

# Debates in Charity Law

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## When should Charities be Allowed to Discriminate?

### *The Case of Single-Sex Services and Transgender People*

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JENNIFER SIGAFOOS<sup>1</sup>

#### I. Introduction

Equality law and charity law have a complicated interaction in England and Wales. On the one hand, discrimination is entrenched in charities, as many define their group of service users by reference to a specific protected characteristic under the Equality Act 2010, such as sex, race, or disability. Some instances of this ‘beneficiary discrimination’<sup>2</sup> are allowable under the Equality Act, while others are not, as determined by a complicated framework of exceptions and schedules. On the other hand, there is an instinctive discomfort with this idea that charities are in fact discriminating by determining to whom they will provide services. Charities with restricted objects have frequently been founded by people who want to help others like themselves. This is problematic when ‘people like themselves’ are relatively advantaged in society. From a perspective concerned with a substantive idea of equality, it is more acceptable to offer all of the advantages that the state provides to charities when these potential beneficiaries possess the more vulnerable of the protected characteristics. This debate in charity law considers the question: when should it be acceptable for charities to exclude potential beneficiaries based upon a protected characteristic, and when should this be unlawful discrimination?

In this chapter I will use the case of transgender women and when they are lawfully entitled to access women-only services provided by charities to illustrate

<sup>1</sup>I thank Debra Morris and Anne Morris for letting me expand on our original study in this chapter. This chapter is indebted to their work on that project. I am grateful for thoughtful comments and insight on earlier drafts from Karen Atkinson, Sarah-Jane Cooper-Knock, Michelle Farrell, Anne Morris, John Picton and reviewers. Any errors remain my own.

<sup>2</sup>D Morris, ‘Charities and the Modern Equality Framework – Heading for a Collision?’ (2012) 65(1) *Current Legal Problems* 295.

the complexities of the legal framework for charities and equality law. There is considerable disagreement about the circumstances in which transgender women are entitled to access women-only services.<sup>3</sup> I will argue that the circumstances in which charities can lawfully restrict their women-only services from transgender women are in fact quite narrow and point to some areas where the law needs clarification, in particular when a transgender woman with a Gender Recognition Certificate could be lawfully excluded from services. This situation is topical in England and Wales because of visible clashes between transgender rights activists and some feminist groups. Although previous research has suggested that charities that are in violation of the Equality Act have little to fear in terms of regulatory interventions in an era of diminished funding for both the Charity Commission and the Equality and Human Rights Commission (EHRC), it also has raised the possibility of an intervention by an interested litigant triggering a regulatory or other challenge.<sup>4</sup> Thus, the high-profile nature of this particular (perceived by some) equality clash at the moment suggests an area where clarification of the legal position is urgently needed.

I will also use the case of transgender women and women-only services as an example of why all discrimination by charities is not benign specialisation. I have argued elsewhere that the exceptions to equality law that allow charities to discriminate should be read strictly, as in effect these exceptions are importing the tests for justification of indirect discrimination (measures that are facially neutral but which have a discriminatory effect) and applying them to justify direct discrimination by charities.<sup>5</sup> We characterised the types of discrimination that should be allowable exceptions to the Equality Act as discriminating *for* someone based upon a protected characteristic, rather than *against* them. This is essentially positive discrimination, unlawful under other circumstances. While endemic discrimination (or specialisation) may be permissible and understandable, there is also an indefinable limit to what discrimination can be allowable. There is debate about to what extent discrimination is in itself not charitable, grounded purely in charity law.<sup>6</sup> By reference to various theoretical underpinnings that have been advanced to justify anti-discrimination and equality law, this chapter will consider the question of when this exception in equality law should permit beneficiary discrimination by charities. The extension by the Equality Act of the requirement that discrimination

<sup>3</sup> See, eg, “Shifting sands”: six legal views on the transgender debate’ *The Guardian* (London, 19 October 2018).

<sup>4</sup> D Morris, A Morris and J Sigafoos, *The Impact of the Equality Act 2010 on Charities* (Liverpool, University of Liverpool Charity Law and Policy Unit, 2013); J Sigafoos, ‘Using Equality Legislation as a Sword’ 16(2–3) *International Journal of Discrimination Law* 66.

<sup>5</sup> D Morris, A Morris and J Sigafoos, ‘Adopting (In)equality in the UK: The Equality Act 2010 and its Impact on Charities’ 38(1) *Journal of Social Welfare and Family Law* 14; Morris, Morris and Sigafoos, *The Impact of the Equality Act 2010 on Charities* (2013) (n 4).

<sup>6</sup> See, eg, M Harding, *Charity Law and the Liberal State* (Cambridge, CUP, 2014) 236–240; D Morris, ‘Charities and the Modern Equality Framework – Heading for a Collision?’ (2012) (n 2); A Parachin, ‘Public benefit, discrimination and the definition of charity’, in D Jensen and K Barker (eds), *Private Law: Key Encounters with Public Law* (Cambridge, CUP, 2013); Parachin, ch 7.

by charities be objectively justifiable to all protected characteristics was a welcome move away from a formal, symmetrical conception of equality. I will argue that charitable discrimination should be acceptable only when it is advancing equality in a substantive way, by redressing disadvantage, challenging stigma and stereotype, enhancing voice and participation, or achieving social change.<sup>7</sup>

In section II, I will set the scene for charities and discrimination. Section III analyses when charitable discrimination can be justified, by way of a case study of whether (and, if so, when) charities can lawfully exclude transgender women from their services. In section IV, I will consider some of the theoretical justifications that have been advanced for equality law, to determine when charities should be allowed to discriminate. Section V will conclude the chapter.

## II. Charities and Discrimination

The Equality Act 2010 requires equal treatment across a number of different activities, including work and the provision of goods and services. It prohibits discrimination, harassment, and victimisation based upon nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Charities have long been restricting their services based upon what we would now term a protected characteristic. For example, the Hospital of St Cross and Almshouse of Noble Poverty, thought to be the oldest surviving charitable institution in England,<sup>8</sup> was founded in the twelfth century to provide accommodation for 13 elderly poor men and to feed 100 poor men daily at its gates. As well as maintaining a chapel, it still provides housing to 25 elderly men.<sup>9</sup> In terms of service provision, it thus appears to restrict its beneficiaries to men. Compared to the common law of charity, anti-discrimination legislation is a relative latecomer to the scene, and the scope of both the Sex Discrimination Act 1975, section 43 and the Race Relations Act 1976, section 34 was restricted to not extend to charitable gifts. As noted by Watkin, 'Discrimination has been, and still is, an accepted feature of charity.'<sup>10</sup> This is linked to the longstanding common law freedom to discriminate in testamentary gifts or trusts, illustrated by Lord Wilberforce's observation that: 'Discrimination is not the same thing as choice: it operates over a larger and less personal area, and neither by express provision nor by implication has private selection yet become a matter of public policy.'<sup>11</sup>

<sup>7</sup> Elements of S Fredman's model of substantive equality in 'Substantive equality revisited' (2016) 14(3) *International Journal of Constitutional Law* 712, 713.

<sup>8</sup> <http://hospitalofstcross.co.uk/history/>.

<sup>9</sup> <http://apps.charitycommission.gov.uk/Showcharity/RegisterOfCharities/CharityFramework.aspx?RegisteredCharityNumber=202751&SubsidiaryNumber=0>.

<sup>10</sup> TG Watkin, 'Discrimination and Charity' (1981) 131 *The Conveyancer and Property Lawyer* 131.

<sup>11</sup> *Blathwayt v Baron Cawley* [1976] AC 397, 426. This testamentary freedom to make discriminatory gifts has persisted.

Harding argues that it would be possible to eliminate these discriminatory gifts through common law devices,<sup>12</sup> but statute-based approaches have been preferred. Beneficiary discrimination was allowable under the predecessor equalities legislation<sup>13</sup> so long as a charity could show that its charitable objects were in the public benefit. It remains lawful under the Equality Act, but the circumstances in which this is allowable have been tightened. As a result, charities must consider to what extent their often long-entrenched practices continue to be lawful.

Section 193 of the Equality Act creates a specific exception for charities. They may restrict their benefits to persons sharing a protected characteristic so long as they do so in furtherance of a charitable instrument<sup>14</sup> and the restriction is either a proportionate means of achieving a legitimate aim<sup>15</sup> or for the purpose of preventing or compensating for historic disadvantage.<sup>16</sup> A number of other exceptions that are not specifically restricted to charities may also allow some charities to discriminate in particular ways, such as the provision of single-sex services.<sup>17</sup> Finally, where it is reasonably thought that persons sharing a protected characteristic suffer a disadvantage linked to that characteristic or have different needs from those who do not share the protected characteristic, or that participation in an activity by persons who share a protected characteristic is disproportionately low, then charities might engage in positive action that is a proportionate means of achieving the legitimate aim of redressing any of these situations.<sup>18</sup>

The activities, as well as the purposes, of a charity must be considered when assessing if it is acting in an unlawfully discriminatory way. The Charity Commission assesses an applicant organisation's purposes and determines whether or not they are exclusively charitable<sup>19</sup> in deciding if the organisation should be registered as a charity. Although a focus on charitable purposes, rather than activities, is traditionally considered to be the extent of appropriate charity law scrutiny,<sup>20</sup> the Charity Commission regularly considers an applicant charity's proposed activities

<sup>12</sup> M Harding, 'Some Arguments Against Discriminatory Gifts and Trusts' (2011) 31 *Oxford Journal of Legal Studies* 303.

<sup>13</sup> Sex Discrimination Act 1975, Race Relations Act 1976 or Disability Discrimination Act 1995.

<sup>14</sup> Equality Act 2010, s 193(1).

<sup>15</sup> *Ibid*, s 193(2)(a).

<sup>16</sup> *Ibid*, s 193(2)(b).

<sup>17</sup> *Ibid*, sch 23, para 3, not considered in the body of this chapter, provides an exception from sex and gender reassignment discrimination in the case of the provision of communal accommodation, so long as the restriction is 'managed in a way which is as fair as possible to both men and women' (para 3(2)). This may be the justification for the direct discrimination on grounds of sex that appears to be the case for the Hospital of St Cross and the Almshouse of Noble Poverty. This exception might also affect our hypothetical charity if it offered accommodation services.

<sup>18</sup> Equality Act 2010, s 158.

<sup>19</sup> Charities Act 2011, s 1.

<sup>20</sup> See Parachin, ch 7; Harding, ch 2, on 'constitutive accountability'; J Garton, *Public Benefit in Charity Law* (Oxford, Oxford University Press, 2013); M Synge, *The 'New' Public Benefit Requirement: Making Sense of Charity Law?* (Oxford, Hart Publishing, 2015); *Independent Schools Council* [2011] UKUT 421.

as part of its determination of whether or not the purposes are charitable.<sup>21</sup> Moreover, the Charity Commission has shown a willingness to revisit its decisions on already registered charities, both as a result of their post-registration activities<sup>22</sup> and as a result of changing policy norms.<sup>23</sup> The Charity Commission guidance on the Equality Act repeatedly addresses what would be considered charitable activities, rather than purposes or aims.<sup>24</sup> In addition to charity law regulatory interventions, the EHRC could also be a potential source of regulatory enforcement, and this would extend to charitable activities, as well as purposes. Moreover, civil claims are brought against charities. There are, therefore, potential sources of both public and private sanction for discriminatory charitable purposes and activities.

This chapter responds to an important question raised by a study conducted by the Charity Law and Policy Unit at the University of Liverpool in 2012–13, which was the first comprehensive exploration of the implications of the Equality Act for charities.<sup>25</sup> The study involved 45 interviews with charities, lawyers and regulators, as well as Freedom of Information Act requests of regulators, and two stakeholder focus groups. One of the specific case studies we included in the study was that of women-only charities. We identified this case study after a number of participants in the first round of interviews with lawyers highlighted that the Equality Act was presenting a particular issue for these organisations. We then conducted two additional interviews specifically related to this case study with umbrella groups for women's charities in the second round of interviews and also analysed a number

<sup>21</sup> See, eg, the decision of the Charity Commission regarding the Countryside Alliance: [www.gov.uk/government/publications/the-countyside-alliance](http://www.gov.uk/government/publications/the-countyside-alliance) (23 March 2017) para 16; *Human Dignity Trust v Charity Commission for England and Wales* CA/2013/0013, 9 July 2014 (FTT (Charity)). The Charity Commission submitted that extrinsic evidence, including about activities, was necessary where a purpose had 'no particular meaning' in charity law, para 18. Also of interest was the Charity Commission submission that although courts have traditionally taken a 'benignant' position on charitable purposes, this arose from trust law and it was 'far from clear' that charitable companies should also benefit, para 29; Among other commentators, Luxton has criticised the Charity Commission for 'an improper attempt to require charities to show public benefit in their activities.' P Luxton, *Making Law? Parliament v The Charity Commission* (London, Politeia, 2009) 18.

<sup>22</sup> *Hipkiss v Charity Commission for England and Wales* CA/2017/0014, 23 August 2018 (FTT (Charity)).

<sup>23</sup> In 2015 the Charity Commission approached the registered charity Gideons UK, the UK arm of the charity the Gideons International, with reference to the Equality Act 2010, querying why the charity restricted its membership to men. After taking legal advice, the charity decided to change its constitution to allow men and women to be members. The Gideons UK, *The Gideons International in the United Kingdom Annual Report and Financial Statements Year ended 31 December 2017* [http://apps.charitycommission.gov.uk/Accounts/Ends05/0000221605\\_AC\\_20171231\\_E\\_C.PDF](http://apps.charitycommission.gov.uk/Accounts/Ends05/0000221605_AC_20171231_E_C.PDF). The Gideons International subsequently voted to reject financial support from the UK affiliate because it did not reflect the international charity's 'core values'. The Gideons International then challenged the Gideons UK's usage of its international intellectual property. C Bentley, 'Gideons UK in legal fight to keep name over women membership dispute', *Premier*, 23 October 2019, [www.premier.org.uk/News/World/Gideons-UK-in-legal-fight-to-keep-name-over-women-membership-dispute](http://www.premier.org.uk/News/World/Gideons-UK-in-legal-fight-to-keep-name-over-women-membership-dispute).

<sup>24</sup> Charity Commission, 'Equality Act Guidance for Charities: Restricting Who Can Benefit from Charities' (Charity Commission, 2013) 4.3, 5.2.

<sup>25</sup> Morris, Morris and Sigafoos (2013) (n 4).

of online reports and other sources of evidence related to the case study. Most of the substance of the case study was around the threat that austerity measures presented to these sources of women-only services, mainly from local authorities and other commissioning bodies requiring organisations tendering for contracts to provide services to agree to provide a universal service.

Also as part of that case study, participants noted reluctance on the part of some charities providing women-only services to allow access to transgender women. In the years since the report for the study was written, the issue of transgender rights has become a frontline social debate. The 2016 Miller Enquiry into transgender equality and a consultation in 2018 on proposed changes to amend the Gender Recognition Act to allow for self-identification have further highlighted the extent of the confusion about what is lawful under the Equality Act and the concern among some charities providing single-sex services about this issue. The results of that study showed that further doctrinal investigation is essential to come to grips with this difficult issue, as is further evidenced by the current heated debate. This chapter supplies that doctrinal investigation, rather than a presentation of study findings.

The case of transgender women and access to single-sex services is illustrative of the thorny issues that can present when there is a clash of rights between two protected characteristics under the Equality Act. This idea is often expressed as a hierarchy of rights. We can clearly perceive a hierarchy of rights in European Union anti-discrimination law when we consider the scope of the protections afforded under the various directives. The Race Equality Directive<sup>26</sup> prohibits discrimination on the grounds of race or ethnic origin across a broad range of areas, including education. Various EU Directives covering sex discrimination and equal treatment of men and women in work,<sup>27</sup> national social security systems,<sup>28</sup> provision of goods and services<sup>29</sup> and pregnancy<sup>30</sup> and parental leave<sup>31</sup> offer the next level of protection in the hierarchy but do not cover education. Discrimination based upon transgender status has been held to be discrimination based upon sex by the Court of Justice of the European Union (CJEU) and thus the protections against sex discrimination extend to transgender discrimination.<sup>32</sup> The Framework Directive<sup>33</sup> prohibits discrimination against people on grounds of disability, religion or belief, sexual orientation and age in employment. These last characteristics are therefore offered a lower level of protection than either

<sup>26</sup> Directive 2000/43/EC.

<sup>27</sup> The so-called Recast Directive, 2006/54/EC.

<sup>28</sup> Directive 79/7/EEC.

<sup>29</sup> Directive 2004/113/EC.

<sup>30</sup> Directive 92/85/EEC.

<sup>31</sup> Directive 2010/18/EU.

<sup>32</sup> *P v S and Cornwall County Council* Case C-13/94 [1996] ECR I-2143; *Richards v Secretary of State for Work and Pensions* Case C-423/04 [2006] ECR I-3585; *MB v Secretary of State for Work and Pensions* Case C-451/16 [2018] ECLI:EU:C:2018:492.

<sup>33</sup> Directive 2000/78/EC.

race or sex. Unlike this visible hierarchy in European anti-discrimination law, the Equality Act for the most part offers ostensibly the same protection to the same protected characteristics for the same situations, such as employment, or the provision of goods and services. Domestic law thus offers more protection than the EU anti-discrimination law, in some situations, because there is no explicit hierarchy of protection. It is difficult, however, to weigh up which rights to privilege when those of two protected characteristics come into opposition.

Conflict arises between charity and equality law, and it is difficult for charities and their beneficiaries to navigate this legally complex area. This chapter presents a case study to illustrate this conflict. I will consider the legal position of a hypothetical charity that provides counselling services to domestic abuse survivors, a general charitable purpose under the Charities Act 2011, sub-section 3(1).<sup>34</sup> The hypothetical charity wishes to restrict its services to cisgender women, that is, women who identify in the gender to which they were assigned at birth, rather than transgender women.<sup>35</sup> The analysis will evaluate the charity's position under the various mechanisms by which specific kinds of discrimination by charities and others can fall within exceptions to the prohibitions against discrimination in the provision of services under the Equality Act.

This case study also raises issues about the broader justifications for charitable discrimination more generally. When does the discrimination that is endemic but permissible and understandable for charities (which I have termed 'discrimination', but which others might call 'specialisation') become 'real' discrimination?

### III. Justifying Charitable Discrimination

In the case of a hypothetical charity that wished to limit its services to cisgender women, and to exclude transgender women, it is first necessary to establish if this is discrimination based upon a protected characteristic under the Equality Act. If it is discriminatory, the charity would then need to be able to justify this under an exception to the Equality Act. This might be possible under the so-called 'charities exception' of section 193, under the exception for separate or single-sex services, or potentially under positive action. Each of these will be considered in turn on behalf of our hypothetical charity. This area is conceptually difficult because a number of different pieces of legislation interact in the consideration of the question. I will conclude that only under the exception for single-sex services

<sup>34</sup> A review of the charity register by the author suggests that it is also quite common for women's domestic violence charities to have a secondary charitable objective of education. This particular conflict might also arise in other situations, such as religious charities in religions that require segregation of sexes.

<sup>35</sup> At least one charity exists that meets this description: <http://cisters.org.uk/>. I am not familiar with its organisational structure or its position under the Equality Act.

could this discrimination be justifiable under the Equality Act, and even then only under a very limited set of circumstances.

## A. The Protection from Discrimination Based on Transgender Status in the Delivery of Goods and Services

One of the nine protected characteristics under the Equality Act is gender reassignment. The Equality Act section 7(1) describes a person sharing this protected characteristic as a ‘transsexual person,’<sup>36</sup> defined as someone who ‘... is proposing to undergo, is undergoing, or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex.’ The process mentioned in section 7 does not need to describe a medical or hormonal process.<sup>37</sup> It could include changing one’s name, dress or other aspects of one’s appearance. The Act prohibits direct or indirect discrimination on this ground, as well as harassment and victimisation.

Although this is how transsexual is defined in the Equality Act, there is an added complication, in that the Gender Recognition Act 2004 (GRA) controls which individuals may receive a Gender Recognition Certificate (GRC), officially recognising that the individual’s legal sex has changed to that of the gender in which they identify. Individuals in possession of a GRC are entitled to protection under anti-discrimination legislation in their acquired legal sex.<sup>38</sup> The individual must have lived in the gender in which they identify for two years and intend to do so for life.<sup>39</sup> The process under the GRA requires that an individual has received a diagnosis of gender dysphoria.<sup>40</sup> The GRA does not require any sort of surgical or other process to change the physical manifestations of biological sex, and thus, according to Sharpe, can be seen to ‘sever the link between sexed status and the physical body.’<sup>41</sup> Nevertheless, Sharpe asserts that it was the clear intention of the government that surgical intervention would be the expected position, and individuals not intending to undertake surgery must justify why.<sup>42</sup> Moreover, the change is viewed as permanent.

<sup>36</sup> The Equality Act 2010, statutory code and non-statutory guidance use the terms ‘gender reassignment’ and ‘transsexual’. I will use these terms when referring to the legislation and code/guidance but will use the preferred terms of ‘trans’ and ‘transgender’ elsewhere.

<sup>37</sup> As the Explanatory Notes to the Equality Act make clear at para 43: ‘A person who was born physically female decides to spend the rest of her life as a man. He starts and continues to live as a man. He decides not to seek medical advice as he successfully “passes” as a man without the need for any medical intervention. He would have the protected characteristic of gender reassignment for the purposes of the Act.’

<sup>38</sup> AN Sharpe, ‘A Critique of the Gender Recognition Act 2004’ (2007) 4 *Bioethical Inquiry* 33; R Sandland, ‘Feminism and the Gender Recognition Act’ (2005) 13 *Feminist Legal Studies* 43.

<sup>39</sup> Gender Recognition Act 2004, s 2.

<sup>40</sup> *Ibid.*, s 3.

<sup>41</sup> Sharpe, ‘A Critique of the Gender Recognition Act 2004’ (2007) (n 38) 37.

<sup>42</sup> *Ibid.*, 39.

In 2018, the CJEU in *MB v Secretary of State for Work and Pensions*<sup>43</sup> held that the UK had discriminated against a transgender woman who had been denied a pension at the lower state retirement age for women. The woman had been denied a GRC because she refused to have her pre-transition marriage annulled (another requirement of the GRA)<sup>44</sup> for religious reasons. The CJEU accepted that the woman was transgender, even though she did not hold a GRC:

in that regard, although ... it is for the Member States to establish the conditions for legal recognition of a person's change of gender, the fact remains that, for the purposes of the application of Directive 79/7, persons who have lived for a significant period as persons of a gender other than their birth gender and who have undergone a gender reassignment operation must be considered to have changed gender.<sup>45</sup>

The court held that this was less favourable treatment based upon sex and was discriminatory. Although the ruling is expressly limited to determinations of eligibility for social security,<sup>46</sup> this may have implications for the consideration of the proportionality of any exclusions of transgender women.

The definition under the GRA is more restrictive than the scope of the protected characteristic under the Equality Act. Although only persons in possession of a GRC, and possibly those similarly situated to the woman in *MB* in the case of social security, are entitled to protection under the protected characteristic of *sex* in their acquired gender, both persons who have a GRC and those who are in the process of gender reassignment but who do not yet have a GRC are entitled to protection from discrimination under the protected characteristic of *gender reassignment*.<sup>47</sup>

The scope of the protected characteristic of gender reassignment under the Equality Act thus offers protection to a considerably broader group of people than those who would be eligible for a GRC. This is welcome, as there are many issues identified with the certification process, leading to the government consultation in 2018 on proposed changes to the GRA, including a shift away from the requirement for a diagnosis of gender dysphoria and a move closer to self-identification.<sup>48</sup> A particular concern with certification is that it is ultimately about something that is known (and therefore verifiable) personally. Requiring a time period as a qualifying factor for certification, moreover, means that a transgender person may

<sup>43</sup> Case C-451/16 [2018].

<sup>44</sup> The European Court of Human Rights has recognised that it is allowable to make recognition of a change of gender conditional on annulling marriages. *Hämäläinen v Finland* (GC) App No 37359/09, July 16, 2014.

<sup>45</sup> *MB v Secretary of State for Work and Pensions* Case C-451/16 [2018] para 35.

<sup>46</sup> *Ibid*, para 27.

<sup>47</sup> The Equality Act also prohibits discrimination based upon someone sharing the protected characteristic of gender reassignment even if this is only based upon a perception (whether correct or not) that a person shares that protected characteristic.

<sup>48</sup> Government Equalities Office and Penny Mordaunt, MP, *Reform of the Gender Recognition Act 2004* (London, Government Equalities Office, 3 July 2018).

have less of a support system around them during their transition – they will be at their most exposed during a time when they are potentially the most vulnerable emotionally, physically and politically.

## B. The Charities ‘Exception’

If a charity wished to limit its beneficiaries to only cisgender women, thus engaging in direct discrimination based upon gender reassignment against transgender women (both those in possession of a GRC and those who are not), it could try to come under the exception in the Equality Act section 193, the so-called ‘charities exception’. In order to bring the discrimination within the exception, it must be in furtherance of the charitable instrument and be objectively justifiable. Harding argues that this sort of blanket exception to anti-discrimination law for charities can be regarded as part of ‘charity law’.<sup>49</sup>

To begin, the exception allowable under section 193 needs to be ‘in pursuance of a charitable instrument’. As has been interpreted to date, this would likely mean that the intention to restrict the hypothetical charity’s services only to cisgender, rather than transgender, women would need to be stated in the instrument establishing or governing the charity, as part of the charity’s purposes. As drawn, the restriction in section 193 is looser than that of the equivalent sections in the predecessor sex and race legislation, which referred to a ‘provision’ in the charitable instrument. Thus, there is an argument that discrimination under section 193 could be acceptable even for charities with more broadly drafted objects. The Explanatory Notes to the Equality Act indicate, however, that what was intended was to replicate and harmonise the predecessor legislation, rather than to change it.<sup>50</sup>

Prior to the Equality Act, the general charitable exception would not have required further justification, except in the case of sex discrimination. In the case of sex discrimination, the Sex Discrimination Act 1975 was amended in 2008 to comply with the EC Directive 2004/113 on equal treatment of men and women in the supply of goods and services. Section 43(2A) was inserted to impose the additional criteria that as well as the provision for the discrimination in the charitable instrument, the discriminatory treatment must be capable of objective justification, and therefore must be either a proportionate means of achieving a legitimate aim or for the purpose of preventing or compensating for a disadvantage. These two restrictions are replicated in Equality Act, section 193(2)(a) and (b). The cisgender women’s charity would therefore be required to demonstrate that its proposed discriminatory restriction in the provision of services could fall within one of these two tests.

<sup>49</sup> Harding, *Charity Law and the Liberal State* (n 6) 206.

<sup>50</sup> Equality Act 2010, Explanatory Notes, para 611.

I will first consider the test in section 193(2)(b), compensating for disadvantage, as our study indicated that it would likely be the easier of the two tests to satisfy. This view may be shared by the Charity Commission, which refers to the section 193(2)(b) test as ‘Test A’ in its guidance.<sup>51</sup> It would be up to the charity to establish the existence of the disadvantage it aims to remedy. The Charity Commission guidance offers examples for when the test would be satisfied. One example is that of a charity set up to address unemployment among persons of a particular nationality or ethnic origin. In order to satisfy the requirements of section 193(2)(b), the charity would need to be able to demonstrate that unemployment is ‘particularly high’ for that group as compared to the population as a whole.<sup>52</sup> The guidance is silent as to the standard of evidentiary requirements for this. The EHRC Statutory Code of Practice on Services, Public Functions and Associations instructs that a charity would have to ‘demonstrate a reasonable connection between the past or current disadvantage experienced by this group and the benefits provided by the charity’.<sup>53</sup> Moreover, the benefits must be ‘capable of making a difference in terms of overcoming the disadvantage linked to the protected characteristic’.<sup>54</sup> Our study indicated that the causal link to disadvantage can be difficult to establish and that data are inconsistently collected.<sup>55</sup>

The requirements for section 193(2)(b) would present a substantial barrier for the hypothetical cisgender women’s charity. The charity would have to show that cisgender women suffer some disadvantage that transgendered women do not. A case might be able to be made for this under section 193(2)(b) if the charity were addressing some sort of biologically linked disadvantage that cisgender women experience but trans women do not, such as cervical cancer, making the discrimination necessary. It would be more appropriate to set up a charity to address cervical cancer in this situation. Concerns about the inclusion of transgender women are most often expressed in the case of sensitive services, such as domestic violence counselling or a rape crisis centre.<sup>56</sup> Even here, however, the evidence of disadvantage would not support excluding transgender women, who suffer violence at a high rate.<sup>57</sup>

The cisgender women’s charity would likewise have difficulty under what the Charity Commission calls ‘Test B’ – the section 193(2)(a) exception for where the proposed discriminatory treatment is a proportionate means of achieving a

<sup>51</sup> Charity Commission for England and Wales, ‘Equality Act Guidance for Charities’ (2013) (n 24) 4.1.

<sup>52</sup> Ibid 5.1.

<sup>53</sup> Equality and Human Rights Commission, *Equality Act 2010 Code of Practice – Services, Public Functions and Associations* (London, EHRC, 2011) para 13.37.

<sup>54</sup> Ibid.

<sup>55</sup> Morris, Morris and Sigafoos, *The Impact of the Equality Act 2010 on Charities* (n 4).

<sup>56</sup> Eg, some of the positions in “‘Shifting sands’: six legal views on the transgender debate’ (2018) (n 3).

<sup>57</sup> C Bachmann and B Gooch, *LGBT in Britain: Trans Report* (London, Stonewall, 2018): 28% of trans respondents had experienced domestic violence in the past year; 41% of trans people and 31% of non-binary people had experienced a hate crime or incident because of their gender in the past year.

legitimate aim. The wording of this test is the same as that for justifying indirect discrimination, and the EHRC expressly makes this connection in its Code of Practice on Services.<sup>58</sup> Although the wording of the provision in section 193(2)(a) and the test for indirect discrimination are the same, it is not necessarily the case that the two tests ought to be construed in the same way. The conduct being justified by section 193(2)(a) is not indirect discrimination, but rather direct discrimination, which is not normally justifiable except in the case of age. In the case of direct age discrimination, case law has established that a stricter scrutiny is appropriate in these cases where direct discrimination is being justified than would be the case for indirect discrimination. In *MacCulloch v Imperial Chemical Industries plc*, Elias J (as he was then) noted that the discriminatory effect of a measure that is directly discriminatory on its face will be greater than that of a measure that is facially neutral but has an indirectly discriminatory effect, and may therefore be harder to justify.<sup>59</sup> This stricter scrutiny approach to justify direct discrimination was confirmed by the Supreme Court in *Seldon*.<sup>60</sup> As section 193(a)(1) justifies *direct* discrimination, it is appropriate that the proportionality of the direct discrimination should also be strictly construed.

In *Catholic Care*, the only case to consider section 193, the court chose to apply the Article 14 European Convention on Human Rights (ECHR) test instead of the section 193 test. The case began under the predecessor equality legislation. As is mentioned above, section 43 of the Sex Discrimination Act 1975 (SDA), which allowed charities to discriminate on grounds of sex, was amended by the insertion of section 43(2A) to introduce a requirement that the discrimination be included in the charitable instrument and that it be objectively justifiable, in order to comply with Directive 2004/113. In response, Catholic Care attempted to amend its Memorandum of Association to expressly limit its provision of adoption services to married heterosexual couples (same-sex marriage was not yet provided for), a practice that it had followed before the change in the SDA. The Charity Commission refused permission, on grounds that it would not fall within the charity exception. An appeal by the charity to the Charity Tribunal was unsuccessful. On further appeal, Briggs J in the High Court remitted the case to the Charity Commission. Briggs J said that the amendment ‘was introduced to bring the express terms of section 43 into compatibility with Convention rights, and with Article 14 in particular.’<sup>61</sup> By this reasoning, all of the exceptions in the predecessor equality legislation required objective justification after the implementation of the Human Rights Act 1998; a surprising result. This framing led Briggs to formulate the question remitted to the Charity Commission as whether the revised charitable objects sought by Catholic Care would be justifiable under Article 14. This is potentially

<sup>58</sup> EHRC, *Equality Act 2010 Code of Practice* (2011) (n 53) para 13.36.

<sup>59</sup> [2008] IRLR 846 (EAT).

<sup>60</sup> *Seldon v Clarkson Wright and Jakes (a Partnership)* [2010] UKSC 16, [2012] 3 All ER 1301.

<sup>61</sup> *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales* [2010] EWHC 520 (Ch), [2010] 4 All ER 1041 [51].

problematic, as what can be objectively justified under Article 14 may be broader in circumstances where the European Court of Human Rights (ECtHR) affords to states a wide margin of appreciation.<sup>62</sup> Although it has been the case so far that, on the particular facts, the approach would have been the same,<sup>63</sup> this is not necessarily so. The use of the ECtHR jurisprudence may thus be ill-suited as a basis for Charity Commission determinations in some circumstances where there is a wide margin of appreciation afforded to states.

In *Catholic Care*, Briggs further deployed the case law and language of the ECtHR on Article 14, noting that discrimination based upon sexual orientation requires particularly weighty and convincing reasons to be justifiable. He cited *Kozak v Poland*<sup>64</sup> for the proposition that the state's margin of appreciation is narrow in such cases and that the proposed discriminatory measure used to meet the legitimate aim must be necessary, as well as suitable. When the matter returned to it, the Charity Commission again decided that Catholic Care could not change its objects, concluding that the charity had not provided 'sufficiently convincing and weighty reasons' to justify the discrimination.<sup>65</sup> This was affirmed in the now renamed First-tier Tribunal (Charity) (the FTT) and then appealed to the Upper Tribunal (Tax and Chancery Chamber) (the UT), where Sales J upheld the FTT and again considered justification under Article 14, noting that '... it is unnecessary to examine further the precise basis on which Article 14 principles come to infuse the interpretation of section 193', although '... on any view, Article 14 provides a powerful analogy for the operation of section 193'.<sup>66</sup> This suggests that future considerations of whether or not charities can be allowed to discriminate will focus more on the case law derived from indirect discrimination, rather than the Equality Act and directives.

In the UT, Sales J agreed with Catholic Care that placing hard-to-adopt children was a legitimate aim, but he did not agree that the means pursued were proportionate. Notably of interest to the cisgender women's charity was Sales J's willingness to entertain the argument that the availability of services for same-sex couples elsewhere might be considered in the calculation of objective justification of the discriminatory practice of limiting services to heterosexual couples. He said that although availability of services elsewhere would not 'of itself justify' the practice, it could be relevant 'in some circumstances'.<sup>67</sup> Catholic Care's

<sup>62</sup> See, eg, *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704, [2012] All ER 1287 [23] (Lady Hale).

<sup>63</sup> See, eg, *Hackenjos v Secretary of State for Social Security* [2004] EWCA Civ 1749, [2005] EuLR 385; *Humphreys v HM Revenue and Customs* [2010] EWCA Civ 56, [2010] 1 FCR 630.

<sup>64</sup> [2010] ECHR 280 (92). This language is repeated in the Charity Commission, 'Equality Act Guidance for Charities' (2013) (n 24) para 5.5.

<sup>65</sup> 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' (London, Charity Commission, 2010).

<sup>66</sup> *Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC) [13].

<sup>67</sup> *Ibid* [28].

services ‘do not dominate the public sphere in relation to the activity in question – provision of adoption services – which are otherwise widely available to homosexuals and same-sex couples.’<sup>68</sup> This is troubling, as it is analogous to the arguments seen in *Bull v Hall and Preddy* that the same-sex couple could simply seek accommodation elsewhere.<sup>69</sup> Sales J nevertheless concluded that the provision of services elsewhere, although possibly reducing the detrimental effect:

did not remove the harm that would be caused to them through feeling that discrimination on grounds of sexual orientation was practiced 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 heterosexual and homosexuals – a value endorsed by Parliament in assessing and responding to the needs of society by legislating general rules to promote quality of treatment for homosexuals.<sup>70</sup>

Thus, the availability of the service itself is really only a piece of the puzzle, and the fact of the discrimination itself is important, both to the individuals who are discriminated against, and to broader society. The harm caused by the existence of the discrimination tips the calculation of proportionality against the discrimination.

Sales J also stated that the motivation of donors to the charity might also be capable of being relevant to calculating proportionality under Article 14, particularly where they ‘are motivated by sincerely held religious beliefs in line with a major tradition in European society such as that represented by the doctrine of the Catholic church.’<sup>71</sup> This is one of the areas where the argumentation under Article 14 in *Catholic Care* is problematic. Benign motive cannot be a defence to direct discrimination, and the section 193 exception is justifying direct discrimination.<sup>72</sup> A charity could always argue that it is operating in pursuance of a recognised charitable purpose and in the public benefit, and that therefore this is benign motivation. The acceptance of a purpose as charitable would provide the justification of the reasonableness of the benign motivation, as the ‘major tradition’ of Catholicism does for Sales J in the case of *Catholic Care*. Nevertheless, both European and domestic lawmakers have placed limits on the ability of charities to discriminate. To allow the discrimination because the motivation is benign would, in the case of charities, effectively read out the limitations of section 193. This, however, is one of the difficulties of balancing equality law. Religion is a protected characteristic, so the beliefs that motivated the charity in *Catholic Care* are protected. This then sets up conflicts with other equality strands, such as sex discrimination or gender reassignment. Whose interests ought society to privilege then?

<sup>68</sup> Ibid [44].

<sup>69</sup> [2012] EWCA Civ 83, [2012] 2 All ER 1017.

<sup>70</sup> *Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC) [66].

<sup>71</sup> Ibid [44].

<sup>72</sup> *Amnesty International v Ahmed* [2009] IRLR 884 (EAT).

Applying *Catholic Care* to the situation of the hypothetical cisgender women's charity considered in this case study, the charity may be able to establish that providing services to cisgender women is a legitimate aim. It cannot be the case that section 193(2)(a) requires that cisgender women be at a greater disadvantage than the general public, because if that were the case then section 193(2)(b) would apply, robbing section 193(2)(a) of meaning. Therefore, providing support to cisgender survivors of domestic violence might be a legitimate aim, even if it were not possible to establish that cisgender women are subjected to domestic violence at a greater rate than the general public or transgender women. The Charity Commission's guidance on 'Test B' would indicate otherwise, however, stating that a legitimate aim 'has a reasonable social policy objective ... is consistent with the lawful carrying out of the charity's stated purpose for the public benefit ... and is not itself discriminatory'.<sup>73</sup> This guidance seems rather circular as, if the objective were not itself discriminatory, there would be nothing to justify via section 193(a). The EHRC's Statutory Code of Practice on Services, Public Functions and Associations states that 'the restriction would need to promote, or in any event not inhibit, the achievement of one of its stated aims'.<sup>74</sup>

Even were this to be a legitimate aim, however, proportionality would require sufficiently weighty justification, which would be difficult for the cisgender charity to meet. There are fundamental problems with the arguments that are made to justify this position, as they accept premises that should be challenged. First, the case for a blanket exclusion of transgender women suggests that they will look like men, and that this might be 'triggering' or distressing for cisgender women service users of sensitive services such as domestic violence counselling. It is not the case that all transgender women look like men, and even if it were, then this argument would seem to require that any cisgender women who do not look 'womanly' be excluded as well. Secondly, it assumes a uniformity and safety among cisgender women that is always greater than those between cisgender and transgender women, which is problematic. The government consultation points to potential circumstances that challenge this construction: 'for example the refuge might want to prevent an abusive lesbian from entering when her abused female partner is inside, or it may exclude a woman with a history of violence and instability'.<sup>75</sup> The argument is sometimes justified on the basis that abusive cisgender men will pretend to be transgender women in order to access these services and abuse women.<sup>76</sup> It is entirely disproportionate, however, to deny services to a vulnerable population group on the chance that another population group entirely might try and abuse the existence of the vulnerable population group in order to commit crimes.

<sup>73</sup> Charity Commission, 'Equality Act Guidance for Charities' (2013) (n 24) para 5.4.

<sup>74</sup> EHRC (2011) (n 53), para 13.36.

<sup>75</sup> Government Equalities Office and Penny Mordaunt, MP, (2018) (n 48), 45.

<sup>76</sup> Eg, M O'Hara, 'Wishful thinking is not a good foundation for law' in "Shifting sands": six legal views on the transgender debate' *The Guardian* (London, 19 October 2018).

By way of analogy to *Catholic Care*, the harm of the discrimination to the transgender potential service users who are denied services would be equivalent to that noted in the case by Sales J. There would also be harm to society by allowing the discrimination, violating the general social value of equal treatment, a value endorsed and protected by Parliament. These harms would weigh against the charity in any proportionality calculation. Moreover, it may well be the case that services are not generally available elsewhere for transgender women survivors of violence in need of counselling. These resources are generally stretched thin throughout the country. Despite the focus on Article 14 in *Catholic Care*, section 193 is justifying direct discrimination and must, therefore, be strictly construed. It is disproportionate to allow a charity to exclude all transgender women.<sup>77</sup>

### C. Single-Sex Services

The discussion of section 193 applies if the charity in question would like to restrict its charitable purposes to cisgender women. It may be the case, however, that a charity wants to restrict only some of its services or charitable activities to cisgender women. The charity could not then rely on section 193, as the restriction would not be in furtherance of its charitable instrument. Charities with more general charitable objects would have to rely upon different exceptions to the Equality Act.

There are a number of exceptions in the Equality Act, some of which are relevant to this chapter, including the exceptions in schedule 3, part 7, paragraph 27, for the provision of services differently to different sexes, including separate but the same services, separate and different services, and services only to one sex. The Sex Discrimination Act 1975 allowed charities to provide services and benefits to one sex if that was why the organisation had been set up.<sup>78</sup> The Equality Act permits single-sex services where they fall within context-dependent circumstances, such as where only persons of that sex need the service;<sup>79</sup> where the service would be insufficiently effective were it to be provided jointly to both sexes;<sup>80</sup> or where a service would be used by two or more persons at the same time and a person of one sex might ‘reasonably object’ to the presence of a person of the opposite sex.<sup>81</sup> In all of these instances, however, the limited provision of the service must also be a proportionate means of achieving a legitimate aim.<sup>82</sup>

<sup>77</sup> It would also be a violation of the Charity Commission’s own Public Sector Equality Duty, Equality Act 2010 s 149, to register a discriminatory charity that cannot fall within s 193.

<sup>78</sup> Sex Discrimination Act 1975, s 43.

<sup>79</sup> Equality Act 2010, sch 3, part 7, para 27 (2).

<sup>80</sup> *Ibid*, para 27 (3)(b).

<sup>81</sup> *Ibid*, para 27 (6)(a) and (b).

<sup>82</sup> *Ibid*, para 27 (1)(b).

The Equality Act also permits the exclusion of persons on grounds of gender reassignment in the provision of separate and single-sex services, so long as it can be objectively justified.<sup>83</sup> It is clear that this is not the expected state of affairs, as the EHRC's guidance states:

Generally, a business which is providing separate or single-sex services should treat a transsexual person according to the sex in which the transsexual person presents (as opposed to the sex recorded at birth), as it is unlawful to discriminate against someone because of gender reassignment.<sup>84</sup>

The circumstances in which the exclusion of transgender persons would be a legitimate aim are not explicitly listed, as they are in the case of separate and single-sex services for males and females. The grounds that would be considered acceptable to be a legitimate aim are likely to be similar.<sup>85</sup> Therefore, under the current legal configuration, it would be likely to be a legitimate aim for a service provider to exclude transgender persons if the service would be less effective if they were included; if the service might be used by both cisgender and transgender persons at the same time and the cisgender persons could reasonably object to the presence of transgender persons; or if there would likely be physical contact between service users and service users could reasonably object to the presence of the transgender person. The Explanatory Notes to the Equality Act offer the following example: 'A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful.'<sup>86</sup> Another potential example is that of a women's refuge for survivors of violence, or a rape crisis centre, where the service might be less effective or other service users might reasonably object to the presence of transgender women as service users.<sup>87</sup>

Even though these may be legitimate aims for the service provider, it would nevertheless be necessary to determine if the exclusion of the transgender person in these circumstances is proportionate. McCann noted that the example in the Explanatory Notes was 'drafted too categorically'.<sup>88</sup> The women's refuge or rape crisis centre would therefore need to be able to evidence that their service would be less effective if opened up to transgender women or that their cisgender service users would object to the presence of transgender women. This would align with

<sup>83</sup> Ibid, para 28.

<sup>84</sup> EHRC, *What Equality Law Means for Your Business* (London, EHRC, October 2018) 17. Amended in October 2018. The earlier guidance stated the case more categorically, until pressure from a feminist campaign.

<sup>85</sup> Claire McCann, 'Legal Opinion in the matter of The Women & Equalities Committee's Inquiry into Transgender Discrimination and the Equality Act 2010', 10 November 2015 (<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/24915.pdf>) 5.

<sup>86</sup> Equality Act 2010, Explanatory Notes, para 740.

<sup>87</sup> McCann, 'Legal Opinion' (2015) (n 85).

<sup>88</sup> Ibid.

the need to substantiate other charity exceptions with evidence, as discussed above. The service provider would also need to assess the circumstances of each potential transgender service user to determine how proportionate the exclusion would be in that individual's case.<sup>89</sup> As is discussed above in relation to the proportionality of barring all transgender women, the premise on which these arguments are founded is flawed. A blanket ban on transgender individuals using a single-sex service would be unacceptable under the Equality Act.

In the case of potential service users who hold a GRC, the grounds justifying their exclusion would need to be weightier in order for the exclusion to be proportionate.<sup>90</sup> Transgender women with a GRC have lived in their acquired gender for a number of years and undergone a lengthy legal process involving medical assessments. Their sex has legally been changed to that of their acquired gender. It is logical that their exclusion from single-sex services is only objectively justifiable based upon particularly serious grounds.

It is not clear what circumstances can justify the exclusion of transgender women who hold a GRC from single-sex services. In the 2018 government consultation document it was noted that, 'The fact a trans person has legal gender recognition will form part of a service provider's decision as to whether to provide a different, or even no service to a trans person, but having a GRC is not a complete answer.'<sup>91</sup> In response to consultation, there were repeated arguments that allowing a GRC only based upon self-identification would erode the protection of women-only spaces.<sup>92</sup> This is a misreading of the impact of changes to obtaining a GRC. Although at present the reasons required to objectively justify excluding a transgender woman with a GRC would have to be weightier than would be required for a woman without a GRC, this is both because of the legal status conferred by the GRC and because a GRC is evidence of commitment. When weighing up the risk of admitting an individual to a women-only service, the GRC is evidence that this individual has been not only identifying as a woman, but living as a woman, for a long time.

We can see from the CJEU in *MB* that even in the absence of a GRC, the facts of a particular case may be such as to warrant an assumption that a woman is transgender and that she is experiencing discrimination based upon sex.<sup>93</sup> Some of the more heated argumentation from those who are opposed to reforming the

<sup>89</sup> In its response to a petition about proposed changes to the GRA, 'Consult with women on proposals to enshrine "gender identity" in law' (<https://petition.parliament.uk/petitions/214118>), the Government Equalities Office affirmed that the risk assessment would have to be made for each individual: 'Providers of women-only services can continue to provide services in a different way, or even not provide services to trans individuals, provided it is objectively justified on a case-by-case basis'. This affirms the argument that a blanket ban on transgender individuals using a single-sex service would be unacceptable under the Equality Act.

<sup>90</sup> McCann, (2015) (n 85).

<sup>91</sup> Government Equalities Office and Mordaunt, (2018) (n 48), 45.

<sup>92</sup> See, eg. some of the positions in "Shifting sands": six legal views on the transgender debate' (2018) (n 3).

<sup>93</sup> *MB v Secretary of State for Work and Pensions* Case C-451/16 [2018] para 35.

GRA is around the risk of male predators declaring themselves to be transgender in order to access women-only spaces in order to prey upon the other service users.<sup>94</sup> A service can already exclude any person, whether cisgender or transgender, if they pose a risk to other users of the service. There is evidence that many services have found ways to accommodate transgender women.<sup>95</sup>

In this investigation of whether charities can exclude transgender women from single-sex services we come, therefore, to the very lawyerly answer of: it depends. A blanket ban on transgender women accessing single-sex services is not lawful. It will be lawful to exclude a particular transgender woman if this discrimination can be objectively justified. A charity should consider each transgender woman on a case-by-case basis in assessing whether it is proportionate to exclude her from services. This is likely to be the case in only a limited number of cases. In the case of a transgender woman with a GRC, those reasons will need to be considerably weightier in order to be proportionate.

#### D. Positive Action

The final mechanism that might allow charity to limit its services is positive action. Positive action may be used when a group defined by one or more protected characteristics are disadvantaged or subject to systematic discrimination. Positive action is allowable under the Equality Act if it is reasonably thought that persons who share a protected characteristic are disadvantaged in a way linked to the protected characteristic, if persons who share a protected characteristic have needs that are different from the needs of those who do not share it, or where participation is particularly low on the part of those who share a protected characteristic.<sup>96</sup> In those instances, members of the group who share the protected characteristic may be treated more favourably than others in order to enable them to overcome or minimise the disadvantage, to meet the needs, or to increase participation, so long as this is a proportionate means of achieving a legitimate aim.<sup>97</sup>

Due to the essentially symmetrical nature of the equality law in the UK, there were few opportunities for positive action, compared with that allowable in the US and in other EU Member States, until quite recently.<sup>98</sup> Positive action is limited in scope. As it must be ‘reasonably thought’, there must be some evidentiary basis for the determination that a particular group needs to be privileged over others. Positive action also must be time-limited, so a charity could not rely on this as to

<sup>94</sup> M O’Hara, ‘Wishful thinking is not a good foundation for law’ (2018) (n 76) is an excellent example of this argument.

<sup>95</sup> Stonewall and NfP Synergy, *Supporting trans women in domestic and sexual violence services* (London, Stonewall, 2018).

<sup>96</sup> Equality Act 2010, s 158.

<sup>97</sup> *Ibid.*

<sup>98</sup> A McColgan, *Discrimination, Equality and the Law* (Oxford, Hart Publishing, 2014) 71.

allow the discrimination forever. Finally, if the positive action has been pursued for a period of time and there is no improvement in the situation of the disadvantaged group, then it is likely that the positive action would be viewed as a less-than-proportionate response and therefore not justifiable.

Positive action is unlikely to help the hypothetical charity. A greater need for the services of counselling might be viewed as a disadvantage linked to the protected characteristic of sex, as women are more likely to be subject to domestic violence. It is, however, also a disadvantage linked to the protected characteristic of gender reassignment. Again, it would not be proportionate to exclude transgender women to compensate for this disadvantage.

#### IV. When should Charities be able to Discriminate?

The complicated interaction between charity law and equality law is illustrated by the case study. Much of the discussion involved calculating when discrimination is proportionate and therefore objectively justifiable. These calculations may be informed by reference to the principles underpinning equality and anti-discrimination law. In this section I will address when it should be lawful for charities to discriminate. This discussion is primarily focussed on discriminatory purposes for charities, such as could be permitted under the section 193 exception, but calls to the principles underpinning equality law also could be useful for the balancing calculations under other exceptions for discriminatory charitable activities.

##### A. What about Public Benefit?

All charities must act exclusively in the public benefit. It is generally agreed that discrimination causes public harm, and the public is benefited by the promotion of diversity. How, then, can it be in the public benefit for a charity to discriminate? Others have argued that discrimination is incompatible with public benefit.<sup>99</sup> Parachin disagrees, calling this ‘an aspirational argument about what public benefit could and perhaps even should come to mean.’<sup>100</sup> Government rejected an opportunity to link public benefit and a lack of discrimination in the charity law reform process that led up to the passage of the Charities Act 2006.<sup>101</sup> Could a charity that fails to justify its discrimination be in the public benefit? The indication at present

<sup>99</sup> See, eg, Harding, *Charity Law and the Liberal State* (2014) (n 6) 236–240; Morris, ‘Charities and the Modern Equality Framework – Heading for a Collision?’ (2012) (n 2).

<sup>100</sup> Parachin, ‘Public benefit, discrimination and the meaning of charity’ (n 6), 173.

<sup>101</sup> Joint Committee on the Draft Charities Bill, *The Draft Charities Bill* (2003-04 HL 167-III, HC 660-III) vol 3: Written evidence, memorandum from Peter Tatchell (DCH 92) Ev 377.

in England and Wales is no. The Charity Commission will consider the impact of any restriction in a charitable instrument based upon a projected characteristic and whether it can be justified in determining whether a charity passes the public benefit test.<sup>102</sup> If the class of persons to benefit is unreasonably restricted then it will not constitute a 'sufficient' section of the public and will, therefore, not be in the public benefit.<sup>103</sup>

In its guidance for charities on the Equality Act, the Commission conflates the Equality Act requirements and public benefit. If a would-be charity is unable to justify discrimination based upon a protected characteristic under section 193, 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'.<sup>104</sup> The EHRC advanced this argument in its intervention in the *Catholic Care* litigation, although the Tribunal was not inclined to accept it.<sup>105</sup> The argument is rather circular, however. If a would-be charity cannot satisfy section 193 to justify its discrimination, then it is not acting in the public benefit. If an entity does not meet the public benefit test, then it is not a charity and cannot rely on section 193 to justify the discrimination. At any rate, reference to public benefit without more does not provide much in the way of insight into when this discrimination is objectively justifiable.

## B. Principles of Equality Law

When considering what the limits should be for when charitable discrimination can be justified, it may be useful to consider the theoretical underpinnings for equality law. If we can situate the sort of specialisation that charities undertake within equality law, then we may gain some insight into when these charitable purposes are objectively justifiable discrimination.

Although a right to equality 'is a central commitment in human rights law ... the meaning of the right to equality is deeply contested'.<sup>106</sup> There is reasonably broad agreement that such a right must involve more than formal equality – the Aristotelian conception of treating like cases alike. Barnard and Hepple describe this as 'a notion of procedural justice which does not guarantee any particular outcome'.<sup>107</sup> A person or entity in a position of power would be free to treat both

<sup>102</sup> Charity Commission, 'Public benefit: the public benefit requirement (PB1)' (London, Charity Commission, 2014) 11.

<sup>103</sup> Ibid; See Parachin, 'Public benefit, discrimination and the meaning of charity' (n 6) for an argument that prohibitions against discrimination grounded in charity law must arise from the 'benefit' element of public benefit, rather than the 'public' element that the Charity Commission is relying on here.

<sup>104</sup> Charity Commission, 'Equality Act Guidance for Charities' (2013) (n 24) para B2.

<sup>105</sup> *Father Hudson's Society and another v Charity Commission (Equality and Human Rights Commission intervening)* (2009) PTSR 1125.

<sup>106</sup> Fredman, 'Substantive equality revisited' (2016) (n 7).

<sup>107</sup> C Barnard and B Hepple, 'Substantive Equality' (2000) 59(3) *Cambridge Law Journal* 562, 563.

men and women, for example, equally poorly – there is no normative power in the term beyond the idea of intergroup fairness.<sup>108</sup> This problem arises, at least in part, because of the largely symmetrical nature of English equality law, where once a characteristic is identified as worthy of protection from discrimination, all groups are protected from discrimination based upon that trait. Formal equality is not, therefore, a very satisfactory framework, as it would restrict the sort of measures to address inequality where people who have been disadvantaged are accorded more favourable treatment in order to improve their position. We can see that the Equality Act has departed from formal symmetrical equality for charities, with the addition of the requirement that discrimination by charities must be objectively justifiable across all protected characteristics, rather than limited only to the protected characteristic of sex, as was the case previously.

What, then, should equality law be for? McCrudden noted that there was no one source or organising principle for notions of equality or non-discrimination in English public law, the concept of equality therefore being ‘essentially pluralistic in its sources, in its origins, in its meaning, in its application, and in its functions’.<sup>109</sup> McCrudden has also suggested considering equalities, rather than equality, as there is no one complete notion of the concept.<sup>110</sup> Formal equality is often contrasted with substantive equality, though this also does not have an agreed definition. Fredman argues that a substantive idea of equality ‘would only be suspicious of groups who are excluded because of, or in spite of, their especial vulnerability’.<sup>111</sup> Young suggests that the groups who should be protected by equality law are those where the members experience systematic or structural disadvantage across multiple spheres.<sup>112</sup> This then would be consistent with a concept that charities may choose to limit their beneficiaries by reference to a protected characteristic, but only where the charity is helping the more disadvantaged side of the symmetrical grouping: women rather than men, for example. In the case of transgender women, equality law is suspicious of a charity that excludes transgender people because of their special vulnerability. Perhaps we can use the degrees of vulnerability of various protected groups to decide which should be protected over the other.

### C. Substantive Equality

Vickers classified three conceptual approaches to this deeper or more substantive understanding of equality: linked to removing disadvantage, individual dignity and

<sup>108</sup> See P Westen, ‘The Empty Idea of Equality’ (1982) 95(3) *Harvard Law Review* 537.

<sup>109</sup> C McCrudden, ‘Equality and Non-Discrimination’ in D Feldman (ed) *English Public Law* (Oxford, OUP, 2004).

<sup>110</sup> C McCrudden, ‘Thinking about the discrimination directive’ (2005) 1 *European Anti-Discrimination Law Review* 17.

<sup>111</sup> S Fredman, ‘Providing Equality: Substantive Equality and the Positive Duty to Provide’ (2005) 21 *South African Journal of Human Rights* 163, 170.

<sup>112</sup> IM Young, ‘Equality of Whom? Social Groups and Judgments of Injustice’ (2001) *The Journal of Political Philosophy* 1, drawing on Michael Walzer’s theory of complex equality.

recognition, and a broader approach that she terms inclusion and participation.<sup>113</sup> Of these, removing disadvantage is conceptually easy to understand. It would hold that the point of equality law is to remove disadvantage associated with discriminatory treatment, or historical discriminatory treatment, based upon a protected characteristic. A concern with this basis is the need to evidence disadvantage, which was also raised by the study. Participants identified that the data which could provide evidence to justify positive action, or the section 193 charity exception, were generally not collected and therefore it was difficult to rely on the exception in any practical way. Despite these evidentiary issues, it is uncontroversial that discrimination designed to address past disadvantage is justifiable under section 193(2)(b). These are the situations that are likely to come most readily to mind when thinking of charity. This is also possibly why the Charity Commission refers to the test under section 193(2)(b) as Test A. Preferential treatment designed to redress disadvantage is the classic situation for justifiable charitable discrimination.

The second of Vicker's clarifications, dignity or recognition, is an appealing basis for these more substantive ideas of equality. We can find dignity used as a first principle of equality and human rights in a number of different sources, including the Universal Declaration of Human Rights.<sup>114</sup> This concept has also been expressed as 'recognition'; inequality can also arise from individuals' personal identity and self-worth not being sufficiently valued.<sup>115</sup> Dignity as a basis for equality should help to prevent 'levelling-down', where protections for all are dropped to the lowest common denominator rather than raised, in order to comply with a symmetrical approach to protection. Dignity has also been criticised as a ground for equality law, however, with Feldman noting that dignity is a 'quality characteristic of human beings, so that an individual cannot have a right to it'.<sup>116</sup>

The addition of dignity to interpretation of the slippery concept of equality adds little in the way of analytical traction. At times, it has proved a false friend to those who would advance a more substantive concept of equality. In Canada, the prevention of 'the violation of essential human dignity and freedom'<sup>117</sup> was defined by the Supreme Court in *Law v Canada* as the purpose of the equality guarantee in section 1(1) to Canada's Charter of Rights.<sup>118</sup> Subsequently, in *Gosselin v Quebec*

<sup>113</sup>L Vickers, 'Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief' (2011) 31(1) *Legal Studies* 135. I have reordered these for purposes of this discussion.

<sup>114</sup>'All human beings are born free and equal in dignity and rights.' Universal Declaration of Human Rights, Art 1.

<sup>115</sup>For a sceptical take: N Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1995) 212(1) *New Left Review* 68.

<sup>116</sup>D Feldman, 'Human Dignity as a Legal Value: Part 1' (1999) *Public Law* 682, 682.

<sup>117</sup>*Law v Canada* (1991) 1SCR 497, para 51.

<sup>118</sup>'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.' Canada's Charter of Fundamental Rights, s 15(1).

(Attorney General),<sup>119</sup> the Supreme Court deployed the idea of dignity as an additional hurdle to surmount for younger social security claimants trying to assert that higher rates paid to those aged 30 and over violated the section 15 equality guarantee.<sup>120</sup> This risk had been raised by Grabham, who pointed out that ‘one could conceivably be dignified *and* materially disadvantaged’.<sup>121</sup> In *R v Kapp* the Canadian Supreme Court acknowledged the contribution that human dignity, as incorporated by the *Law* court, had added to ‘understanding of the conceptual underpinnings of substantive equality’ but that nevertheless difficulties had arisen from its use ‘as a legal test’.<sup>122</sup>

Vickers argues that ‘the reifying of difference’ between groups is another shortcoming of dignity as a basis for equality claims, particularly in the area of religion and belief, where the boundaries are unclear and ‘the range of voices within religious groupings so varied’.<sup>123</sup> In considering how to weigh up the hierarchy of protection in a reworked equality law structure for the UK, McColgan would relegate religion or belief to a lower level of protection than that afforded sex, race, disability or sexual orientation, except where it is serving as a proxy for ethnicity.<sup>124</sup> It can be seen from the *Catholic Care* litigation that there is tension between modern charity law and the practices of some religious groups. Religion was one of the traditional four heads of English charity law,<sup>125</sup> and yet it is an area where there is controversy about charitable status in the modern era.

Dignity or recognition does seem conceptually similar to the ideas invoked by Sales J in *Catholic Care* as to when and why discrimination is harmful for individuals and broader society. In the case of transgender women, recognition or dignity is a key conceptual issue. To be ‘misgendered’ or ‘deadnamed’ is an assault.<sup>126</sup> Exclusion from services for transgender women is misgendering that woman by treating her as if she had not acquired her new gender. This is an assault on the dignity of the transgender woman. Dignity or recognition might thus be a helpful concept when considering whether discrimination can be justified in the case of transgender. Vickers noted that some theoretical conceptions for equality law may be better suited to different protected characteristics.<sup>127</sup>

<sup>119</sup> (2002) 4 SCR 429.

<sup>120</sup> The majority required that the plaintiff demonstrate that the disparate treatment based upon a protected ground (age) was irrelevant to the legislative purpose, which was declared to be promoting autonomy for younger adults. This deference to the legislative purpose effectively meant that the plaintiff would have to show both the discriminatory impact and also that this was intended to violate the dignity of younger people.

<sup>121</sup> E Grabham, ‘*Law v Canada: New Directions for Equality under the Canadian Charter?*’ (2002) *Oxford Journal of Legal Studies* 641, 654, cited in McColgan, *Discrimination, Equality and the Law* (2014) (n 98).

<sup>122</sup> (2008) 2 SCR 483, paras 20–21.

<sup>123</sup> Vickers, ‘Promoting Equality or Fostering Resentment?’ (2011) (n 114), 150.

<sup>124</sup> McColgan, *Discrimination, Equality and the Law* (2014) (n 98), 230.

<sup>125</sup> *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

<sup>126</sup> K McLemore, ‘Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals’ (2014) *Self and Identity* 14(1); Stonewall, *The truth about trans: A Q&A for people who are hungry for real info* ([www.stonewall.org.uk/truth-about-trans](http://www.stonewall.org.uk/truth-about-trans)).

<sup>127</sup> Vickers, (2011) (n 114).

The last of Vicker's classifications is the inclusive model, which would address both recognition and redistribution. There are many models of what equality law is for that would fall into this category. O'Connell argues that equality and anti-discrimination law are intended to tackle a variety of different harms and so therefore it could be impossible to distil the concepts down to a single underlying harm. The ultimate aim of equality and anti-discrimination law is 'as a tool to help achieve some sort of social transformation.'<sup>128</sup> Fredman elaborated a 'four dimensional principle' for substantive equality: 'to redress disadvantage; to address stigma, stereotyping, prejudice and violence; to enhance voice and participation; and to accommodate difference and achieve structural change.'<sup>129</sup> If we are to consider when a charity should be able to justify discrimination under these models, we see that it would be in situations when a charity is challenging social structures that perpetuate inequality.

## V. Conclusion

This chapter has focused on a legal flash point in the UK at the moment. The consultation on potential changes to the GRA has led to debate about whether and when transgender people should be able to access single-sex services in the gender in which they identify. Charities that offer these services would do well to consider their policies for including transgender people, to determine whether they are lawful. If a charity's policy is framed as an exclusion policy, it is unlikely to be lawful.

I have demonstrated the complex interrelationship between charity and equality law. The section 193 Equality Act requirement that discrimination be justifiable across all protected characteristics was a positive step. As UK equality law is largely symmetrical, this additional justification requirement is necessary to ensure that charitable discrimination is achieving more than a formal ideal of equality. I have argued that because section 193 is justifying direct discrimination, rather than indirect discrimination, it should be construed strictly. The experience of being directly discriminated against is invidious and the justification required to make this lawful should be correspondingly stringent. Charities have favoured status from the state and, therefore, should be held to a higher standard to justify their discriminatory practices.

<sup>128</sup> C O'Connell, 'Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain' (2006) 57 *Northern Ireland Law Quarterly* 57, 60.

<sup>129</sup> Fredman, 'Substantive Equality revisited' (2016) (n 7) 713. MacKinnon, in response, argued that the single principle Fredman was missing is that of 'social hierarchy'. C MacKinnon, 'Substantive Equality Revisited: A Reply to Sandra Fredman' (2016) 14(3) *International Journal of Constitutional Law* 739, 740.

I examined three possible mechanisms by which a charity might lawfully be able to limit its services to only cisgender women, and I concluded that the exception for single-sex services was the only viable option. A charity would not and should not be able to issue a lawful blanket ban on all transgender women, however. Each individual would need to be assessed on a case-by-case basis. These assessments would need to be based upon evidence, rather than assumptions. The reasons required to exclude a transgender woman with a GRC would need to be correspondingly weightier than for those without. This is true both because a transgender woman with a GRC has legally changed her sex, but also because a GRC will be evidence of her long-term commitment to living in her acquired gender. This must tip the scales of proportionality away from exclusion in these cases, in all but a handful of circumstances.<sup>130</sup>

Finally, I looked to the theoretical underpinnings that have been offered in support of normative ideals of equality and anti-discrimination law to see if they offered any further insight into when it should be allowable for a charity to discriminate. The theory underlying equality and anti-discrimination law is deeply contested. That said, we were able to gain some insight into when charitable discrimination should be able to be justified. In terms of discrimination that redresses disadvantage under section 193(2)(b), this should be straightforward. As there is now a general consensus that equality law is striving for more than formal equality, tackling disadvantage is a noncontroversial goal for both discrimination law and charities.

When deciding what could be a proportionate means of achieving a legitimate aim under section 193(2)(a), considering the theoretical bases for equality law offered that this should only be allowable when the discrimination is in favour of the vulnerable. Although symmetrical equality law offers protection to all the cognate groups of a protected characteristic, it would not be acceptable to focus on the relatively advantaged at the expense of the relatively disadvantaged. This is not what equality law is for. Charities should be making a difference by tackling the additional elements of Fredman's model, by combating stigma and stereotyping, enhancing voice and participation, accommodating difference and achieving social change.<sup>131</sup> The discrimination against transgender women discussed in this chapter meets none of these circumstances and is unacceptable. Charitable discrimination should be able to be justified when it is operating as a tool for social transformation.<sup>132</sup> That should be the point of charity and the point of equality law.

<sup>130</sup> This is likely to also be the case where a woman fits the circumstances of the plaintiff in *MB v Secretary of State for Work and Pensions*, despite the fact that the case was limited to social security determinations.

<sup>131</sup> Fredman, 'Substantive Equality Revisited' (2016) (n 7) 713.

<sup>132</sup> O'Cinneide, 'Fumbling Towards Coherence' (2006) (n 129).