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### **Discrimination on grounds of sexual orientation outside the workplace: is it actionable?**

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# Discrimination On Grounds Of Sexual Orientation Outside The Workplace - Is It Actionable?

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## Summary

In 1998 the European Court of Justice - in *Grant v. South West Trains Ltd* (Case C-249/96 [1998] I.C.R. 449) - held that the existing EU sex discrimination legislation did not extend to discrimination on the grounds of sexual orientation. Domestic courts have taken the same line with the Sex Discrimination Act 1975. However, since 1st December 2003, discrimination on grounds of sexual orientation has been unlawful in the workplace, under the Employment Equality (Sexual Orientation) Regulations ('the Regulations') 2003 (S.I. 2003/1661, implemented in response to the Framework Directive, 2000/78/EC). Unfortunately, these new Regulations, covering employment matters only, do not correspond fully with the UK's existing legislative schemes provided by the Sex Discrimination Act, or the Race Relations Act 1976. This is because they do not extend to activities such as the provision of goods, facilities and services; housing, and education. However, in these activities, there are some cases of sexual orientation discrimination that may be argued under the Sex Discrimination Act, the Human Rights Act 1998, or the common law. These possibilities will be explored, sometimes with the help of the Canadian and United States' experiences.

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## Introduction

When the European Court of Justice in *Grant v. South West Trains Ltd Case C-249/96* [1998] I.C.R. 449 held that the existing EU sex discrimination legislation did not extend to discrimination on the ground of sexual orientation, it rejected the 'analytical argument' - that men, but not women, are penalised for being attracted to men, and as such, treatment on the ground of sexual orientation amounted to treatment on the ground of sex (see Pannick, 1985 pp 201-203, Wintemute, 1997 pp 344-348, and Bamforth, 2000, pp 701-708). The ECJ's decision echoes the approaches taken in Canada and the US. (Respectively: *Egan v. Canada* (1992) 87 D.L.R. (4th) 320, 330-331); and *De Santis v. Pacific Telephone & Telegraph Co* (1979) 608 F. 2d 327, 331.) More recently, in *Macdonald v. Secretary of State for Defence* [2003] UKHL 34, the House of Lords upheld the majority decision of the Court of Session ([2002] I.C.R. 174) that the word 'sex' in the Sex Discrimination Act 1975 ('SDA') did not include sexual orientation, reversing the EAT, which held that 'sex' should be given broad interpretation because of the Human Rights Act.

The good news is that since 1st December 2003, discrimination of grounds of sexual orientation has been unlawful in the workplace, under the Employment Equality (Sexual Orientation) Regulations ('the Regulations') 2003 (S.I. 2003/1661, implemented in response to the Framework Directive, 2000/78/EC). The bad news is that these new Regulations, covering employment matters only, do not correspond fully with the UK's existing legislative scheme provided by the SDA or the (slightly wider) the Race Relations Act 1976. This is because they do not extend to activities such as the provision of goods, facilities and services; housing, and education. Further, there are no plans to

extend the coverage so. Meanwhile, the Equal Treatment in Goods and Services Directive (2004/113/EC, due in force by 21 Dec 2007) has been adopted, which will extend *sex* discrimination law beyond employment matters. The Race Directive (2000/43/EC), which was implemented in the UK on 19th July 2003, covers inter alia, education and the provision of goods, services, and housing. And recently, the UK government announced plans to legislate for religious discrimination in the provision of goods and services.<sup>1</sup> So whilst dedicated legislation will outlaw discrimination in the provision of goods and services on the grounds of sex, gender reassignment, disability, religion or belief, and race, it will not do so on the ground of sexual orientation. Until this anomaly is corrected, victims will have to use imaginative arguments under alternative causes of action to seek a remedy. This article explores the possibilities of such victims suing under the Sex Discrimination Act, or the Human Rights Act 1998, or the common law. Some of the discussions will draw on Canadian and United States' experiences.

## Sex Discrimination Act 1975

Discrimination on grounds of sexual orientation may, by coincidence, amount to sex discrimination, thus falling within the SDA. The key to success here is making the correct comparison and showing that the claimant was treated less favourably than a comparator of the opposite sex would have been treated, all other circumstances being the same (or 'not materially different'; see SDA, s. 6(3)). So, for instance, one should look for a homosexual man being treated less favourably than a homosexual woman. This argument succeeded in the Court of Appeal in *Smith v. Gardner Merchant* [1999] I.C.R. 134, an *employment* case predating the Regulations, which is why it was brought under the SDA. Paul Smith was harassed at work. A colleague constantly asked personal questions regarding his sexuality and made offensive remarks about him being gay. For example, he probably had all sorts of diseases, and that gay people who spread AIDS should be put on an island. The Court of Appeal held that this treatment could amount to discrimination on the ground of his sex, within the meaning of the SDA. Ward L.J. stated (at [2] and [4]):

“[A]s I now see it, the right question had not been addressed. The right question ... is whether the applicant, a man, had been less favourably treated than his employers ... would have treated a woman. By focusing on the applicant's homosexuality, the drift of the argument pushes one almost ineluctably - as I myself was carried along - to ask the wrong question: was he discriminated against because he was a man (sex) or because he was a homosexual (sexual orientation)? In concentrating on that, one falls into the error that one does not make the comparison which the statute requires namely between his position as a man, and the comparative position of a woman. The fault in the argument is that it precludes consideration of a vital question, namely whether or not discrimination against him based upon his homosexuality may not also be discrimination against

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<sup>1</sup> See DTI Press Release, (<http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=135864&NewsAreaID=2&NavigatedFromDepartment=False>) and 'Commission for Human Rights and Equality: Response to Consultation' ([http://www.womenandequalityunit.gov.uk/equality/project/consultation\\_govtresponse\\_nov2004.doc](http://www.womenandequalityunit.gov.uk/equality/project/consultation_govtresponse_nov2004.doc)).

him as a man. I am grateful to Ms Cox [counsel for the claimant] for withstanding a fairly hostile judicial barrage and for opening my eyes to errors made by the tribunal. ...

To compare like with like, a male homosexual must be compared with a female homosexual.”

Smith succeeded on a conservative interpretation of the SDA: a strict man/woman comparison. If the facts are disposed to this argument, counsel should have no problem persuading a tribunal. The lesson is, for practitioners, when hearing an account from a client, is to probe for all the facts and incidents and analyse them carefully, so as not - in the words of the contrite Ward, L.J. - to be “carried along” to the wrong question. Other examples might include: harassment related specifically to male sexual acts, a gay man’s physical strength, competitiveness, or sporting prowess; or adverse commentary regarding lesbian mothers.

The limitation of this approach was illustrated by the recent House of Lords decision in *Pearce v. Governing Body of Mayfield School* [2003] UKHL 34. A not unfamiliar story was that of the teacher, Shirley Pearce, who was taunted by pupils at her school because she was a lesbian. The headmaster told her “grit your teeth.” Later, her head of department suggested that she either look for another job or join the supply list. Ms Pearce went off sick - for a second time - and, a year later, took early retirement on health grounds. She lost her claim against the school for sexual discrimination. Again, although this was an employment case, Shirley Pearce had to rely on the SDA, as the facts predated the Regulations. The House of Lords held that as the pupils would have subjected a male gay teacher to similar abuse, Ms Pearce was not treated less favourably than a male gay teacher.<sup>2</sup>

In the field of education, the obvious problem is homophobic bullying. In an American case, *Nabozny v. Podlesny*, (92 F. 3d 446, (1996) U S CAs 7th Circuit), a group of schoolboys subjected Jamie Nabozny, a pupil who was homosexual, to a mock rape. The school did not punish the boys, although it admitted it would punish boys who assaulted or mock-raped a girl. In fact, the Principal responsible for school discipline told Jamie that “Boys will be boys.” This was held to be *sex* discrimination under the Equal Protection Clause. Such examples should also amount to sex discrimination under the SDA.

For the provision of goods, facilities and services, as well as housing, the same reasoning applies. So, for instance, a pub landlord, who refuses to serve gay men, but admits lesbians, could be liable under the SDA. Other providers such as swimming baths, gyms and sports centres would be equally liable. But note that private clubs are not covered by the SDA, (nor the recently adopted Equal Treatment in Goods and Services Directive: Art

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<sup>2</sup> A problem with this case is that the House of Lords focussed on the treatment by the pupils, when the defendant was the *employer*. The focus should have been on whether the employer would have treated a man, suffering homophobic abuse from pupils, more favourably. On the facts, the result may have been the same.

4(5) and Recital 16). The same reasoning applies to the provision of housing, so the landlord discriminating between homosexual men and women, would be liable under the SDA.

In the medium term, it is likely that the Equal Treatment in Goods and Services Directive (2004/113/EC, due in force by 21 Dec 2007), which will extend Community sex discrimination law to the provision of goods and services, including housing, but not education.<sup>3</sup> Although the SDA covers these activities already, some Community Law definitions of discrimination will need to be added (see Connolly 2001). The pertinent one here is the definition of sexual harassment, which will follow the definition already adopted elsewhere:

“- sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”<sup>4</sup>

The point for the present purpose is that taunting, such as that suffered by Shirley Pearce, falls within that definition of ‘conduct of a sexual nature’. Thus the Equal Treatment in Goods and Services Directive could extend the protection to homophobic harassment of a sexual nature. It will not cover other homophobic harassment, such as adverse commentary regarding lesbian mothers. Of course, many cases will be mixture of the two. If a claim focuses on the sexual aspects of the harassment, it should succeed.

Another limitation of using the SDA is that it does not give a victim the right to sue for discrimination on the ground of *another’s* sex, (unlike most other discrimination legislation, such as the Race Relations Act 1976; Sexual Orientation Regulations; Employment Equality (Religion or Belief) Regulations, S.I. 2003/1660; but not the Disability Discrimination Act 1995.) An example would be where a barman is fired for disobeying an order not to serve women.<sup>5</sup> Transferred to other activities, this means that a man who is refused service in a bar because he has gay male friends (presumably the landlord is trying to keep the gay men from patronising his bar), could not sue under the SDA because he is being treated less favourably on the ground of somebody else’s sex. It should be noted that although there is no individual remedy, the Equal Opportunities Commission, by SDA, ss 39 and 40, has power to take action against those who instruct or pressurise to discriminate. Further, the Equal Treatment Amendment Directive (2002/73/EC, due in force 5 Oct 2005) will categorise *instructions to discriminate* as a form of discrimination, thus providing an individual remedy, and bringing sex discrimination law into line.

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<sup>3</sup> Art 1 provides: ‘4. This Directive shall not apply to education nor to the content of media and advertising, in particular advertising and television advertising as defined in Art 1(b) of Council Directive 89/552/EEC.’

<sup>4</sup> Art 2, Equal Treatment Directive (76/207/EEC), (inserted by Equal Treatment Amendment Directive, (2002/73/EC)), due for implementation by 5 Oct 2005. This Directive covers Employment matters only. See also Art 2(d), Equal Treatment in Goods and Services Directive (2004/113/EC).

<sup>5</sup> Contrast *Showboat Entertainment v. Owens* [1984] 1 All E.R. 836, EAT, (manager fired for disobeying order not to admit black youths) decided under the Race Relations Act 1976.

## Human Rights Act 1998

The Human Rights Act 1998 ('HRA') brought the European Convention on Human Rights into domestic law, coming into force on 2nd October 2000. Several matters arise in cases of sexual orientation discrimination under the HRA. First, whether sexual orientation is a ground of discrimination recognised under the Convention. Second, the activity must fall within the ambit of a free-standing article of the Convention. Third, the horizontal effect problem: Convention rights bind only 'public authorities' (as defined in the HRA). Forth, discrimination may be justified.

### Is Sexual Orientation a Ground of Discrimination Recognised Under The Convention?

Article 14 states:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Although sexual orientation is not included within Article 14's non-exhaustive list, it was held to fall within Article 14 in *Salgueiro v. Portugal* (2001) 31 E.H.R.R. 47. The Strasbourg Court said (at [28]):

“The Court is accordingly forced to conclude that there was a difference of treatment ... based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words 'any ground such as' (in French '*notamment*') ....”

The position is similar in Canada. Section 15(1) of the Canadian Charter of Rights and Freedoms provides:

“15(1) 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.”

The Canadian Supreme Court has recognised sexual orientation as an “analogous” ground of discrimination under section 15.<sup>6</sup> In the British case, *Godin-Mendoza v. Ghaidan* the House of Lords took the same approach. ([2004] UKHL 30, per Lord Nicholls, at [9], (citing *Frette v. France* (2003) 2 F.L.R. 9, 23, at [32]); with Lords Steyn (at [37]), Rodger (at [103]), Millett (at [55], on this issue only, and Baroness Hale (at [136]) concurring. See further below, ‘Section 3 and Statutory Interpretation’)

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<sup>6</sup> See eg *Egan v. Canada* [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609; *M v. H* [1999] 171 D.L.R. (4th) 577.

## **Ambit - The Activity Must Fall Within a Free-Standing Article of The Convention**

The Convention gives no free-standing right against discrimination.<sup>7</sup> Article 14 provides merely that the rights and freedoms in the Convention must be ‘secured’ without discrimination. The most likely rights for the present purpose are: respect for private and family life, the home, and correspondence (Art 8); freedom from torture or inhumane or degrading treatment or punishment (Art 3); the right to marry (Art 12), the right to peaceful enjoyment of one’s possessions (Art 1, 1st Protocol) and the right to education (Art 2, 1st Protocol).

However, for claims of discrimination there is no need to prove a breach of a substantive right. So long as the activity falls within the ‘ambit’ of one of the rights, Article 14 is engaged. For example, in *Petrovic v. Austria* (1998) 33 E.H.R.R. 307, the State paid parental leave allowance to mothers, but not fathers. Mr Petrovic, a father, challenged this rule under the Convention, for discriminating on the ground of sex. He relied on Article 8 in combination with 14. The Court stated that Article 8 did not impose any obligation upon states to give financial assistance to parents. However, it went on to hold that the allowance fell within the ambit of Article 8 and so Article 14 was engaged. This was the Court’s reasoning (at [27]-[29]):

“[T]his allowance paid by the State is intended to promote family life and necessarily affects the way in which the latter is organised as, in conjunction with parental leave, it enables one of the parents to stay at home to look after the children.

The Court has said on many occasions that Article 14 comes into play whenever ‘the subject-matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed’ (see the *National Union of Belgian Police v. Belgium* judgment of 27 October 1975, Series A no. 19, p. 20, § 45), or the measures complained of are ‘linked to the exercise of a right guaranteed’ (see the *Schmidt and Dahlström v. Sweden* judgment of 6 February 1976, Series A no. 21, p. 17, § 39).

By granting parental leave allowance States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the allowance therefore comes within the scope of that provision. It follows that Article 14 – taken together with Article 8 – is applicable.”

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<sup>7</sup> The 12th Protocol provides a free-standing right against discrimination. It has been adopted, but not yet ratified and the UK government are not likely to ratify it in the foreseeable future. For a discussion of the protocol see G. Moon, (2000) 1 E.H.R.L.R. 49; J. Schokkenbroek, ‘Towards a stronger European protection against discrimination: the preparation of a new additional protocol to the ECHR’ and J. Cooper, ‘Applying equality and non-discrimination rights through the Human Rights Act 1998’ both in *Race Discrimination*, (Oxford: Hart 2000); and V. Khaliq, ‘Protocol 12 to the ECHR: a step forward or a step too far?’ [2001] P.L. 457.

Although it is clear then that no breach of a free-standing right is necessary to engage Article 14, the question remains precisely what the Court meant by the two definitions given in the second paragraph. In the Court of Appeal in *Mendoza v. Ghaidan* [2002] 4 All E.R. 1162 (aff'd [2004] UKHL 30) Buxton, L.J. cited Grosz, Beatson and Duffy (1999, p 327), which concluded that "even the most tenuous link with another provision in the Convention will suffice for Article 14 to enter into play". There have been some judicial doubts of this opinion. For instance, in *R.(Erskine) v. London Borough of Lambeth* [2003] EWHC 2479 (Admin), Mitting, J suggested (at [21]-[22]): "[I]t overstates the effect of the Strasbourg case law." And in *R. (Douglas) v. North Tyneside Metropolitan Borough Council* [2004] 1 All E.R. 709, Scott Baker, L.J. commented (at [54]):

"For my part I do not read Buxton, L.J. as seeking to extend the ambit of the test as set out in *Petrovic's* case. The bottom line is that the measures of which complaint is made have to be linked to the exercise of the right guaranteed."

The difference between "link" (per Scott Baker, L.J.) and "tenuous link" (per Grosz, Beatson and Duffy, 1999 p 327) is perhaps illustrated in *Douglas*, where it was claimed that the refusal of student loans to over-55 year olds amounted to age discrimination, under Article 2 of the 1st Protocol (right to education) combined with Article 14. The Court of Appeal held that student funding was "one stage removed" (at [57]) from the right to education. This is a convenient rubric, with the attraction of apparent certainty, but its logic is questionable. In *Petrovic* the Court stated that parental leave allowance showed the state's "respect for family life". It is impossible to escape the similarity to student loans demonstrating the state's respect for education. It would seem that Strasbourg case law goes further than the interpretation afforded it in *Douglas* and the 'one stage removed' guide is not helpful. For the present, it is better to observe Grosz, Beatson and Duffy's conclusion. Of the most likely rights to arise, the right to education (Art 2, 1st Protocol) is the closest equivalent to an activity covered by the SDA. So, discrimination by schools, for example, homophobic bullying, or the tolerance of it, will be covered. The rights provided by Articles 8 and 3 warrant further consideration.

### **Article 8 - Respect for Private and Family Life, Home, and Correspondence**

Cases of sexual orientation discrimination will commonly engage Article 8, which provides: "Everyone has the right to respect for his private and family life, his home and his correspondence". The element of "family life" has been engaged in discrimination cases. For instance, in *Salgueiro v. Portugal* (2001) 31 E.H.R.R. 47 a divorced father was refused custody of his daughter because he was homosexual. The Court held that Articles 8 and 14 were engaged, and found in favour of the father. The element of 'home' has also arisen in discrimination cases. For instance, in *Karner v. Austria*, (App. no. 40016/98; (2003) 2 F.L.R. 623) the Court recognised that legislation restricting succession rights to heterosexual couples fell within Article 8, combined with Article 14.

The element of 'private life' is slightly more complicated. In *PG & JH v. UK* (App. no.

44787/98, ECHR 2001-IX) the Court noted (at [56]):

“Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8 ...”<sup>8</sup>

This means that unjustified interference with a person’s sexual orientation and sexual life will breach Article 8 per se, with no need to rely on Article 14. For instance, in *Dudgeon v. UK* (1982) 4 E.H.R.R. 149 legislation outlawing sexual intercourse between consenting males in Northern Ireland was held to breach Article 8, as it was a continuing interference with the applicant’s private life, which included his sexual life. (See also *ADT v. UK* (2001) 31 E.H.R.R. 33.) However, for the present purpose at least, the Court placed a significant limit on the scope of Article 8 in *Botta v. Italy* (1998) 26 E.H.R.R. 241. In this case no facilities were laid on to enable a person with a disability to gain access to a private beach. Although this broke Italian law, the authorities took no action. Botta complained that this omission infringed Article 8 in combination with Article 14, as discrimination on the ground of disability. The Court stated (at [32] and [34]):

“Private life, in the Court’s view, includes a person’s physical and psychological integrity; the guarantee afforded by Art 8 ... is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings...

The Court has held that a State has obligations of this type where it has found a direct and immediate link between the measure sought by an applicant and the latter’s private and/or family life. ...”

Yet the Court held (at [35]) that:

“In the instant case, however, the right asserted by Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant’s private life.”

The matter was put more clearly in the Commission’s Opinion, which stated (at [35]):

“The rights invoked by the applicant are in fact of a social nature, namely participation by disabled persons in recreational and leisure activities associated with beaches, the scope of which exceeds the concept of legal obligation inherent in the idea of ‘respect’ for private life contained in ... Article 8.”

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<sup>8</sup> Citing *B v. France* 25 March 1992, Series A no. 232-C, at [63]; *Burghartz v. Switzerland* judgment of 22 February 1994, Series A no. 280-B, at [24]; *Dudgeon v. UK* 22 October 1981, Series A no. 45, at [41], *Laskey, Jaggard & Brown v. UK* 19 February 1997, Reports 1997-1, at [36].

For the present purpose, this means, at last in the private sector, that typical cases arising, such as the refusal of admission to bars, restaurants, swimming pools and other leisure amenities, will not fall within Article 8 of the Convention. The thrust of the Court's, and the Commission's, Opinions is that the provision of leisure facilities falls outside the scope of Article 8. This suggests that the Court would adopt the same view where the facility was provided by the State.

In the field of housing, Article 8 only provides a right to respect for a person's home, not a right to obtain one (*X v. Germany* (1956) 1 YB 202). So, Article 8 covers, for instance, discrimination against an existing tenant, but not discrimination against a prospective tenant.

### **Article 3 - Torture, Degrading Treatment or Punishment**

It is conceivable that a case of discrimination could fall under Article 3, which provides that "[n]o one shall be subjected to torture or to degrading treatment or punishment". In *Smith and Grady v. UK* (1999) 29 E.H.R.R. 493 the applicants were homosexual and served in the armed forces. When their superiors suspected that they were homosexual, each was subjected to interrogation, at times abusive, of the intimate aspects of their personal lives, which was humiliating and distressing. Although the Court held that this did amount to a breach of Article 3,<sup>9</sup> it noted (at [121]-[122]):

“[T]he Court would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3 ...”

Thus, upon more severe facts, Article 3 per se, or in combination with Article 14, could be breached in a discrimination case. Perhaps the most obvious example here would be institutional severe homophobic bullying, or 'punishment' of homosexuals, in a school. (See *Tyrer v. UK* (1978) 2 E.H.R.R. 1; *Costello-Roberts v. UK* (1993) 25 E.H.R.R. 112.)

In conclusion, it would seem that the only activities covered by the SDA where it is certain the HRA will apply is housing, education; and where the provision of goods, services, and facilities touches 'family' or 'private' life. But it will cover the more general or 'social' aspects of the provision of goods, services, and facilities.

## **The 'Horizontal Effect' Problem**

### **'Public Authorities'**

The Convention and the HRA do not impose obligations on private parties ('horizontal effect'), only on the State ('vertical effect'). However, there is a grey area where private disputes may involve Convention rights. Article 1 obliges States to "secure for everyone within their jurisdiction the rights and freedoms defined in ... the Convention". So, a state

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<sup>9</sup> The Court held however, there was a violation of Art 8.

can be liable for a breach arising from a dispute between private parties. In *Young, James & Webster v. UK* (1981) 4 E.H.R.R. 38, the State was held liable for the dismissal of workers for refusing to join a closed-shop trade union, in violation of their right to freedom of association under Article 11; it did not matter whether the employer was State or private. The HRA attempts to confine liability to 'public authorities', or anyone carrying out public functions. Section 6(1), HRA, provides "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right." Section 6(3) informs us "[i]n this section 'public authority' includes ... (b) any person certain of whose functions are functions of a public nature ..." Finally, section 6(5) states "[i]n relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private". Thus, the draftsmen envisaged two classes of 'public authority'. First, 'core' public authorities, which will be liable for Convention breaches, whether the act was public or private. Second, 'hybrid' authorities, which may be a private party carrying out some public functions; these bodies can be liable for Convention breaches, but only when carrying out their public functions.

The HRA does not provide the certainty of a list of public bodies, handing a significant interpretive role to the courts. After some uncertainty, the House of Lords, *Aston Cantlow v. Wallbank* [2004] 1 AC 546,<sup>10</sup> made it clear that when deciding who is a public authority under the HRA, the courts should follow Strasbourg jurisprudence. Lord Hobhouse explained the approach thus (at [87]):

"Neither parliamentary material nor references to the law of judicial review assist on this question. The relevant underlying principles are to be found in human rights law not in Community law nor in the administrative law of England and Wales. ... The relevant concept is the opposition of the 'victim' and a 'governmental body'. The former can make a complaint; the latter can only be the object of a complaint. The difference between them is that the latter has a governmental character and discharges governmental functions."

This polarised analysis of 'victims' and 'governmental bodies' suggests that private parties, such as housing landlords and schools, cannot be liable under the HRA. This appears to emasculate section 6(3)(b), leaving no scope for a hybrid body to be liable. In *Poplar Housing Association Ltd v. Donoghue* [2001] EWCA 595, [2002] Q.B. 48, at [59]-[66], the Court of Appeal stated that normally, private landlords, including housing associations, are carrying out private functions, and so are not bound by the HRA, section 6(3)(b). However, on the facts, the Court found that a private landlord, who took over a property occupied by a tenant with a weekly non-secure tenancy granted by her local authority (pending a decision on whether she was intentionally homeless), was bound by the HRA, because the private landlord's role was 'so closely assimilated' to that of the local authority's. This suggests that a private landlord may be bound by the HRA only when carrying out a *particular* public function on behalf of a local authority. It is arguable that the position is slightly different for education. In *Costello-Roberts v. UK* (1993) 25 E.H.R.R. 112 the Strasbourg Court made clear (at [27]) "that the State cannot

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<sup>10</sup> *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v. Wallbank and another* [2004] 1 AC 546, held, by 4 to 1, that a Parochial Church Council was not a public body.

absolve itself from responsibility by delegating its obligations to private bodies or individuals.”<sup>11</sup> Further, “in the United Kingdom, independent schools co-exist with a system of public education. The fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, no distinction being made between the two.”<sup>12</sup> Although this case centred on Government liability before the Strasbourg Court, the implication is that education is governmental in character. Thus, private schools are bound by the HRA. At the least, where the State is funding, even partly, a school, or a pupil at a school, the school’s role relating to the funding could be said to be ‘so closely assimilated’ to the State’s role of providing education, it would be bound by the HRA.

Nonetheless, *Costello-Roberts* provides all victims of discrimination by *private* schools a remedy, albeit only against the Government. This logic does not extend to the provision of housing, however. This is because the Convention only provides, by Article 8, the right to respect for a person’s home, not a right to obtain one (*X v Germany* (1956) 1 YB 202). Thus, it is difficult to apply the reasoning of *Costello-Roberts* to housing, because the State has no Convention obligation to house the public.

### Section 3 and Statutory Interpretation

Notwithstanding section 6, HRA, private parties, exercising private functions, may find themselves bound by Convention rights. This is because section 3, HRA, provides: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”. Failing this, by section 4, a court must issue a declaration of incompatibility. This makes it possible for parties to call upon Convention rights in a private dispute which is governed by legislation. A recent example occurred in *Godin-Mendoza v. Ghaidan* [2004] UKHL 30. Godin-Mendoza and Mr Walwyn-Jones lived together in a same-sex relationship in Mr Walwyn-Jones' rented flat. When Mr Walwyn-Jones died, Mendoza claimed from the landlord a right to succeed the statutory tenancy under the Rent Act 1977, which provided, by paragraph 2, Schedule 1:

- “(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence.
- (2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant.”

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<sup>11</sup> The ECtHR cited *Van der Musselle v. Belgium* Series A no. 70, pp. 14-15, paras. 28-30.

<sup>12</sup> *Kjeldsen, Busk Madsen and Pedersen v. Denmark* judgment of 7 December 1976, Series A no. 23, p. 24, para. 50).

The Court of Appeal held that “as his or her wife or husband” in paragraph 2(2) should read to mean “as if they were his wife or husband” ([2002] EWCA Civ 1533, at [35]). The House of Lords upheld that decision, but significantly, Lord Nicholls reasoned ([2004] UKHL 30, at [35]): “The precise form of words read in for this purpose is of no significance. It is their substantive effect which matters.” This tells us that courts should not be fettered by an impossibility of a grammatical solution and that section 3 goes further merely than resolving ambiguities in legislation. However, the interpretation should “go with the grain of the legislation” (per Lord Rodger, at [121]) and not be against a fundamental feature of it or amount to a decision better suited for Parliament, for instance, where recognising a male-to-female transsexual as female under the Matrimonial Causes Act 1973 “would have had exceedingly wide ramifications...” (per Lord Nicholls, at [33], citing *Bellinger v. Bellinger* [2003].) For the present purpose, the obvious example would be the infamous section 2A, Local Government Act 1986,<sup>13</sup> (now repealed) which expressly prevented local authorities from the promotion of homosexuality or the teaching of “the acceptability of homosexuality as a pretended family relationship”. As sexual orientation was a ‘feature’ of this legislation, it would have been extremely difficult for a court to give a Convention-compliant interpretation, save if it were being misused to promote homophobia. Instead, a court finding that the section offended the Convention, would only have been able to issue a declaration of incompatibility, under section 4.

### **The Discriminatory Measure may be ‘Justified’ by the State**

Unlike most domestic legislation direct discrimination may be justified, but in *Karner v. Austria*, (App. no. 40016/98; (2003) 2 F.L.R. 623) the Strasbourg Court stated (at [37]):

“The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised ...Furthermore, very weighty reasons have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention ....Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.”

So, a discriminatory policy can only be justified with weighty reasons, in pursuit of a legitimate aim and proportionate to that aim. In *Karner*, the applicant lived with Mr W in a same-sex relationship in Mr W’s apartment. After Mr W died, (designating Karner as his heir), the landlord sought possession relying on the Austrian Rent Act which provided rights of succession only for family members. The Austrian Government argued that the

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<sup>13</sup> Inserted by the Local Government Act 1988 s 28(1). Repealed in Scotland by the Ethical Standards in Public Life etc (Scotland) Act 2000 s 34 (with effect on 29 March 2001: S.I. 2001/113, art 2(a)); and in England and Wales by the Local Government Act 2003, ss 122, 127(2), Sch 8, Pt 1 (with effect on 18 Nov. 2003: Local Government Act 2003 s 128(2)(d), (f)(i)).

provision in the Rent Act was for the protection of ‘the traditional family unit’. The Court held that whilst the protection of the family could be a weighty and legitimate reason, it had not been shown that the exclusion of same-sex relationships from the benefit of the Rent Act was necessary for that aim. This was followed in *Godin-Mendoza v. Ghaidan* [2004] UKHL 30, (see above, ‘Section 3 and Statutory Interpretation.’)

## The Common Law and the Human Rights Act

As seen above, section 6(3), HRA, provides that a public authority must act compatibly with Convention rights. It is significant that section 6(3)(a) includes courts and tribunals as public authorities. This broadens the scope of section 6, but also creates some uncertainty as just how far a court can develop the common law to accord with Convention rights. The main debate here is whether the courts merely should develop existing common law, or to create new law, to accord with Convention rights. The Government and the courts have favoured the more conservative former position.

In his final speech at the Third Reading of the Bill, the Lord Chancellor stated:

“[W]e have not provided for the Convention rights to be directly justiciable between private individuals. We have sought to protect the human rights of individuals against the abuse of power by the state, broadly defined, rather than to protect them against each other.” (HL Deb vol 594 col 1231 (3 Nov. 1998))

This is best understood beyond the usual horizontal/vertical effect dichotomy, using a more subtle analysis, with a further distinction between two types of horizontal effect: direct, and indirect. With *direct* horizontal effect, private parties are bound by convention rights and thus can be sued for a violation. With *indirect* horizontal effect, a private party may be bound by a convention right, but only through some indirect mechanism, such as a court refusing a remedy which would infringe a Convention right (see Clayton 2000, p 225). The Lord Chancellor’s statement shows that the Government preferred indirect effect, but not direct effect.<sup>14</sup> The case law so far suggests the judges will take the same line.

The cases implementing the ‘indirect effect’ analysis mainly centre on Article 8, which provides the right to privacy. This is because, although there is no precise common law equivalent, there is an established common law cause of action - breach of confidence - with obvious potential for development into a right to privacy. Persons who have suffered an invasion of privacy from a private party, usually a tabloid newspaper, relied on, *inter alia*, the law of confidence, supplemented with an argument that this law should be developed to accord with Article 8 (see Phillipson 2003, and *A v. B plc* [2002] EWCA Civ 337, [2003] Q.B. 195, and *Campbell v. MGM Ltd*, ([2004] UKHL 22, [2004] 2 A.C. 457). In *Campbell*, Baroness Hale accepted this approach, but cautioned that (at [133]):

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<sup>14</sup> Earlier, the Lord Chancellor stated (HL Deb cols 783-785 (24 Nov. 1997)): “[I]t is right as a matter of principle for the courts to have the duty of acting compatibly with the convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals... In my view the courts may not act as legislators and grant new remedies for infringement of convention rights unless the common law itself enables them to develop new rights or remedies.”

“[T]he courts will not invent a new cause of action to cover types of activity which were not previously covered...”. In support of this, she cited *Wainwright v. Home Office* ([2003] UKHL 53), a case predating the HRA, where a mother and disabled son suffered a ‘gross invasion’ of their privacy when they were strip-searched before visiting another son in prison. The House of Lords refused them a remedy. This illustrates, said Baroness Hale, that the common law cannot, “even if it wanted to”, develop a new tort.

This is similar to position in Canada, although it was reached using a different device. Section 32(1) of the Charter of Rights and Freedoms states that the Charter applies to the national and provincial governments and legislatures, but *not* to the courts. However, section 52(1), Constitution Act 1982, provides:

“The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

Referring to section 52, McIntyre, J, in the Supreme Court in the *Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd* ([1986] 2 S.C.R. 573), asserted (at 593):

“Where, however, private party ‘A’ sues private party ‘B’ relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of Charter causes of action or Charter defences between individuals.”<sup>15</sup>

Although the judicial comments so far in Britain amount to much the same thing, there are reasons why the British courts could go further and adopt a ‘direct’ horizontal approach. First, Baroness Hale’s comment (above) in *Campbell* was obiter. Second, as the facts in *Wainwright* arose before the HRA came into force, all it illustrates is that courts would not develop new rights-based torts, *before* they became obliged to act compatibly with the Convention. Unlike the Canadian legislation, Britain’s Human Rights Act expressly includes the courts as a public authority. Third, the root of the Lord Chancellor’s and the judges’ views is that human rights documents are intended to protect the individual from human rights abuses by the State. That this reflects Strasbourg jurisprudence is no argument. Although the Convention, as an international document

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<sup>15</sup> This opinion was applied in: *Dagenais v. Canadian Broadcasting Corporation* [1994] 3 S.C.R. 835 (modifying the law of contempt to accord with the Charter); and *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 S.C.R. 156 (refusal to restrain secondary picketing as it would infringe freedom of expression under the Charter).

between States, was intended to bind only States (and even here the Strasbourg Court will hold a State liable for not protecting an individual's Convention rights, where a private party infringed a right - see *Young, James & Webster v. UK* (1981) 4 E.H.R.R. 38, above, "Public Authorities"), the matter is different now, as the Convention has been incorporated into domestic law, which, as the Government spun it, was 'bringing rights home'. If a fundamental human right means anything, it is something to which all citizens are entitled, regardless of the identity of the violator. If the law cannot remedy this class of violations, then the proposition that human rights are fundamental - and now 'home' - overstates the position. Further, this also allows a Government to violate rights by proxy. For instance, if minded, a government could encourage widespread homophobia by private parties under a political crusade on 'family values'. The most obvious solution is for the courts to develop *and* create common law in accordance with the Convention, as and when disputes arise.

On the face of it, the restrictive 'indirect effect' approach will create anomalies. Take, for example, the provision of housing. Since the 1980s, successive Governments in the UK have encouraged the movement of local authority housing management into the private sector. Under the 'indirect effect' rubric a tenant's human rights may depend on something as capricious as the identity of the landlord: state or private (See comments in *Poplar Housing Association Ltd v. Donoghue* [2001] EWCA 595, [2002] Q.B. 48, at [59]-[65].) But if the 'direct effect' rubric is followed, a court could impose a duty on a landlord, public or private, not to discriminate, contrary to Articles 8 and 14.

However, it may be that there is existing common law suitable for development (by indirect effect) in the areas of housing and education. The common law once placed duties upon the likes of innkeepers, common carriers, and some monopoly enterprises such as ports and harbours, to accept all travellers and others who are 'in a fit and reasonable condition to be received'. A rare (if not only) example of one of these duties coinciding with *racial* discrimination arose in *Constantine v. Imperial Hotels* [1944] 1 K.B. 693, KBD. During World War II, a hotel refused to accommodate Constantine, a black West Indian cricketer (and later a member of the Race Relations Board), for fear of upsetting white American soldiers. The Kings Bench division awarded Constantine nominal damages for the breach of the Innkeepers' duty to receive all travellers.

As things stood before the HRA, these duties could be used against hoteliers, and perhaps even a yacht club, where they refuse admission, or membership, on the ground of sexual orientation. But under the HRA, the courts could develop these duties to prevent discrimination under Article 14 in housing (Article 8) and education (Article 2, 1st Protocol), although they could not impose such duties into areas of a "broad and indeterminate social nature", such as the provision some leisure facilities, because the Convention itself does not provide for this. (*Botta v. Italy* (1998) 26 E.H.R.R. 241, discussed above, 'Article 8 - Respect for Private and Family Life, Home, and Correspondence.')

A similar common law doctrine has been developed in the field of employment in many states of the US. Employees may claim damages where an employer breaches a 'clearly manifested public policy', which includes discrimination (see eg *Bacon v. Honda* (2004) FED App. 0155P (6th Cir.) and *Wagner*, 1996).

## Conclusion

Under the SDA, the discrimination must be on the ground of sex. Thus arguments showing sex discrimination, when the principal reason for the litigation is sexual orientation discrimination, may become quite technical, and their success may depend upon fortuitous facts. The two main problems using the HRA are its limited horizontal effect and the restriction of the non-discrimination principle to the Convention's free-standing rights. There are some situations where private parties may be bound to observe Convention rights: where a private party exercises a public or 'governmental' function; where a private dispute involves legislation that appears contrary to Convention rights; and where the common law - particularly in this context, the ancient duties to receive all-comers - may be developed to comply with the Convention. There is some overlap between the free-standing Convention Articles and the activities covered by the SDA. 'Education' coincides with the right to education (Article 2, 1st Protocol), and in extreme cases freedom from degrading treatment or punishment (Article 3); 'Housing' falls easily within Article 8; but the provision of goods, services, and facilities is not covered where that provision is of a purely social nature.

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