



Equality law and female bishops

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Author: Doug Pyper

Section Business & Transport Section

This short note outlines the religious organisation exceptions to the *Equality Act 2010* that apply to the Church of England's decision regarding female bishops. It also touches upon some aspects of EU anti-discrimination law.

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1 Domestic law

There are exceptions to the discrimination provisions of the *Equality Act 2010* (the Act) which apply to the decisions of religious organisations. The relevant exceptions are those which exempt religious organisations from the prohibition against discrimination on grounds of sex in an employment context.

1.1 Employment exceptions

An organised religion can apply an “occupational requirement” that an employee be of a certain sex, and doing so will not contravene the employment discrimination provisions of the Act if:

1. the employment is for the purposes of organised religion;¹
2. the person applying the requirement has reasonable grounds for being satisfied that the person to whom the requirement is applied does not meet it; and²
3. the application of the requirement engages either the compliance or non-conflict principles.

As regards point three, the compliance principle is engaged when:

...the requirement is applied so as to comply with the doctrines of the religion.³

The non-conflict principle is engaged when:

...because of the nature or context of the employment, the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.⁴

Provided the above criteria are met, the requirement that an employee be of a particular sex is exempt from the prohibition of discrimination in an employment context.⁵ These exceptions for religious organisations apply similarly in respect of:

- appointments to personal offices;
- appointments to public offices;
- recommendations for appointment to a public office.⁶

Therefore, so long as the prohibition of female bishops engages either the compliance or non-conflict principles (or both) the Church of England may lawfully discriminate on grounds of sex when determining who to appoint as a bishop.

2 EU anti-discrimination law

The Church of England's refusal to appoint female bishops may be susceptible to challenge under EU law.

¹ Schedule 9, Part 1, para 2(1)(a)

² Schedule 9, Part 1, para 2(1)(a)-(c)

³ Schedule 9, Part 1, para 2(5)

⁴ Schedule 9, Part 1, para 2(6)

⁵ Schedule 9, Part 1, para 2(4)(a); Schedule 9, Part 1, para 2(2)

⁶ Schedule 9, Part 1, para 2(2)

Article 14 of [Directive 2006/54/EC](#), the *Equal Treatment Directive*, prohibits sex discrimination in the following way:

1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

(a) **conditions for access to employment**, to self-employment or to occupation, **including selection criteria** and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

...

2. Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a **characteristic related to sex shall not constitute discrimination** where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a **genuine and determining occupational requirement**, provided that its objective is legitimate and the requirement is proportionate.

Article 14 does not contain the same exemption for religion as does the *Equality Act*. For the purposes of Article 14, a discriminatory occupational requirement will only be permissible where a required characteristic related to sex constitutes a “genuine and determining occupational requirement”. This is limited to occupational requirements necessary for the performance of the activity concerned.⁷

Provisions of directives that are sufficiently clear, precise and unconditional may have direct effect; that is to say, they may be relied on in national courts. Article 14 of Directive 2006/54/EC may be directly effective against the Church. In an [article in the Guardian](#) Declan O'Dempsey, an equality law barrister, argues that aspiring female bishops would probably succeed in a claim under EU law:

The church is the pre-eminent emanation of the state and so EU law can be used by individuals to challenge its discriminatory exclusions. The church was explicitly established to be the state church, now ironically headed by the Queen.

The current equality laws of the UK are the offspring of 1970s domestic laws and the form they took when taken up by the EU. UK laws formed the model for EU wide anti-discrimination law. Equality for women is one of the foundations of the Treaty on the Functioning of the EU, and the EU produced directives furthering that aim. These, unlike those relating to other characteristics (such as sexual orientation), contain no exception allowing religious institutions to discriminate in relation to employment and occupation.

In 2005, the [House of Lords found](#) that clergy can be workers and that current EU law applies to “occupations”. Bishops are engaged in an occupation and so it follows that EU gender law requires the UK to apply equality law to bishops. The Equality Act 2010, accordingly will have to be read so as to include clergy of the Church of England within its scope, or aspiring female bishops may rely directly on the EU law against the

⁷ See: Barnard, *EU Employment Law*, 4th Ed, p365

church, as it is clearly an emanation of the state. Aspirant female bishops would be likely to succeed in a claim.⁸

The argument that Article 14.2 of Directive 2006/54/EC would not exempt the Church of England's decision is based partly on the fact that an earlier directive, [Directive 2000/78/EC](#), contained a derogation (ie an exemption),⁹ expressly applicable to churches, which is broader in scope than Article 14.2. Article 14.2 must be interpreted in light of that earlier, broader derogation. The fact that Article 14.2 postdates that derogation, is narrower in scope and does not mention religious organisations, may suggest that the European legislator did not intend a broad exemption for religious organisations in respect of sex discrimination.

On 21 November 2012 a Private Member's Bill, the [Equality Act 2010 \(Amendment\) Bill](#), had its [first reading](#).¹⁰ The Bill proposes to amend the *Equality Act 2010* to remove discrimination against women in relation to the consecration of bishops in the Church of England.

⁸ [Female bishops: EU anti-discrimination law may be the CoE's salvation](#), Thursday 22 November 2012, the *Guardian* online [accessed 03 December 2012]

⁹ [Article 4.2](#)

¹⁰ [HC Deb 22 November 2012 c762](#)