some much needed clarity. Quite what weight should be given to competing interests certainly needs to be clarified and this remains the task of the judges. Speaking extra-judicially, Baroness Hale has herself commented in the context of how far the law should allow a conscience clause that ‘[t]he story has just begun.’ (Hale 2014).

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