

IN THE MATTER OF:

JOB SHARING AND MEMBERS OF PARLIAMENT

A D V I C E

A. Introduction

1. I am asked to advise on the legal challenges that might be available to address the present bar on access to elected office as a Member of Parliament on a job-share basis. I address only elections to, and membership of, Parliament (not the National Assembly for Wales or the European Parliament).
2. This issue gives rise to complex issues of law of constitutional significance, the resolution of which require consideration of both domestic, regional and international legal standards.
3. In summary, I advise that,
 - (a) A legal challenge to the restriction on access to elected office as a Member of Parliament, permitting only single, full-time constituency representatives, would be difficult in view of the broader legal context and the constitutional norms addressing election to Parliament. However, and subject to the evidence I identify below, there are reasonable prospects of establishing that a bar on the accepting of nominations from proposed job-sharers is indirectly discriminatory

and constitutes a failure to comply with the duty to make adjustments (s19 and s20-s21, Equality Act 2010¹);

- (b) There are good prospects of establishing that any such discrimination, if proved, is unlawful under s53, Equality Act 2010, alternatively s29(6), Equality Act 2010;
- (c) There are reasonable prospects of establishing that such a refusal is in violation of Article 3, Protocol 1 read with Article 14, Schedule 1, Human Rights Act 1998;
- (d) There are reasonable prospects of establishing that the Representation of the People Act 1983 and the Parliamentary Constituencies Act 1986 can be read compatibly with the Convention rights (and if not, that a declaration of incompatibility should be made);
- (e) Assuming that the relevant Returning Officer and Electoral Commission have failed to have due regard to the equality objectives in s149, Equality Act 2010, then they will be in breach of the Public Sector Equality Duty;
- (f) Any proceedings could most effectively be brought in judicial review, outside of a challenge in relation to any particular election. Any such proceedings should be instituted against any relevant² Returning Officer and the Electoral Commission, in the event of (i) a decision by a Returning Officer that any job-share nomination would be rejected (ii) any refusal by the Electoral Commission to provide advice and guidance to Returning Officers to the effect that nominations based on job-sharing should not be rejected as invalid and to report to the Secretary of State on the same. The grounds are explored fully below. The Minister for Justice (and, if different, the appropriate Secretary of State under the Political Parties, Elections and Referendums Act 2000) should be joined as an interested party in such circumstances.

4. There would be practical obstacles to overcome were job-sharing permitted (including distribution of votes within Parliament and the management of expenses) and I consider these matters further below.

¹ This is subject to adducing the evidence I identify below.

² That is, one who indicates that a nomination based on a job-share would be refused.

B. Background

(a) Cases

5. There are two cases that have so far raised the question whether access to elected office as a Member of Parliament should be open to job sharers.

(i) Lorraine Mann

6. In 1999, Lorraine Mann sought to stand on a job-sharing basis as a candidate for membership of the Scottish Parliament for the Highlands and Islands Alliance. The Returning Officer advised her that he did not consider that this was permissible and Ms Mann brought proceedings under the Sex Discrimination Act 1975. She won on a preliminary point, namely that the office of Member of the Scottish Parliament was a “profession” within the meaning of section 13(1), Sex Discrimination Act 1975 (Qualifying Bodies). However, the Employment Appeal Tribunal allowed an appeal on the ground that an Employment Tribunal did not have jurisdiction to hear complaints relating to election law (*Secretary of State for Scotland and A’or v Mann and A’or* [2000] EAT/56/00; for a discussion of the case, see the A Belcher and A Ross, “The Case for Job Sharing Representatives” (2001) *Edinburgh Law Review*, Vol 5, 380.
7. The *Mann* case was decided by reference to Scottish law, principally the Scottish Parliament Election Order 1999 S.I. No. 787. This provided, as is material, that: “Appropriate returning officer means(b) in relation to an individual candidate for return as a regional member or to a registered party submitting a regional list for a particular region ... the regional returning officer for that region” (Article 2). The duties of the returning officer were contained in Article 6(2), as follows: “It is the general duty of every returning officer at a Scottish parliamentary election to do all such acts and things as may be necessary for effectually conducting the election in the manner provided by those Scottish Parliamentary Election Rules.” By Article 27(1) of the Order, it was provided that: “(1) If a person to whom this article applies is, without

reasonable cause, guilty of any act or omission in breach of his official duty, he shall be liable on summary conviction to a fine not exceeding the amount specified as level 5 on the standard scale.” According to the Employment Appeal Tribunal the fact that the “performance of the returning officer’s functions is fenced by a criminal provision” was highly significant (para 13).

8. According to the Employment Appeal Tribunal, the Employment Tribunal lacked jurisdiction to hear any claim under what was then s13, Sex Discrimination Act 1975.³

This was for two reasons essentially. Firstly:

“[I]t is well established that the role of the courts in regulating constitutional matters and in particular in the field of elections, has been carefully constrained by Parliament and indeed laid out by reference to the election petition process to be found within the relevant statutes and embodied into the Scotland Act and the remedy of judicial review as it now is, previously operating under prerogative writs at least in England, is available to deal with relevant grievances in both legal jurisdictions.”

9. Secondly, “the jurisdiction of the Employment Tribunal system is entirely dependent upon statute where positive jurisdictions are conferred whether by primary or subordinate legislation. Thus the original jurisdiction on employment matters has been extended to comprise matters of race, sex and disability but that does not mean that such a jurisdiction automatically arises if there is a competing one unless, in our view, the relevant legislation with regard to that competing jurisdiction makes express provision therefore” (paras 32-33).

10. The Employment Appeal Tribunal found that there was no reference in the Order to specific jurisdiction being conferred on the Employment Tribunal “against a background of the general ouster clauses to which we have made reference and the fact that the

³ Now s53, Equality Act 2010.

conduct or acts or omissions of the returning officer are fenced by a criminal provision” (para 34).

11. As such, according to the Employment Appeal Tribunal in *Mann*, the Employment Tribunal did not have jurisdiction conferred upon it to determine a claim under the Sex Discrimination Act and any remedy lay in judicial review (or an Election Court in appropriate cases).
12. However, though concluding that the Employment Appeal Tribunal had no jurisdiction to hear the claim, the Tribunal did accept (*obiter* and “with some hesitation”) that the Returning Officer was a Qualifying Body for the purposes of s13 of the Sex Discrimination Act (para 38). This decision was made before the decision of the House of Lords in *Watt (formerly Carter) and others v Ashan* [2007] UKHL 51; [2008] 1 AC 696). The Employment Appeal Tribunal made reference to *Sawyer* which the House of Lords overruled in *Watt*. However, *Watt* and *Sawyer* concerned the position of the Labour Party which ultimately the House of Lords regarded as a “club” (or “association” in the language of the Equality Act 2010) and thus not a “Qualifying Body”. This will be of no significance in the case of Returning Officers. For this reason when accepting, refusing or otherwise dealing with nominations, a Returning Officer is very arguably a “Qualifying Body”. This is a matter to which I return below.
13. It is also of note that the facts giving rise to the claim in *Mann* occurred before the coming into force of the Human Rights Act 1998 and accordingly the Employment Appeal Tribunal decided that it was not applicable. It was also decided without reference to any international standards addressing access to elected office. It also appears to have been decided without reference to the provision in the Sex Discrimination Act 1975 addressing conflicting statutory provisions.

(b) Job-Share campaigns and political support

14. There has been non-legal activity directed at achieving a change in the law so as to allow MPs to serve on a job-share basis, including e-petition in an effort to secure a change in the law. There have also been debates about job-sharing Members of Parliament in Parliament itself. There is cross party support for flexible working. For example, an early day motion was tabled on 11 January 2012 by Mark Williams, regarding job-share Members of Parliament sponsored by, Bottomley, Corbyn, Meale, Williams and Willott MPs. In 2010, Caroline Lucas of the Green Party raised the issue of job-sharing MPs at the Green Party Conference. She stressed that job-sharing would allow MPs to keep a foot in their community, keep caring responsibilities, do voluntary work, and continue part-time in their profession.
15. John McDonnell M.P. has appealed for disabled people interested in standing for Parliament on a job share basis to contact him as part of an evidence-gathering exercise for a Bill he is preparing for Parliament (“Disability Now”⁴).
16. However the benefits would extend beyond those with disabilities but also to those with childcare or other caring responsibilities. As Caroline Lucas has observed, this would also benefit other potential MPs who may only seek election as a job-sharing MP for reasons connected with other aspects of their life. This would invariably affect women positively because women are responsible, disproportionately, for child care and for other forms of care.

(c) Participation in Parliamentary Elections of Women and Disabled People

17. In 2010 the Speaker’s Conference⁵ published a Report on Parliamentary Representation. The Speaker’s Conference had been asked to:

"consider, and make recommendations for rectifying, the disparity between the representation of women, ethnic minorities and

⁴ <http://www.disabilitynow.org.uk/latest-news2/politics-1/parliament-and-the-job-share-option/>.

⁵ A Committee chaired by the Speaker established on 12th November 2008.

disabled people in the House of Commons and their representation in the UK population at large.”

(“Speaker’s Conference (on Parliamentary Representation”)

(2010) HC 239-I)

18. The Conference noted the significant under-representation of women and disabled people and of people from Black and minority ethnic communities in the House of Commons and acknowledged that the composition of the Commons “does not reflect society” (ibid, 17, para 3). As the Conference observed:

“Justice requires that there should be a place within the House of Commons for individuals from all sections of society. If anyone is prevented from standing for Parliament by reason of their gender, background, sexual orientation or a perceived disability, this is an injustice. ... While justice is the primary case for widening Parliamentary representation, there would also be real benefits for both Parliament and wider society if the House of Commons were to be made more fully representative. As we stated in our previous reports we believe that there are, in all, three arguments for widening representation in the House of Commons: in addition to justice, there are arguments relating to effectiveness and enhanced legitimacy. We believe that a more representative House of Commons would be a more effective and legitimate legislature.”

(pp17-18, paras 5-6)

19. The case for a more representative legislature has, then, been acknowledged at institutional level and as the Report itself observes, the principle that the membership of Parliament should be more diverse has been accepted by the leadership of all the main political parties (ibid, para 5). The Speaker’s Conference made numerous

recommendations directed at promoting and securing greater diversity in membership of the House of Commons. None of these addressed the question whether different arrangements might be introduced altogether so as to permit constituency representation and membership of the House to be effected by job-sharing MPs.

20. The Speaker's Conference did, however, identify the responsibilities of a Member of Parliament and this is helpful for purposes of scrutinising whether or not those responsibilities could be discharged by job-sharing Members of Parliament, or whether a single constituency representative in the form of a Member of Parliament is required to ensure the effective discharge of their functions.

21. The Speaker's Conference identified the main responsibilities of a Member of Parliament, as follows:

- as a legislator debating, making and reviewing laws and government policy within Parliament; and
- as an advocate for the constituency he or she represents.

The MP can speak for the interests and concerns of constituents in Parliamentary debates and, if appropriate, intercede with Ministers on their behalf. The MP can speak either on behalf of the constituency as a whole, or to help individual constituents who are in difficulty (an MP represents all their constituents whether or not the individual voted for them). Within the constituency an MP and his or her staff will seek to support individual constituents by getting information for them or working to resolve a problem (ibid, p38, para 81).

22. As the Speaker's Conference observes sometimes Members of Parliament will take on additional responsibilities, such as a government ministerial role or a formal role within Parliament or within their own political party (ibid, p38, para 82).

23. There does not appear to be anything intrinsically problematic about undertaking those responsibilities on a job-share basis. I address this issue further below.
24. The Speaker's Conference identified working hours as a key issue, in particular in relation to access for women, and the need to consider "a more family friendly approach to sitting arrangements and unscheduled (un-programmed) votes" (ibid, p13, para 54). Long working hours may impact on many disabled people, as well as those with caring responsibilities (usually women).
25. In February 2011, the Government published a consultation document: "Access to Elected Office for Disabled People; A Consultation" (February 2011), HM Government. This followed the Coalition Government's commitment to introduce extra support for disabled people who want to become MPs, Councillors or other elected officials and this commitment followed the recommendations made by the Speaker's Conference. The background and context to the consultation was described as an initiative "to identify and address the barriers faced by disabled people who want to enter politics. The overall objective is to reverse the under-representation of disabled people in local and national political life which has a real and detrimental effect on the quality of decision-making by those elected bodies. While there are no statistics regarding the numbers of disabled MPs we know that numbers of MPs who have declared themselves as disabled are very low compared to the proportion of the population as a whole" (para 2.2).
26. The response to that consultation exercise made a passing reference to job-sharing for MPs by the observation: "one response attached a petition with 300 signatures asking that the law be changed to allow MPs to job-share"⁶ ; "Access to Elected Office for Disabled People A Consultation: A response to the Consultation" (Sept 2011). The response to the consultation document contained no other details or observations about the submissions made in relation to job-sharing or the Government's position in

⁶ Page 17.

relation to the same. Save to a reference to several responses proposing that “flexible working” should be considered (p10, para 37), no mention was made of proposals addressing the total number of hours that must be worked.

27. A request was made to the Government Equalities Office for the purposes of determining why consideration was not given to job-sharing. The response from the Government Equalities Office⁷ was as follows:

"Job-sharing for MPs is not within the scope of this Strategy, which will only focus on five of the six proposals which were consulted on. The six proposals consulted on were drawn up following findings from an informal engagement exercise involving key partners from the political arena, disability organisations and equality focussed organisations. As I know you will be aware, enabling job-sharing for MPs raises significant constitutional and practical issues which would need to be considered in detail and as such is outside the scope of this particular programme of work."

28. Freedom of Information Act requests thereafter revealed that the Cabinet Office and the Office of the Leader of the House of Commons advised that electoral law was based on the principle that a named individual is elected as a representative and therefore it would not be possible for two individuals to act “with one mind in a way that is consistent with the duty of a Member of Parliament to use his or her judgment in speaking on voting in the House of Commons on behalf of his or her constituents”.⁸ A further Freedom of Information Act request led to the disclosure that a ministerial meeting had taken place between the Minister for Equalities and the Minister for Disabled People and the Speaker of the House of Commons on 13 July 2011. The note

⁷ E-mail from Suzi Daley, Civic Participation Team, 14 September 2011 (this is not enclosed with my Instructions but is referred to in the document headed “Job Sharing MPs Campaign WIKI page”).

⁸ Annex B, FOIA Response 20016 contained in a letter dated 10 October 2011 which is not enclosed with my Instructions but is referred to in the document identified in the footnote above.

of the meeting indicated that flexible working/job-share had been raised and: “the Speaker said that he was interested to know more about how feasible this would be. He said that the scheme would need transparency”.⁹

29. The question of job-sharing for MPs, therefore, though a constitutionally difficult one (as I shall address further below) is not one which has been pre-emptively rejected by the Speaker, at least. It has been the subject of consideration at Ministerial level. Further, the Government’s response to consultation exercise on the reform of the Equality and Human Rights Commission (EHRC) identifies the provision of practical help and support to disabled people seeking elected office as a priority for funding (“Building a Fairer Britain: Reform of the Equality & Human Rights Commission, Response to the Consultation” (2012) HM Government).
30. These matters indicate that this may well be the right time to pursue the matter further, either through legal action or otherwise.

C. Parliamentary Elections: Legal Regulation

(a) Representation of the People Act 1983

31. The franchise for, the conduct of, and the questioning of Parliamentary elections are governed by the Representation of the People Act 1983 and associated legislation.
32. A “Parliamentary election” is the election of a member to serve in Parliament for a constituency (Interpretation Act 1978, s5 and Sch 1). The Representation of the People Act 1983 provides for a separate election in each Parliamentary constituency and does not recognise the concept of a “general election”, which is simply the description that has evolved for the totality of separate Parliamentary elections occurring simultaneously. Accordingly, the term “Parliamentary election” is an election for a

⁹ Home Office FOIA Request No. 20958 dated December 2011, not enclosed with my Instructions but referred to in the document in the footnote above.

particular constituency and not a panoply of elections commonly known as a general election (see, *R v Tronoh Mines Ltd* [1952] 1 All ER 697, [1952] 1 TLR 461, CCA).

33. A “constituency” is an area having separate representation in the House of Commons (Parliamentary Constituencies Act 1986, s 1(2)). For the purpose of Parliamentary elections, county and borough constituencies are established, each returning a single member (Parliamentary Constituencies Act 1986, s 1(1)). Constituencies are constituted and designated as either county or borough constituencies in Orders in Council under the Parliamentary Constituencies Act 1986.
34. The Representation of the People Act 1983 sets out the rules for Parliamentary elections (Schedule 1 and s23). In addition, it prescribes the conditions for participation in Parliamentary elections.
35. According to the Act, a person becomes a candidate at a Parliamentary election (a) on the date of the dissolution of Parliament or, in the case of a by-election, the occurrence of the vacancy, in consequence of which the writ for the election is issued, if on or before that date he is declared by himself or by others to be a candidate at the election; and (b) otherwise, on the day on which he is so declared by himself or by others or on which he is nominated as a candidate at the election (whichever is the earlier) (Representation of the People Act 1983, s118A(2)). The rules appear to anticipate single candidates for each constituency since candidates are referred to in the singular as are the relevant nomination papers. Thus, Schedule 1, para 6 requires that “each candidate shall be nominated by a separate nomination paper” and Schedule 1, para 18, refers to “each candidate” and identifies “the candidate to whom the majority of votes have been given shall be declared to have been elected”. However, though a difficulty, these do not seem to me to be insuperable obstacles since s 6, Interpretation Act 1978 which provides that “words in the singular include the plural” (s 6(c)) might be relied upon to support a more expansive construction.

36. However, the Parliamentary Constituencies Act 1986 provides that “[t]here shall for the purpose of Parliamentary elections be the County and Borough constituencies (or in Scotland the County and Burgh constituencies), each returning a single member, which are described in Orders and Council made under this Act” (s 1(1), emphasis added). Further, a “constituency” “means an area having separate representation in the House of Commons” (s 1(2)). This makes clear that a constituency’s Member of Parliament must be a single person.
37. As to standing as a candidate for election, where a nomination paper and the candidate's consent to it are delivered (and, where required, a deposit is made and additional documents delivered) in accordance with the relevant rules, the candidate is deemed to stand nominated unless and until: (1) the appropriate Returning Officer decides that the nomination paper is invalid; or (2) proof is given, to the appropriate Returning Officer's satisfaction, of the candidate's death; or (3) the candidate withdraws (Sch 1, r 12(1), Representation of the People Act 1983). The Returning Officer at a Parliamentary election is entitled to hold a nomination paper for an individual candidate invalid only on one of the following grounds: (1) that the particulars of the candidate or of the persons subscribing (or witnessing) the paper are not as required by law; (2) that the paper is not subscribed (or witnessed) as so required; and (3) in the case of a Parliamentary election, that the candidate is disqualified by the Representation of the People Act 1981 (s23(1), Sch 1 r12(2), Representation of the People Act 1983). A Returning Officer could refuse to include in the statement of persons nominated a candidate who on the foregoing grounds has not been validly nominated. It is doubtful that a Returning Officer is able to declare a candidate not validly nominated on other grounds (Halsbury’s Law of England, “Elections and Referendums,” Vol 15(3), para 270).
38. By s23(2), Representation of the People Act 1983 ; “[i]t is the returning officer's general duty at a parliamentary election to do all such acts and things as may be necessary for

effectually conducting the election in the manner provided by those parliamentary elections rules.” Further, by s23(3)(3): “No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary elections rules if it appears to the tribunal having cognizance of the question that— (a) the election was so conducted as to be substantially in accordance with the law as to elections; and (b) the act or omission did not affect its result.”

39. By s24, Representation of the People Act 1983 the Returning Officers for each constituency are identified (and see, s28).
40. The Returning Officer at a Parliamentary election must give his decision on any objection to a nomination paper as soon as practicable after delivery of the nomination paper and, in any event, before the end of the period of 24 hours starting with the close of the period for delivery of nomination papers (Sch 1 r12(2), Representation of the People Act 1983).
41. Importantly, having regard to the case of *Mann*, by s63, “(1) If a person to whom this section applies is, without reasonable cause, guilty of any act or omission in breach of his official duty, he shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale. (2) No person to whom this section applies shall be liable for breach of his official duty to any penalty at common law and no action for damages shall lie in respect of the breach by such a person of his official duty. (3) The persons to whom this section applies are—.....any.. returning officer” (emphasis added).
42. No Parliamentary election and no return to Parliament may be questioned except by a petition (a “Parliamentary election petition”) complaining of an undue election or undue return, which is presented in accordance with the statutory provisions (section 120(1), Representation of the People Act 1983). A Returning Officer's decision that a

nomination paper is invalid can be questioned on an election petition (s 23(1), Sch 1 r12(6), *R v Dublin Town Clerk* (1909) 43 ILT 169). A Returning Officer's decision that a nomination paper is valid is final (Sc1, r12(5), Representation of the People Act 1983 Sch 1 r 12(5)). Other objections to a candidate's nomination can also be considered on an election petition (Sch 1 r 12(6); see, too (though under different statutory wording), see *Monks v Jackson* (1876) 1 CPD 683; *Brown v Benn* (1889) 53 JP 167, DC; *Boyce v White* (1905) 92 LT 240, DC).

(b) The Electoral Commission

43. The Electoral Commission was established by the Political Parties, Elections and Referendums Act 2000. It is a body corporate consisting of members known as Electoral Commissioners (s1(1) – (2)). Its duties require it to prepare and publish a report on the administration of, amongst others, Parliamentary general elections (s5(1) and (2)). Further, the Commission is required to keep under review, and from time to time submit reports to the Secretary of State including on “such matters relating to elections to which this section applies¹⁰ as the Commission may determine from time to time” (s6(1)(a)). There is also a statutory obligation to consult the Commission on changes to electoral law (s7).
44. The Electoral Commission may also at the request of any relevant body (which includes a local council but not individuals) provide the body with advice and assistance (s10(1)). It may also provide advice and assistance to registration of officers, Returning Officers, registered parties, amongst others (s10(2)). They may also provide advice and assistance to other persons which is incidental to, or otherwise, connected with, the discharge by the Commission of their functions (section 10(3)(b)).
45. The Political Parties, Elections and Referendums Act 2000 also regulates registration of political parties. In relation to, amongst others, Parliamentary elections “no nomination

¹⁰ Including general elections; s6(6)(a) and s5(2).

may be made in relation to a relevant election unless the nomination is in respect of (a) a person who stands for election in the name of a qualifying registered party; or (b) a person who does not purport to represent any party; or (c) a qualifying registered party, where the election is run for which registered parties may be nominated” (section 22(1) and (5)). Again this does not present insuperable obstacles since the reference to a “person” may be taken to include the plural (persons).¹¹ The Electoral Commission is given a number of functions including addressing the registration of political parties, the regulation of campaign expenditure, amongst other things.

46. The Electoral Commission will be exercising public functions and, it seems to me, will be a “core” public authority¹² and will therefore be subject to s 6, Human Rights Act 1998 (HRA) and (subject to any exception) as well as s 149, Equality Act 2010 (EA 2010). I address both these sets of statutory provisions below.

D. Challenging decisions relating to elections

47. The High Court’s general jurisdiction including to grant injunctive relief has been exercised rarely when called upon in cases relating to elections (Halsbury’s Law of England, “Elections and Referendums,” Vol 15(3), para 668; see, for example *Choudhry v Triesman* [2003] EWHC 1203 (Ch), [2003] 22 LS Gaz R 29, (2003) Times, 2 May). Although jurisdiction is conferred on the High Court to make orders before an election in restraint of false statements made in relation to a candidate, the guiding principle otherwise is that the court should be extremely slow to intervene in the machinery of an election before it has taken place, and should do so only in exceptional circumstances (*ibid.*).
48. In general challenges to matters relating to the conduct of elections are adjudicated upon following an election petition and heard by an election court in accordance with Part II, Representation of the People Act 1983.

¹¹ It again refers to “the candidate”, for example section 22(3); for the same reasons, this does not create too much difficulty.

¹² Though it is not listed in Schedule 19, Equality Act 2010 for the purposes of the specific equality duties.

49. However, where a claim relates to the general procedures applicable in electoral law (as opposed to that pertaining to a particular election), this restriction would be no bar to judicial review (see the observations of Lord Johnston in *Mann*).

E. International and Regional Human Rights Instruments

50. There are numerous measures at international and regional level addressing representation, elections and the right to participate equally in political institutions.

51. The courts will have regard to the UK's international obligations in construing domestic legislation; see, most recently, *Burnip v Birmingham CC* [2012] EqLR 701 (see, too *R v Chief Immigration Officer, Heathrow Airport ex p Bibi* [1976] 1 WLR 979, 984; *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771; *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55; [2005] 2 AC 1; *A v Secretary of State for the Home Department* [2005] 2 AC 68 (for a full discussion see, R Clayton and H Tomlinson, *The Law of Human Rights* (2009) OUP 2nd edn. para 2.05 et seq). This is because there is a prima facie presumption that Parliament does not intend to act in breach of international law (*Solomon v Com'rs of Customs and Excise* [1967] 2 QB 116, 143). Where a statutory provision is ambiguous, then, a court will adopt the construction which is consistent with its treaty obligations (R Clayton and H Tomlinson, *The Law of Human Rights*, supra, para 2.09).

52. Further, because much EU law is now informed by international human rights instruments, the obligation to construe domestic law consistently with any EU law to which it gives effect, brings to the interpretation of much UK law international human rights law (see, for example, the Framework 2000/78/EC which refers in particular, to the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the

Elimination of all Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights); *Burnip v Birmingham CC* [2012] EqLR 701.

53. Further still, the European Court on Human Rights has shown an increased willingness to deploy international instruments as aids to the construction of the European Convention on Human Rights; *Demir and Baykara v Turkey* (2009) 48 EHRR 54; *Burnip v Birmingham CC* [2012] EqLR 701.

(a) United Nations

54. The main United Nations' human instruments all contain provision addressing participation in public and political life and, therefore, elections.

55. Article 25, International Covenant Civil and Political Rights (1966) provides that:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

.....

(c) To have access, on general terms of equality, to public service in his country.”

56. The Human Rights Committee has promulgated a General Comment (No. 25) (“General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)”) emphasising the importance of Article 25 and the principles of equality that underlie it. These “lie.. at the core of democratic government based on the consent of the people and in conformity with the principles of

the Covenant” (para. 2). Accordingly, “State reports should outline the legal provisions which define citizenship in the context of the rights protected by article 25. No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (para. 2).

57. Article 7, of the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW) provides that:

“States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.”

58. Article 11 also ensures equality in access to employment and the professions.

59. In 1997 the Committee on the Elimination of Discrimination Against Women published a general recommendation addressing discrimination against women in political and public life (General Recommendation No.23, 16th session, 1997). This recommendation noted that: “Other conventions, declarations and international analyses place great importance on the participation of women in public life and have set a framework of international standards of equality. These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Political Rights of Women, the Vienna Declaration, paragraph 13 of the Beijing

Declaration and Platform for Action, general recommendations 5 and 8 under the Convention, general comment 25 adopted by the Human Rights Committee, the recommendation adopted by the Council of the European Union on balanced participation of women and men in the decision-making process and the European Commission's "How to Create a Gender Balance in Political Decision-making" (para 4, internal footnotes removed).

60. The substance of the recommendation is, as is material, as follows:

“No political system has conferred on women both the right to and the benefit of full and equal participation. While democratic systems have improved women's opportunities for involvement in political life, the many economic, social and cultural barriers they continue to face have seriously limited their participation. Even historically stable democracies have failed to integrate fully and equally the opinions and interests of the female half of the population. Societies in which women are excluded from public life and decision-making cannot be described as democratic. The concept of democracy will have real and dynamic meaning and lasting effect only when political decision-making is shared by women and men and takes equal account of the interests of both. The examination of States parties' reports shows that where there is full and equal participation of women in public life and decision-making, the implementation of their rights and compliance with the Convention improves.

While removal of de jure barriers is necessary, it is not sufficient. Failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men. Under article 4, the Convention encourages the use of temporary special measures in order to give full effect to articles 7 and 8. Where countries have developed effective temporary strategies in an attempt to achieve equality of participation, a wide range of measures has been implemented, including recruiting, financially assisting and training women candidates, amending

electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in the everyday life of all societies.

.....

Measures that should be identified, implemented and monitored for effectiveness include, under article 7, paragraph (a), those designed to:

(a) Achieve a balance between women and men holding publicly elected positions;

.....

(c) Ensure that barriers to equality are overcome, including those resulting from illiteracy, language, poverty and impediments to women's freedom of movement;

(d) Assist women experiencing such disadvantages to exercise their right to vote and to be elected." (paras 14 – 15 and 45, emphasis added).

61. This recommendation anticipates that positive measures, including the amending of electoral procedures, might be necessary to address under-representation.

62. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) (CERD) provides that:

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

.....

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the

Government as well as in the conduct of public affairs at any level and to have equal access to public service..”

63. The Convention on the Rights of Person with Disabilities (CRPD) provides at its Article 29;

“States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

(a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

(i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

(ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

(iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

(b) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

(i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;

(ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.” (emphasis added).”

64. Article 27 secures non-discrimination rights in employment.

65. The Convention requires that Member States “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities” (Article 4(1)(b)). The purpose of the CRPD is described in its Article 1 as “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.” To this end, the CRPD requires Member States to make reasonable adjustments to accommodate the full participation of disabled people. Thus, Article 5(3) and (4) provide that: “In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.”

66. Pursuant to new constitutional arrangements, the EU has become party to the UNCRPD.¹³ This means it is binding in EU law and accordingly EU legal instruments must be read consistently with it.

(b) Council of Europe

67. Article 3 , First Protocol to the European Convention on Human Rights (ECHR) provides that:

¹³ See Council Decision 2010/48/CE. The EU signed the signed the UN Convention on the Rights of People with Disabilities on its opening day for signature on 30th March 2007 and ratified the Convention (but not the Optional Protocol) on the 23rd December 2010.

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. “

68. This confers a right which can be invoked by individuals; *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 EHRR 1, para 50 (see, too; R. Clayton and H. Tomlinson, *Law of Human Rights* (2009) OUP 2nd edn. para 20.30). It embraces the right to stand for election to the legislature (*Mathieu-Mohin and Clerfayt v Belgium*, para 52). Whilst states are afforded a margin of appreciation in according respect to these rights, any conditions imposed must not impair the very essence of the rights or deprive them of their effectiveness and any conditions must pursue a legitimate aim, and the means employed must be proportionate (*ibid.*; *Scoppola v Italy (No. 3)* (Application no. 126/05) (para 82-4)). In the context of standing for election, the ECtHR has been somewhat cautious, showing a degree of deference to Member States (R. Clayton and H. Tomlinson, *The Law of Human Rights* (2009) OUP 2nd edn. para 20.36).
69. However, when read with Article 14, the guarantee in Article 3, First Protocol is likely to have greater force in so far as relating to the issues with which this Advice is concerned.
70. Article 14, ECHR provides that:
“Article 14 is the Convention’s non-discrimination guarantee. It provides that:
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.”
71. Article 14 complements the other substantive provisions of the ECHR in that it has no independent existence. It has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded elsewhere in the Convention. However, in order for Article

14 to be engaged, the complainant need not show that there has been a breach of a substantive provision, merely that the facts of his case fall within the ambit of one of the substantive provisions (*Abdulaziz Cabales and Balkandali v UK* (1985) 7 EHRR 471; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [2004] 3 WLR 113, per Lady Hale para 133).

72. Broadly, five questions arise in an Article 14 inquiry, namely:
- (i) Do the facts fall within the ambit of one or more of the Convention rights?
 - (ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?
 - (iii) Were those others in an analogous situation?
 - (iv) Was the difference in treatment objectively justifiable? ie did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?
 - (v) Was the difference in treatment based on one or more of the grounds proscribed—whether expressly or by inference—in Article 14? (*Ghaidan v Godin-Mendoza*, *ibid*, per Lady Hale para 133, based on the approach of Brooke LJ in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625, para 20, as amplified in *R (Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin), para 52 and [2003] EWCA Civ 797, [2003] 3 All ER 577).
73. The acts of the Returning Officer are very likely to fall within the “ambit” of Article 3, Protocol 1.¹⁴ Further, and as to any discrimination, in addition to direct discrimination, the ECtHR has now clearly established that discrimination akin to indirect discrimination falls within Article 14. According to the Court, the application of a neutral rule which violates particular communities will require justification: “Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group” (*Jordan v United Kingdom* (2003) 37 EHRR

¹⁴ And possibly Article 8.

2, at para 154. See also *Pretty v United Kingdom* (2002) 35 EHRR 1, para 88-89). In some circumstances this imposes a positive obligation on the State to make provision to cater for the significant difference akin to an adjustments duty towards those who might otherwise be disadvantaged: “the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different” (*Thlimmenos v Greece* (2000) 31 EHRR 411 at para 44; *Stec v UK* (2006) (App Nos 65731/01 and 65900/01; *DH & Ors v the Czech Republic*, para 176 and see, *Burnip v Birmingham CC* [2012] EqLR 701).

74. The concept of indirect discrimination in Convention jurisprudence is wide. In *DH v Czech Republic* (2008) 47 EHRR 3 the Grand Chamber ruled that disparate outcomes may establish discrimination for the purposes of Article 14, absent proof that they are not connected to one of the protected characteristics. Article 14 then may address what is commonly described as “institutional” (caused by policies and practices which disadvantage one group or another) and “structural” (caused by de facto segregation and exclusion) discrimination and may impose a duty upon the State to take steps to avoid it.
75. Any reliance upon justification must be carefully scrutinized and the burden of establishing the same rests with the respondent State in any case. In determining whether any discriminatory treatment is justified, it is necessary to determine (a) whether the discriminatory treatment pursues a legitimate aim; and then, (b) whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized (*Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [2004] 3 WLR 113; *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 54). Distinctions based on “suspect classes”, in particular sex (*Balkandali v United Kingdom* (1985) 7 EHRR 471, 501, para 78; *Schmidt v Germany* (1994) 18 EHRR 513, 527, para 24; *Van Raalte v The Netherlands* (1997) 24 EHRR 503, 518–19, para 39; *Ghaidan v*

Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557, [2004] 3 WLR 113, para 19) and disability (*Kiss v Hungary* (application no 38832/06) [2011] EqLR 41, para 42; *Kiyutin v Russia* [2011] EqLR 530) will be subject to particularly rigorous scrutiny and will require “very weighty reasons” if they are to be justified (*R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, para 16–17, per Lord Hoffman; paras 57–8, per Lord Walker). These matters are addressed further below.

(c) Conclusion

76. All of these measures reflect the importance given to the rights essential and fundamental to a properly functioning democracy. They are reflected in other important international and constitutional instruments too numerous to mention here (see, R. Clayton and H. Tomlinson, *The Law of Human Rights* (2009) OUP 2nd edn. para 20.01 et seq). In addition to these specific provisions, all the main international human rights instruments contain other guarantees directed at securing the conditions for effective democracy, including free expression, association and discrete equality rights. The importance of equality in access to political and civil institutions is obvious; it affords equality for all (an important aspiration in a democracy) and ensures that the legislature and other political and civil institutions reflect, and act upon the interests of, all members of the communities they serve. Inequality in access to political life and a lack of representation (or significant under-representation) of particular groups undermines democracy itself.

F. EU Law

77. Pursuant to new (post-Lisbon) constitutional arrangements, the Union has become party to the CRPD¹⁵ and accordingly the Convention will be a powerful context for interpreting the Framework Directive. The Directive protects against discrimination in occupation more broadly and the Convention injuncts States to increase participation rates in both

¹⁵ See Council Decision 2010/48/CE. The EU signed the signed the UN Convention on the Rights of People with Disabilities on its opening day for signature on 30th March 2007 and ratified the Convention (but not the Optional Protocol) on the 23rd December 2010.

work (Article 27) and public and political life and these matters will be relevant to the scope of the Directive.

78. Further, a principle of equality and specifically gender equality is a foundational principle in EU law (see, for example, *Defrenne v SABENA (No.2)* (Case 43/75) [1977] ECR I-455; *P v S & Cornwall County Council* (Case C-13/94) [1996] ICR 795).
79. A general principle of equality has progressively developed in EU law and this now informs the parameters of Union law, so “transcending” the specific provisions of the Treaties (T Takis, *The General Principles of EU Law* (2006, Oxford) 61–2).
80. The general principle of equality applies therefore in the context of any activity covered by EU law, irrespective of any specific legislative measure and whether the activity concerned arises in the State or private sphere (*Mangold v Helm* (C-144/04) [2005] ECR I-09981; [2006] IRLR 143, see Advocate-General Tizzano’s opinion, paras 83–4, 101 and CJEU judgment, paras 74–6; *Ángel Rodríguez Caballero v Fondo de Garantía Salarial* (C-442/00) [2002] ECR I-11915, paras 30–32. See, too *Kúćúkdeveci v Swedex Gmb & Co KG* (Case C-555/07) [2010] IRLR 346. See too, *Runevič and A’r v Vilniaus miesto savivaldybės administracija* (Case C-C 391/09) [2011] EqLR 895, para 43; *Wippel* (Case C—313/02) [2005] IRLR 211, paras 54 and 56) and has both vertical and direct effect (*Mangold v Helm* (C-144/04) [2005] ECR I-09981; [2006] IRLR 143).
81. The principle of equality now seen in EU law embraces an obligation not to discriminate for reasons connected with status (including sex, race, disability, sexual orientation, religion or belief, and age). It seems clear, having regard to recent CJEU case law, that a national court faced with a domestic legislative measure operative in an activity covered by EU law that is in breach of the principle of equality, must disapply it (*Rodríguez Caballero v Fondo de Garantía Salarial* [2003] IRLR 115; *Mangold v Helm* (C-144/04) [2005] ECR I-09981; [2006] IRLR 143, paras 77–8; *Simmenthal* [1978] ECR 629, para 21).

This is necessary to “guarantee the full effectiveness of the general principle of non-discrimination” (*Mangold v Helm* (C-144/04) [2005] ECR I-09981; [2006] IRLR 143, para 78).

82. Further, the value of democracy and its essential characteristics are also recognised in the founding treaties of the EU. The Treaty on European Union (“TEU”)¹⁶ states in its preamble:

"DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law ...

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law ...

HAVE DECIDED to establish a European Union ...”

83. Article 2, TEU provides that:

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail.”

¹⁶ As consolidated and amended by the Lisbon Treaty.

84. The TEU incorporates into EU law the Charter of Fundamental Rights of the European Union (which is binding as a matter of EU and domestic law; *NS v SSHD* (Case C-411/10) [2011] CJEU) and the European Convention on Human Rights¹⁷ (Article 6, TEU).
85. The Charter of Fundamental Rights contains important provisions addressing equality, devoting a whole chapter to it (“Title III; Equality”). These include provisions addressing equality between women and men, which must be “ensured in all areas, including employment, work ...”. The Charter also addresses the “integration of persons with disabilities”. Article 26 provides that “the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”. “Human dignity” is also declared as “inviolable” and requires that it be “respected and protected” (Article 1).
86. Article 19, Treaty on the Functioning of the European Union (“TFEU”) provides the EU institutions with competence to legislate in the field of sex and disability discrimination (amongst other characteristics); Article 19. These are regarded as “suspect classifications” in EU law (Advocate General Maduro, *Coleman v Attridge Law* (Case C-303/06) [2008] ICR 1128, para 1). They thus attract heightened protection.
87. Two relevant and directly effective (as against the State) Directives address gender discrimination and disability discrimination in the sphere of employment and occupation. These are the Framework Directive 2000/78/EC (addressing, inter alia, disability) and the Recast Directive 2006/54/EC (addressing gender).
88. These Directives are broad enough in scope to address discrimination by “Qualifying Bodies”, as appears to have been accepted by the United Kingdom Government since when transposing the Directives they amended the provisions addressing “Qualifying

¹⁷ To which the EU will in due course accede; Article 6, TEU.

Bodies” in the legacy enactments to match the requirements of the Directives.¹⁸ The United Nations and Regional Human Rights Instruments referred to above will be an important context for construing the Directives (see, for example, Recital 4, Framework Directive).

89. Further, and as is important for determining the significance of the exceptions in domestic law that I address below, there are no relevant exceptions in the Directives.
90. The Directives prohibit direct and indirect discrimination connected to (amongst other characteristics) disability and sex and the concepts they adopt for these purposes now match those found in domestic law and accordingly I address them below under the EA 2010.
91. The Framework Directive also requires that reasonable accommodation be afforded for disabled people. Whilst the reasonable accommodation duty is referred to as applicable to “employers” (Article 5), since the Directive will be read with the CRPD as a relevant interpretative context, it will be possible to argue that the duty extends to, for example, “Qualification Bodies”.
92. Where it is not possible to interpret domestic legislation consistently with a directly effective provision of a Directive, the incompatible domestic provisions must be disapplied in any proceedings involving the State or an emanation of it (see, for example, *Marshall v Southampton & South West Area Health Authority* (Case C-271/91 [1993] ECR I-4367; *Bossa v Nordstress Limited* [1998] ICR 694; *Alabaster v Barclays Bank plc (formerly Woolwich plc) & Another (No.2)* [2005] ICR 1246).

¹⁸ Section 13 and s1 as amended (and as made applicable to s 13) as amended by the Employment Equality (Sex Discrimination) Regulations 2005 SI 2005/2467 enacted to give effect to the amendments to the Equal Treatment Directive effected by Directive 2002/73/EC and s 14A and B, Disability Discrimination Act 1995 as substituted by the Disability Discrimination Act 1995 (Amendment) Regulations 2003, SI 2003/1673 enacted to give effect to the Framework Directive; all enacted under the European Communities Act 1972 to give effect to an EU “obligation”.

G. Equality Act 2010

93. As those instructing me know, the EA 2010 now regulates discrimination and inequality domestically. “Disability” and “sex” are protected characteristics for the purposes of the EA 2010 (s4, s6 and s11, EA 2010). “Disability” is restrictively defined (s6 and Schedule 1, EA 2010). The definition of disability closely matches that found under the Disability Discrimination Act 1995 (though it does not replicate the list of capacities found in the Disability Discrimination Act 1996; Schedule 1, para 4(1) and this may make it easier to establish some forms of disability including some mental illnesses; Explanatory Notes to EA 2010 para 674-5).
94. Pregnancy and maternity are also protected characteristics but the regulation of discrimination in respect of them is more limited and, in particular, indirect discrimination related to pregnancy and maternity is not outlawed (ss 17-18 and 19, EA 2010). Any discrimination connected with pregnancy and maternity falling outside the limited provision against pregnancy and maternity discrimination ought, therefore, to be brought under the provisions addressing sex discrimination.
95. The EA 2010 proscribes certain forms of “prohibited conduct”, including direct discrimination, indirect discrimination and by the imposition of a duty to make adjustments (s13, s19 and s20, EA 2010).
96. The issues raised by my instructions are unlikely to engage the direct discrimination provisions (though they may exceptionally) but instead are more likely to engage indirect discrimination and the duty to make adjustments.
- (a) Indirect Discrimination
97. Indirect discrimination is defined by section 19, EA 2010 and is now to the same effect as that imposed by EU law. Section 19, EA 2010 provides that:

- "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of sub-section (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

98. The relevant protected characteristics for s 19, EA 2010 include disability and sex. The concept of indirect discrimination is a wide one and has been recently reviewed by the House of Lords in *Homer v Chief Constable of West Yorkshire* [2012] UKSC 15; [2012] ICR 704; [2012] EqLR 594. In *Homer*, the Supreme Court gave a liberal meaning to the concept of indirect discrimination. This is important in particular in relation to disability because in determining whether or not there has been disparate impact insofar as disability is concerned, the question whether disabled persons are to be treated as sharing a protected characteristic, for the purposes of indirect discrimination, depends upon whether or not they "have the same disability" (s6(3)(b), EA 2010). Accordingly indirect disability discrimination requires that the impact of any provision, criterion or practice must be measured by reference to the impact on disabled persons sharing a disability (for example, mental illness, epilepsy, asthma, as the case may be).¹⁹

¹⁹ See, *Homer v Chief Constable of West Yorkshire* [2012] UKSC 15; [2012] ICR 704; [2012] EqLR 594, para 14.

99. According to the Supreme Court,

“[T]he new formulation [of indirect discrimination] was not intended to make it more difficult to establish indirect discrimination: quite the reverse.... It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages.”

(Homer, para 14, per Lady Hale)

100. This may make it easier to establish indirect disability discrimination which might otherwise be complex to address because of the frequently idiosyncratic nature or experience of disability. If it can be shown that a disabled person experiences “a particular disadvantage when compared with other people who do not share” the disability in question, then indirect disability discrimination may be made out.

101. There are no statistics or other relevant evidence of a similar type enclosed with my instructions. However experience indicates that women are less likely to be able to work full time because of their childcare and other caring responsibilities because they fall disproportionately on women. The same may apply to disabled people with certain disabilities.

102. Evidence as to part-time work can be obtained by those instructing me but the likelihood is that a requirement to undertake a full-time role would disadvantage women as a group because of the proportion of women who undertake caring responsibilities and the same is likely to be true for some groups of disabled people.

103. As can be seen indirect discrimination will not be made out where any provision, criterion or practice is shown to be “a proportionate means of achieving a legitimate aim”. To be proportionate “a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so” (*Homer*, para 24). In particular, any provision, criterion or practice will be carefully scrutinised to see “whether they ... meet the objective (legitimate aim) and there are not other, less discriminatory, measures which would do so” (*Seldon*, para 62). Justification is addressed below.

(b) Reasonable Adjustments

104. Section 20, EA 2010 imposes the duty to make reasonable adjustments. The duty comprises three requirements. As is most material to this advice, the first requirement is “a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage” (section 20(3), EA 2010, so far as is material). The particulars of the duty varies according to the context in which it is said to be operative (in particular, in the employment sphere it is generally a reactive duty whereas in the context of the exercising of public functions, it is generally anticipatory; see, Schedule 8 and Schedule 2, EA 2010²⁰). However, for present purposes a reactive or anticipatory duty is applicable in respect of those matters falling within the scope of the EA 2010 where a provision, criterion or practice puts disabled people at a substantial disadvantage as compared to persons who are not disabled, and that duty is to take such steps as it is reasonable to have to take to avoid the disadvantage.

105. A failure to comply with the duty amounts to “discrimination” for the purposes of the EA 2010 (s21(2), EA 2010).

²⁰ Other way round.

(c) Unlawful Acts

106. These forms of prohibitive conduct – that is, indirect discrimination and a breach of the duty to make reasonable adjustments – are made unlawful across a range of activities.

(i) Qualifying Bodies

107. The most relevant of the unlawful acts are likely to be found in Part 5, EA 2010 which addresses discrimination occurring within the sphere of “Work”. In my view, there will be negligible (if any) prospect of establishing that a Member of Parliament is an employee (see guidance in, *O’Brien V Ministry of Justice* (Case C- 393/10) [2012] IRLR 421).

108. However, Part 5 extends protection beyond employees. In particular, s53, EA 2010 provides that:

"(1) A qualifications body (A) must not discriminate [and this will include indirect discrimination]²¹ against a person (B) –

- (a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;
- (b) as to the terms on which it is prepared to confer a relevant qualification on B;
- (c) by not conferring a relevant qualification on B."

Further, a duty to make reasonable adjustments applies to a Qualifications Body (s53(6), EA 2010) and a failure to comply with that duty amounts to discrimination for the purposes of section 53 (s21(2), EA 2010).

²¹ See Schedule 28, EA 2010.

109. A “Qualifications Body” is an authority or body which can confer a relevant qualification. A “relevant qualification” is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession (Section 54(1)-(2)). As referred to above, the Employment Appeal Tribunal in *Mann* concluded that a Returning Officer was a “Qualifications Body” for the purposes of the legacy enactments and that the acts of the Returning Officer “a part of the essential steps required for someone to gain access to ... Parliament as a member.” Other than the *obiter* decision in *Mann*, there is no case law on the question whether or not Returning Officers are “Qualifications Bodies” for these purposes.
110. As to the meaning of the expression “Qualifications Body” (under the analogous provisions of the legacy enactments) there is relatively little case law. In *Arthur v Attorney-General* [1999] ICR 631, the Attorney-General was held not to be a “Qualifying Body” when carrying out functions relating to the appointment of magistrates. According to the Employment Appeal Tribunal, the “Qualifying Body” provisions are “directed to circumstances in which A confers on B a qualification which will enable B to render services for C. Where A and C are the same entity, the section would appear to be inapplicable, otherwise it would apply to every selection panel” (at 637). Whether an accurate analysis of the law or not, that would not preclude the application of the provisions to a Returning Officer since any approval by the Returning Officer is granted for the purposes of providing services to a third party (the constituency and/or Parliament).
111. In *Triesman (sued on his own behalf and on behalf of all other members of the Labour Party) v Ali* [2002] EWCA Civ 93, [2002] ICR 1026; [2002] IRLR 489, the Court of Appeal concluded that the “Qualifying Body” provisions did not extend to the Labour Party’s selection procedures in respect of candidates for political office, so that in failing to select and re-select applicants as candidates for election as local councillors, the Labour Party were not acting as a “Qualifications Body”. According to the Court of Appeal, this

provision applies in “the employment field ... in a wide or loose sense. The obvious application of the section is to cases where a body has among its functions that of granting some qualification to, or authorising, a person who has satisfied appropriate standards of competence, to practice a profession, calling or trade” (para 28). That determination was approved in due course by the House of Lords in *Watt (formerly Carter) and others v Ashan* [2007] UKHL 51; [2008] 1 AC 696.

112. On the other hand, in *Patterson v Legal Services Commission*,²² the Court of Appeal concluded that the franchising arrangements imposed by the Legal Services Commission upon solicitors seeking contracts to provide legal services fell within scope. In *Patterson* the Court of Appeal accepted that in granting a franchise and, in effect, the right to do publicly funded work on behalf of her clients, the Commission conferred an authorization on an applicant which facilitated her engagement in the solicitor’s profession for these purposes (para 62-3). The Court of Appeal noted that the Commission was quite a different body from the Labour Party (in *Triesman*), and was charged with specific public functions under its establishing Act (para 71) and “[w]hen it grants a franchise to a solicitor on the ground that LAFQAS has been satisfied and thus enables the franchisee to display the logo, it seems to us to grant an authorization to do so. Further, since the grant of the franchise is an essential pre-condition to the making of a three year contract it can in our opinion again fairly be said to be conferring on the franchisee an authorization to perform publicly funded legal services for its clients” (para 72). In addition, such a franchise was sufficiently personal to constitute the “conferring” of an authorization upon an applicant (para 79).
113. The position of the Returning Officer in accepting or not a nomination is much closer to a *Patterson* case than a *Triesman* case. They are conferring a personal authorisation (that is, on a candidate specifically) such as will authorise a candidate to stand for

²² [2004] EWCA Civ 1558; [2004] ICR 312; [2004] IRLR 153.

Parliament. There are good grounds for contending, even absent EU law, that a Returning Officer is in such circumstances a “Qualifications Body.”

114. Further, having regard to the international and regional human rights instruments described above and EU law, which does not preclude occupation connected to political activity, there are compelling grounds for contending that Returning Officers should be so treated. This will ensure that effect is given to the obligations in EU law to prohibit discrimination in “occupation” (Article 3(1)(a), Framework Directive and Articles 1 and 14, Recast Directives) and international and regional human rights standards as above which are highly material to the understanding of (and in the case of the CRPD binding on) EU law.

115. Accordingly any discrimination by a Returning Officer would be justiciable under the “Qualifications Bodies” provisions (save for the jurisdiction bar that the Employment Appeal Tribunal identified in *Mann* (para 39) which I address below).

(ii) Services and public functions

116. In the event that the a Returning Officer was not a Qualifications Body for these purposes, then in performing duties under the Representation of the People Act 1983, they would be providing services or exercising public functions within the meaning of s29, EA 2010.

117. Section 29, EA 2010 only applies where an act is not made unlawful by Part 5 (Work) or another provision of the EA 2010 (or would be but for express an exception) (s28 (2)(a), EA 2010). Therefore, if the Returning Officer is acting as a Qualifications Body, s29 EA 2010 will not apply.

118. Section 29(1) outlaws discrimination in the provision of services. Given the case law, I doubt that a Returning Officer would be regarded as providing “services” (see for

example, *Re Amin* [1983] 2 AC 818; *Farah v Commissioner of Police of the Metropolis* [1998] QB 65). However, if not a Qualifications Body, a Returning Officer will be exercising public functions for the purposes of s29(6), EA 2010.

119. There are advantages to establishing that the Returning Officer is instead and in material respects a Qualifications Body since in that event the Directives will apply and they will have direct effect in any proceedings against the Returning Officer. This is highly relevant for the exceptions.

(d) Justification/Reasonableness

120. As referred to above, indirect discrimination may be lawful where objectively justified. This will be so where the provision, criterion or practice in issue is shown to be “a proportionate means of achieving a legitimate aim” (s19(2)(d), EA 2010). Further, the duty to make adjustments is a duty to take “reasonable” steps to overcome any disadvantage. The issues of objective justification and reasonableness will give rise to similar issues.
121. As to indirect discrimination, for objective justification, the aim sought to be realised by any provision, criterion or practice requiring full-time appointments in the case of Members of Parliament would no doubt be argued to relate to our present constitutional arrangements (with Members of Parliament representing particular constituencies with a single vote). This will be a significant aim and one to which, in my view, the courts will give great weight. The difficulties of splitting a vote or having an indivisible vote operative alternatively by one of other Members will run counter to constitutional tradition and formal procedure.
122. However, the functions of a Member of Parliament, as identified by the Speakers Conference are not intrinsically incompatible with job-share occupants. Further, in determining whether any such requirement is proportionate, the impact on women and

disabled people would have to be scrutinised and the under-representation of both would suggest that the impact of the present arrangements is severe. The impact of any barriers to access to Parliament experienced by women and disabled people is, of course, important for women and disabled people themselves but also for representative democracy itself, the importance of which is recognised in all the main human rights instruments as explored above. Having regard to the matters above, in particular the international and regional human rights instruments and EU law, in my view the indirect discrimination consequential upon a requirement to work full time as a single MP as a condition of Membership of Parliament will be difficult to justify.

123. As to whether any provision, criterion or practice prohibiting job sharing violates the duty to take “such steps as are reasonable” for the purposes of discharging the duty to make adjustments, the issues addressed in the context of indirect discrimination are likely to be applicable. Further, justification and reasonableness in all likelihood will turn principally and ultimately on consideration of the practical difficulties that would arise as compared to the impact on women disabled people of such a rule.
124. It seems to me that the practical difficulties are likely to be identified as: (i) voting (ii) speaking in Parliament and (ii) expenses.
125. A number of concerns have been raised as to how voting would work and this is a real and important issue, as I have observed. Hilary Benn MP has noted, for example, that if each member job-sharing were to have one vote shared between the two so as to confer half a vote on each the partners to the job-share, a constituency would be only half represented if one job-share partner was in Parliament to cast a vote. Further, if a single vote were given to both then the constituency would enjoy two votes and whether or not a full vote or a half vote for each of the partners, if used in opposite ways a constituency “would not be represented at all because there would be no effective vote cast by [its] MP”.

126. There is no doubt that difficult questions relating to voting would arise if job-sharing were permitted. However, there are a number of ways in which the voting could be organised.
127. The easiest and most satisfactory arrangement would seem to me to be one which permitted each of the partners to a job-share to hold half a vote each but each with authority to exercise the other partner's half vote where there was consent so to do and when both were not available to exercise a vote at the same time.²³ Most votes are still heavily Whipped and exercised in accordance with Manifestos so, though there are rebellions from time to time, most party members vote in the same way on every issue ("Free Votes, Parliamentary Information List" House of Commons Library SN/PC/04793). However, whether or not one or other of the job-share partnership proposed to vote differently as against the Whip or as independent members (when not Whipped), there is no reason why their half vote ought not to be counted. The same is true if the partners vote in opposite ways (which would be unusual in all probability given that job-sharing partners would be speaking to the same Manifesto and no doubt self selected for their shared political vision). It could mean that if a single vote could be split between two partners that an overall vote could win by a margin of half a vote. However, there does not seem to be anything necessarily objectionable about this and as job-shares increase, as would be anticipated, the significance of a half vote may well become more important.
128. Alternatively, job-sharers could be allocated a single indivisible vote to be exercised by one or other. That would seem to me to be less desirable. This is because as Members of Parliament they must be able to vote with their conscience and this must be reflected

²³ Agreements in relation to voting as between MPs already occurs through the tradition of "pairing" (see the discussion about the same in the paper prepared "Speaker's Conference on Representation") (supra, paras 272 et seq). There is no reason why agreements between job-sharers as to the casting of a vote could not be put on a formal footing.

in their voting ability. This would be impossible in the case of an indivisible vote if there was disagreement as between the job-sharers as to any particular issue.

129. The question whether a job-share could be accommodated having regard to speaking in Parliament, this does not seem to me to be a significant difficulty. To the extent that any opportunity for speaking was time limited, then where both job-sharers wish to speak on any matter that time could be shared between them.
130. As for expenses, this will also raise issues since most constituencies are outside London and many too far to commute and therefore Members of Parliament must often sustain two homes and in addition both partners in a job share will require administrative support. Administrative support or constituency support could no doubt be shared between job-sharing partners but accommodation might cause the State to incur further costs. Balanced against the need for a proper representative democracy, however, this is unlikely to be regarded as a significant obstacle. I bear in mind that cost alone is not to be regarded as sufficient justification for indirect discrimination (see, for example, *Cross v British Airways plc* [2005] IRLR 423 and see the observations of the CJEU in *O'Brien v Ministry of Justice* [2012] IRLR 421, para 66, amongst others). Further, I note the Government's recent commitment to prioritising practical help and support to disabled people seeking elected office in respect of the allocation of funding ("Building a Fairer Britain: Reform of the Equality & Human Rights Commission, Response to the Consultation" (2012) HM Government, above).
131. Since there will be a close relationship between the duty to make reasonable adjustments and indirect discrimination in this context, again cost is unlikely to explain the absence of an adjustment since regard to that consideration alone is unlikely to convert what would otherwise be a reasonable adjustment into one which is not.

132. It does not seem to me that any of the obstacles described above are insurmountable. Whether job-sharers will be elected by voters in any constituency having regard to the job-sharing arrangements that would follow would, of course, be a matter for the electorate.
133. Further, any difficulties arising from present constitutional arrangements would have to be balanced against the impact of the full-time requirement on women and disabled people. As “suspect classes”, any justification will be subject to rigorous scrutiny. Evidence about the impact would be required for these purposes. As is well known, full-time working requirements do disadvantage women and some groups of disabled people. However, there will need to be some evidence that in the context of Parliament that is an issue. In ten years there have been only two complaints (and so far as I am aware they are the only two cases) and a court may take this to mean that the impact is not significant (bearing in mind the other obstacles to access). It seems to me that access to Parliament is likely to be greatly improved if job-sharing were permitted and evidence as to the impact of job-sharing in other industries and professions would be helpful in establishing this.

(e) Exemptions

134. In addition to justification and the question of reasonableness (of any adjustment), exceptions apply to those acts done in accordance with various conflicting statutory provisions, in certain circumstances.
135. There are very limited exceptions available in the context of sex. Where an act is done pursuant to a mandatory requirement of an enactment, it will not contravene s29(6) (Public Functions) (s191 and Schedule 22, para 1, EA 2010²⁴). These exemptions go no

²⁴ There are also exemptions contained within Sch 3 (in respect of claims under s29) but none of these are relevant to this Advice.

further than are permitted by EU law. The Recast Directive²⁵ permits of no such exemptions in the context of employment and occupation and accordingly any wider exemptions would not be permissible. Importantly therefore the exemption does not apply to any claim under s53, EA 2010 (“Qualifications Bodies”).

136. As to the application of the exemption if the actions of the Returning Officer did not fall under s53 but instead s29(6), EA 2010 (public functions), the exemption is narrow in scope. It applies only where the requirement in any enactment is such as to mean that the putative discriminator “must do” the discriminatory act (*Hampson v Department of Education & Science* [1991] 1AC 171; [1990] ICR 511; [1990] IRLR 302; *Amnesty International v Ahmed* [2009] ICR 1450; [2009] IRLR 884). In my view, a court will be very reluctant to hold otherwise than that a Returning Officer is bound to reject a nomination paper from job-sharers because of the consistency in language used throughout the relevant statutory provisions which point to a single nominated individual. However, a court could be persuaded otherwise. Firstly, because the exemption does not apply in the employment sphere (and so there is no *general* exception to that effect). Secondly, properly construed, it could be argued that the Representation of the People Act 1983 does not require (in the sense of giving no choice to) a Returning Officer to reject a job - share dual candidate nomination since there are limited grounds upon which a nomination should be treated as invalid. However, and in any event, as indicated, a Returning Officer is likely to be treated as a Qualifications Body as is material to this Advice and so the exemption will not apply at all. I address the question of jurisdiction (and whether the Representation of the Peoples of Act imposes a statutory bar to proceedings) below.

137. In the context of disability, the exemptions are a little wider but still very limited. It is not unlawful under the EA 2010 to do anything related to the protected characteristics of disability in order to comply with a mandatory requirement of an enactment or a

²⁵ Nor does the Gender Goods and Services Directive 2004/113/EC (though as I have indicated the latter is unlikely to apply since a Returning Officer is unlikely to be providing a Service).

relevant requirement or condition imposed by virtue of an enactment²⁶ (s191 and Schedule 22, para 1, EA 2010). The observations in relation to gender apply so that any requirement must impose a duty to do the discriminatory act (ie not a discretion) if the exemption is to apply. This exemption applies to the exercising of public functions and Part 5, EA 2010 (Work) unlike that applicable to gender. This difference is not explained but in my view it is not justified having regard to EU law. There are no relevant exceptions under the Framework Directive and having regard to the directly effective nature of the rights under the Directive any such exemptions will have to be disapplied in proceedings relating to a claim covered by EU law. EU law will only operate in the context of employment and occupation since that represents the scope of the Directive. Accordingly the exemption will be set aside in proceedings under s53, EA 2010 but not s29(6), EA 2010 so that the position will be as with gender.

(f) Public Sector Equality Duty

138. Section 149, EA 2010 provides that:

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

139. This Public Sector Equality Duty (PSED) applies to public authorities, namely persons who “exercise.. public functions ... in the exercise of those functions” (s149(2), EA 2010) and as such all core (and hybrid) authorities will be covered (for that reason there is no

²⁶ The distinction is not material to this issues raised by this Advice (since there are no, so far as I am aware, relevant *requirements or conditions imposed by virtue of an enactment* as opposed to by an enactment itself).

need to explore that issue). The PSED will without doubt apply to Returning Officers and the Electoral Commission.

140. There are three equality objectives enumerated in the Public Sector Equality Duty and due regard must be had to each of them. That they are described as “needs” reflects the importance given to them by the EA 2010. Each limb of the duty is explained further under s149, EA 2010. Firstly, as relevant, “having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it”²⁷ involves having due regard, in particular, “to the need to (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.”²⁸ Further, “meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons’ disabilities.”²⁹ As such, this element of the duty is a substantive one and goes further than the first. Further, “having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it”³⁰ requires having due regard, in particular, “to the need to (a) tackle prejudice, and (b) promote understanding”.³¹
141. As mentioned, each limb applies discretely so that even if the first limb of the duty (“eliminating discrimination”) does not apply because, for example, the actions of the Returning Officer are not made unlawful, the other two limbs will still apply. The three

²⁷ Section 149(1)(b), EA 2010.

²⁸ Section 149(3), EA 2010.

²⁹ Section 149(4), EA 2010.

³⁰ Section 149(1)(c), EA 2010.

³¹ Section 149(5), EA 2010.

limbs of the duty require separate consideration. Whilst advancing equality of opportunity “will be assisted by, ... [it] is not the same thing as, the elimination of discrimination. ...[T]he promotion^[32] of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination” *R (Baker) v Secretary of State for Communities and Local Government and LB Bromley* [2008] EWCA Civ 141; [2008] LGR 239, para 30, per Dyson LJ; see too, *Pieretti v London Borough of Enfield* [2010] EWCA Civ 1104; [2010] EqLR 312, para 31).

142. There is now a great deal of case law on the discharging of the PSED, with which those instructing me will be familiar. In essence, the PSED imposes a duty to have proportionate regard to the equality objectives in the exercising of all of its functions (*R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2008] LGR 239, para 31, per Dyson LJ; *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); [2009] PTSR 1506, para 82, per Aikens LJ).
143. It is not clear that any thought (less so “due regard”) has been given by relevant Returning Officers (ie those to whom nominations by job-sharers have sought to be made) or, more particularly, the Electoral Commission, to the issues explored in this Advice. This is so though it appears that at least one Returning Officers has been alerted to the potential impact of a requirement for a single (non-job-sharing) candidate. The likelihood is that on this issue, the Electoral Commission and at least one Returning Officer in recent years has not properly discharged the PSED.
144. The EHRC has specific powers to take action in relation to a breach of the PSED but it is also enforceable through judicial review proceedings.

³² As it was then; there is now the even more substantive requirement focussed on “advancing” equality of opportunity; s149(1)(b), EA 2010.

145. There are exceptions to the PSED in relation to “constitutional matters”. However these do not include Returning Officers or the Electoral Commission or any relevant functions. The only relevant exceptions will be those applicable to acts done pursuant to statutory authority and they are, as I have indicated, of limited impact.

H. Human Rights Act 1998

146. As to the Convention rights, a court is bound to act compatibly with them, as is a Returning Officer (as a public authority) and the Electoral Commission (s6(3), HRA). This is so save where the act in issue is one which as the result of one or more provisions of primary legislation, the authority could not have acted differently; or in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions (s6(2), HRA).

147. In a related and most important provision, s3, HRA provides that “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.” This applies to primary legislation whenever enacted (s3(2), HRA).

148. Where legislation cannot be read and given effect in a way which is compatible with the Convention rights, then a court may make a “declaration of incompatibility” (s4(2), HRA).

149. To the extent that it is said that the Representation of the People Act 1983 and the Parliamentary Constituencies Act 1986 prohibit the holding of the office of Member of Parliament on a job-share basis, then a court would be bound to construe it compatibly with the Convention Rights “so far as it is possible to do so” . This imposes a compelling obligation; there is no need to identify any ambiguity or absurdity in the legislation sought to be construed in accordance with the Convention Rights; compatibility with the Convention Rights is the sole guiding principle (*R v A (No.2)* [2002] 1AC 45, para 108, per

Lord Hope). According to Lord Steyn, it may be necessary to adopt an interpretation which is linguistically strained³³ and a declaration of compatibility should be regarded as the measure of last resort.

150. As I have indicated above, a failure to permit job-sharing, having regard to the regional and international human rights instruments above, may violate the Convention Rights. As with the unlawful acts under the EA 2010, ultimately the question will be whether the objection to job-sharing is justified and this is addressed above. Assuming it is regarded as unjustified (and there is much to be said for such a conclusion) then, the Representation of the People Act 1983 and the Parliamentary Constituencies Act 1986 should be read compatibly with those Convention Rights and as a last resort if not possible, a declaration of incompatibility should be made.

151. The Representation of the People Act 1983 and the Parliamentary Constituencies Act 1986 suggests that any candidature should be a single person, nominated as such. However, given the compelling nature of s3, it does not seem to me to be “impossible” to read it otherwise (especially having regard to the Interpretation Act which anticipates the singular incorporating the plural) and the limited grounds upon which a Returning Officer can refuse a nomination or treat it as invalid.

152. In my view, if a violation of the Convention rights results from the refusal to permit job-sharing, then it is possible construe the Representation of the People Act 1983 and the Parliamentary Constituencies Act 1986 compatibly, having regard to the compelling nature of s3, HRA. If not, a court is likely to make a declaration of incompatibly.

I. Merits

153. There is no doubt that any legal challenge to the restriction on access to elected office as a Member of Parliament (permitting only single, full-time constituency

³³ [2002] 1AC 45, 67, 68, paras 44, 45.

representatives), would be difficult having regard to the broader legal context and the constitutional norms concerning election to Parliament. However, and subject to the evidence I identify below:

- (g) There are reasonable prospects of establishing that such a refusal would amount to indirect discrimination and a failure to comply with the duty to make adjustments (s19 and s20-s21, EA 2010);
- (h) There are good prospects of establishing that any such discrimination, if proved, is unlawful under s53, EA 2010, alternatively s29(6), EA 2010;
- (i) There are reasonable prospects of establishing that such a refusal is in violation of Article 3, Protocol 1 read with Article 14, Schedule 1, HRA;
- (j) There are reasonable prospects of establishing that the Representation of the People Act 1983 and the Parliamentary Constituencies Act 1986 could be read compatibly with the Convention rights (and if not, that a declaration of incompatibility should be made);
- (k) Assuming (as appears likely) that the relevant Returning Officer and Electoral Commission have failed to have due regard to the equality objectives in s149, EA 2010, they will be in breach of the PSED.

154. Whilst change may be counter-intuitive to those familiar with the present constitutional arrangements, of course matters do change as respect to equality and human rights values achieve greater prominence in public debate and social and political norms. After all, it was not until 1918 that women were permitted to stand for Parliament and not until 1963 that full equality was afforded women in relation to membership of the House of Lords.³⁴ These changes would not have been countenanced at one time.

³⁴

<http://www.parliament.uk/about/living-heritage/transformingsociety/electionsvoting/womenvote/overview/womenthelords/>

J. Legal Challenges/Jurisdiction

155. As I have indicated above the courts have shown considerable reluctance to interfere in cases involving electoral law (or related issues). This is evident from the *Mann* case itself. The fact that the Employment Appeal Tribunal decided that they had no jurisdiction when they accepted that s 13 applied is indicative of the very great reticence demonstrated by the courts in this area. Further, as seen above, by s63(2) and (3), Representation of the People Act 1983 “No person to whom this section applies [including a Returning Officer] shall be liable for breach of his official duty to any penalty at common law and no action for damages shall lie in respect of the breach by such a person of his official duty”. However, having regard to the limited exceptions to the application of the EA 2010 even where a conflicting statutory provision exists (and having regard to the Framework and Recast Directives³⁵ both of which require that effective judicial procedures exist for enforcement of the rights provided therein), in my view this will not act as bar to proceedings.³⁶

156. As to any challenge to a refusal to permit job-sharing candidates, there are a number of possible routes.

(i) Employment Tribunal

157. Subject to proceedings in judicial review (s117(3)), EA 2010), proceedings in respect of s53, EA 2010 must be brought in the Employment Tribunal (s120, EA 2010).

158. Accordingly, a job-share partnership seeking nomination together for the seat of a single constituency could await refusal of any nomination by the Returning Officer and then commence proceedings in respect of it in the Employment Tribunal pursuant to s53 (as to jurisdiction, see s120, EA 2010).

³⁵ Article 9 and Article 17, respectively.

³⁶ The Employment Appeal Tribunal does not appear to have considered these issues.

159. Whilst the Employment Appeal Tribunal in *Mann* concluded that the Employment Tribunal had no jurisdiction to hear the claim relying on the presence of criminal sanctions, the reasoning in *Mann* on this issue is unconvincing. The Tribunal was afforded jurisdiction by s63, Sex Discrimination Act 1975 and though there were relevant exceptions to that jurisdiction in the SDA (see, s63(2), affecting s13), these were not material to the facts in *Mann*. The fact that other criminal sanctions were available, in my view, did not oust jurisdiction having regard to the provisions of the SDA (which were materially similar to those in the EA 2010) addressing conflicting statutory provisions and EU law.

160. In my view, therefore, the Employment Tribunal will have jurisdiction to hear a claim relating to s53, EA 2010 in the circumstances with which this Advice is concerned. For reasons I give below, however, this is unlikely to be the most effective way of challenging the discrimination in issue.

161. The Employment Tribunal has no power to make a declaration of incompatibility (s4(5), HRA).

(ii) County Court

162. Subject to proceedings in judicial review (s117(3)), EA 2010), proceedings in respect of s29(6), EA 2010 must be brought in the County Court (s114, EA 2010).

163. If a decision of the Returning Officer does not fall within s53/s120, EA 2010, then a claim in respect of it may be brought in the County Court.

164. The County Court has no power to make a declaration incompatibility (s4(5), HRA).

(iii) Judicial review

165. Proceedings in judicial review may include a challenge based on:

- (a) the unlawful acts in the EA 2010 (ie s53/s29(6), EA 2010; see, eg, *R (Elias) v Secretary of State Commission for Racial Equality Intervening*) [2005] EWHC 1435 (Admin); [2005] IRLR 788);
- (b) the Convention rights under the HRA (Article 3, Protocol 1 and Article 14 and ss3 and 6, HRA) which may include an application for a declaration of incompatibility (s4, HRA);
- (c) the PSED.

166. Proceedings in judicial review are likely to be the most advantageous. They will allow for all the issues to be addressed. Proceedings in the Employment Tribunal and/or County Courts are unsatisfactory because of their limited jurisdiction (and proceedings would have to be issued in both so as to protect the position because of the uncertainty as to whether a claim would lie under s53 or s29(6), EA 2010). Proceedings in judicial review will allow for all of the arguments to be run in the same forum; namely those addressing the application of the Qualifications Bodies provisions; the application of the public functions provisions; the application of the PSED; the impact of the Convention Rights (and if necessary a declaration of incompatibility). They will allow, therefore, for the fullest scrutiny of the arguments in favour of job-sharing in this context.
167. Judicial review proceedings could be commenced in respect of a particular election. However, there would be the very real risk that the High Court would regard itself as an inappropriate forum, with an electoral court being the right place to challenge any decision in respect of a particular election.
168. Judicial review proceedings might more satisfactorily be commenced outside of the context of any particular election. However, a “decision” will need to be identified for the purposes of founding any claim in judicial review. This is likely to be generated by correspondence with a relevant Returning Officer and the Electoral Commission.

169. The most appropriate way to ensure that the proceedings address the broadest possible issues would be to first write to the Returning Officer for any district in which a job-share candidate was likely to stand asking them (i) whether they would be prepared to accept nominations for job-sharing members of Parliament; (ii) whether regard has been had to the PSED in addressing this issue and (iii) whether advice had been sought from the Electoral Commission on this issue and, if not, requesting that such advice be sought. Secondly, the Electoral Commission should be written to (i) requesting that they issue advice and guidance to Returning Officers so as to make clear that job-sharing nominations should be accepted as valid; (ii) requesting that they report to the Secretary of State on the issue and (iii) asking whether regard has been had to the PSED in addressing this issue. Further, the Returning Officer and the Electoral Commission should be asked to undertake an impact assessment of any decision in relation to the accepting of job-share nominations and should be asked to give particulars as to how they have discharged the PSED in relation to these matters, giving full particulars. These letters would need to be carefully constructed and further Advice taken as to their contents. Proceedings in judicial review could then be taken as against the Returning Officers and Electoral Commission, if appropriate. In my view, the Ministry of Justice (at least) (and, if different, the relevant Secretary of State under the Political Parties, Elections and Referendums Act 2000) should be joined as an interested party since the difficulty in this case will arise from electoral law.
170. Those instructing me will be aware of the strict time limits applicable in judicial review proceedings (*promptly* and in any event within 3 months; CPR r54.5)
171. Judicial review proceedings could be commenced by the EHRC in their own name (s 30, EA 2006) and for these purposes the Commission may rely on section 7(1)(b), HRA (and for these purposes, need not be a victim or potential victim). The Commission may only rely on s7(1)(b) if there is or would be one or more victims of the violation of Convention Rights alleged.

172. Alternatively, proceedings in judicial review may be brought by an individual adversely affected.
173. As to who the Returning Officer should be in any proceedings, this will need to be a Returning Officer who has been asked to accept a nomination by job-sharing partners.
174. In any proceedings, in addition to the matters addressed above, evidence would be required both of the impact of the requirement to have a single constituency Member of Parliament working part-time on women and disabled people generally and the impact on any particular individuals who might wish to stand but for the full-time requirement. This is important because, in particular, in relation to matters of great constitutional significance like this, a court would be very reluctant to hear a case which it regards as “academic”. It will be necessary to show that the present constitutional arrangements truly do disadvantage women and disabled people and that there would be disabled people and women who would stand but for this requirement. There may well be very many other bars that operate so as to deter women and disabled people from standing for Parliament – what matters for the purposes of any proceedings arising out of this Advice is that the requirement to stand as a single MP for a constituency working full-time is one which has a significant impact.
175. It would be helpful to have evidence pertaining to other jurisdictions where job - sharing in the legislature is permitted if such is available.
176. I hope this is of assistance to those instructing me and if I can be of any further assistance I hope they will not hesitate in contacting me.

Matrix

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