SEX DISCRIMINATION IN EMPLOYMENT WITHIN THE CHURCH OF ENGLAND

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Abstract

The principle of equality in the workplace, enshrined in the Sex Discrimination Act 1975, applies to a wide category of workers. However, there are certain exceptions to the legislation. Ministers of religion are not protected by the Act where employment is limited to one sex. Historically "employment" as a Church of England priest was limited to one sex. Then in 1993, following the momentous General Synod vote, legislation was passed which allowed women to be ordained as priests. A significant change had taken place regarding the theology of the Church. This shift in theology also brought the legal position of priests, in relation to sex discrimination, into question. An initial question was, should such priests be protected by secular employment legislation? If so, what are the legal difficulties of inclusion under the Sex Discrimination Act, and what are the practical difficulties of accommodation under the Act? These questions form the foundation stones of this thesis.

A four stage process was used to answer these questions. First, a philosophical analysis of the theory behind sex discrimination law was undertaken, focusing on the concepts of equality and difference. Secondly, the position of the Church of England in relation to sex discrimination law was assessed with special reference to the employment status of ministers of religion. Thirdly, drawing on the theoretical work of stages one and two, an empirical investigation into the treatment of Church of England priests was conducted. The fourth stage built upon the empirical findings and the theoretical framework. British and European Community sex discrimination law was critically analysed, as was the relevant ecclesiastical law, and recommendations for law reform were made.

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Introduction

This thesis examines current sex discrimination legislation in Britain. This involves an examination of national law, principally the Sex Discrimination Act 1975, and European Community (EC) law, principally the Equal Treatment Directive.[1] At the inception of the research in September 1994, a major organisation was sought for the purpose of assessing the theoretical and practical aspects of the legislation. From a legal perspective it was preferable to concentrate on one of the exemptions from the legislation, allowing recommendations for legal reform to be made. A recent development made one particular exempted organisation stand out from the rest. The Sex Discrimination Act does not apply to ministers of religion where employment is limited to one sex.[2] Such priests are also exempted from the protections of the Equal Treatment Directive. Until recently both exemptions clearly covered Church of England priests. However, in 1993 legislation was passed to allow the ordination of women priests for the first time in the Church of England's two thousand year history.[3] Immediately the legal position of 10,000 priests in regard to sex discrimination was brought into question. Prior to this thesis no assessment of the position of Church of England priests in relation to sex discrimination legislation had been made. Additionally, the uncertain employment status of ministers of religion, which is troubling the courts, is ripe for critique. Employment status dictates a person's employment rights with regard to sex discrimination, equal pay and unfair dismissal. Lack of requisite employment status results in the individual being denied employment rights. An empirical study of the treatment of male and female priests in the Church of England is a principal feature of this thesis. To summarise, the aim of this research is to assess whether or not, in light of theory and the results of the empirical study, it is justifiable to exclude Church of England priests from sex discrimination legislation.

Is sex discrimination a problem in the Church of England? It was decided that proof of sex discrimination in particular cases was not to be an aim of the research. Instead, the

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[1] Sex Discrimination Act 1975; Halsbury's Statutes of England and Wales, Fourth Edition, 1992 Reissue, vol.6. EC Council Directive 76/207 (Equal Treatment)

[2] Sex Discrimination Act 1975 s 19

[3] Priests (Ordination of Women) Measure 1993; Halsbury's Statutes of England and Wales, Fourth Edition, vol.14 continuation. Unless otherwise indicated references to the 1993 Measure in this thesis refer to the Priests (Ordination of Women) Measure 1993.

aim is to identify the problems which the Church of England face in relation to sex discrimination and recommend law reform. To do this a four stage process is employed. First, what is the theory behind sex discrimination law? This is detailed in Chapters One and Two. Secondly, what is the relevant law under discussion? What is the relationship between Church of England priests and sex discrimination law? This is briefly set out in the Introduction before being discussed in Chapters Three, Four and Seven. Thirdly, what is the position in practice of male and female priests? The methodological approach to this is discussed in Chapter Five, whilst the results of the investigation are presented in Chapter Six. The theoretical and empirical investigation into sex discrimination in employment within the Church of England will serve two purposes. It will explain the current position of male and female priests. Additionally, critical analysis of this investigation within the robust theoretical framework will result in a powerful thesis for the future direction of the law. Therefore, the fourth stage is the presentation of legal and policy reforms which ought to be made as a response to the theoretical and empirical investigation. Suggestions for reform are presented in Chapter Seven and in the Conclusion.

At the root of discrimination law is the formal principle that we should all be treated equally. In Chapter One the relevant literature on equality is reviewed and evaluated by undertaking a philosophical analysis. Ideas of equality as a moral concept, equality and justice and equality and rights are investigated. It is submitted that there is just one formal idea of equality, that likes should be treated alike, but that there are many different substantive theories of equality. There are at least five employment law policies which use a substantive theory of equality; equality of opportunity, equality of condition, equal treatment, equality of result and equality of respect. These are discussed in detail.

Flowing directly from the philosophical discussion of equality is the question; are men and women equal or are they different? In Chapter Two the philosophical foundations of difference are examined. If equality is taken to mean equal treatment of men and women before the law (as it often is in this debate) one must ask how equal treatment is defined. The usual criticism is that equal treatment is defined in male terms. Such equality threatens to destroy sexual difference. If female difference is taken as the dominant

concept, this can itself lead to the subordination of women to the domestic sphere and into economic dependence. The seemingly irreconcilable equality/difference debate has forced writers to look for other means to produce genuine equality. Gradually writers have moved away from the idea of women's inequality; that women do not receive the same treatment as men, to ideas of disadvantage, oppression and subordination.

In Chapter Three the anatomy of the Church of England is detailed. It is necessary to explain the structure of Church government and the relevant offices which can be held in the Church. An analysis of Church legislation regarding the appointment and dismissal of priests is given. This enables one to identify where sex discrimination could occur and from whom it might emanate.

Chapter Four examines the employment status of ministers of religion, drawing on case law concerning Church of England priests and ministers of other denominations and religions. Unfair dismissal cases form the backbone of the discussion. To bring such a claim it is necessary to prove the existence of a contract of employment. In this regard, Church of England priests have usually been held to be office holders with public law rights. At present case law denies that they can hold a contract of employment and hence claim private law protection. In relation to sex discrimination no cases have been brought. Section 19 of the Sex Discrimination Act 1975 provides that sex discrimination against a minister of religion will not be unlawful where employment is limited to one sex. Section 6 of the Priests (Ordination of Women) Measure 1993 provides that sex discrimination in ordination or appointment against a female Church of England priest will not be unlawful. As will be discussed, both section 19 and section 6 might be inapplicable to the case in hand. In this situation a priest would still need to prove that he or she was employed, as defined by the wider definition of employment contained in the Sex Discrimination Act. As well as including a contract of employment, this definition encompasses a contract personally to execute any work or labour. Case law on unfair dismissal is used to demonstrate that a priest could be in employment for the purposes of sex discrimination. It is argued that religious duties are not incompatible with a contract of employment. Therefore, priests ought to be able to bring unfair dismissal cases and sex discrimination cases (subject to section 19 and section 6).

A questionnaire was administered to a sample group of priests. In Chapter Five the construction of the questionnaire and the sample group is explained. Theoretical ideas are used as a springboard for constructing relevant questions. Abstract concepts such as equality of opportunity are broken down into a series of questions in order to measure the treatment of priests. The idea of equality of condition runs throughout the questionnaire. This has two aims; one to help compare like with like and secondly to examine how conditions like age, education, pastoral experience and churchmanship influence equality of opportunity, both independently and in conjunction with a person's sex. The choice of data analysis method is explained with reference to quantitative and qualitative research methods.

The questionnaire findings are presented in Chapter Six. How are women priests treated now that they are eligible to be ordained to the priesthood? How is the Church legislation working in practice? The treatment of women priests is examined by making a comparative assessment with the treatment of male priests. Specific questions focus on how male and female priests are treated when they are searching for a post and how they are treated once in a post. In order to produce relevant answers the questions are constructed using the terminology of the Sex Discrimination Act. However, inevitably the answers will reflect a respondent's perception of sex discrimination which might not constitute sex discrimination as defined by the law. Whether the perception of discrimination does represent actual sex discrimination is not crucial as the purpose of the questionnaire is to highlight problem areas rather than to prove or disprove sex discrimination in particular cases. Perceptions of sex discrimination will help identify where the discrimination exists, what form it takes and who is the perpetrator.

A detailed analysis of domestic and EC sex discrimination legislation in relation to the Church of England is given in Chapter Seven. Whether priests can be included under the legislation is asked before turning to specific problems which priests might encounter if included under the legislation. Does the present law need reforming? If so, what changes should be made? Drawing upon the theoretical and empirical investigation, Chapter Seven and the Conclusion suggest possible solutions. These include reform of the Sex Discrimination Act 1975, the Equal Treatment Directive and the Priests (Ordination of Women) Measure 1993. Behind these specific suggestions lies the major theme of the

uncertain employment status of Church of England priests.

The theoretical work was carried out using primary and secondary legal materials. The primary sources comprise case law, statute law (including Church of England legislation), EC case law and EC legislation. The secondary sources comprise books and articles on the philosophy of sex discrimination law, the law itself and, as far as was necessary, the theological background. The bulk of the empirical work was carried out by administering a questionnaire to a sample group of male and female clergy. Additional strategies included contacting groups which are concerned with the employment status of the clergy and discriminatory practices regarding the appointment and treatment of the clergy. These included the Manufacturing, Science and Finance Union and the Private Patrons' Consultative Group. Groups which have been set up either to promote the position of women within the Church or to oppose the ordination of women were also contacted. The former category included "Watch" a group which monitors the treatment of women within the Church, the latter category included "Forward in Faith". Church policy decisions which were relevant to sex discrimination were also assessed.

Priests (Ordination of Women) Measure 1993

Until the ordination of women to the priesthood was approved by the General Synod and by Parliament in 1992, women were prohibited from exercising full priestly functions within the Anglican Church. Since 1987 women have been able to act as Anglican deacons, which is one type of Holy Order.[4] Their prohibition from the other two Orders, the priesthood and the episcopate, was felt by many to be unjust, by others it was deemed theologically necessary. The priest differs from the deacon in important respects. The priest's ministry is one, "of oversight and leadership of the people of God and a ministry which, in a particular way (though not exclusively) is focused in the presidency of the Eucharist."[5]

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[4] Deacons (Ordination of Women) Measure 1986. The first ordinations took place in 1987.

[5] General Synod (1988) *The Ordination of Women to the Priesthood. A Second Report by the House of Bishops* (GS 829) p10 (London, General Synod). This will be referred to as the Bishops' Second Report.

Since 1973 there had been sustained pressure to allow the ordination of women to the priesthood. It was not until 1992 that this was achieved. In 1990 draft legislation enabling the ordination of women priests was sent to the diocesan synods for approval. Article 8 of the constitution of the General Synod required a majority approval by the 44 diocesan synods before the draft legislation could be given final approval by the General Synod.[6] 38/44 dioceses expressed assent by majority votes in their diocesan Houses of Clergy and Laity.[7] Following the diocesan vote the Priests (Ordination of Women) Measure was debated and approved by the General Synod by the required two-thirds majority in all three of its Houses. Concurrently, the Synod approved the Ordination of Women (Financial Provisions) Measure. This provides financial support for Church workers who feel unable to remain within the Church of England, because of the approval of women priests. This Measure, allowing a graceful departure for dissenters, was passed with large majorities. In 1993 both pieces of legislation received parliamentary approval and the royal assent. The first ordinations took place in March 1994.

The content of the legislation will be examined. The purpose is to briefly explain the legal rights of male and female priests, diocesan bishops and parochial church councils (PCCs). From henceforth references to the bishop refer to the diocesan bishop. Where an assistant, suffragan or area bishop is involved this is specifically stated.[8] The parochial church council will be referred to as the PCC. An in-depth analysis of the legislation is given in Chapter Seven.

Section 1 (1) of the Priests (Ordination of Women) Measure 1993 allows women to be ordained to the priesthood. Women are prohibited from being consecrated as bishops.[9] In America, Canada and New Zealand women have been consecrated as Anglican bishops. It remains to be seen whether the Church of England follows its more progressive partners in allowing the consecration of women bishops. The present disunity of the Church of England regarding women priests suggests this may be off the

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[6] Synodical Government Measure 1969 Sch 2 Article 8

[7] General Synod (1993) *The Ordination of Women to the Priesthood. The Synod Debate* p89 (London, Church House Publishing). This will be referred to as the Synod Debate.

[8] Definitions of these terms are given at 3.2.1.

[9] Priests (Ordination of Women) Measure 1993 s 1 (2)

agenda for some time.

A bishop who is in office when the Canon enabling the ordination of women comes into effect may make any one, or more than one, of the following three declarations:
" (a) that a woman is not to be ordained within the diocese to the office of a priest; or
(b) that a woman is not to be instituted or licensed to the office of incumbent or priest-in-charge of a benefice, or of team vicar for a benefice, within the diocese; or
(c) that a woman is not to be given a licence or permission to officiate as a priest within the diocese."[10]

A declaration made by a bishop will remain operative, unless officially withdrawn, during the bishop's office and during the first six months of his successor's office.[11] The result of a bishop making all three declarations would be to exclude all women priests from that particular diocese. However, the power is somewhat limited by the fact that the bishop must be in office at the time of the promulgation of the Canon. In February 1994 the General Synod met to promulgate Canon C4B and Amending Canon No. 13 pursuant to the 1993 Measure. Only the present episcopate have had the opportunity actively to block women priests. This, coupled with the provisions of section 2 (5) which limits the duration of the declaration to six months after the dissenting bishop has left, seeks to prevent the permanent exclusion of women priests in certain dioceses.[12] In the event, no bishop has made a declaration under section 2 (1) of the Measure, even bishops who remain staunchly opposed to women priests.[13]

The power of bishops formally to prevent the ordination and appointment of women priests will be unavailable to the future episcopate. At the Synod debate it was suggested that requiring the future episcopate to support or at least tolerate the ordination of women, was another step towards marginalising opponents of women priests. Bishops do not suddenly materialise - they are the priests, the rural deans and the archdeacons who are working in the dioceses. What position will an ambitious, but dissenting priest have in the Church of England? To climb further they must either reconcile their

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[10] Ibid. s 2 (1)
[11] Ibid. s 2 (5)
[12] Ibid. general note which accompanies s 2
[13] Personal Communication, Professor David McClean, 24/2/96

position with the accepted Church position, or publicly deny their feelings whilst secretly holding them, or depart from the Anglican communion altogether. It is submitted that dissenters will still have a place in the Church of England. Women priests will not necessarily benefit under future bishops. The present episcopate have failed to take advantage of their formal powers contained in section 2 (1), preferring instead (in dioceses such as Chichester) to rely on informal but accepted practices to exclude women priests. There is no way of preventing future bishops, of whom there are already a number appointed since the Canon was promulgated in 1994, from employing the same informal methods of exclusion.

The power of the parish as regards the appointment of women priests is governed by section 3 of the Measure. The PCC of a parish has the power to pass either or both Resolutions contained in Schedule 1 of the Measure.[14]

> Resolution A states, "That this parochial church council would not accept a woman as the minister who presides at or celebrates the Holy Communion or pronounces the Absolution in the parish."
>
> Resolution B states, "That this parochial church council would not accept a woman as the incumbent or priest-in-charge of the benefice or as a team vicar for the benefice."

Resolution A is designed for parishes who do not accept the ordination of women as priests. Resolution A cannot be considered by a PCC if a woman priest is already present in the benefice, whether as an incumbent, a priest-in-charge, a team vicar or a curate. This includes both stipendiary and non-stipendiary ministers.[15] Resolution B is not covered by the provisions of section 3 (3). It can be considered by the PCC of a multi-parish benefice even if one of the team vicars is a woman priest.[16] Resolution B is designed specifically for Evangelical parishes which have no objection to the ordination

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[14] Priests (Ordination of Women) Measure 1993 s 3 (1). PCC membership and election is discussed at 3.2.2.

[15] Priests (Ordination of Women) Measure 1993 s 3 (3)

[16] Hanson, B.J.T. (1994) "Recent Legislative Developments" in Ecclesiastical Law Journal vol.3 no.15 p247

of women to the priesthood but have difficulty with women being in positions of authority in the Church. Such positions are deemed to cover incumbents, priests-in-charge and team vicars.[17] A Resolution shall not be passed unless the secretary of the PCC has given all PCC members four weeks notice of the meeting at which the motion proposing the Resolution is to be considered. The meeting must be attended by at least one half of PCC members entitled to attend.[18] Therefore the parish, through the PCC, has considerable power to prevent the appointment of a woman priest. A PCC may consider the Resolutions as frequently as they like. If a Resolution is in place, the PCC can rescind it.[19] Once this has been done, there is nothing to stop the Resolution being re-instated at a later date. There is no requirement that the PCC review a Resolution after a number of years.[20] PCCs containing Christians with traditional conservative values might block opportunities for women priests for some time.

Section 6 of the Measure clarifies that section 19 of the Sex Discrimination Act 1975 is still lawful. If a woman is refused ordination or appointment as a priest she will be unable to claim unlawful sex discrimination. Section 6 reads;

> "Without prejudice to section 19 of the Sex Discrimination Act 1975, nothing in Part II of that Act shall render unlawful sex discrimination against a woman in respect of-
> (a) her ordination to the office of priest in the Church of England;
> (b) the giving to her of a licence or permission to serve or officiate as such as a priest;
> (c) her appointment as dean, incumbent, priest-in-charge or team vicar or, in the case of a woman ordained to the office of priest, an assistant curate."

Section 19 (1) of the Sex Discrimination Act 1975 states that;

> "Nothing in this Part applies to employment for purposes of an organised religion where the employment is limited to one sex so as to comply with the doctrines of

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[17] Ibid. p248
[18] Priests (Ordination of Women) Measure 1993 s 3 (4)
[19] Ibid. s 3 (2)
[20] Hanson, B.J.T. (1994) Op. cit., p247

> the religion or avoid offending the religious susceptibilities of a significant number of its followers."[21]

Section 6 of the 1993 Measure denies a woman priest the opportunity to claim sex discrimination in regard to ordination and appointment. It does not cover working conditions and dismissal. Section 19 (1) prevents a minister of religion claiming sex discrimination in relation to all aspects of employment. Women are given the opportunity to become ordained as priests, but they are given no corresponding legal rights covering ordination and appointment. Whether they have any rights which cover working conditions and dismissal is discussed in Chapter Seven. The focus of this thesis is employment in the Church of England. Selection to train for the priesthood will not be discussed.[22] Likewise, subsequent ordination as a priest is not the primary focus of the research. It is discussed in relation to sex discrimination at 7.6.3. Instead this thesis focuses on the appointment, working conditions and dismissal of a priest. It examines parochial ministry; that is the ministry of a priest working in his or her parish. It does not examine sector ministry, for example the work of chaplains in hospitals and prisons. It does not examine the working structure of the cathedral and its dean and chapter. However, it may be that cathedral officers, primarily the bishop, are influential in parochial ministry.

The Church of England is now engaged in what it terms a reception process. This is whereby the Church decides, through working with women priests, whether their ordination is indeed God's will.[23] However, it seems highly unlikely that the Synod vote would ever be reversed. To aid the reception process the General Synod has issued the Episcopal Ministry Act of Synod.[24] This states that the two integrities; those supporting women's ordination as priests and those opposing it, should be given equal respect. The Act of Synod does not have legally binding force. Rather, it acts as a moral code with the intention of preventing schism in a Church which is still divided over the issue of

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[21] Sex Discrimination Act 1975 s 19 (2) provides an exemption from sex discrimination in regard to training as a minister of religion. The reader is referred to 7.6.3. for more information on this. Section 19 (1) will be referred to unless the text generally refers to the whole of section 19.

[22] For more information on this the reader is referred to; Advisory Board of Ministry (1994) "Theological Training in the Church of England"

[23] Bishops' Second Report (1988) Op. cit., pp106-109

[24] General Synod (1993) "Episcopal Ministry Act of Synod" (GS 1085) (London, Church House Publishing)

women priests. However, it remains a fact that the Church, through the diocesan synods and the General Synod, voted to support one integrity, the ordination of women priests. It remains to be seen whether the two integrities can be successfully respected.

The law as described in the thesis is that existing on 30th April 1997. The only exception to this is the discussion of the Court of Appeal decision in *Diocese of Southwark and Others* v *Coker*, *The Times*, 17th July 1997, in Chapter Four.

Chapter One

Equality: A Philosophical Analysis

The concept of equality shapes and defines the theoretical and methodological approach of the research from inception to conclusion. The philosophical analysis of equality not only acts as an introduction to the study of sex discrimination law, it serves as an inspiration for the empirical study of Church of England priests. The integration of equality theory, largely in the form of employment law policies, with the empirical investigation is detailed in Chapter Five. Finally, the analysis of the meaning of equality helps shape the conclusion of the research. The conclusion of this thesis is that the Sex Discrimination Act and the Equal Treatment Directive should be amended to allow Church of England priests access to protection from sex discrimination. Before one can recommend the inclusion of priests under the legislation, one must understand the philosophy which underpins the legislation. The starting point, therefore, is a critical analysis of the meaning of equality.

To make any sense, the concept of equality must involve a unit of measurement. Science uses measurements such as length, width and height. A comparison of two physical objects will result in equality or difference depending upon the unit of measurement. "Between any two things, however dissimilar, we can always find some point of resemblance: and between any two things, however similar, we can always find some point of difference."[1] The idea of equality as a philosophical concept suffers from the same difficulty. One cannot pronounce that two people are equal or different without specifying the unit of measurement. An examination of the different ways of measuring equality is crucial. It explains the chameleon-like nature of equality; forever in a different guise. Hence, one may value equality, but only value it in certain areas. For example, one might support equality of opportunity but not equality of income and wealth. The respects in which equality is valued will not commit one to absolute equality. It may be that trade-offs are needed against other values, such as freedom.[2]

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[1] Lucas, J.R. (1967) *The Principles of Politics* p244 (Oxford, Clarendon Press)
[2] Flew, Antony (1981) *The Politics of Procrustes* pp28-29 (London, Temple Smith)

1.1 Equality as Fact

The natural differences between humans renders it impossible for them to be factually equal in all respects. However, a weak version of factual equality can be used to suggest that humans are equal because of their common humanity. "That all men are human is, if a tautology, a useful one, serving as a reminder that those who belong anatomically to the species homo sapiens...are also alike in certain other respects more likely to be forgotten."[3] For example, humans are alike in their capacity to feel pain and affection. Lucas argues that this reasoning has more to do with humanity than with equality. It is an argument of universal humanity that we should treat all human beings, as humans, humanely. The logical reasoning is respect for humanity not equality. Lucas describes the egalitarian attempt to hijack the argument;

> All men are men.
> Therefore all men are equally men.
> Therefore all men are equal.

He ridicules this sequence by applying it to numbers;

> All numbers are numbers.
> Therefore all numbers are equally numbers.
> Therefore all numbers are equal.

The mistake of the egalitarian, claims Lucas, is to assume that the uniformity of humans as humans, will make them equal in all other respects.[4] Williams does employ a humanitarian argument. However, he avoids deriving from the argument the premise that humans are equal in all respects; this being the strong version of factual equality. His weak version of factual equality recognises that humans are not equal in every respect. Williams realises that the common humanity argument is useful but not sufficient. One needs to move from equality as fact to equality as a moral concept.

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[3] Williams, Bernard (1962) "The Idea of Equality" in P. Laslett & W. Runciman (Eds.), *Philosophy, Politics and Society* (Second Series) p110, 112 (Oxford, Basil Blackwell)
[4] Lucas, J.R. (1967) Op. cit., pp250-251

1.2 Equality as a Moral Concept

The historical roots of the concept of equality lie in Greek philosophy. Aristotle made pronouncements on equality which affect our modern understanding of the concept.

> **(1)** "Equality in morals means this: things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness."
>
> **(2)** "Equality and justice are synonymous; to be just is to be equal, to be unjust is to be unequal."[5]

A rule of distribution will be egalitarian and just if it distributes equal shares to equals. Conversely, a policy will be inegalitarian if equals receive unequal shares or if unequals receive equal shares.[6]

If two persons are alike, why should they be treated alike? How can one move from an "is" proposition to an "ought" position? Initially, the definition of alike must be uncovered. Westen suggests three possible definitions. The first definition, that persons are alike in every respect, he discounts as impossible. No two people can be alike in every respect. Secondly, does it refer to persons being alike in some respects? This leaves one with an unworkable definition. All people are in some respect alike. This would lead to the strange situation where we should treat all people alike. Rather, he asserts that persons are morally alike. This definition avoids the problems of deriving an "ought" from an "is". "It starts with a normative determination that two people are alike in a morally significant respect and moves to a normative conclusion that the two should be treated alike."[7] Rather than deriving an ought from an is, an ought flows from an ought. People are morally alike, therefore they can expect a moral standard of treatment

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[5] Westen, Peter (1982) "The Empty Idea of Equality" in Harvard Law Review vol.95 p537, 543 paraphrasing Aristotle, *Ethica Nicomachea*, W. Ross trans. (1925) Book V 1131a-1131b (Oxford, Clarendon Press)

[6] Oppenheim, Felix (1981) *Political Concepts* p119 (Oxford, Basil Blackwell)

[7] Westen, Peter (1982) Op. cit., pp544-545

which treats them alike. For persons to be equal they must share the characteristic of the unit of measurement; whether it be income, intelligence or height. This leads to people being equal in a host of situations. The standard of measurement defines what is equality, therefore the measurement will always be egalitarian. Inegalitarian rules of distribution become a logical impossibility.[8]

Westen reveals the circularity of his construction of equality. "Just as no categories of 'like' people exist in nature, neither do categories of 'like' treatment exist; treatments can be alike only in reference to some moral rule."[9] Equality as a moral concept instructs us to treat like people alike. How do we discover who these like people are? They are people who ought to be treated alike. Has equality any substantive content of its own? Westen believes it to be an empty vessel, a tautological device.[10]

1.2.1 Proportional Equality

Aristotle developed his theory of equality with the idea of proportional equality.[11] This requires that there be equality of ratios between the characteristic of one person and his or her goods and the characteristic of another and his or her allotment. The problem again is that the chosen characteristic will define a class of equals and thus render the principle egalitarian. For example, Feinberg applies the characteristic of common humanity to economic wealth. Distributive justice is achieved when the following ratio is accomplished.

$$\frac{\text{A's share of P}}{\text{B's share of P}} = \frac{\text{A's possession of Q}}{\text{B's possession of Q}}$$

Where P stands for economic goods and Q for common humanity. As all possess Q equally all should receive P equally.[12] Feinberg dislikes the consequences of proportional equality. He considers it to be a sufficient claim for human rights but not

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[8] Oppenheim, Felix (1981) Op. cit., p119
[9] Westen, Peter (1982) Op. cit., pp546-547
[10] Ibid. p547
[11] Aristotle, *Ethica Nicomachea*, Op cit., 1131a; *Aristotle's Politics*, B. Jowett trans. (1921) Book V 1301b (Oxford, Clarendon Press)
[12] Feinberg, Joel (1973) *Social Philosophy* p109 (Englewood Cliffs NJ, Prentice Hall)

for the distribution of the economic pie. It is submitted that it is necessary to provide a justification for the characteristics which define allotment. To strengthen the account of equality as a moral concept, a philosophical analysis of which characteristics are morally relevant is needed.

1.2.2 Equality and Liberal Theory

The Enlightenment period provides guidance on the morally relevant characteristics which are used by contemporary writers on equality.

When animals are compared with humans it is often said that humans are rational, animals are not. Others believe that humans have a soul and that animals do not. Yet a potent argument in favour of the protection of animals is that like humans they feel pain. Can we take from any of these characteristics one which will define human equality?

1.2.3 Equal Passions

Classical utilitarian thinkers such as Jeremy Bentham and James Mill believed in equal passions; that is people have a similar capacity for pleasure and pain. This school of thought locates humans closer to the animal kingdom. "By nature we are all designed to satisfy our passions. We naturally call good only that which is a means to our own satisfaction."[13] No preordained hierarchy of passions exists. Rather, Gutmann describes how reason is harnessed to "scout and spy" at how best to fulfil our desires. On this account, reason (or rationality) does not have a separate moral content of its own. An objection might be made that people are incapable of acting in their own interests. Mill believed that what was needed was knowledge of one's interests. Knowledge would serve self-interest not transcend it. It would balance pleasures and pains and decide upon the most suitable cause of action.[14]

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[13] Gutmann, Amy (1980) *Liberal Equality* p20 (Cambridge, Cambridge University Press)
[14] Ibid. p25

1.2.4 Equal Rationality

The rationalist school of Locke and Kant viewed humans as equally rational individuals, capable of constructing reasonable life plans and following the moral law. Locke believed that all humans rationally desire the protection of life, liberty and property. If this is so, why do some rational beings fail to recognise these self-evident rights as their main political interest?[15] The reason is that humans are not completely equal in their rationality. Humans share varying degrees of rationality and they have different capacities for rationality. Perhaps, Feinberg says, rationality involves a minimal potential for rationality which is above anything lower animals can attain.[16]

Kantian metaphysics helps to explain why a person who possesses a rational faculty does not always use it. The Kantian self is both rational (as a noumenal self) and sensual (as a phenomenal self). Sometimes the sensual self will override reason. Kantian theory maintains that, "Every person has the potential for human dignity based upon reason....As an end in oneself, one must be treated by others as a person guided by reason and one must act not only according to but from the moral law."[17] It is this moral personality which is capable of giving rights to humans. Reason is seen as independent of the passions. To achieve civil independence and equal subjection it is necessary that people make the law as rational beings, not passionate beings with arbitrary wills. However, Feinberg considers metaphysics to be an inadequate explanation of human worth. The description of humans as persons and not things and the premise that humans are ends in themselves does not explain human worth. Feinberg is sympathetic to, although unconvinced by, metaphysical statements. He states, "It may well be that universal 'respect' for human beings is, in a sense, 'groundless' - a kind of ultimate attitude not itself justifiable in more ultimate terms."[18]

Gutmann describes how equal passions and equal rationality converge. Utilitarianism must find a place for reason in its method and the rationalist must succumb to the effect of human passions in the construction of principles of distributive justice. Are passions

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[15] Ibid. p28
[16] Feinberg, Joel (1973) Op. cit., p91
[17] Gutmann, Amy (1980) Op. cit., p33
[18] Feinberg, Joel (1973) Op cit., p93

and rationality morally relevant characteristics? First, a reply can be made that persons do not share these qualities equally, neither do they have an equal capacity to exercise these qualities. This may be so, but Gutmann argues that there is no evidence to show that such a capacity differs according to sex, race, religion or class.[19] Therefore, principles of justice favouring (say) males over females cannot be justified using the unequal capacity argument. Secondly, there is the recurrent is-ought problem which claims that one cannot derive normative conclusions regarding distributive justice from empirical claims. Equal passions and equal rationality are not simply factual assertions. Rather a process has taken place which gives greater political significance to people's similarities than to their differences. Like Westen, Gutmann derives an ought from an ought. "The argument from human equality to principles of egalitarian justice is therefore circular, but the reasoning is not tautological. Our idea that human beings are equal gains plausibility from our firm belief that certain distributive inequalities are unjust. Our normative intuitions therefore support our descriptive belief in human equality."[20]

1.2.5 Contemporary Liberal Thinkers

(a) Bernard Williams

Williams constructs a conception of equality which is based on equality of respect. As a springboard he uses and criticises the theory of Kant. Williams dislikes Kant's transcendental idealism. In order to remove moral worth from any contingency Kant locates it as a transcendental characteristic. The capacity to will as a rational agent and to receive equal respect as such an agent, has no connection with the empirical world but is confined to metaphysics. Williams believes that for moral capacity to be useful in the quest for equality it must have an empirical element. The absence of empirical grounding would render equality as an empty concept - the very premise which Westen propounds.[21]

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[19] Gutmann, Amy (1980) Op. cit., p45
[20] Ibid. p46
[21] Williams, Bernard (1962) Op. cit., pp115-116

Williams suggests that we should regard each other from the "human point of view". We should see the world through other peoples' eyes, including the label of their work title and their achievement. It does not mean that each person is identical but it does mean that each person is owed the effort of understanding.[22] Feinberg suggests that this represents a causal, not a logical, connection between the human point of view and the idea of human worth.[23] It is arguable that we have simply returned to the common humanity argument - we should equally respect every person because each is a human being. The idea of the human point of view, although appealing, appears groundless. Williams does not escape the metaphysical trap after all.

(b) John Rawls

Rawls uses a liberal theory of justice based on the idea of the social contract to produce principles of distributive justice. He states that the capacity for moral personality is a sufficient condition for being entitled to equal justice. He asserts that the majority of persons possess moral personality and that they possess this property equally.[24] Moral personality comprises: a sense of justice and the ability to make moral appeals with some hope that the appeal will be followed. Aware of the pitfalls of Kant, Rawls avoids metaphysics by empirically grounding moral personality. He derives equality from natural characteristics. However, in doing so it is arguable that he contaminates his theory with real world problems. For example, when does a person have a sufficient moral personality? If people have different degrees of moral personality why should there not be different grades of moral status, with greater duties assigned the greater the moral capacity?[25] Rawls recognises such problems and states that, "provided the minimum for moral personality is satisfied, a person is owed all the guarantees of justice."[26]

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[22] Ibid. pp116-118
[23] Feinberg, Joel (1973) Op. cit., p94
[24] Rawls, John (1971) *A Theory of Justice* pp505-507 (Oxford, Oxford University Press)
[25] Singer, Peter (1979) *Practical Ethics* pp16-17 (London, Cambridge University Press)
[26] Rawls, John (1971) Op. cit., p507

(c) Peter Singer

Singer makes the point, referred to by Gutmann, that it is arguable that despite individual differences, there are no morally significant differences between the sexes and the races. If one pursues this argument, that differences cut across society, and then apply an intelligence test to assign hierarchical places in that society, one arrives at an inegalitarian position. The hierarchical society could be justified by an appeal to the real differences between people. It is an argument that is unpalatable to most people.[27] Singer claims, "We can reject this 'hierarchy of intelligence'...if we are clear that the claim to equality does not rest on intelligence, moral personality, rationality or similar matters of fact."[28] However, it is submitted that moral personality and rationality (arguably also a component of moral personality) are not wholly factual claims but have a moral relevance. They are ought as opposed to is statements. Singer asserts that equality is an ethical principle, not a factual one. Whilst, this may be true, Singer's position is part of a wider problem on the relationship between facts and morals.[29]

Turner argues that the idea of equality as a moral concept, is not a relevant modern concept. He believes that human nature is now recognised as a cultural product. "Within this relativistic perspective it is difficult to isolate any specific form of human attribute which could be shared universally amongst the whole human race."[30] Yet without the highest level of abstraction, can one objectively verify political concepts and social policies? What basis do ideas such as equality of opportunity and equality of result have if one removes the formal, abstract idea of equality?

Westen believes that equality provides form but no substance. Turner believes that equality is substance rather than form. It is submitted that the formal idea of equality can act as the mainspring for substantive theories of equality. One needs the form to provide the foundations, yet form is left floundering without content.

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[27] Singer, Peter (1979) Op. cit., pp17-18
[28] Ibid. p18
[29] For further information on the fact-value distinction the reader is referred to; Honderich, Ted (Ed.), (1995) *The Oxford Companion to Philosophy* p267 (Oxford, Oxford University Press)
[30] Turner, Bryan (1986) *Equality* p35 (London, Ellis Horwood)

1.3 Equality and Justice

Browne describes justice as, "giving every person his due".[31] Is there a connection between justice and equality? Egalitarians maintain that either there is a logical connection or that there is a substantive or morally necessary connection.[32] Anti-egalitarians eschew such a connection. Justice, on this reading, is connected to true deserts and is not reliant on equality at all. In fact justice and equality are rival concepts.

Initially different types of justice will be defined. Noncomparative justice is when one can determine a person's claims without making a comparison with anyone else. Importantly, noncomparative principles do not involve any morally relevant relationships between people. Instead the person is compared to an objective standard and a judgment is delivered. The standards of noncomparative justice can be diverse and unrelated. Comparative principles of justice require a comparative analysis of morally relevant characteristics between people.[33] Comparative principles follow the Aristotelian formula that like cases are to be treated alike and different cases are to be treated differently.[34] The idea of the like treatment principle is an idea of formal justice for it does not itself specify what the relevant moral characteristics are to be. Egalitarians state that the principle of formal justice is equivalent to formal equality. Anti-egalitarians deny this. Formal justice is transformed into substantive justice by the addition of relevant moral characteristics. It is the moral characteristics, not formal justice, upon which commentators disagree.

Aristotle used formal logic to make a connection between equality and justice.[35] Westen, agreeing with this approach, illustrates the equivalence relationship between equality and justice. First, justice can be reduced to equality. One gives persons their due by treating them in accordance with moral rules. Whether a person is governed by a moral rule depends upon their moral characteristics. If they are morally alike in significant respects they will be treated alike, if they are morally unalike in significant

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[31] Browne, Derek (1978) "Nonegalitarian Justice" in Australasian Journal of Philosophy vol.56, no.1 p48, 49
[32] Ibid. p48
[33] Ibid. p49
[34] Feinberg, Joel (1974) "Noncomparative Justice" in Philosophical Review vol.83 p297, 310
[35] Aristotle n.5 supra

respects they will be treated unalike - and so we return to the concept of equality. Secondly, equality is reducible to justice. Saying that persons who are alike should be treated alike is to assume principles of justice which define that it is right to treat these persons alike and wrong to treat them unalike. Here we return to giving people their due.[36] Westen believes that justice, like equality, is a formal concept. Justice asks us to give people their due but it does not define what is their due. To ascertain what is one's due, one must examine substantive moral or legal standards. Westen believes that the substantive moral content is a source other than equality or justice.

1.3.1 Normative Egalitarianism

Many writers argue that equality and justice do have a substantive content, but there is widespread disagreement as to that specific content. Some try to connect equality and justice by substantive egalitarian principles. How the move is made from form to substance is as important as the substantive principles themselves.

Feinberg explains how morally relevant characteristics are chosen. Intuitively many would not choose sex or race as a morally relevant characteristic, whereas merit, need or respect might be used. What supplies the relevance? Relevance can be given by the object of the law.[37] If the object of the law is equal income then people's incomes are the relevant characteristic. How are the objectives of the law decided? How can one decide whether the legislators have passed an unjust law? Feinberg answers that, "Differences in a given respect are relevant for the aims of distributive justice...only if they are differences for which their possessors can be held responsible; properties can be the grounds of just discrimination between persons only if those persons had a fair opportunity to acquire or avoid them."[38] He assesses five characteristics to see whether they pass the fair opportunity test. First, he dismisses the idea of "perfect equality" (the common humanity argument) as too imprecise on its own. Secondly, human need, a principle derived from perfect equality, does match fair opportunity; "mere possession of basic human needs qualifies a person for the opportunity to satisfy them."[39] His third

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[36] Westen, Peter (1982) Op. cit., p557
[37] Hart, H.L.A. (1961) *The Concept of Law* p159 (Oxford, Clarendon Press)
[38] Feinberg, Joel (1973) Op. cit., p108
[39] Ibid. p110

characteristic, combined as merit and achievement, he dismisses. The skills one uses, whether native or acquired, are not deserved but are randomly distributed as part of a person's genetic inheritance. A fair opportunity to achieve is thwarted by genetic and inherited factors. Fourthly, the contribution a person makes to the economy is an appealing ground to decide upon distributive justice. Difficulties surround this too. For example, how do you measure contribution? Factors other than individual contribution will have helped the person, such as luck, social factors, uncreated natural resources and the efforts of dead people. Finally, he dismisses the notion of effort, which is likewise hampered from dispensing fair opportunity because of genetic or acquired handicaps.[40]

The basis of this analysis is the idea of responsibility for one's attributes. It is submitted that behind this is the idea of possession. Rawls discusses the idea that one cannot possess one's attributes because one does not deserve those attributes.[41] What we need to do is pare the self down to its core. Feinberg believes that in a stable economy basic needs will have priority. When economic growth occurs nonegalitarian considerations such as contribution and effort will be used.[42]

1.3.2 The Denial of the Equality-Justice Connection

Browne denies that there is a conceptually relevant connection between equality and justice. He maintains that principles of equality cannot solve distributive problems, whereas nonegalitarian principles will supply the solution. Browne argues that the analytical egalitarianism of Aristotle is not as logical as it appears. The Aristotelian principle assumes a background of noncomparative justice. Aristotle believed that people were owed certain dues. But if justice depends upon claims and the possession of goods appropriate to those claims, justice is noncomparative and nonegalitarian. Browne argues that for justice to be egalitarian, "the normative claim must be made that the relational property itself has some additional moral significance over and above that of the attributes it relates. Moral importance must attach, not (or not only) to the fact that each individual has a certain attribute, but (also) to the fact that those individuals are

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[40] Ibid. pp109-117
[41] Rawls, John (1971) Op. cit., pp310-315
[42] Feinberg, Joel (1973) Op. cit., p117

equal (in some respect)."[43] That equality is crucial to justice must be shown before the Aristotelian principle is applied; the principle itself cannot prove this connection.

Browne believes that comparative principles, although promoting equality, do not necessarily promote justice. Comparative principles have no relation to the amount a person should receive. If all are treated badly then there is equality but not justice. Normative egalitarians, like Feinberg, argue that there is a morally relevant connection between equality and justice. Browne ignores the moral content that Feinberg attempts to find in his discussion of need. Admittedly Feinberg does not specify what is needed to live a minimally decent life, but he does say that this is a matter of justice, whereas it is less evident that anything above the line is required by justice to be equally dispensed.[44]

Flew likewise challenges the idea that equality and justice are synonymous. He believes that equality of result, a forward looking notion, should not be equated with justice - the backward looking notion of giving people their due. The fault of Flew's argument is that equality of result, along with equality of opportunity and equality of respect, is a substantive equality policy. It is misleading to equate equality of result with formal equality. Similarly, it is questionable whether justice should always be defined as receiving one's due or legitimate entitlements and having nothing to do with redistribution.

Instead of denying the logic of Aristotle, Flew develops his logic by pursuing his study of equality. When discussing distributive justice Aristotle stated, "it is possible for one man to have a share either unequal or equal to that of another."[45] He does not say that we should redistribute goods of every kind. He even suggested that a relevant characteristic of entitlement might be wealth.[46] The combination of private holdings and contribution to economic wealth might determine distributive justice. Flew asserts that Aristotle's distributive justice does not require that everyone receive an equal share of all goods but rather that all systems of justice treat all relevantly like cases alike. It is

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[43] Browne, Derek (1978) Op. cit., p52
[44] Feinberg, Joel (1973) Op. cit., p110
[45] Aristotle, *Ethica Nicomachea*, Op. cit., Book V 1130b
[46] Ibid. Book V 1131a-1131b

submitted that Flew misses the point. He uses the substantive content of Aristotle to justify unequal results. A more useful course would have been to attack the formal logic of Aristotle which holds equality and justice to be synonymous. For all Flew has done is to return to the formula without criticising its form.

1.4 Equality and Rights

Equal rights, human rights, noncomparative rights, a right to equality of opportunity - these are all phrases that abound in equality and discrimination literature. What is the relationship between equality and rights?

Many writers see equality as being different to rights.[47] The emphasis on difference has led to disagreement regarding the priority of the concepts. Some argue that rights are the source of equality.[48] Others argue that equality is the source of all rights.[49] Nielsen, perhaps unconsciously, covers all three positions in his description of equality and rights.[50] First, he contrasts the idea of equality as a goal - a desirable goal that humans are treated as being equal in certain respects, with equality as a set of rights. If we introduce negative rights equally (rights not to be interfered with) this will lead to unequal wealth and well-being. If positive rights are introduced, depending upon what they are, equal rights may be synonymous with equality as a goal. This suggests that rights can be the source of equality. Secondly, he suggests that equality and rights are related but independent concepts, "a certain condition of equality is a goal that we should strive toward and that, quite independently of its attainment, there are certain rights that we all have, the covering formula for which is the claim that we are all to be treated as moral equals."[51] Thirdly, he asserts that there is a link between equality as a goal and equality as a right. He believes that what starts off as a goal turns into a right

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[47] Feinberg, Joel (1973) Op. cit., pp98-119, who believes that rights are noncomparative in nature, whilst equality is comparative. For a similar analysis the reader is referred to; Flew, Antony (1981) Op. cit., p29

[48] Westen, Peter (1982) Op. cit., p539 refers the reader to Beck, (1980) "Liberty and Equality" in 10 Idealistic Studies p36; Machan, (1977) "Equality's Dependence on Liberty" in G. Dorsey (Ed.), *2 Equality and Freedom* pp664-665

[49] Dworkin, Ronald (1977) *Taking Rights Seriously* pp273-274 (London, Duckworth)

[50] Nielsen, Kai (1985) *Equality and Liberty* (Totowa, New Jersey, Rowman & Allanheld)

[51] Ibid. p9

when the goal can be realistically achieved. This specifies equality as the source of rights.[52]

Westen believes that contrasting equality and rights is the wrong approach. He considers that equality statements involve, and collapse into, simple statements of rights. Rights mean "all claims that can justly be made by or on behalf of an individual or group of individuals to some condition or power - except claims that 'people who are alike be treated alike'"[53] Like people are treated alike because a moral rule states that they ought to be treated alike. If both persons satisfy the rule they will be treated alike. "After such a rule is established, equality between them is a 'logical consequence' of the established rule. They are then 'equal' in respect of the rule because that is what equal means....They are also then entitled to equal treatment under the rule because that is what possessing a rule means."[54] Equality thus derives from rights.

One of the reasons used to differentiate equality from rights is the comparative nature of the former. Equality makes comparisons between the treatment of people, whereas rights look to the individual complainant. A contrast is made between comparative rights - rights which do make comparisons regarding the treatment of people, and noncomparative rights - rights that are used without a comparative element. Therefore, a contrast can be made between noncomparative rights on the one hand and comparative rights and equality taken as identical concepts on the other.

To further cloud the situation Westen believes that a comparative right may exist in isolation from equality. For example, an assessment of the right of preferential treatment can only proceed by analysing the initial relationship of a person with others, it is not concerned with equality. Additionally, equality claims can be noncomparative rights. The right of persons qua persons not to be tortured can be assessed by looking at individual treatment and not by making comparisons.[55] It is submitted that the latter example might not even be an equality right unless Westen is basing it on the common humanity argument.

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[52] Ibid. pp7-10
[53] Westen, Peter (1982) Op. cit., p540
[54] Ibid. p548
[55] Ibid. p552

There are two types of comparison at work here. Comparison for the purposes of equality is conducted by taking each individual and deciding how they should be treated by the moral standard. Then the treatment of persons under the standard is assessed to determine whether they are being treated equally or not. When assessing a comparative right one initially compares persons to see if they are alike or different. Only then does one decide how they are to be treated under the moral rule of treatment.[56] Westen illustrates this difference in his analysis of affirmative action programmes. In some American states blacks have been given preferential treatment in graduate school admissions. This can be regarded as a comparative right as one has to examine the candidates' relationship with others. One cannot tell whether the right to preferential treatment has been broken unless one initially compares the candidates. "[T]he quantitative comparison logically precedes the determination of their rights."[57] The right to preferential treatment has an equality dimension too. If one wants to decide who are like and who are unalike one must take each person and determine their treatment under the moral rule - in this case the rights under the preferential treatment scheme. Only then can one assess whether people are being treated equally. "[T]he comparison of 'like' to 'like' in respect to admission logically follows the determination of everyone's admission rights."[58]

1.5 Legal Equality and Rights

To understand whether people are being treated differently a moral standard must be used to gauge whether people are alike or not. This is not provided by the statement that likes should be treated alike, states Westen, rather it comes in the form of an underlying right. Once the particular right is found, whether it be, say, freedom of speech or freedom of religion, "our substantive work is complete, and the additional and self-evident step of stating our conclusion in terms of 'equals' or 'unequals' is entirely superfluous."[59]

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[56] Ibid. p553
[57] Ibid. p554
[58] Ibid. p555
[59] Ibid. p560

Many writers agree with Westen but they do not extend the analysis to "suspect classification cases". These are sex and race discrimination cases. Some writers maintain that these cases are "true equality cases" which cannot be collapsed into rights discourse.[60] Westen believes that alongside rights of speech and religion stand rights of sex and race. These rights can stand alone without reference to equality. Yet these rights also provide the substantive standard for assessing like and unalike.

In *Sweatt* v *Painter* a state law which prohibited blacks from entering the state's law school was challenged.[61] Should race be allowed to make a difference here? The idea of equality, that likes should be treated alike, does not help here. It cannot discern what are relevant differences from what are irrelevant ones. One needs to show that the exclusion on the ground of race caused Mr Sweatt an injury that would not have occurred in a case where exclusion by race was unacceptable. A prohibition against race discrimination must stem from a substantive right to be free from such injury. Only then can one say that the state treated Mr Sweatt unequally by treating him differently in comparison to like persons.[62]

1.6 Types of Equality

1.6.1 Overview

This thesis proceeds on the view that there is just one formal idea of equality - that likes should be treated alike - but that there are many different substantive theories of equality.[63]

The main types of substantive equality are discussed below. First, the beneficiaries of equality policies and the breadth of these policies is examined. Some policies place the individual as the subject of equality. An individual belonging to a relevant class will be treated as equal with the other members of that class. Rosenfeld cites the example of

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[60] Ibid. p565 refers the reader to Fullinwider, Robert (1980) *The Reverse Discrimination Controversy* pp222-223, 236-237 (Totowa, New Jersey, Rowman & Littlefield)

[61] *Sweatt* v *Painter* 339 U.S. 629 (1950)

[62] Westen, Peter (1982) Op. cit., pp566-567

[63] Rae, Douglas & Yates, Douglas (1981) *Equalities* p133 (Cambridge, Massachusetts, Harvard University Press) count at least 108 kinds of equality.

one-person-one-vote. The relevant class in this situation is that of citizens. Each individual citizen in the class is given the right to vote. Some policies place the group as the subject of equality. In this situation a certain class must be treated equally. Equality is not necessary between individuals but between subclasses. Provided that the distribution between relevant subclasses is equal, the policy is satisfied. It does not matter if the distribution within the subclasses is unequal.[64]

The breadth of equality policies is influenced by political ideologies. Although this thesis is specifically concerned with equality policies in regard to employment, it is useful to situate equality in a wider context by examining the "domain of equality".[65] The issue is; what classes of things are to be distributed equally? A libertarian such as Robert Nozick would pursue a narrow domain of equality, focusing on the distribution of formal property rights.[66] A Marxist would argue for a radical redistribution of wealth. The broader the domain, the more likely that policies of positive action and positive (reverse) discrimination would be approved. These policies would be inconceivable to libertarians.

1.6.2 Equality Policies

Five equality policies that are used in employment law will be outlined. Initial definitions will be given before a comparative assessment is made.

1.6.3 Equality of Opportunity

In democratic societies with mixed economies, like Britain and America, there is a prevailing economic, social and political principle - equality of opportunity. The direct discrimination provisions of the Sex Discrimination Act 1975 and the Race Relations Act 1976 are based on the concept of equal opportunity.[67] The idea is that each person should be free to pursue their life plans and be able to compete for scarce goods in society on an equal basis. How are goods allocated? Williams suggests that equal

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[64] Rosenfeld, Michael (1991) *Affirmative Action and Justice* p15 (New Haven, Yale University Press)
[65] Ibid. p16
[66] Nozick, Robert (1974) *Anarchy, State and Utopia* (Oxford, Basil Blackwell)
[67] Sex Discrimination Act 1975 s 1 (1) (a); Race Relations Act 1976 s 1 (1) (a)

opportunity to obtain goods is fulfilled if there is no exclusion from the competition on grounds other than appropriate and rational ones. To prevent arbitrary principles such as wealth being classed as appropriate and rational the "grounds considered appropriate for the good should themselves be such that people from all sections of society have an equal chance of satisfying them."[68] Initially, one can say that people are rewarded according to their merit. "In a meritocracy positions in the occupational structure of a society would be filled on the basis of personal merit, in terms of universal criteria of achievement, not on ascribed standards of age, sex or wealth."[69] This is the weak version of equality of opportunity. The strong version argues that because of genetic and social factors people cannot compete equally, and it is unfair to rely on notions of merit. People do not deserve their skills, neither is achievement untainted by factors beyond the individual's control. It is argued that for equality of opportunity to function as a social policy it is necessary to strengthen it to include the idea of equality of condition.

It is necessary to separate equality of opportunity from equality of result, but often the distinction collapses. Flew believes this centres around the definition of opportunity. "Someone has an opportunity to do something (or to have something) if, and only if, they can do (or have) that something, if they choose."[70] A literal meaning of equality of opportunity would be the offering of two people either the same or equivalent opportunities. On this reading the objective has become equality of result; that all should receive the same. The ordinary reading of equality of opportunity is that there is an open competition for scarce resources. The only opportunity available is the opportunity to compete. Flew believes that the latter definition is the correct one. Likewise, Levin maintains that equality of opportunity does not entail equality of result. He equates opportunity with probability. "I take an opportunity for a job to be the probability that one will be offered that job."[71] An individual's overall employment probability can be displayed in graphic form by plotting their probability of getting a job against all existing jobs. This is the individual's competition curve. Equality of opportunity is measured by a comparative analysis of competition curves. This analysis is interesting as it calls into question what variables should be included to define the curve and also

[68] Williams, Bernard (1962) Op. cit., pp125-126
[69] Turner, Bryan (1986) Op. cit., p35
[70] Flew, Antony (1981) Op. cit., p46
[71] Levin, Michael (1981) "Equality of Opportunity" in Philosophical Quarterly vol.31 p110

whether the curve can be shifted upwards or downwards by the government.[72] The last words are reserved for Lucas who maintains that equality of opportunity and equality of result are separate concepts. Additionally, he doubts the efficiency of the former. Unlike Levin and Flew, Lucas does not think that opportunity can be measured. Does one fail because one has missed an opportunity or because one has been deprived of that opportunity? In a passage fit for inclusion in the Scriptures he writes, "We blame external circumstances rather than our own inadequacies, and find in the failures of life fuel for fires of resentment rather than lessons in the grace of humility. Equality of Opportunity has bred envy rather than endeavour."[73]

1.6.4 Equality of Condition

The strong version of equality of opportunity requires equality of condition. To make the competition for scarce resources fair the initial starting points must be equalised. This is done by assessing the conditions which affect individuals. Williams suggests that where a condition is curable it is to be regarded as part of what is done to the individual rather than a part of the individual's core self.[74] The tricky idea of tampering with the self's core (whatever that is) is circumvented and some notion of equality between persons is preserved. A social policy advocating equality of condition aims to equalise the basic resources available to those entering the competition. Basic goods such as money and education are needed so one can develop the capabilities to compete for positions open to all. Compensation can be issued for handicaps and penalisation for those who are unfairly advantaged. British anti-discrimination law fails to provide the necessary equality of condition believe Fredman & Szyszczak. "[E]qual opportunity is predicated on equalizing the starting point of different groups. Yet the legislation makes no commitment to supplying sufficient resources to ensure such equality."[75]

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[72] The reader is referred to 1.7.3.
[73] Lucas, J.R. (1967) Op. cit., p247
[74] Williams, Bernard (1962) Op. cit., pp127-128
[75] Fredman, Sandra & Szyszczak, Erika (1992) "The Interaction of Race and Gender" in B. Hepple & E. Szyszczak (Eds.), *Discrimination: The Limits of Law* p214, 216 (London, Mansell)

1.6.5 Equality of Result

Equality of result (or equality of outcome) aims to transform an unequal starting position into an equal finish. Factors which disadvantage the competitors starting point, such as sex, race, disability, age, social status and natural ability, will be swept aside. Other means such as positive action programmes and reverse discrimination are used to produce equality of result. The achievement of equality of result, and likewise its lesser partner equality of condition, would involve enormous state intervention. Although some equality of result policies are being pursued the absolute success of the policy would, Turner believes, lead to "political despotism which would subordinate individual talent and achievement."[76]

Rosenfeld makes a distinction which somewhat answers this criticism. He divides equality of result into lot- and subject-regarding equality of result.[77] Lot-regarding equality of result is when every person is given equal lots. This ignores the difference and creativity of persons and is susceptible to Turner's criticism. Subject-regarding equality of result allocates goods that are necessary to the development of people's talents. It is legitimate to allocate unequal bundles of goods as people's needs vary. Apart from the problem of subjectivity of needs, this is a Utopian vision, clouded by the presence of scarce resources. A policy combining lot-regarding and subject-regarding equality of result could be the solution with the former providing necessary goods to all, whilst the latter could concentrate on people's talents and recognise their differences.

Who chooses which characteristics are to be equalised? Who will equalise the equalisers?[78] Why stop at equal wealth when we have eugenics at our disposal? What reasons are given for equality in one direction but stops at the vision of Huxley's Brave New World? We return to the idea that one may value equality in some respects but not all. Just because those on the left of the spectrum have pushed the idea of equality further than those on the right, does not prevent them being entitled to stop short of annihilation.

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[76] Turner, Bryan (1986) Op. cit., p37
[77] Rosenfeld, Michael (1991) Op. cit., p117
[78] Flew, Antony (1981) Op. cit., p64

1.6.6 Equal Treatment and Treatment as an Equal

Equal treatment and treatment as an equal are two related but different ideas. The latter idea is also referred to as equal consideration of interests and equality of respect.[79] For ease it will be referred to as equality of respect.

The concept of equal treatment involves an equal distribution of some opportunity or resource. For example, every citizen has a right to an equal vote in a democracy. Equality of respect does not go this far, but it stipulates that each person is to be treated with the same respect as everyone else. Equality of respect is prior to equal treatment. As will be explained, the former may in some cases lead to the latter, but on occasion it will result in differential treatment. The essence of equality of respect is that in our moral deliberations we give equal weight to the interests of others. "True scales favour the side where the interest is stronger or where several interests combine to outweigh a smaller number of similar interests; but they take no account of whose interests they are weighing."[80] Picking out an arbitrary factor such as sex rather than weighing interests is prohibited. The only important characteristic is that of having an interest. This begs the question how is an interest created? To preserve equality of respect you cannot neutralise the reasons that form the interest. Therefore, it could be argued that the interest needs to be viewed against a background of social and genetic factors. The reasons that form the interest might then include a person's experiences of being a male or a female.

Equality of respect is only a minimal principle of equality, it does not necessarily lead to equal treatment, or for that matter equality of result. Singer uses the example of two people in pain to illustrate this. One person is in agony, whilst the other only has minor pain. Two shots of morphine are available. By weighing the interests of the two the result will be two shots for the first person and none for the second. Equality of respect does not lead to equal treatment, yet says Singer the object is egalitarian. However, he

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[79] For example, Dworkin refers to it as treatment as an equal, Singer as equal consideration of interests and Williams and Flew as equality of respect.
[80] Singer, Peter (1979) Op. cit., p19

uses grounds of utility to argue for this. An argument could be pursued which states that utility considerations will not lead to equal treatment and nor will they preserve equality of respect.[81]

1.6.7 Reverse Discrimination

Reverse discrimination is influenced by equality of respect and equal treatment. In order to preserve equality of respect it may be necessary to apply differential treatment to disadvantaged groups in society. Equal treatment would only serve to marginalise these groups.[82] Does reverse discrimination merely replace one injustice with another? Does it treat another group with less respect? Can reverse discrimination be justified? Two American cases take up this point. *De Funis* v *Odegard* presented the argument that race could not be used as a criterion of admission into a law school.[83] The admission procedure required that the majority group were screened against an average grade. The minority group, which consisted of various ethnic minorities, received special consideration by a committee and many were admitted despite being below the average grade. The law school conceded that De Funis would have been admitted with his score if he had been a member of the ethnic minority group. It was argued that distinctions of race are unjust because they treat the opposing race with less than equal respect. Unfortunately, as the law school then chose to admit De Funis, the court did not decide the issue. Dworkin believes that this case presents a distinction between equality as a policy and equality as a right. De Funis does not have a right to equal treatment in the allocation of law school places, because not everyone has an equal right to legal education. He does have a right to treatment as an equal when the university is deciding its admission standards. "That is, he has a right that his interests be treated as fully and sympathetically as the interests of any others when the law school decides whether to count race as a pertinent criterion for admission."[84]

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[81] The reader is referred to 1.6.7. where Dworkin denies that equality of respect can be justified on utilitarian grounds.

[82] Montgomery, Jonathan (1992) "Legislating for a Multi-Faith Society: Some Problems of Special Treatment" in B. Hepple & E. Szyszczak (Eds.), *Discrimination: The Limits of Law* pp193-213 (London, Mansell); Poulter, Sebastian (1992) "The Limits of Legal, Cultural and Religious Pluralism" in B. Hepple & E. Szyszczak (Eds.), *Discrimination: The Limits of Law* p172, 186 (London, Mansell)

[83] *De Funis* v *Odegard* 416 U.S. 312 (1974)

[84] Dworkin, Ronald (1977) Op. cit., p227

In *Regents of the University of California* v *Allan Bakke* the court held that race could be used as one of a number of criteria of admission.[85] A medical school reserved 16% of its places for minority students. The quota did not vary according to the ability of the minority applicants. Bakke, a white applicant, was denied a place. Could Bakke claim that the use of the criterion of race in admissions denied him equality of respect?

If it is unjust to use racial distinctions there must be a flaw in making the distinctions as such and not just because the distinction works against a group that is currently in favour.[86] Singer argues that a university has the discretion to decide its own criteria for admission provided that they are applied impartially. The use of intelligence as a criterion of admission is not generally contested. Yet if a university uses intelligence as a criterion it is not because it is in the students' greater interest, nor is it because higher intelligence carries with it an intrinsic right to be admitted, it is because the university favours goals which will be promoted by the admission procedure.[87] The reason why reverse discrimination seems unusual is that it is the new policy, whereas an intelligence criterion was the old policy. Since no-one has a right to be admitted, equality of respect is not violated provided that the chosen criteria are applied impartially and the criteria support reasonable goals. One might argue that the use of race cannot support reasonable goals. Dworkin argues that it can be justified on ideal grounds of desiring a more equal society, but not on mere utilitarian arguments. Programmes which discriminate against blacks are based on utilitarian arguments. Hence, equality of respect cannot be achieved. Programmes which discriminate in favour of blacks are based on ideal as well as utilitarian considerations. Ideal arguments state that "a more equal society is a better society even if its citizens prefer inequality. That argument does not deny anyone's right to be treated as an equal himself."[88]

Bakke won his case on the facts because the court prohibited the use of quotas. They held that a university could decide how to choose their students and that they were entitled to use race as one factor among others in deciding this. Singer is confident of the moral justifiability of reverse discrimination and he would extend it to the use of

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[85] *Regents of the University of California* v *Allan Bakke* 438 U.S. 265 (1978)
[86] Dworkin, Ronald (1977) Op. cit., p229
[87] Singer, Peter (1979) Op. cit., pp42-44; Dworkin, Ronald (1977) Op. cit., p225
[88] Dworkin, Ronald (1977) Op. cit., p239

quotas. However, the concern is that reverse discrimination will serve only to reinforce stereotypes which state that certain groups will only prosper with special attention.

1.6.8 Formal Equality and Material Equality

Formal equality refers to formal, legal equality before the law.[89] Generally it is formal equality of opportunity which is being discussed. Fullinwider defines it as a situation where, "X and Y have equal opportunity in regard to A so long as neither faces a legal or quasi-legal barrier to achieving A the other does not face."[90] A law shall not prohibit an individual from exercising their talents and their present and future means. Material equality is referred to in various ways; as fair, genuine, real and substantial equality. This type of equality is concerned with equal access to means to achieve one's life plans. Socially created differences in prospects must be eliminated, whereas naturally received abilities will not be equalised.

Criticism has been made that formal equality does not accommodate the differences between people. Does material equality solve this problem? Once one has decided that there are differences between individuals one must decide whether to use formal, equal treatment or different, material treatment. Those erring on the differential treatment side see a further problem. The two concepts are commonly fused to provide an instrumental view of equality - equality as a goal.[91] The idea is that equality before the law will naturally lead to material equality. Within this goal of equality the male norm is paramount, with emphasis on employment, not on other areas of social life such as the family.[92] For women, who are descriptively different to men, this creates a problem. "It leaves women no other possibility than to try to participate in a world shaped by men, without changing it."[93]

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[89] Occasionally it is referred to as procedural equality; Meehan, Elizabeth & Sevenhuijsen, Selma (1991) "Problems in Principles and Policies" in E. Meehan & S. Sevenhuijsen (Eds.), *Equality, Politics and Gender* p1, 2 (London, Sage)

[90] Rosenfeld, Michael (1991) Op. cit., p28 quoting Fullinwider, Robert (1980) Op. cit., p101

[91] Bussemaker, Jet (1991) "Equality, Autonomy and Feminist Politics" in E. Meehan & S. Sevenhuijsen (Eds.), *Equality, Politics and Gender* p52, 57-58 (London, Sage)

[92] Parvikko, Tuija (1991) "Conceptions of Gender Equality: Similarity and Difference" in E. Meehan & S. Sevenhuijsen (Eds.), *Equality, Politics and Gender* p36, 48 (London, Sage)

[93] Bussemaker, Jet (1991) Op. cit., p58

1.7 A Comparative Analysis of Substantive Equality Ideals

1.7.1 *Birds Eye Walls* v *Roberts* and *James* v *Eastleigh BC*

When assessing legislation or judicial decisions it is necessary to know what precise meaning of equality is involved. Applying different legal standards will result in different legal consequences.[94] In *Birds Eye Walls Ltd* v *Roberts* a company paid a larger bridging pension to male employees than to female employees.[95] It was argued that differential treatment was necessary in order to combat the discriminatory state pension structure. The European Court of Justice (ECJ) ruled that there was no unlawful sex discrimination contrary to Article 119 of the Treaty of Rome. It is arguable that the purpose of the employer influenced the ECJ decision.[96] In *James* v *Eastleigh BC* free admission to a swimming pool was only allowed to those who had reached state pension age.[97] Men and women were treated differently because of the discriminatory state pension age. The House of Lords held that this was unlawful sex discrimination, despite the employer's lack of discriminatory intent. Similar facts result in differing case decisions. In *Roberts* there is no sex discrimination, whereas in *James* there is. Fredman believes that the decisions can be understood if one assesses them in terms of equality policies. In *Roberts* there was unequal treatment of men and women. However, if assessment is made on equality of result - that is putting everyone in the same end position - then inequality of treatment disappears to be replaced by equality of result. In *James* the House of Lords required that men and women be treated equally. Requiring equal treatment meant that equality of result was impossible: men under the state pension age would receive a concession which women under the state pension age would not.[98]

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[94] Fredman, Sandra (1994) "Less Equal than Others...Equality and Women's Rights" Paper Delivered at the 1994 WG Hart Legal Workshop on Understanding Human Rights p1, 23-25

[95] *Birds Eye Walls Ltd* v *Roberts* [1994] IRLR 29

[96] A full discussion of the ratio of *Roberts* is given at 7.4.2.

[97] *James* v *Eastleigh BC* [1990] 2 AC 751

[98] Fredman, Sandra (1994) Op. cit., p25

1.7.2 Equality of Opportunity and Equality of Condition

It has been argued that equality of opportunity is dysfunctional because it produces inequalities by placing a high social value on natural abilities.[99] Equality of opportunity suggests that we can all achieve success yet it does not say that all persons are created as equal beings. The promise of equal opportunity leading to equal performance leading to equal reward is alluring. However, reward is allocated by demand. Each society dictates what knowledge and skills are valued. Skills that are often valued are natural talents of no moral significance or acquired skills which have been shaped by social factors. Thus we return to Singer's point that factors such as intelligence give us no intrinsic right to the rewards of the good life. Intelligence is rewarded because it leads to goals such as technological advance and economic growth. Schaar redefines equality of opportunity as being, "equality of opportunity for all to develop those talents which are highly valued by a given people at a given time."[100] Only those who are endowed with the relevant abilities can effectively enjoy equality of opportunity. Naturally gifted individuals receive social recognition of their talents. The combination of natural and social forces serves to reinforce the inequality in a society.[101]

A reply might be made that the premise of equality of opportunity is to allow entry to the race, not to guarantee uniformity of success. Equality of opportunity, says Flew, is the equal chance to compete.[102] Schaar believes the principles give false hope to those not capable of such success. The loser is left to ponder his own lack of ability. The loser could enter another race. Again society dictates how many races there are, and which are the coveted, prestigious races, and which are put there as afterthoughts. Such consolation measures are not helpful to real democratic equality, believes Schaar. "When the fat boy who finishes last in the footrace gets the prize for 'best try' he has lost more than he has won."[103]

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[99] Schaar, John (1971) "Equality of Opportunity and Beyond" in A. de Crespigny & A. Wertheimer (Eds.), *Contemporary Political Theory* pp135-153 (London, Nelson)
[100] Ibid. p137
[101] The reader is also referred to Forbes, Ian (1991) "Equal Opportunity: Radical, Liberal and Conservative Critiques" in E. Meehan & S. Sevenhuijsen (Eds.), *Equality, Politics and Gender* p17, 19 (London, Sage)
[102] Flew, Antony (1981) Op. cit., p111
[103] Schaar, John (1971) Op. cit., p142

Policies promoting equality of condition partly address the criticism of equality of opportunity detailed above. In 1.6.4 equality of condition was defined. For the purposes of this section it is referred to as means-regarding equality of opportunity. Equality of opportunity is referred to as prospect-regarding equality of opportunity; that is the equal chance to compete for scarce resources. Means-regarding equality of opportunity is when each person possesses the same tools for obtaining the scarce good they desire.[104] "While it is possible for equal means and equal prospects to coincide, in many cases, equal means will lead to unequal prospects and equal prospects will require unequal means."[105] For example, if two people desire a good whose appropriation requires physical strength, and one person is stronger, then the other is left with unequal prospects for obtaining that good. The addition of equal means in the form of a strong implement will not help, as the one person still remains the stronger. To achieve equal prospects one has to institute unequal means.

The policy of equal allocation of means has to be delicately treated. If some competitors, despite the equal distribution of certain means, are still left with a weak prospect of success, then equal opportunity is a hollow principle.[106] In the case of disabled people, considerable unequal means will still result in them being disadvantaged. Yet how far can the policy be allowed to go? It is not possible to compensate people for ever and ever. Should self-induced unequal prospects be compensated? An example of this would be an illness caused by smoking. Conversely, how far do you penalise someone who is advantaged? If you raise tax the rich might opt for tax evasion or a tax haven. A diminution in reward for intelligence could lead to a brain drain.

If the policy provides a just and fair procedure to allocate scarce goods, for example jobs, then it is functional. If each job candidate has received an equivalent education, then the competition will be fair. The candidate with the greater natural talents will be selected. The candidates will possess an inequality of prospects. This is necessary for the efficient functioning of job allocation.[107] When equal allocation of means leads to equality of prospects problems arise. If all candidates are equal in the necessary respects

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[104] The reader is referred to Rae, Douglas (1981) Op. cit., for a further definition of these concepts.
[105] Rosenfeld, Michael (1991) Op. cit., p25
[106] Ibid. p27
[107] Ibid. p27

how can a choice be made regarding their appointment? It would be difficult to arrive at this position. To obtain equal prospects from equal means would require a huge redistribution of basic goods. The narrower the definition of basic goods the easier it is to achieve equal means leading to equal prospects. Does basic goods mean income, health and education? Does it extend further to the family environment and even genetic factors? Williams warns that the self will collapse under such interference. "In these circumstances, where everything about a person is controllable, equality of opportunity and absolute equality seem to coincide; and that itself illustrates something about the notion of equality of opportunity."[108] There is a conflict here; trying to give everyone equality of opportunity and locating ability as a central aim actually laughs at the idea of a common, but individuated humanity which is itself an ideal of equality. At this point equality of opportunity reflects contrived equality but denies human difference.

1.7.3 Equality of Opportunity and Equality of Result

It is submitted that there is a distinction between the concepts of equality of opportunity and equality of result. However, critical analysis of the former concept sometimes results in the distinction being collapsed. A useful comparison of equality of result and equality of opportunity is given by Rosenfeld.[109] The former produces an equal distribution of lots. The latter gives each person an opportunity to acquire scarce goods, but it does not predicate equal lots. Rosenfeld uses an illustration of a rescue situation to highlight the effect of different equality policies. If one hundred morally alike people are trapped underground and because of scarce resources only fifty can be rescued, which equality policy should be followed? Equality of treatment and equality of result would require that all one hundred were rescued (which is impossible) or that none were rescued (which appears morally abhorrent). Equality of opportunity based on a lottery system would be a fair system of deciding who was to be rescued. "[E]quality of opportunity may not result in equal treatment, but it does (in the context of the above case) respect every person's right to treatment as an equal."[110]

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[108] Williams, Bernard (1962) Op. cit., pp128-129
[109] Rosenfeld, Michael (1991) Op. cit., pp23-25
[110] Ibid. p24

In attempting to provide a radical conception of how the equal opportunity principle might be transformed, Forbes blurs the distinction between equality of opportunity and equality of result. To provide real equality of opportunity, he says, one must provide the necessary means to achieve equal ends. Forbes is concerned with means-regarding equality of opportunity to produce equal prospects and equal results. His definition of radical equality includes the idea that individual liberty consists of freedom and ability. If ability is lacking, freedom will be reduced. Forbes is collapsing his ideas into equality of result policies instead of working within equality of opportunity.

Levin uses a probability account to explain why the two concepts are different. A competitor's expectation is the sum of his or her chances over all jobs. Two individuals have equal opportunity if they share the same expectation. This does not mean that the two individuals will end up in the same position. "[I]ndividuals with probabilistically equal opportunities can end up in quite different positions. They can have the same expectation, even the same curve, yet scale very different heights of success. This is a fact about probability."[111] Does Levin include equality of condition on the axes measuring the probability of getting a job or is this merely confined to the equal chance to compete? It appears that it is the latter. Levin makes an analogy between a competition curve and property rights. Just as no-one has the right to interfere with your property, no-one has the right to interfere with your competition curve. Any policy of penalisation for advantage would be ruled out. Can compensation for disadvantage be allowed? On this model all curves are connected, therefore helping one person will harm another. On this basis he condemns preferential hiring on the basis of sex, as it interferes with competition curves and harms innocent parties.[112] Could one raise a curve if there has been a past injustice? If so, how far can one go back? If there is a claim of injustice it must be empirically investigated, before reforming policies are initiated. The disadvantaged group, it would seem, have the burden of proof of showing discrimination, compounded by issues of history. Levin recognises the harshness of the approach but he believes, "What is equal amidst all this inequality are the rules for

[111] Levin, Michael (1981) Op. cit., p114
[112] Ibid. pp121-122

securing competition curves on which individuals are perched when they come into the world."[113]

Flew develops the work of Williams to propose that equality of opportunity and equality of result are incompatible. If one uses a strong version of equality of opportunity (that is, including equality of condition) people will eventually be completely equal. Williams notes that at this point equality of opportunity coincides with absolute equality. Flew describes absolute equality as equality of result. Williams has unwittingly collapsed the concepts. If outcomes are the same for all we no longer have equal opportunity because there is no incentive to compete and there are no scarce opportunities to compete for.[114] Flew dislikes Williams' contempt for competitive advantage and his reduction of the individual to a ghostly figure with no identity of its own. Surely we have to work with the actual individuals who are involved in the competition. It is to real world conditions that Flew turns when he offers a cynical view of why it is useful to subsume equality of result within equality of opportunity. The lure of money and social status attracts individuals to the notion of equality of opportunity. Less attractive is the notion of a reward on a level scale with everyone else. He quotes Confucius, "It is not easy to find a man who has studied for three years without aiming at pay."[115]

This Chapter has analysed the meaning of equality. However, the theoretical framework is far from complete. The opposite of equality is difference. In recent years feminist jurisprudence has turned the focus away from ideas of equality to ideas of difference. In Chapter Two the concept of difference as it relates to sex discrimination law is examined.

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[113] Ibid. p121
[114] Flew, Antony (1981) Op. cit., p113
[115] Ibid. p49 quoting Confucius, *Analects* VIII, Section 2

Chapter Two

Difference: A Philosophical Analysis

For two thousand years of Church history sexual difference prevented women from becoming Church of England priests. Sex difference was an essential categorical feature in the theology which prohibited women priests. The Synod vote, allowing women priests, effectively says that sex difference is usually no longer a defining feature of a priest. Hence male and female priests are equal as priests. However, there is still the possibility that in some posts and parishes sex difference will remain an essential characteristic. In this case women's difference is used to their disadvantage.

It is interesting to note that the traditional stereotypes of male and female roles which have hindered women in certain areas of employment have previously been unable to help women as regards the priesthood. For example, the priesthood is a sacrificial ministry which involves skills often associated with women such as care and empathy. Yet the priesthood remained exclusive to men for so long. At the Synod debate the skills women would bring to the profession were noted as a positive contribution. Now that the profession is mixed it will be interesting to see whether women priests, once in post, are treated as equal to male priests or whether their sex difference results in differential treatment.

2.1 The Equality-Difference Debate

The equality-difference debate has dominated sex discrimination literature in recent years. Are men and women equal or are they different? "When equality and difference are paired dichotomously, they structure an impossible choice. If one opts for equality, one is forced to accept the notion that difference is antithetical to it. If one opts for difference, one admits that equality is unattainable."[1] The two concepts are often

[1] Pateman, Carole (1992) "Equality, Difference, Subordination: the Politics of Motherhood and Women's Citizenship" in G. Bock & S. James (Eds.), *Beyond Equality and Difference. Citizenship, Feminist Politics and Female Subjectivity* p17 (London, Routledge) quoting Scott, J.W. (1988) *Gender and the Politics of History* p172 (New York, Columbia University Press)

compared as irreconcilable ideas. As detailed in Chapter One, equality is a difficult concept to define. Similar problems occur when one examines difference.

If equality is taken to mean equal treatment of men and women before the law (as it often is in this debate) one must ask how equal treatment is defined. The usual criticism is that equal treatment is defined in male terms. Under the mask of a universal, neutral subject is in fact the male subject. "In Western political thought the self-evident and privileged parameter of human action is man. At the same time the sexual difference of woman is made insignificant....A woman finds herself with the destiny of Sisyphus. She can try to become similar to men but the result of this effort can never be perfect."[2] If female difference is taken as the dominant concept, this can itself lead to the subordination of women. Difference can be used to justify the relegation of women to the domestic sphere and into economic dependence.[3] Women's exclusion from the labour market, especially from certain types of jobs, can be legitimised.

There are dangers in the division of equality and difference. Writers promoting equality have concentrated on women as employees. Writers prioritising difference have concentrated on women as mothers. Phillips notes that as many women are in reality workers and mothers, the division between equality and difference may not be a wise one.[4] Perhaps a more useful approach is to examine men and women's personal autonomy.[5] How can men and women become autonomous citizens? Is this achieved by being treated the same as one another or is different treatment required? Is it necessary to include both policies in anti-discrimination legislation? Is it possible to define once and for all the situations of equality and difference or should a more flexible approach, responding to cultural changes, be taken? Although this returns the problem to the equality-difference debate it focuses on the wider goal of securing autonomy for men and women. Finally, the theorists who criticise the focus on equality versus difference,

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[2] Parvikko, Tuija (1991) Op. cit., pp36-37

[3] Alexander, Sally (1987) "Women, Class and Sexual Difference" in A. Phillips (Ed.), *Feminism and Equality* p160, 166 (Oxford, Basil Blackwell)

[4] Phillips, Anne (1987) "Introduction" in A. Phillips (Ed.), *Feminism and Equality* p1, 20 (Oxford, Basil Blackwell)

[5] Meehan, Elizabeth & Sevenhuijsen, Selma (1991) Op. cit., p1; Collins, Evelyn & Meehan, Elizabeth (1994) "Women's Rights in Employment and Related Areas" in C. McCrudden & G. Chambers (Eds.), *Individual Rights and the Law in Britain* p363, 407 (Oxford, Clarendon Press)

and who instead create models based on sexual disadvantage not sexual difference, will be examined.

2.2 Philosophical Foundations of Difference

Having examined the philosophical framework of equality the focus now turns to the foundations of difference. Philosophers have pointed to the difference between men and women, and certain accounts are misogynistic. In some theories the position of women is integral to the rest of the theory, whereas in others the inferior position of women could be removed to leave the grand theory intact.[6]

2.2.1 Aristotle and the Issue of Difference

Aristotle believed in natural and historical differences between individuals. These differences were represented in a hierarchical political order. He drew a division between the political sphere and the private sphere of the household.[7] The Aristotelian self was a free, adult, male endowed with rationality. Those who did not conform to this model such as women, slaves and adolescent males were regarded as different and inferior. Each of these groups were seen to lack rationality. Adult males were regarded as equal to one another in the sense that they were equally free. Males were unequal amongst themselves regarding, "wealth, virtue or nobility."[8] Women remained in the private sphere, tending to the family which gave the man the opportunity to pursue the highest goal; political life. Aristotle's philosophical theory regarding the ruling classes needed women to be subordinate to men in order to free men for political life.[9]

2.2.2 Natural Rights and the Issue of Difference

Not until the seventeenth century, and the natural rights theories of Locke and Kant, was the Aristotelian model challenged. Natural rights theorists believed that all individuals

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[6] Grimshaw, Jean (1986) *Feminist Philosophers* p37 (London, Harvester Wheatsheaf)
[7] Cavarero, Adriana (1992) "Equality and Sexual Difference: Amnesia in Political Thought" in G. Bock & S. James (Eds.), *Beyond Equality and Difference. Citizenship, Feminist Politics and Female Subjectivity* p32 (London, Routledge)
[8] Ibid. p33
[9] Grimshaw, Jean (1986) Op. cit., p49

are equal by nature and therefore everyone holds the same rights and powers. The Aristotelian hierarchical model based on difference was purported to be illegitimate. It would appear logical to abandon sexual difference at this point. Yet Cavarero argues that there were two levels at which women were excluded from theory.

At an elementary level, women simply do not feature in state of nature theories, men are the only visible characters. Women are not purposely excluded, they are forgotten. At a complex level the idea of a male as a universal being is presented. This is a legacy of Greek philosophy preserved through history. Both Aristotle and Plato make a connection, "between 'man', understood as the human species in general, and 'male', which was to pass into most Western languages as the universalization of the male."[10] Instead of excluding women, at this level women are included by bringing them within the male paradigm. To be equal women must abide by the male paradigm. On this view a universal paradigm and a male paradigm are not separate concepts. The male subject has become the universal paradigm. There is no true universal, neutral paradigm, only one corrupted and infected by male values.

2.2.3 Human Nature

Depending upon which description of human nature is followed, arguments fall into the equality-difference debate. Four versions of human nature have been identified; universal human nature, universal male and female nature, concrete human nature and concrete male and female nature. Details of their defining characteristics are summarised in Table 1. It is the first and the last which are often pitted against one another. The universal camp state that there are fixed characteristics which can be found for all humans, or for males and females separately. The concrete camp believes that human nature, or separate male and female natures, are shaped by social and historical circumstances and are not fixed categories.

[10] Cavarero, Adriana (1992) Op. cit., p37

(1) Universal Human Nature	(3) Concrete Human Nature
Abstract principles make all human beings morally equal.	Historical and social circumstances shape human nature. Male and female seen as equal.
(2) Universal Male/Female Nature	**(4) Concrete Male/Female Nature**
Abstract principles make male and females morally different.	Historical and social circumstances have defined male and female difference.

Table 1 *Philosophical Models of Human Nature*

On the first view men and women, being human beings, all share universal human rights. Differences between the sexes, beyond biological differences, do not affect human identity as they are "merely" social and historical. "On this view, being a woman is an accidental, and neither a universal property of being human, since one may be human and not female....women as such cannot constitute a philosophical notion or category."[11] This is the traditional liberal legalist view.

The second view supported by relational feminism is that there is not a universal human nature, but that there are essential male and female natures. The woman question becomes a philosophical one as sex difference is viewed as essential, as categorical. Many feminists believe that universal human nature is constructed as male nature. Universal principles have been formulated using characteristics associated with maleness, whilst ignoring female values. Women have been viewed as incapable of achieving full human excellence.[12] Even if there is an essential female nature it can be used to the woman's detriment. Concentration on fixed characteristics can lead to stereotypical views of women as childbearers and men as participants in the public world.

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[11] Gould, Carol (1980) "The Woman Question: Philosophy of Liberation and the Liberation of Philosophy" in C. Gould & M. Wartofsky (Eds.), *Women and Philosophy* p5, 7 (New York, Perigee Books)

[12] Kant, Immanuel, *Observations on the Feeling of the Beautiful and Sublime*, J. Goldthwaite trans. (1965) (Berkeley, University of California Press)

The dissatisfaction with abstract principles led commentators to look at concrete situations. How do people develop in the social world? The third view holds that human nature is shaped by social, historical and cultural factors. This is an appealing notion as it allows for changes. The problem with this construction, Grimshaw says, is that if society shapes human nature why do we have discrimination and injustice?[13] But could this not be attributable to an evolving human nature which has not yet reached its peak of morality? It is in the nature of things that evil will exist and with it injustice and immorality. Civilisation does not conquer all it surveys, but this does not stop it trying and improving on its record.

The final argument is that male and female nature respectively has been shaped by social relationships. It is because of the gendering of men and women into certain roles that differences have appeared. The construction and then misuse of difference has led to the subordination of women. Feminists who use this strand of thought deny the idea of an essential woman. The problem with this approach is that there are no parameters left. The characteristics and problems of women may become so unmanageable and subjective that the risk is that they will be struck off the political agenda.

2.3 Should Men and Women try to be Equal?

The demand for equality requires that the two individuals under observation be essentially similar. Liberal natural rights theories recognised that individuals were different but argued that individuals did share an essential sameness, which could, in the public sphere, overcome natural differences. Liberal theorists conceived of a social contract made between equal individuals in which power would be transferred to a central government. It was a hypothetical contract which assumed that individuals were free, equal and moral. The self represented in the hypothetical contract was supposedly a universal gender-neutral being. It can be argued that the self was in fact a white, western male.[14] An agent in a social contract was required to be rational. The criticism of

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[13] Grimshaw, Jean (1986) Op. cit., p110

[14] Meehan, Elizabeth & Sevenhuijsen, Selma (1991) Op. cit., p6; Flax, Jane (1992) "Beyond Equality: Gender, Justice and Difference" in G. Bock & S. James (Eds.), *Beyond Equality and Difference. Citizenship, Feminist Politics and Female Subjectivity* p193, 196 (London, Routledge)

women's ability to reason by philosophers such as Aristotle and Kant had excluded women from participation in philosophical theories. However, the liberal feminist Mary Wollstonecraft believed that both men and women were rational. In fact reason was the most important human characteristic, sex and gender were accidental features and of no consequence to becoming fully human. Pateman believes that the constructs of emotion versus reason, body versus mind, nature versus culture, which underpin the contractual model must be deconstructed before any progress can be made.[15]

One way for women to be equal to men is to be assimilated into the public sphere. The idea is that men and women are essentially similar. To achieve equality women must be treated in the same way as men. This would not require great policy alterations, other than the removal of irrational prejudices. On this instrumental view of equality, equality is seen as a goal. Equal treatment of men and women will lead to equality of result. Here autonomy is represented by rational individuals who participate in the labour market. The child care responsibilities of employees are to be arranged outside the labour market.[16] The assumption is that autonomy can only be achieved through paid employment. It is argued that women are only included in the public sphere by asking them to conform to a male standard. "Yet if women must cease being feminine to be citizens, to speak of women's political emancipation would be an oxymoron since we must eliminate our 'difference' before entering the public world."[17] Legislation which aims to subjugate women into the male paradigm is not a benevolent gesture it is a manipulative form of power. Such "equality" threatens to destroy sexual difference. Women will not be free until they abandon the enveloping nature of the male norm.[18]

Before the practical application of assimilationist policies is discussed, another method which sees men and women symmetrically situated will be briefly mentioned. Androgyny suggests that men and women could be alike if social institutions picked out a norm, or norms, located between the sexes and then based the treatment of both sexes on this norm. The practicality of this would be onerous. "In order to be truly

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[15] Pateman, Carole (1987) "Feminist Critiques of the Public/Private Dichotomy" in A. Phillips (Ed.), *Feminism and Equality* p103, 112 (Oxford, Basil Blackwell)
[16] Fredman, Sandra & Szyszczak, Erika (1992) Op. cit., p220
[17] Flax, Jane (1992) Op. cit., pp194-195
[18] Cavarero, Adriana (1992) Op. cit., pp39-40

androgynous within a symmetrical framework, social institutions must find a single norm that works equally well for all gendered characteristics."[19]

British and American feminists in the 1960's emphasised the similarity of men and women in order to benefit from formal equality policies. Contemporary feminists see equality policies as problematic. Under the direct discrimination provisions of the Sex Discrimination Act a woman may not be less favourably treated than a similarly situated man. An actual male comparator is not necessary. Detrimental treatment is measured by comparison with treatment that a hypothetical man would receive. Fredman believes that women's rights under the Act are limited because of the presence of the male norm. The Act "is based on the assumption that gender can be simply subtracted from both sides of the equation, leaving two similarly situated individuals."[20] In reality she believes that an individual's experiences are affected by their gender. The values placed on paid labour market work and unpaid family work serve to glorify the public, male world and downgrade the private, female realm. A sharp division is made between the public and the private, rather than any attempt to integrate the two. For example, many employment rights require full-time continuous employment. Women who want to work must find a way of separating private from public. Fredman believes that a re-assessment of the value of family work is the only way to progress in this debate.

Complainants must come within the legislation. They must conform to the "normal" standard. They are in no position to criticise that standard.[21] "Legal equality analysis 'runs out' when it encounters 'real' difference, and only becomes available if and when the difference is analogized to some experience men can have too."[22] Difference, is viewed by legal equality as natural within the woman and not shaped by social and cultural factors. Critical legal theorists, along with many feminists, are challenging liberal legal norms. Instead of supplying universality and objectivity such norms are regarded as supplying bias towards certain groups and interests. Lacey suggests a

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[19] Grimshaw, Jean (1986) Op. cit., p113. The reader is also referred to Elshtain, Jean Bethke (1987) "Against Androgyny" in A. Phillips (Ed.), *Feminism and Equality* pp139-159 (Oxford, Basil Blackwell)

[20] Fredman, Sandra (1994) Op. cit., p2

[21] Lacey, Nicola (1992) "From Individual to Group?" in B. Hepple & E. Szyszczak (Eds.), *Discrimination: The Limits of Law* p99, 104 (London, Mansell)

[22] Littleton, Christine (1993) "Reconstructing Sexual Equality" in P. Smith (Ed.), *Feminist Jurisprudence* p110, 119 (Oxford, Oxford University Press)

working solution to the problematic male norm. If one steps away from the individual legal subject and instead focuses on group claims, there is a greater chance that women, blacks and ethnic groups will be recognised.[23] Her belief is that the concern of equality has focused too much on the individual and not enough on the group.

2.4 Should Men and Women try to be Different?

If genuine equality is not achieved by equal treatment can it be achieved by recognising differences between men and women? How should differences be incorporated into public policy? Should there be preferential treatment for women? Would such a policy play into the hands of assimilationists who use female difference as an obstacle to participation in the public sphere? Should female values stand side by side with male values in society? Some writers advocate this, whilst others deny the need for two sets of values in society. Can man or woman be essentially defined? If not are similarities and differences culturally relative? If so, flexible legislation will be necessary so as to provide space for diverse male and female identities. Is there a position between these two absolutist poles, where difference can be recognised, though not confined to an absolute male or female identity?

What policies can be formulated using difference? First, an accommodation model demands the differential treatment of biological differences. Women are to be given special treatment so that they can be like men, for example, maternity leave followed by the opportunity to return to work. However, social differences, such as skills, ought to be compared under an equal treatment model. At the other pole, an empowerment model eschews the relevance of difference, viewing it as a social construct that subordinates women. Instead of celebrating difference, the practices of domination should be removed.[24] Between these positions lies the seemingly moderate ground of women's values.

The idea that women possess different values and talents to men is a popular one. Women's experience with regard to pregnancy and childbirth is unique. Would the

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[23] Lacey, Nicola (1992) Op. cit., p108
[24] Littleton, Christine (1993) Op. cit., pp113-116

creation of a female norm be helpful in the present debate? There are two different perspectives that this norm could reflect. It is submitted that either in isolation will marginalise the women's movement. First, there is the idea of woman as the victim of man's oppression who is now seeking liberation. Secondly, there is the description of woman with different talents to man. This involves a deconstruction of the dominant values in society. To describe women as victims ignores the talents and values which they possess. Yet these talents and values have been partly shaped by the social environment. Additionally, women encounter very different experiences to one another which makes it difficult to construct one female norm.

There has been a backlash to the equality-difference debate. Even if women are different to men, why is it that the male norm is paramount? To argue that because women are different they require special treatment is to present normal treatment as a male standard.[25] As a reaction to this Spender modelled a woman-centred culture which asserted female values over and against male values.[26] Running away from men will not help women. A female norm of this type will serve to promote women's values at the expense of men's. It is not a credible alternative.

The work of Carol Gilligan has received more support.[27] Working within the area of relational feminism she analyses the different ethical approaches that men and women take due to their psychological development. Her empirical research found that girls tended to discuss moral problems by looking at the whole issue and the rest of their experience; she labelled this an ethic of care. Boys tried to discover the essence of the problem and worked from abstract principles taking a rights based approach. Gilligan believes that female values should be re-assessed and incorporated into society as public values. The appeal of her work is the recognition that women must be involved in the public world, they must co-operate with men and not hide away from them. The opportunities for a political commitment to feminism are far greater on this model.

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[25] Smith, Patricia (1993) "Introduction: Feminist Jurisprudence and the Nature of Law" in P. Smith (Ed.), *Feminist Jurisprudence* p3, 8 (Oxford, Oxford University Press)

[26] Spender, Dale (1982) *Women of Ideas (And What Men Have Done to Them)* (London, Routledge & Kegan Paul)

[27] Gilligan, Carol (1982) *In a Different Voice: Women's Conception of Self and Morality* (Cambridge, MA, Harvard University Press)

Feminists have appropriated this concrete model. Scales believes that the abstract model should be abandoned to be replaced by the concrete approach. She does not believe that the rights-based and care-based approaches are compatible. Her fear is that the rights based model would devour the ethic of care model. Her argument is that it is better to use a model which incorporates many viewpoints rather than one which invites no disagreement. Is this not just another way of describing democratic decision making, but this time with a feminist slant? Feminists encounter problems when they seek to pursue the relational model as being better than the rights model, rather than trying to reconcile or incorporate the two. For example, Scales' description of why we prefer it is vague; "because only it describes how we as language users actually and responsibly perform according to truly meaningful criteria."[28]

There are difficulties with the description of a female norm. The woman can be idealised, whilst the man is seen as a repressive force. It can situate the woman in a vacuum, where she is consumed by female experiences such as childbirth, and hidden from the public world. By emphasising female values of altruism and compassion and male values of intellect and reason we return once more to the fixed liberal ideas of body versus mind, nature versus culture and emotion versus reason. Historically, these dichotomies have restricted opportunities for women.[29] By saying that men should develop their feminine characteristics and women their male ones leaves uncriticised the initial classification of characteristics into male and female.[30] There is the point that it is difficult to include women in philosophical models as they are often defined in opposition to what is male. "What is female has been defined as what is excluded from maleness, what is in opposition to it, what is complementary to it, what 'fills the gaps' in male life or consciousness."[31] Rhode questions how different is women's "different" voice? Are women really bound together by these specific values? How do factors such as race, class, age and culture affect female values?[32] We return to the question; is there an essential woman or is there a pluralism of identities? How can one conceptualise

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[28] Scales, Ann (1993) "The Emergence of Feminist Jurisprudence: An Essay" in P. Smith (Ed.), *Feminist Jurisprudence* p94, 100 (Oxford, Oxford University Press)
[29] Rhode, Deborah (1992) "The Politics of Paradigms: Gender Difference and Gender Disadvantage" in G. Bock & S. James (Eds.), *Beyond Equality and Difference. Citizenship, Feminist Politics and Female Subjectivity* p149, 157 (London, Routledge)
[30] Grimshaw, Jean (1986) Op. cit., pp47-48
[31] Ibid. p73
[32] Rhode, Deborah (1992) Op. cit., p157

female qualities initially? How should this female norm be incorporated into society: as a separate female norm, by integration with the male norm, or should difference be abandoned to be replaced by a political concept such as justice or disadvantage?

2.5 The Public-Private Debate

Neatly intertwined with the equality-difference debate is the public-private debate. The liberal theory of the state divides activities into public, political activities and private, personal ones. The public sphere of the state is separate and independent from the private sphere. The government is fully concerned with public affairs, but is unwilling to intervene in private matters. In the private sphere distinctions of sex, race and class exist. In the public realm people are undifferentiated, they are citizens, the bearers of rights. Over the last two centuries advances have been made to remove as many contingencies from the public world of work. Measures such as property rights and discrimination law have promoted this end.[33]

Depending upon their political ideologies, feminists have either accepted or questioned the public-private divide. Liberal feminists who support equal rights are less likely to question the public-private divide. Secondly, the view of Elshtain is that the division is a necessary one, but that the public sphere has failed to appreciate female values. Her concern is not so much that the division prevents women's participation in public life but that it fails to recognise female values.[34] Thirdly, the view of Pateman is that public and private life should be interconnected and not kept separate. Finally, radical feminists view the personal as political.[35] This is the idea that our private lives are controlled and affected by social forces. "Where law has the capacity to intervene, the decision not to do so is itself a political decision: omission, feminism argues, calls for justification as much as does intervention, for it effectively legitimizes the status quo."[36]

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[33] Wolff, Robert Paul (1980) "There's Nobody here but us Persons" in C. Gould & M. Wartofsky (Eds.), *Women and Philosophy* p128, 134 (New York, Perigee Books)
[34] Phillips, Anne (1987) Op. cit., p17
[35] Millet, Kate (1971) *Sexual Politics* (New York, Abacus)
[36] Lacey, Nicola (1992) Op. cit., p108

2.5.1 Liberalism and the Public-Private Divide

The liberal basis for the separation of public and private can be traced back to Locke.[37] In the public sphere, Locke stated that, political power could be exercised over free and equal adult individuals. In the private sphere, paternal power could be exercised over children. The husband's rule over his wife was taken for granted. Women were not awarded the status of the individual and were excluded from public life. Behind this lay the patriarchal idea that the division of public and private was due to the natural characteristics of men and women. "Patriarchalism rests on the appeal to nature and to the claim that women's natural function of childbearing prescribes their domestic and subordinate place in the order of things."[38]

2.5.2 Problems with Liberalism

Some feminists argue that instead of a universal egalitarian model, liberalism presents a patriarchal structure dominated by the male citizen. Women are not included in political life because they lack the characteristics necessary for political citizenship. Because of this, female difference is not included in the political sphere. The paradoxical relationship between liberalism and patriarchalism has remained unnoticed for so long, comments Pateman, because the two spheres are represented as separate but equal. She believes that this hides the fact that women are dominated by men in the public and the private sphere.[39] Historically women were not totally excluded from the public sphere. They had the political function of childbearing. Women were included because of their different sex and their different function. Hence we return full circle to the equality-difference debate. "The debate therefore continues to oscillate between 'difference' (maternal thinking should be valued and brought into the political arena) and 'equality' (citizenship not motherhood is vital for feminists)."[40] The dilemma for women, she argues, is that motherhood is not viewed as a duty of citizens. To bring women within the political arena, we should not focus on whether difference is politically relevant.

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[37] Locke, John, *Second Treatise of Government*
[38] Pateman, Carole (1987) Op. cit., p109
[39] Ibid. p105
[40] Pateman, Carole (1992) Op. cit., p21

Rather, the way that women have been incorporated into the political model should be analysed in order to reformulate the equality-difference debate.[41]

A further paradox is at work here. Whilst many decry sex discrimination, they also abhor the anonymity of capitalist work structures. The debate returns to human nature; are we free or are we conditioned? If abstract principles are relied upon the individuality of the person is eradicated. "To ignore the sex, race, age, culture, religion, or personality of a person when hiring, or paying, or electing, or admitting that person is to accept the public private split, and to shove into the private sphere out of sight and out of consideration, everything that makes a person a human being and not merely a rational agent."[42] However, if we allow a conditioned view of human nature we may return to the injustices of the past.

2.6 Solutions to the Public-Private Debate

2.6.1 The Personal is Political

Is there any solution to the equality-difference and public-private debate? Radical feminists using the slogan, "the personal is political" believe a way can be found. They believe that private structures are governed by the public realm. To resolve problems in the private sphere political action must be taken. For example, Kate Millet in "*Sexual Politics*" regards all power as political. The exercise of male power in the private sphere becomes a political matter, a matter that the state has a duty to intervene in.

2.6.2 Pateman's Solution

To state that women are now fully included in the political sphere, via the universalisation of liberal principles, cannot be the answer. It ignores male domination within private life. "[T]he spheres are integrally related and that women's full and equal membership in public life is impossible without changes in the domestic sphere."[43]

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[41] Ibid. p27
[42] Wolff, Robert Paul (1980) Op. cit., p136
[43] Pateman, Carole (1987) Op. cit., p115

Pateman is not saying that the personal is political, but rather that the two spheres are interrelated. The relationship that men and women have between personal and political life ought to be examined. The two realms are distinct, but they should not be set in opposition to one another. The real issue is women's subordination not their difference. Pateman's vision is a democratic citizenship in which men and women are equal citizens who possess an equal worth of citizenship. For women to be free the definition of sexual difference as subordination must be abandoned. "This does not mean that all citizens must become (like) men or that all women must be treated in the same way....for citizenship to be of equal worth, the substance of equality must differ according to the diverse circumstances and capacities of citizens, men and women."[44]

2.7 New Perspectives: A Departure from the Equality-Difference Debate

The seemingly irreconcilable equality-difference debate has forced writers to look for other means to produce genuine equality. Gradually writers have moved away from the idea of women's inequality; that women do not receive the same as men, to ideas of oppression and subordination. Phillips defines oppression as, "a complex of ideological, political and economic forces that combine to keep women in their place."[45] Subordination is the next stage on. This is where men are identified as the cause of women's oppression. How the concepts of disadvantage and domination are used to promote equality will now be examined.

The constant scrutiny of characteristics into male or female is a tortuous, if not ridiculous task. It requires that women must be either the same as men or different to men. The concentration on this dichotomy, believes Fredman, cloaks us from the real issue which is women's disadvantage.[46] Lacey believes that British legislation is far too concerned with sexual and racial difference to the effect that the disadvantage of women and ethnic groups is ignored.[47] It is often the case that, because of past discrimination, minority groups are not at an equal starting point. Formal, legal equality will not remedy this position. Fredman uses the case of *Rainey* v *Greater Glasgow Health Board* to

[44] Pateman, Carole (1992) Op. cit., p29
[45] Phillips, Anne (1987) Op. cit., p1
[46] Fredman, Sandra (1994) Op. cit., p4
[47] Lacey, Nicola (1992) Op. cit., p104

illustrate how the use of disadvantage might have produced a more useful result.[48] The case was brought under the Equal Pay Act 1970. Unequal pay is justified if it is due to a genuine material factor other than the sex of the worker. There must be an objective purpose for differential pay levels. The unequal pay must achieve that objective purpose. In *Rainey* new entrants to a NHS department were paid more than existing employees. The new employees were all male, whilst the existing employees were mainly female. The employers, using the genuine material factor defence, submitted that market forces required them to pay the new entrants a higher wage in order to attract them to the department. The House of Lords accepted this argument. The defence covered objectively justified grounds for women being paid less. Fredman believes that the use of disadvantage would have prompted an assessment of why existing and new employees were segregated by gender.[49] This was not a relevant question under the present legislation.

Rhode also uses the disadvantage framework. She creates a disadvantage model which constructively uses sex/gender difference. She goes further than Fredman and Lacey in her construction of how disadvantage should positively work in a legal framework. Additionally, she does not pit disadvantage against difference as a conceptual tool. Rather she uses difference and disadvantage in collaboration. Her model starts with the assumption that men and women are not fairly situated. An analysis is made of the effect that legal recognition of sexual difference would have. Is it more likely to reduce or increase sexual inequality? The model is committed to gender equality via a recognition that women ought not be disadvantaged as a group. "[I]n employment settings, the issue becomes not whether gender is relevant to the job as currently structured, but how the workplace can be restructured to make gender less relevant."[50] The equality-difference debate cannot be solved, but at least in this new perspective, difference is not seen as a stumbling block to genuine equality.

Littleton believes that equality can be reconstructed to counter the negative emphasis which has resulted from sex difference. Her concern is not the source of differences but

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[48] *Rainey* v *Greater Glasgow Health Board* [1987] IRLR 26
[49] Fredman, Sandra (1994) Op. cit., p17
[50] Rhode, Deborah (1992) Op. cit., p155

the consequences of difference. Difference, whether real or assumed, should not make a difference to the equality of people's lives. Littleton labels this "equality as acceptance".[51] Equality should apply across differences that are gendered complements. Therefore, an analysis of the valuation of skills would be necessary. As a policy option she suggests that, "women and men who opt for socially female occupations, such as child rearing, be compensated at a rate similar to those women and men who opt for socially male occupations, such as legal practice."[52] As a policy, occupations should be restructured to allow equal access to those whose inclinations are culturally conditioned as male or female. The long run implications should be that socially male behaviour is no longer seen as more important than socially female behaviour. A further reform would be to attack the public-private divide by introducing private sphere interests into the public world of work, and in consequence the private realm itself would be given greater value.[53]

How does one decide what are gendered complements? Biological differences can be subdivided into areas where there are ranges of differences such as height and areas where there are definite differences such as pregnancy. Additionally, the social female has developed because of men. Should we appropriate this description if we are trying to help women? It is impossible to identify the essential woman, believes Littleton, as one cannot abstract away from male influence. But by reconstructing equality women have a chance to be included in the analysis. Should we be trying to eradicate the male relationship with women anyway? It is submitted that the relationship between men and women should be examined as opposed to removing one from the other.

Supporters of a meritocracy with a hierarchy of valued jobs will deny Littleton's ideas as socialism at its worst. To pay professionals such as lawyers and doctors the same as mothers and nannies is a difficult policy to follow through. The professionals might flee to more hospitable shores where merit is rewarded. Working mothers would never have the financial dilemma again, therefore a possible consequence would be the loss of (say) women lawyers. It would be a smack in the face for those who have devoted years to

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[51] Littleton, Christine (1993) Op. cit., pp111-112
[52] Ibid. p116
[53] Ibid. p126

study (and often financial commitment) to find that they are on a par with (say) a teenage mother at the end of it all.

Like Littleton, MacKinnon is a radical feminist who believes that difference has been constructed in order to oppress women. In her account of male domination she presents women as the victims who are destined to be trampled on by the male norm.[54] There is no promise of free will or self determination. One can feel rather gloomy with statements such as, "For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness," and "women value care because men have valued [women] according to the care [they] give them."[55] Women, according to MacKinnon, have not been free to choose what they want to do. Is it not foreseeable that some of the millions of women world wide might have wanted to care for others, including their husbands, their children and their parents? In Western culture women do have freedom of choice, which means that many do have control over their lives.

MacKinnon focuses on experiences which only women suffer to show how domination is presented as difference. For example, rape, domestic violence and prostitution, happen almost exclusively to women, so they are treated as a sex difference, when in actual fact they are issues of domination. She illustrates the deception; "If gender were merely a question of difference, sex inequality would be a problem of mere sexism, of mistaken differentiation, of inaccurate categorization of individuals....But if gender is an inequality first, constructed as a socially relevant differentiation to keep that inequality in place, then sex inequality questions are questions of systematic dominance."[56] MacKinnon's focus on women's experience of rape and prostitution fails to acknowledge that there are male equivalents that are equally damaging. The phenomenon of male rape is less well documented but it exists as do male prostitutes and the molestation of boys by paedophile gangs. In reply it can be argued that in the main the aggressors are male. Nevertheless, the acknowledgement that males also share

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[54] MacKinnon, Catharine (1994) "Difference and Dominance: On Sex Discrimination" in M.D.A. Freeman (Ed.), *Lloyd's Introduction to Jurisprudence* pp1081-1091 (London, Sweet & Maxwell)
[55] Ibid. p1086
[56] Ibid. p1088

these experiences removes victimhood as the preserve of the female and it indicates that men are not a homogenous class either.

2.8 The Feminist and Postmodernist Critique of Abstraction

The differences between abstract and concrete thinking will be explained and some feminist concrete models will be presented. Feminists and postmodern theorists share common ground when they deny that there is an objective reality. The equality-difference debate becomes irrational in itself as it presents an essentialist view of human nature. MacKinnon describes the use of abstract concepts as a tool to marginalise women. "In the liberal state, the rule of law - neutral, abstract, elevated, pervasive - both institutionalizes the power of men over women and institutionalizes power in its male form."[57] The alternatives suggested are variations of concrete thinking which bring both relational and radical feminists together.

2.8.1 Abstraction

It is submitted that the critique of abstraction is inadequate in its description of what abstraction actually is. There is general agreement that it involves a universal view of human nature. By describing which differences matter and which do not one can evaluate human action. Abstract norms are used to decide whether a society is treating accidental differences as irrelevant or whether discrimination is rife. "It is the abstract universals, and not the differences, which serve as a critical measure for existing social reality."[58] How do we use abstract universals when we make judgments? Grimshaw identifies two different uses of abstract universality. First, we make an abstract moral judgment if we apply to a situation a rule or a principle which will apply to all situations of that sort. Thus one returns to the Aristotelian formula of treating like cases alike. Secondly, an abstract moral judgment is when we make a judgment about a situation without considering what human consequences this might have.[59] Arguably a fault of feminist writings is the conflation of this distinction: the consequence being a vague

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[57] MacKinnon, Catharine (1993) "Toward Feminist Jurisprudence" in P. Smith (Ed.), *Feminist Jurisprudence* p610, 611 (Oxford, Oxford University Press)
[58] Gould, Carol (1980) Op. cit., p10
[59] Grimshaw, Jean (1986) Op. cit., pp204-205

critique of the perils of abstraction and a correspondingly vague solution of concreteness which feeds off the conflation.

2.8.2 Concreteness

Feminists, disliking the result of formal equality policies, have turned their attention to concrete thinking. "Where mainstream equality law is abstract, this approach is concrete; where mainstream equality law is falsely universal, this approach remains specific."[60] Many ideas of concrete thinking flow from Gilligan's work. There is a belief that female thinking is related to the context of the situation. It is argued that contextual thinking should become part of moral thinking in general. This ties in with Gilligan's ethic of care, with stress on the values of empathy and nurturance. There is a critique of the liberal notions of will and choice being central to morality and of the separation of fact and value.[61] As in the description of abstraction, there is a failure to properly define concreteness. Two possible meanings of concreteness can be offered. The first definition focuses on the particularity of a situation, which then must be assessed on that basis. The second definition requires that one experience or empathise with the consequences of a situation, either to oneself or others, and then make a judgment with this information. It is easy to see why the two definitions might become confused or bonded together. The second approach has the danger of being undetached and subjective, making it an impossible model to work with. It is submitted that feminists should try to develop the first approach. It is flexible yet it has potential for being used in a reconstructed legal system.

2.8.3 The Critique of Abstraction

Abstract universality states that sex and gender are accidental properties and are not philosophically relevant. Essential properties must be universal, necessary and unique to that class of subjects or objects. Gould argues that abstract universality does have to consider accidental properties as a philosophical issue. In order to decide which properties are essential the theorist must examine all human properties, which will

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[60] MacKinnon, Catharine (1993) Op. cit., p613
[61] Grimshaw, Jean (1986) Op. cit., p203

include accidental ones. To state that philosophy is only concerned with universal principles and not particularities is a misnomer.[62] The philosophical study of first principles is contaminated with bias, believes Gould. For example, the male bastion of reason does not mean that men will become rulers. It is because men are rulers that reason is described as a male trait. On this reading, characteristics whether accidental or essential, are shaped by social and political forces; they are not the product of a priori knowledge. Reason may well be a universal property, but the hierarchy which places it as a foremost property is socially constructed.[63]

Gould arguably takes the third position on human nature, which she describes as concrete universality.[64] Social and historical circumstances shape a human being's essence. The idea is that universality should include differences. "[T]he criterion of concrete universality is concerned also with human and social differences, and includes them not simply as accidents, but as aspects which constitute the universal or the essence itself."[65] Differences are part of the universal, thus the universal can change over time. Concrete universality views sex difference as a contingency which has developed via the historical and social relationships between men and women. The power of concrete universality is that it can account for the differences which are the causes of discrimination. The abstract model can determine if a universal human right has been violated, but it cannot recognise that discrimination has taken place because of a person's sex or race. Concrete universality is useful because it connects differences to one another and allows for old differences to depart and new differences to enter the model. In order to discover whether women are being subordinated, the actual standard applied will vary according to the situation. "To worry in the abstract about which standard should be applied at what time is to replicate the fallacy of the differences approach."[66]

An omission thus far is how to stipulate concrete reality. MacKinnon attempts to describe this. Initially women's situations must be described. The fact that women

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[62] Gould, Carol (1980) Op. cit., p13
[63] Ibid. pp22-23
[64] The reader is referred back to 2.2.3.
[65] Gould, Carol (1980) Op. cit., p26
[66] Scales, Ann (1993) Op. cit., p103

encounter unequal pay and sex discrimination and that they are exploited as prostitutes and in pornography must be acknowledged. Secondly, male power over women embodied in legislation must be identified and repealed. As an example of a necessary reform, she cites the defence of mistaken belief in consent in the American rape law. MacKinnon argues for substantive rights for women. This approach only serves to replace male law with female law. Law based on a woman's point of view is not neutral. She replies that the existing law is not neutral. Is it just special pleading for women? She replies that the current law is special pleading for men.[67] Is MacKinnon's reasoning process adequate? One feels that feminist jurisprudence has not been advanced by these latter assertions.

Is it correct to make a distinction between abstract and concrete methods? Is it correct to label abstract thinking as male and concrete thinking as female? Is the division meaningful? Even if it is, will it help women or will it backfire and marginalise women yet again? For example, even if women can see the real human consequences of an action better than men (concrete thinking as opposed to an abstract judgment in isolation from human consequences) is it always wise that she should practise this?[68] Employment situations often require employees to engage in abstract judgments in order to remain psychologically healthy themselves. Women are walking a tightrope. For example, women generally are supposed to "care", nurses are supposed to "care", (and many nurses are women) yet a female nurse should not, it is felt, care too much: if she does, her capability as a worker is diminished.

Bartlett argues that it is difficult and less than useful to polarise abstract and concrete methods. She notes that feminist methods require some degree of abstraction to work at all. "Concrete facts have significance only if they represent some generalizable aspect of the case....I abstract whenever I fail to identify every fact about a situation, which, of course, I do always."[69] Additionally feminist practical reasoning uses rationality when

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[67] MacKinnon, Catharine (1993) Op. cit., pp615-618

[68] Grimshaw, Jean (1986) Op. cit., p215

[69] Bartlett, Katherine (1994) "Feminist Legal Methods" in M.D.A. Freeman (Ed.), *Lloyd's Introduction to Jurisprudence* p1115, 1120 (London, Sweet & Maxwell). For the view that the abstract requires the concrete the reader is referred to Gould, Carol (1980) Op. cit.,

analysing common features and differences. It takes the enterprise of rationality further by examining a great variety of Weltanschaungs.

Chapter Three

The Anatomy of the Church of England

In this Chapter the constitutional status of the Church of England and its position as a law-maker will be examined. The principal bodies and officers of the Church will be examined, with particular emphasis being placed upon the parish priest. The formal procedures which surround a priest's "employment" are discussed in detail. This covers appointment, disciplinary action and dismissal.

3.1 Constitutional Position of the Church of England

The Church of England is the established Church in England; meaning that the Church is in a special legal relationship with the state. Phillimore J. described this unique position. "A Church which is established is not thereby made a department of the state. The process of establishment means that the state has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position."[1] A clear explanation of establishment is given by "*Moore's Introduction to English Canon Law*".[2] At one extreme is the USA which does not have an established Church. Instead, there are many types of churches, including the Anglican Church known as the Episcopalian Church. These churches are free associations, whose government is regulated by contract. The state has no cause to interfere, unless the contract contravenes national or state law. At the other extreme is ancient Jewry, where the Church was seen as equal to the state and the state as equal to the Church. "There was no law which was not regarded as divine, and there was no facet of the national religion which was not regarded as part of the law."[3]

The Church of England today nestles between these two extremes. The monarch is the Supreme Governor of the Church of England.[4] The monarch, as head of state and head

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[1] *Marshall* v *Graham Bell* [1907] 2 KB 112 at p126, per Phillimore J.
[2] Moore, E. Garth & Briden, Timothy (1985) *Moore's Introduction to English Canon Law* pp12-16 (London & Oxford, Mowbray)
[3] Ibid. p13
[4] The reader is referred to the preface of the Thirty-Nine Articles of Religion of the Church of England, contained in the *Book of Common Prayer*, 1662

of the Church, has the final decision in law-making, whether secular or ecclesiastical. In practice royal supremacy is exercised by Parliament. As the established Church, the Church of England must conform to limitations placed on it by Parliament. In England there are many other churches, such as the Catholic Church and the Methodist Church, who do not have this relationship with the state because they are not part of the established Church. A disestablished church, such as the Church in Wales, has had state control and patronage withdrawn. It is only within the Church of England that Church officials are state officials and that Church government is part of state government. An established Church must allow the state to have the final say in matters of Church government. Nonconformist churches and disestablished churches do not have this constraint. However, such churches are not totally free from state control. No individual or body can be completely free from secular power. Moore describes this situation: "A Free Church is free only in so far as the supreme secular authority is content to leave it alone, and an Established Church is bound only in so far as the supreme secular authority chooses to exert itself in the Church's affairs."[5]

3.1.1 The Church, the State and the Law

The law of the Church of England has various sources. Parts of the common law cover church matters. For example, the office of incumbent is of common law origin.[6] Two parliamentary sources are Acts of Parliament and statutory instruments.[7] Despite Parliament's continued power to legislate on Church matters, most legislation is now formulated by the General Synod, either by Measure or by Canon.

The Synod may pass a Measure on any Church matter.[8] It has the force of an Act of Parliament and will bind the whole Church of England, clergy and laity alike. In order for a Measure to receive final approval in the General Synod it must receive a majority vote in each of the Synod's three Houses.[9] Certain legislation requires two-thirds

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[5] Moore, E. Garth (1985) Op. cit., p16

[6] For greater detail on this the reader is referred to; The Legal Advisory Commission of the General Synod (1994) *Legal Opinions Concerning the Church of England* p121 (London, Church House Publishing)

[7] An example of the former being the Submission of Clergy Act 1533 and an example of the latter being the Church of England Pensions Regulations 1988, S.I. 1988 No. 2256

[8] Church of England (Assembly) Powers Act 1919 s 3 (6); Synodical Government Measure 1969 s 2 (2)

[9] Synodical Government Measure 1969 Sch 2, Art 5(1)

majorities in each House.[10] An example of this was the Priests (Ordination of Women) Measure 1993. Once it has been given final approval the Measure is passed to the Legislative Committee of the General Synod, who then pass it to the Ecclesiastical Committee with any comments which they deem appropriate. The Ecclesiastical Committee comprises thirty members who represent both Houses of Parliament. They submit a report to Parliament stating the nature and legal effect of the intended Measure and comment upon the constitutional effect of the Measure on the citizen.[11] Once this is complete, Parliament must vote on the legislation. They must either approve it without amendment or reject it. Finally, it must receive the royal assent. Thus the General Synod cannot legislate for the Church without Parliament's approval.

Canons are in part directives for the guidance of the Church in ecclesiastical matters and in part subsidiary legislation made under the direction of the Crown by the General Synod.[12] They do not require the scrutiny of the Legislative or Ecclesiastical Committee or Parliament. Matters of worship and doctrine can be passed by Canon. They are used to make rules regarding the clergy and doctrinal matters. A Canon binds only the clergy and laypersons holding ecclesiastical office, for example churchwardens.[13]

3.2 Church Government

The Church of England is divided into units for ecclesiastical and administrative purposes. There are two provinces, Canterbury and York, each with a separate archbishop. Each province contains dioceses which are governed by a bishop. The dioceses contain parishes which the priest presides over. For administrative purposes several parishes are grouped together into rural deaneries which are overseen by a rural dean. Rural deaneries are grouped together into archdeaconries which are overseen by an archdeacon. For the purposes of this thesis the role of the bishop in his diocese, and the priest in his or her parish will be the most relevant. To provide the foundations for this, the functions of the bishop and the PCC will be examined. As part of the Church

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[10] Ibid. Sch 2, Article 8; Church of England (Miscellaneous Provisions) Measure 1978, s 1
[11] Church of England (Assembly) Powers Act 1919 s 3 (3)
[12] Halsbury's Laws of England, Fourth Edition vol.14 para 308
[13] For a comprehensive list of Canons the reader is referred to; "The Canons of the Church of England" (1993) Fifth Edition (London, Church House Publishing).

government structure the bishop and the PCC are likely to have continuous involvement with the parish priest. Other important parts of Church government are the monarch, the General Synod, diocesan synods and deanery synods. The working conditions of a parish priest will also be influenced by the archdeacon, the rural dean and lay workers. For completeness these will be briefly mentioned.

The monarch, as Supreme Governor of the Church of England, must assent to all legislation concerning the Church. The monarch formally appoints the two archbishops and the bishops. Additionally, the monarch exercises patronage over many benefices. The General Synod was created as the principal ruling body of the Church by the Synodical Government Measure 1969. It must meet at least twice a year to pass Measures and Canons. It has three Houses; the House of Bishops, the House of Clergy and the House of Laity. Diocesan synods must be instituted in each diocese. They comprise three Houses as described regarding the General Synod. The diocesan synod must make provision in its own diocese for matters concerning the Church of England. Another function is the discussion of matters referred to them by the General Synod, especially matters concerning Article 8 of the Church's constitution. Article 8 provides that specified majorities are required in the General Synod before certain legislation can be passed.[14] Deanery synods must be instituted in each deanery. They have two Houses; the House of Clergy and the House of Laity. Deanery synods discuss the problems of parishes in their deanery, and make provision regarding these matters. They may wish to refer a matter to the diocesan synod. A core idea is the bringing together of parish ideas, with the aim of formulating common policies and fostering a sense of community. Can this be done now with the advent of women priests? Deanery synods consider any matters that are before the diocesan synod, especially any matters so referred by the General Synod and sound parochial opinion whenever it is required or it is appropriate to do so.[15]

[14] Synodical Government Measure 1969 Sch 2, Article 8
[15] Ibid. ss 5 (3) (a-e)

3.2.1 Bishops, Archdeacons and Rural Deans

At present only men can become bishops.[16] They are appointed by the monarch, on the advice of the Prime Minister. Each diocese has a standing committee which submits a short list of two candidates in order of priority to the appointments committee of the General Synod, who in turn pass this list to the Prime Minister. The Prime Minister can recommend either name to the monarch, and in exceptional circumstances may ask the standing committee for another name.[17] Generally, the Prime Minister will recommend the first person on the list.

The bishop undertakes the cure of all souls in his diocese. He alone ordains priests and deacons, confirms the baptised and consecrates land and buildings. The bishop appoints priests, rural deans and archdeacons in his own diocese.[18] The diocesan bishop can request that an appointment of a suffragan bishop be made in his diocese. A suffragan bishop is a subsidiary bishop who is appointed to help a diocesan bishop in a particular part of his diocese. In certain dioceses, including London, the diocese is divided into areas. Episcopal oversight of such areas is shared between the diocesan bishop and an area bishop.[19] The diocesan bishop also has complete discretion to appoint a retired bishop as an assistant bishop. The functions of suffragan, area and assistant bishops are similar to those of a diocesan bishop. Importantly, they do not possess the power to pass any of the declarations contained in section 2 of the 1993 Measure. This is reserved for the diocesan bishop.

An archdeacon is an ordained priest. He or she works closely with the bishop. In particular an archdeacon has responsibility, in his or her archdeaconry, for pastoral oversight of the clergy. The archdeacon must monitor any difficulties which a priest is experiencing and if necessary report this to the bishop.[20] A rural dean is appointed by the bishop and the archdeacon and will usually be a beneficed priest in the deanery.[21]

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[16] *Book of Common Prayer*, Preface to Form of Making, Ordaining and Consecrating Bishops, Priests and Deacons; "The Canons of the Church of England" (1993) Op. cit., Canon C2, para 5
[17] Moore, E. Garth (1985) Op. cit., pp19-20
[18] Ibid. p28
[19] Dioceses Measure 1978 s 11
[20] "The Canons of the Church of England" (1993) Op. cit., Canon C22, para 4
[21] Halsbury's Laws of England, Fourth Edition, vol.14 para 524

The rural dean must report to the bishop any problems in the deanery which he or she considers are necessary for the bishop to know.[22] Certain dioceses, including London, use the title area dean to refer to a rural dean.

3.2.2 The Parochial Church Council

Each parish has a PCC. At the annual PCC meeting the new members of the council are elected. All Church of England members resident or worshipping in the parish can attend and vote in new members. Lay members of the PCC must be actual communicants aged sixteen or over. Lay members hold office for one year. At the next meeting they are eligible for re-election. A lay member must retire after three years of holding office. The incumbent of the parish is the PCC chairman. The vice-chairman is a lay person elected by the council. The two churchwardens, if actual communicants, are ex-officio council members. All clerks in Holy Orders beneficed or licensed to the parish are council members. This includes priests in a team or a group ministry and curates. Members of the deanery, diocesan and General Synod, if on the electoral roll of the parish, are ex-officio members. The council may also co-opt clergy or lay members provided that their number does not exceed one-fifth of the number of elected lay representatives or two persons whichever is the greater.[23]

An important power of the PCC is their ability to pass Resolutions A and/or B.[24] In this way a PCC can prevent the appointment of a woman priest in their parish. Whether or not the Resolutions are in place, the parish representatives are involved in the appointment of an incumbent.[25] The parish representatives are generally the churchwardens of a parish, who are in turn usually PCC members. A prospective incumbent cannot be offered the post until approved by the parish representatives.[26] The laity have considerable influence over the appointment of a priest to a parish.

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[22] "The Canons of the Church of England" (1993) Op. cit., Canon C23, para 1

[23] A complete list of qualifications for council membership is to be found in the Synodical Government Measure 1969, Sch 3 - Church Representation Rules, Part II, rr 9, 12, 13, 14. The reader is referred to Moore, E. Garth (1985) Op. cit., p38 and Halsbury's Laws of England, Fourth Edition vol.14 paras 569, 570, 571 for a general discussion of council membership.

[24] Priests (Ordination of Women) Measure 1993 s 3 (1)

[25] This is discussed in detail at 3.3.6.

[26] Patronage (Benefices) Measure 1986 s 13 (1) (b) (i)

3.3 The Parish Priest

The parish priest can mean so many different things that it requires an explanation. Various descriptions of those officiating as a priest in the parish church include; assistant curate, curate, priest-in-charge, vicar, rector, incumbent or minister.

The parish priest is charged with the cure of all souls in his or her parish. "The parish priest is, therefore, rightly called the curate, while his ordained assistants are only, at most, assistant curates, despite the fact that in modern parlance the assistant curate is the person to whom most people refer as the 'curate'."[27] The modern phraseology is adopted in this thesis. The legal position of curates and priests-in-charge will be discussed at 3.4. First, the legal position of the incumbent will be examined. For clarity, the word minister needs definition. It has different meanings according to the context. It is wide enough to apply to a bishop, priest or deacon in the Church of England.[28] It is often used in the context of stipendiary and non-stipendiary ministry.

3.3.1 The Incumbent

The priest who does have considerable legal rights is the incumbent. "The 'incumbent' is, strictly, the clergyman in possession of the benefice, or living; he may be rector or vicar; and he has, under the bishop, the exclusive cure of souls in the benefice."[29] The incumbent is in possession of the freehold, and cannot, therefore, be moved on at will. The incumbent may operate solely or as part of a team or group ministry. In a team ministry there will be one rector and a vicar or vicars. The rector will be the incumbent. The vicar will be given "a status equal to that of an incumbent of a benefice."[30] A vicar in a team ministry has, for their term of years, the same security of tenure as the incumbent of a benefice. A group ministry comes into existence when several benefices are grouped together. An incumbent from one benefice can perform services in other benefices within the group as long as he or she abides by any directions from the

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[27] Moore E. Garth (1985) Op. cit., p35
[28] Halsbury's Laws of England, Fourth Edition, vol.14 para 654 n.1
[29] Dale, Sir William (1989) *The Law of the Parish Church* p17 (London, Butterworths)
[30] Pastoral Measure 1983 s 20 (1)

incumbent of the other benefice.[31] A group minister is not allowed to withdraw completely from group duties without resigning his or her own benefice.[32] A woman incumbent in a group ministry does not have authority to preside at or celebrate the Holy Communion or pronounce the Absolution in a parish which has passed Resolution A and/or B.[33]

Finally, it should be noted that a male incumbent has the opportunity formally to prevent the appointment of a woman priest to his benefice. The incumbent's role as chairman of the PCC means that he can be influential when Resolutions A and/or B are under consideration.[34]

3.3.2 The Benefice

The term benefice is integral to the definition of an incumbent. Before the appointment of an incumbent is discussed the term benefice requires a definition. "A benefice is a freehold office. The holder of a benefice is called the incumbent or minister, according to the nature of his benefice, he is also styled rector (or parson) or vicar."[35] It is the incumbent who is in possession of the benefice. A benefice can be constituted in a number of ways. For example, it might comprise a single benefice with one parish or separate parishes, a single benefice with parishes united into one, a single benefice with some parishes united and others left separate and finally benefices held in plurality.

An incumbent can only be removed from his or her benefice under the Incumbents (Vacation of Benefices) Measure 1977 or if he or she has committed an ecclesiastical offence which warrants the vacation of the benefice.[36] The General Synod instituted a steering committee to consider the abolition of the freehold. The freehold has been criticised for protecting inadequate and inefficient clergy. Arguably it is inappropriate to have two different categories of clergy: freeholders enjoying security of tenure and unbeneficed clergy reliant on the bishop's licence. However, the committee advised the

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[31] Ibid. s 21 (1) (a-c)
[32] Moore, E. Garth (1985) Op. cit., p45
[33] Pastoral Measure 1983 s 21 (1); Priests (Ordination of Women) Measure 1993 Sch 3, para 7
[34] Priests (Ordination of Women) Measure 1993 s 3 (1)
[35] Halsbury's Laws of England, Fourth Edition, vol.14 para 689
[36] The reader is referred to 3.6.1. and 3.6.2.

General Synod not to pursue the issue. It was perceived that such a move would damage clergy morale which was already low following the ordination of women priests and financial difficulties in the Church.[37] Additionally, no consensus had been reached on how to operate changes to the freehold system. First, how should the abolition be introduced; should it be immediate or should existing freeholders retain their rights as long as they remain in that office? Secondly, should abolition apply to all ecclesiastical offices? For example, if it is appropriate to abolish the freehold with regard to incumbents, why not apply it to bishops and archdeacons?

It is arguable that the introduction of women priests has downgraded the status of a priest's office. Just as in other areas of employment, such as the armed forces, the introduction of women is viewed by the profession itself as a devaluation of the job. The identification of social class by occupation has always placed the clergy in the top band. Despite receiving a modest stipend, the clergy have enjoyed a higher status than wealthier employees. Might this change with the introduction of women priests? Was the proposed abolition of the freehold an emanation of this progressive downgrading? The calls for employee status detailed in the next chapter might result in a greater levelling; which is why many clergy might resist secular protection.

3.3.3 Appointment as an Incumbent

Before an incumbent can exercise their ministry in a new post three legal procedures must be complied with; presentation, institution and induction. Only the former will be examined. To be admitted to a benefice, the person must be an ordained priest.[38] If the priest lacks three years experience in Holy Orders the bishop may refuse appointment.[39] The requisite experience in Holy Orders is normally gained by serving a curacy of three or four years.[40] The first year of the curacy is spent as a deacon. After one year the curate is priested and then completes the remaining two or three years of the curacy. This is the usual position for men and it will be for women who have only just entered

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[37] The Guardian, 7th November 1995

[38] Act of Uniformity 1662 s 10; "The Canons of the Church of England" (1993) Op. cit., Canon C10, para 1

[39] Benefices Measure 1972 s 1 (1); "The Canons of the Church of England" (1993) Op. cit., Canon C10, para 3

[40] This is discussed in detail at 3.4.1.

the ministry. However, in this transitional period, whilst there is a glut of experienced women clergy, it is not necessary for these women to serve a full-length curacy provided that they have comparable experience to a male priest with three years experience in Holy Orders. Some women have years of experience as deaconesses dating back to the 1970's and experience as deacons from 1987 onwards. There are even those who have thirty or more years of pastoral experience, who started their vocations as "licensed women workers".

3.3.4 The Patron

Each benefice has a patron. This is often the bishop, or it may be a lay patron. In many benefices the patronage is shared jointly between the bishop and the lay patron. The right of presentation to a living, the advowson, is held by the patron. An advowson is a property right which can be transferred by deed of gift or bequeathed. It cannot be bought or sold.[41] Regulations regarding the right of presentation to a living are governed by the Patronage (Benefices) Measure 1986.[42]

The patron has two primary functions. First, to invite prospective incumbents to visit the benefice and secondly to present the living to the successful candidate. The patron has considerable discretionary power regarding these decisions. For example, if a priest asks to visit the benefice the patron can, as a matter of practice, refuse this. If the patron invites the priest to visit the benefice, but following the visit believes him or her to be an unsuitable candidate, the patron can inform the bishop of this (if it is a lay patron) and the process usually stops there. This discretionary power is held in check by the fact that the patron does not act alone. He or she will liaise with the bishop and importantly the parish representatives. The latter will usually meet the priest when he or she visits the benefice. It is normal practice that the parish representatives will have indicated informally to the patron whether they think the candidate is suitable or not before the

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[41] Halsbury's Laws of England, Fourth Edition, vol.14 para 776

[42] Unless otherwise indicated references to the 1986 Measure in this Chapter refer to the Patronage (Benefices) Measure 1986. For further information on patronage the reader is referred to Halsbury's Laws of England, Fourth Edition, vol.14 paras 776-831 and Halsbury's Laws of England, Fourth Edition, Cumulative Supplement 1997, vol.14 paras 776-831

formal approval stage is reached. If the patron wishes to present the living to a priest the formal approval of the bishop and the two parish representatives must be given.

3.3.5 Procedure When a Benefice is Vacant

Sometimes when a benefice becomes vacant it is held in suspension.[43] In this situation no notice of the vacancy can be given.[44] The patron's right of presentation to the benefice is suspended. Instead the bishop can licence a priest-in-charge to the benefice. Such a priest does not have a freehold office.[45] If the benefice is not to be held in suspension, notice of the vacancy must be given by the bishop to the patron and the secretary of the PCC.[46] Once notification has been given, the PCC must meet within four weeks to fulfil various tasks. The PCC will send a letter to the patron and to the bishop describing the particular needs of the benefice. They will elect two parish representatives to act in connection with the appointment of an incumbent - these are usually the two churchwardens. They must decide whether to ask the patron to advertise the vacancy and whether to request a joint meeting with the patron and bishop under section 12 of the 1986 Measure. Also whether they wish a written statement by the bishop regarding the needs of the diocese must be decided.[47] Finally, they need to decide whether to pass Resolutions A and/or B and thereby prevent the appointment of a woman priest.[48]

Where a benefice comprises two or more parishes certain of the provisions are modified. For example, at the PCC meeting the councils must decide when preparing a statement of the needs of the parishes whether to make a joint statement or whether each parish will prepare a separate statement.[49] As regards the appointment of parish representatives, the councils must appoint, "such numbers of persons, but not less than four, as will enable each of those councils to have at least one representative, to act as

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[43] Pastoral Measure 1983 s 67 (1)
[44] Ibid. s 70; Patronage (Benefices) Measure 1986 Sch 4, para 21
[45] The reader is referred to 3.4.2.
[46] Patronage (Benefices) Measure 1986 s 7
[47] Ibid. s 11 (1) (a-e)
[48] Ibid. s 11 (1) (f); Priests (Ordination of Women) Measure 1993 s 3 (7). The reader is referred to the Introduction and the description of the Priests (Ordination of Women) Measure 1993.
[49] Patronage (Benefices) Measure 1986 Sch 2, para 4 (1A)

representatives of those councils in connection with the selection of an incumbent."[50] Where a benefice comprises two or more parishes there may be a conflict of ideas regarding the needs of the benefice. For example, one parish may desire a woman priest, whereas a neighbouring parish might vehemently oppose this. Once a Resolution forbidding the ministrations of a woman priest in a benefice has been passed, there is nothing that the other parish can do. They can only hope that the neighbouring parish revokes the Resolution, either by a change of heart or by a change in council composition.

If the PCC have asked the patron to advertise the vacancy he or she can do so by two methods. First, the patron could inform the Church of England clergy appointments adviser who will place the vacancy in a bulletin which is received by clergy seeking a new appointment. Secondly, an advertisement in a clergy newspaper such as the Church Times will reach a wider audience. This may result in patrons being able to consider candidates who otherwise would not have come to their attention. The decision not to ask for the vacancy to be advertised means that informal contacts will flourish, and a suitable candidate may not even enter the race.

Under section 12 of the 1986 Measure the PCC, the bishop or the patron may request that a joint meeting is held. At this meeting the bishop must deliver a statement outlining the needs of the diocese and the wider interests of the Church. The meeting can comment upon the bishop's statement and the PCC's statement regarding the needs of the parish. By assessing both statements the patron is in a better position to judge the necessary job requirements. The patron should not only be aware of any distinctive features of the office, but also features which are purposely excluded from the statements.[51]

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[50] Ibid. Sch 2, para 4 (1) (b), see also Sch 2, paras 19, 20 regarding benefices having a team council or a joint PCC.

[51] Private Patrons' Consultative Group (1995) "Exercising Patronage in the Church of England" p6

3.3.6 Selection of a Prospective Incumbent

As with many occupations, there is no single method of selection for the office of incumbent. The patron has ultimate authority to decide how the selection of an incumbent is to be conducted. Again they will act in conjunction with the parish representatives and the wider body of the PCC. Both may have specific views as to how the selection should be conducted. They may inform the patron of their wishes, but there is no legal duty on the patron to acquiesce to these wishes.[52] Church appointments appear to thrive on informality, but there is no reason why formal interviews should not be used - indeed they are used. Because of the nature of group and team ministries, certain procedures are required. Before an offer of presentation to a group ministry is approved by the bishop and the two parish representatives the patron must consult with other incumbents and any priests-in-charge. In the case of a team ministry, the consultation can come at a later stage, before the presentation of the priest for institution. However, it is recommended that this consultation is preferable at an earlier stage, before an offer of presentation is made.[53]

A patron must not make an offer to present a priest to a benefice until the approval of the parish representatives and the bishop is given.[54] Naturally the two parish representatives will have specific ideas as to the type of incumbent they are looking for. It is hoped that these views represent the needs of the parish and not solely personal preferences. The involvement of the laity is an important check on the power of the patron, whether they be lay or clerical. Lay involvement is seen as a step forward from the days when patrons could import their friends and family into a benefice.

3.3.7 Disapproval of a Candidate

If the bishop or the parish representatives disapprove of the appointment they must notify the patron in writing the grounds of their refusal.[55] What grounds are sufficient to justify a refusal? The Code of Practice which accompanies the 1986 Measure suggests

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[52] Ibid. p6
[53] Ibid. pp6-7
[54] Patronage (Benefices) Measure 1986 s 13 (1) (b) (i), (ii)
[55] Ibid. s 13 (4)

two wide categories by which an offer of presentation could be refused. First, that "the Bishop or PCC Representatives could withhold that consent if the priest failed to meet some important requirement in the PCC statement or the Bishop's statement, particularly if the Bishop and the PCC are agreed on that requirement." Secondly, that "the Bishop or the PCC Representatives consider that the priest's personality make him unsuitable for the parish and unlikely to be able to minister in it effectively."[56] The latter ground is ripe for subjective assessments, stereotypes and sex discrimination. The problem is how to uncover such discriminatory practices. The patron can request that the archbishop review the matter. The archbishop, if he sees fit, may authorise the patron to make the offer.[57] In an unreported hearing in December 1994 the Archbishop of Canterbury held that the marital status of an incumbent was not an appropriate ground for refusal either by the bishop or the PCC representatives.[58] Could a candidate's sex be used as a ground for refusal? Clearly, Resolutions A and/or B justify sex discrimination on theological grounds. Parishes which have not passed these Resolutions do not have a justification for sex discrimination against women priests unless they can rely upon the wider protections of section 6 of the 1993 Measure.[59] The archbishop would need to establish that the disapproval was because of the candidate's sex and not because of the candidate's personal characteristics (other than their sex). Alternatively, the candidate might wish to pursue a sex discrimination claim regarding recruitment in the civil courts.[60]

The patronage system consolidated in the 1986 Measure ensures lay as well as ecclesiastical involvement in clergy appointments. The Church's credibility as an impartial institution can only be increased by this. However, the process of benefice suspension and the transfer of patronage to diocesan bishops and Diocesan Boards of Patronage weakens this link. There is a perception that the tide is turning to create an insular Church. The Private Patrons' Group believes that patronage transfer should be

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[56] Patronage (Benefices) Measure 1986, Code of Practice, quoted in Private Patrons' Consultative Group (1995) Op. cit., p8
[57] Patronage (Benefices) Measure 1986 s 13 (5)
[58] Private Patrons' Consultative Group (1995) Op. cit., p8
[59] This is discussed in detail at 7.1.2. and 7.1.3.
[60] This is subject to the legal obstacles to a sex discrimination claim discussed in Chapter Seven.

avoided. To do otherwise "is to assist a process which is making the Church of England more narrowly ecclesiastical and silences a lay voice."[61]

3.4 Unbeneficed Clergy

The position of beneficed clergy has been explained, now the focus turns to unbeneficed clergy. These comprise curates and priests-in-charge. Unlike incumbents, unbeneficed clergy do not hold a freehold office, instead they require a licence to officiate granted by the bishop. First, the position of a curate will be examined before turning to that of a priest-in-charge. For simplicity licensing rules will be described in relation to curates only, but they are equally applicable to priests-in-charge.

3.4.1 A Curate

After finishing theological college, a student will seek their first curacy, the first year of which is spent as a deacon. They are ordained as a deacon which is the first Holy Order. Which comes first; ordination or acquisition of an ecclesiastical appointment? Before a candidate can be ordained into the first Holy Order they must provide the bishop of the diocese in which they seek ordination with a certificate stating their intended appointment. The bishop must judge this post to be sufficient and the deacon must be able to attend to the cure of souls and execute their ministry. This is known as "Title to Orders".[62] Even when a candidate can provide evidence as to the provision of an ecclesiastical office, a bishop has absolute discretion as to whom he ordains.[63] Additionally, the House of Bishops has ruled that candidates who are over 45 will not be accepted for training for the stipendiary ministry.[64] A candidate must possess a sufficient knowledge of holy scripture, of the doctrine, discipline and worship of the Church of England. They must satisfy the requirement as to learning and other qualities which the bishop deems necessary for the office of deacon.[65] These requirements are met by studying at theological colleges or on part-time courses. A variety of

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[61] Private Patrons' Consultative Group (1995) Op. cit., p2
[62] "The Canons of the Church of England" (1993) Op. cit., Canon C5, para 1
[63] Halsbury's Laws of England, Fourth Edition, vol.14 para 657
[64] This is discussed at 7.6.3.
[65] Halsbury's Laws of England, Fourth Edition, vol.14, para 657; Clergy (Ordination and Miscellaneous Provisions) Measure 1964 s 1 (1)

qualifications are offered, some based on exams and others on continuous assessment. Standardisation is achieved by the Advisory Board of Ministry (ABM), on behalf of the House of Bishops, approving or disapproving of a course. Only an ABM approved course of education will enable a candidate to undertake training for Holy Orders.

Despite being referred to generally as a deacon, they are licensed as a curate.[66] Once they have served their "Title to Orders" successfully (usually after one year) they will be ordained as a priest, which is the second Holy Order. References to curates in the text include deacons in the first year of their curacy, as well as curates who have been priested.

When seeking a first curacy the process is usually fairly informal. Often the bishop who has sponsored the application to theological college will know of vacancies. The applicant meets the incumbent of the parish, who decides whether he or she is suitable for the curacy or not. The incumbent has considerable power regarding the necessary job requirements and the type of candidate that he or she wants to work with. The incumbent will nominate the person to the bishop, then ordination as a deacon can take place.[67] A curate who works with an incumbent owes to him or her certain duties. The curate must act in accordance with the incumbent's directions, unless the incumbent has been suspended or inhibited. Likewise the incumbent is responsible for the actions of the curate whilst under his or her directions or whilst acting with his or her consent.[68]

A curate is licensed to officiate by the bishop. A licence can be for an unspecified term or for a fixed term. A licence is granted at the will and pleasure of the bishop, "there is no reason why it should not be limited to a given period, either for a given number of years, or to expire on a particular happening, for instance on the person licensed reaching a stated age."[69] When the period has ended or the age is reached the licence will automatically expire. Then there is the possibility that it might be renewed or a permission to officiate might be issued.

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[66] The Legal Advisory Commission of the General Synod (1994) Op. cit., p95
[67] "The Canons of the Church of England" (1993) Op. cit., Canon C12, para 3
[68] Halsbury's Laws of England, Fourth Edition, vol.14, para 711
[69] The Legal Advisory Commission of the General Synod (1994) Op. cit., p229

First, the ways in which a curate can have their licence revoked by a bishop will be examined. A bishop can revoke a fixed term licence prior to its expiration, he can also revoke a licence for an unspecified term. The revocation may be a summary one. "The bishop of a diocese may by notice in writing revoke summarily, and without further process, any licence granted to any minister within his diocese for any cause which appears to him to be good and reasonable after having given the minister the sufficient opportunity of showing reason to the contrary."[70] The curate may appeal against the revocation within one month to the archbishop of the province.[71] The provisions of Canon C12, para 5 only apply to summary revocation and not when the revocation is on notice. The Canon is a safeguard to prevent an unwarranted withdrawal of a licence. The Legal Advisory Commission of the General Synod believe that the fact that a person has reached a certain age, even if it is pensionable age, is not a good and reasonable cause to warrant a summary revocation.

A bishop can revoke a licence on reasonable notice. In this situation, the fact that someone has reached a certain age would be a legitimate ground for revocation. The bishop must give reasonable notice. The criteria for judging this would include a person's length of service in their post and the time needed to relocate the person. If reasonable notice is not given the revocation becomes a summary one. Importantly, no appeal lies against the revocation of a licence on reasonable notice.

An incumbent has limited powers to revoke a curate's licence. First, this can be done with the curate's consent. Secondly, where there is no consent the incumbent can revoke the licence provided that certain conditions are met. If the licence is a fixed term one the incumbent may give the curate a notice to quit before the term is complete.[72] Whether the licence is for a fixed term or for an unspecified term the incumbent must give six months notice to the curate and obtain the written consent of the bishop.[73] If the bishop refuses, the incumbent may within one month appeal to the archbishop of the province who will decide whether or not to terminate the curacy.[74] The incumbent's seemingly

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[70] "The Canons of the Church of England" (1993) Op. cit., Canon C12, para 5; Church of England (Miscellaneous Provisions) Measure 1976 s 2 (1) (b)
[71] Church of England (Legal Aid and Miscellaneous Provisions) Measure 1988 s 14 (2), Sch 3
[72] Church of England (Miscellaneous Provisions) Measure 1976 s 2 (2) (a); Pluralities Act 1838 s 95
[73] The Legal Advisory Commission of the General Synod (1994) Op. cit., p10
[74] Pluralities Act 1838 s 95

formidable power over their curate should be kept in check by the overall control exerted by the bishop and the archbishop. But these provisions do highlight the control an incumbent exercises over their curate.

3.4.2 A Priest-in-Charge

The second category of unbeneficed clergy are priests-in-charge. They are similar to the incumbent in that they must have at least three years experience in Holy Orders and they are put in charge, but not possession, of the benefice. The important difference is that a priest-in-charge does not hold a freehold office, rather they officiate under the grant of a licence. As mentioned in relation to an incumbent, a woman priest with pastoral experience can become a priest-in-charge without serving the traditional curacy: one year as a deacon and two or three years as a priest. The office of priest-in-charge is a recent one, and has emerged because of pastoral reorganisation schemes. A bishop may suspend the presentation of an incumbent to any vacant benefice in his diocese as part of a process of pastoral reorganisation.[75] Suspension of presentation should not exceed five years. During this period the patron can no longer exercise their rights of patronage. Instead the bishop may licence a priest-in-charge to the benefice. The licence will be for five years or less.

Where a bishop proposes to appoint a priest-in-charge he must before making the appointment consult the PCC of the parish or parishes and so far as is reasonably practical the patron.[76] The Private Patrons' Group are monitoring the use of suspension. They comment that it is hard to see why it would be impossible to consult a patron. It could be argued that this clause is another attempt to remove power from lay patrons. They comment, "there are those bishops...who present the Patron with a fait accompli and make no effort to consult."[77]

The reason for appointing a priest-in-charge is to allow for pastoral reorganisation without the complications of having an incumbent with a freehold office. The priest-in-

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[75] Pastoral Measure 1983 s 67; Church of England (Miscellaneous Provisions) Measure 1992 Sch 3, para 21

[76] Pastoral Measure 1983 s 68 (3)

[77] Private Patrons' Consultative Group (1995) Op. cit., p10

charge is subject to the same rules regarding revocation of licences. In this case only the bishop has the power to remove a priest-in-charge. Unlike the curate's position, there will not be an incumbent involved. The Manufacturing, Science and Finance Union (MSF), which formed a clergy section in 1994, argue that suspension is being used more and more frequently and not for its original purpose of genuine pastoral re-organisation. Rather it is being used to combat the Church's financial difficulties.[78] There is a fear that the independence of the parish and the exercise of lay patronage rights are being eroded by the creeping power of diocesan decision making. The use of suspension to deprive a parish of a full-time incumbent is being questioned in the courts. The PCC and churchwardens of St Luke's, Kingston-upon-Thames, have been granted leave to apply for judicial review of a decision to suspend a living. The bishop wanted the parish to accept a part-time priest-in-charge to be shared with another parish. The parish believed that they were being denied a full-time incumbent because of their strong traditionalist leanings. A spokesperson for the bishop denied this and stated that the reductions were necessary so that diocesan staffing levels should more nearly comply with national policies concerning the deployment of clergy.[79]

Vacancies for a post as a priest-in-charge are advertised in the same way as for other clergy appointments; some are placed in newspapers or clergy appointments bulletins others are circulated informally. Depending upon the benefice the selection process may be formal, informal or a mixture of the two. A candidate usually meets with the two parish representatives and possibly the patron (if the patron is a lay patron). However, the patron does not have presentation rights and the parish representatives do not have veto powers. The bishop has considerable powers to dictate the job requirements and the type of person who is wanted. Nevertheless, usually the parish, through the parish representatives, has chance to comment on the needs of the benefice.

MSF conducted a survey of clergy opinion on their conditions of service.[80] Unbeneficed clergy were concerned with their fragile job security. At the time of the survey beneficed clergy were faced with the proposed abolition of the freehold. They were worried that if

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[78] MSF (1995a) "Clergy Conditions of Service (GS 1126) Response by MSF Clergy Section Steering Committee" p6

[79] Church Times, 17th November 1995

[80] MSF (1995b) "What do Church of England Clergy think about their Conditions of Service?"

carried this might result in similar job insecurity. Instead of reducing the security of the beneficed clergy should changes be introduced to give greater security to unbeneficed clergy? There is no obvious justification for the discrepancy between the two categories of clergy.

3.5 Non-Stipendiary Ministers and Lay Workers

Mention must be made of non-stipendiary ministers as they feature in the questionnaire data.[81] They are essentially the same as stipendiary ministers but for the fact that they are not paid. NSMs are usually curates and sometimes priests-in-charge. They may be a deacon or a priest. Their duties will vary depending upon whether the post is a part-time or a full-time one.

Many of the clergy have worked for the Church in a lay capacity before their ordination. Not all lay workers go on to become ordained, but their influence on Church affairs is worthy of note. Lay workers are involved with the clergy on a daily basis. Their influence on a priest's working conditions is therefore considerable. Relevant lay workers are; deaconesses, licensed lay workers, readers and churchwardens.[82] Lay workers may be stipendiary or non-stipendiary.

3.6 Disciplinary Action Against the Clergy

Disciplinary action against the clergy is relevant to sex discrimination in two respects. First, male or female clergy might perceive sex discrimination if they are dismissed from their post or disciplinary action is taken against them. In this situation disciplinary and dismissal decisions might be questioned in a civil action for sex discrimination. Secondly, disciplinary action might be taken against a fellow cleric where allegations of sex discrimination are made by a male or a female priest. In this way sex discrimination could be dealt with internally by ecclesiastical law. However, as will be seen, this would

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[81] To be referred to henceforth as NSMs.

[82] For further information on these workers the reader is referred to; Halsbury's Laws of England, Fourth Edition, vol.14 paras 759-761 (deaconesses), 762-765 (readers), 546, 551 (churchwardens) 766-767 (licensed lay workers); Halsbury's Laws of England, Fourth Edition, Cumulative Supplement 1997, vol.14 paras 766-767 (licensed lay workers); "The Canons of the Church of England" (1993) Op. cit., Canons D1, D2, D3 (deaconesses), E4, E5, E6 (reader), E1 (churchwardens), E7, E8 (licensed lay workers)

only cover sex discrimination where the source is a clerical one. It would not cover sex discrimination, for example, by the PCC. In this section disciplinary action against the clergy will be discussed starting with internal disciplinary action against incumbents. Following this the regulation of both beneficed and unbeneficed clergy by the ecclesiastical courts will be examined.

3.6.1 Internal Disciplinary Action Against Incumbents

An incumbent may be removed from office in two situations covered by the Incumbents (Vacation of Benefices) Measure 1977.[83] Initially it must be shown that an incumbent is involved. The 1977 Measure does not define incumbent but it does define benefice: "'benefice' means the office of rector or vicar, with cure of souls, including the office of vicar in a team ministry established under the Pastoral Measure 1968 [as consolidated by the Pastoral Measure 1983]."[84]

The first situation to consider is where there is a "serious breakdown of the pastoral relationship between the incumbent and his parishioners to which the conduct of the incumbent or of his parishioners or of both has contributed over a substantial period."[85] An enquiry can be requested by either the incumbent, the archdeacon, a two-thirds majority of the lay members of the PCC, or where the incumbent is the archdeacon by a majority of the members of the bishop's council and standing committee of the diocesan synod of the diocese in which the parish is.[86] An enquiry will only be instituted after the persons involved have had an opportunity to resolve the pastoral situation. If the archdeacon believes that there should be an enquiry, or if he or she had initially requested one, or if he or she is the incumbent involved, the bishop will order an enquiry to be held.[87] The enquiry will be held by a diocesan committee, unless the incumbent elects for an enquiry by a provincial tribunal. The proceedings will come to an end if the incumbent resigns and the bishop accepts this.

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[83] Unless otherwise indicated references to the 1977 Measure in this Chapter refer to the Incumbents (Vacation of Benefices) Measure 1977.
[84] Incumbents (Vacation of Benefices) Measure 1977 s 19
[85] Ibid. s 1A (1) as amended by the Incumbents (Vacation of Benefices) (Amendment) Measure 1993
[86] Incumbents (Vacation of Benefices) Measure 1977 s 1A (1) (a-d)
[87] Ibid. s 3; Incumbents (Vacation of Benefices) (Amendment) Measure 1993 s 3

In the second situation the bishop may order a diocesan committee of enquiry to discover whether an incumbent is, "unable by reason of age or infirmity of mind or body to discharge adequately the duties attaching to his benefice and, if so, whether it is desirable that he should resign his benefice or be given assistance in discharging those duties."[88]

The committee or tribunal will report back to the bishop with their findings and possible solutions. In the case of a pastoral breakdown the most heavy penalty that can be imposed is the declaration that the benefice is vacant.[89] There are other sanctions available such as, "the imposition of disqualification on the incumbent, a rebuke to him or the parishioners as may be appropriate, and pastoral advice and guidance."[90]

It is more likely that the circumstances of a serious breakdown of the pastoral relationship would have more bearing on sex discrimination than the age or infirmity section. An incumbent might perceive that the resulting disciplinary action or dismissal was on the ground of sex and hence might consider a sex discrimination claim. As an internal mechanism for dealing with sex discrimination between fellow clergy the 1977 Measure is not a suitable device. Its purpose is to regulate pastoral relationships. This becomes evident when one examines who can request an enquiry; it is the incumbent and the PCC. Therefore, a curate who has a grievance against his or her incumbent would not find the 1977 Measure an appropriate channel to use.

3.6.2 The Ecclesiastical Courts

Beneficed and unbeneficed clergy are regulated by the ecclesiastical courts, which exercise both civil and criminal jurisdiction. Within both of these branches of law are doctrinal and non-doctrinal matters. The Church of England is the only religious body in England that has its own law courts. For other religious bodies to enforce their rules they must use the ordinary civil law of contract. No appeal lies from an ecclesiastical

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[88] Incumbents (Vacation of Benefices) Measure 1977 s 6 (1); Incumbents (Vacation of Benefices) (Amendment) Measure 1993 s 14, Sch 3

[89] Incumbents (Vacation of Benefices) Measure 1977 s 10 (2); Incumbents (Vacation of Benefices) (Amendment) Measure 1993 ss 7, 14, Sch 3

[90] Dale, Sir William (1989) Op. cit., p32; Incumbents (Vacation of Benefices) Measure 1977 ss 10 (5), 10 (6), 10 (7); Incumbents (Vacation of Benefices) (Amendment) Measure 1993 s 14, Sch 3, para 7

court to a temporal one. However, the Queen's Bench Division of the High Court exercises a supervisory function ensuring that the ecclesiastical courts do not exceed their jurisdiction.[91]

The ecclesiastical courts were restructured under the Ecclesiastical Jurisdiction Measure 1963.[92] Only the criminal jurisdiction will be examined. The criminal jurisdiction of the ecclesiastical courts is concerned with clergy discipline. Issues are divided into doctrinal and non-doctrinal issues. An incumbent is not easily removed from his or her freehold. However, in some situations it may be necessary to take action against an incumbent. A more sensitive course of action may lie under the Incumbents (Vacation of Benefices) Measure 1977. Nevertheless, in some cases it may be necessary to use the ecclesiastical courts. Also some cases will not involve an incumbent but a curate or a priest-in-charge who are not covered by the previous Measure but who are incorporated in the 1963 Measure. In practice the 1963 Measure has only been used against incumbents. The ability to revoke the licence of a curate or a priest-in-charge has prevented the cumbersome procedure of the Measure being used.

Only the jurisdiction relating to non-doctrinal issues, which are often referred to as conduct cases, will be examined. A conduct case against a deacon or a priest covers any offence against ecclesiastical law except one regarding doctrine. For example, it includes conduct unbecoming to the office of a clerk in Holy Orders and neglect of duty.[93] A case can be brought against an incumbent or a stipendiary curate by six or more persons on the electoral roll of the parish, or by the incumbent against a stipendiary curate, or (against any priest or deacon) by any person authorised by the bishop.[94] The bishop decides whether to refer the matter to an examiner;[95] a barrister or solicitor drawn from a panel selected by the diocesan synod.[96] If there is a case to answer to it will be sent to the Consistory Court which comprises a Chancellor joined by

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[91] Moore, E. Garth (1985) Op. cit., p130
[92] Unless otherwise indicated references to the 1963 Measure in this Chapter refer to the Ecclesiastical Jurisdiction Measure 1963.
[93] Ecclesiastical Jurisdiction Measure 1963 s 14 (1) (b)
[94] Dale, Sir William (1989) Op. cit., p124
[95] Ecclesiastical Jurisdiction Measure 1963 s 23
[96] Ibid. s 30, Sch 2, part 1

two priests and two lay persons, who use a procedure as close as possible to that of the Crown Court.[97]

Certain penalties can be issued against the priest by the Chancellor.[98] For less serious offences the priest will be rebuked or have a monition order placed on him or her. Next in the hierarchy comes suspension which disqualifies the priest from performing any right or duty connected with the preferment without the bishop's leave for a specified period or which prevents the priest from residing in the house of residence of his or her preferment or within such distance of it as is specified in the censure. An inhibition disqualifies the priest from exercising the duties of a cleric for a specified period. Finally, deprivation is an order to remove the priest from clerical office and to prohibit him or her holding clerical office in the future.[99] The sentence of deprivation can be passed on a priest automatically, without trial in the ecclesiastical courts if he or she has been involved in certain proceedings in the secular courts.[100]

If the priest perceived that the disciplinary action or dismissal taken under the 1963 Measure was on the ground of sex he or she might bring a civil action for sex discrimination. The Measure might also be relevant to sex discrimination in the second situation envisaged above. The Measure covers conduct unbecoming to a clerk in Holy Orders. Arguably, if a priest perceived sex discrimination by a fellow cleric he or she could use this part of the Measure in order to penalise the discriminator. However, the Measure does not provide compensation for the victim of a priest's wrongdoing. A case can be brought by parishioners, by an incumbent against his or her curate and by any person authorised by the bishop. Thus if any priest, other than the incumbent, wanted to bring an action against another priest, he or she would need to be authorised by the bishop. The difficulties of bringing a case under the 1963 Measure mean that it is an unsatisfactory method of dealing with sex discrimination cases. Ecclesiastical law is not an adequate replacement for the private law protection against sex discrimination which the clergy lack.

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[97] Ibid. ss 24 (4), 28 (a)

[98] The term priest is used here to cover both priests and deacons.

[99] Ecclesiastical Jurisdiction Measure 1963 s 49 (1) (a-e); Robilliard, St John A. (1984) *Religion and the Law* p97 (Manchester, Manchester University Press)

[100] The reader is referred to the Ecclesiastical Jurisdiction Measure 1963 s 55 (1) (a-f) for a complete description of when a priest may be deprived following certain proceedings in the secular courts.

Only three disciplinary cases have been heard under the 1963 Measure.[101] It is questionable that this is the level of clerical misconduct. This small number of cases points to the fact that the system is not working effectively. MSF argue that the main purpose of the 1963 Measure is as a threat to facilitate resignation. Instead of a formal working procedure they suggest that it operates to transmit threats, "which form the basis for unwritten, irregular and uneven informal processes to operate, which may serve to deny justice rather than facilitate it."[102]

A theme which recurs in the debates on clergy discipline is impartiality. Various stages in the court process could be considered to lack impartiality. First, who institutes proceedings? It could be the incumbent, six people registered on the electoral roll or a complainant authorised by the bishop.[103] MSF argue that this procedure lacks the impartiality necessary for an objective decision as to whether charges should be brought.[104] But what would be objective? These people at least have a thorough local knowledge of the situation. If their views are discerned to be malevolent this should be discovered by the examiner when the facts are presented. Secondly, the bishop's immense authority over the Consistory Court has been questioned. He appoints the Chancellor, decides whether to refer the case to an examiner and can also authorise a complainant to institute proceedings. It has been suggested that a priest who is unpopular with his or her bishop has a greater chance of prosecution than a favoured one.[105] This may be true during the initial stages, but the use of an examiner to filter cases surely prevents an abuse of power. The bishop is involved in sentencing. If the accused consents the bishop can pass a sentence out of court. If the case goes to court and a guilty verdict is found the bishop will be involved in passing one of the censures. MSF point to a confusion between the pastoral and the judicial role of the bishop. At this point MSF are keen to pursue classical theological roles. This is interesting as in other areas they are less sensitive to theology and are more interested in the secular credibility of the Church. They believe, quite rightly, that the bishop's primary office is

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[101] Revd. Michael Bland (1969-70); Revd. Thomas Tyler (1991-1992); Dean of Lincoln (1995)
[102] MSF (1995c) "The Church and Disciplinary Issues Among its Clergy: Fair Process in a Modern Context" p5
[103] Ecclesiastical Jurisdiction Measure 1963 s 19
[104] MSF (1995c) Op. cit., p6
[105] Church Times Letters, 28th July 1995

pastoral. This in turn contains an element of disciplinary oversight. "The role ought, however, if it is to be a genuinely pastoral office, to be sufficiently detached from those of manager, employer or judge, to enable the bishop to enter into counselling relationships with the clergy."[106] The general tenor of their report is that bishops should be removed from the judicial role. It is interesting that they mention the role of employer and manager. Do they likewise believe that these roles interfere, or are not compatible with, the pastoral office of a bishop?[107]

Thirdly, the location of disciplinary action at a diocesan level has invited criticism. The fact that the Consistory Court is personal to the diocese could cause problems of impartiality. The four assessors are drawn from the diocese of the accused, two of whom are clerical colleagues. Not only could this cause problems for a fair trial, it could store up future problems for the diocese. Because so few cases are brought, the Chancellor has limited experience in dealing with ecclesiastical offences, court procedure and sentencing. This can only add to the vicious circle of unworkability. These general points on court composition and procedure point to a need for a national disciplinary system.

Finally, many of the ecclesiastical offences are matters of moral and professional discipline, and are not of a criminal nature. It may be that the criminal nature of the proceedings is preventing cases of sex discrimination being properly dealt with. A civil tribunal could provide the forum for more cases to come to light, with less stigma being attached to the final decision. There are various reasons why the Church will resist these changes. First, the power of the diocese has increased in recent years. For example, each diocese has control over their budget and their pastoral reorganisation. Diocesan power regarding disciplinary action will not easily be forgone. Additionally, many see the criminal nature of the proceedings as essential in the case of a priest. It is an important reminder that they are different from the laity and that higher standards are expected of them.

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[106] MSF (1995c) Op. cit., p7

[107] The reader is referred to Chapter Four for an analysis of the employment status of ministers of religion.

The freehold is an important protection in this type of case. A priest-in-charge or a curate in similar circumstances might not reach the Consistory Court, instead their licence might be revoked. As the freehold only covers a certain section of the clergy, surely a protective mechanism which allows all clergy to remain in their office or post until they have been proved guilty should be investigated.

3.6.3 The Hawker Report

A General Synod working party was instituted to review clergy discipline and the working of the ecclesiastical courts. The resulting report is commonly known as the Hawker Report.[108] The Report recommends that a national tribunal should replace the ecclesiastical courts as a means of dealing with clergy discipline. Organisation would be centralised but the tribunal would sit locally as and when needed. A national team of investigators, such as rural deans and archdeacons, would assemble evidence for prosecutions. The bishop would retain his role in the passage of a case. The hearings would normally be held in private. The proposed structures would make it easier to bring a case against a cleric. Therefore, the number of cases should rise.

Discussing licences in the context of clergy disciplinary procedures the Report stated that the existence of two classes of clergy, beneficed and unbeneficed, meant that the present disciplinary system did not operate equally amongst those in Holy Orders.[109] The Incumbents (Vacation of Benefices) Measure 1977 applies only to incumbents and the Ecclesiastical Jurisdiction Measure 1963 is largely designed to discipline incumbents. Cases against curates and priests-in-charge are less likely to be brought under this Measure because of the current ease of their removal. The new disciplinary procedures proposed by the Hawker Report would apply equally to all clergy. In order that this is possible adjustments need to be made to the rules on revocation of licences. There will be cases that are unconnected to disciplinary matters where it is perfectly proper that a licence is revoked. For example, when pastoral re-organisation is complete a priest-in-charge is no longer required as an incumbent is to be instituted.[110] The

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[108] General Synod (1996) *Under Authority. Report on Clergy Discipline* (GS 1217) (London, Church House Publishing) to be referred to henceforth as the Hawker Report.
[109] The Hawker Report (1996) Op. cit., p40
[110] Ibid. pp41-42

following adjustments apply where the grounds for revocation are disciplinary. The Report recommends that a fixed term licence should not be revocable by the bishop on notice as it is at present. Ecclesiastical offences committed by unbeneficed clergy should be dealt with in the same way as offences by beneficed clergy. Removal from office, which would include revocation of licence, would be a penalty open to the tribunal.[111] Where the licence is for an unspecified term they recommend that the bishop ought to use the disciplinary procedure, rather than using the notice procedure. If the licence was likely to be revoked on certain grounds, such as when suspension of presentation is lifted, this should be specified in the licence.[112] By using the disciplinary procedure and not relying on licence revocation, all clergy are given the opportunity to defend themselves against allegations of ecclesiastical offences. As they currently have no private law protection against unfair dismissal or sex discrimination, such internal protection is vital.[113]

[111] Ibid. p42
[112] Ibid. p43
[113] Draft legislation based on the Hawker Report's recommendations is expected to be debated at the General Synod in November 1997.

Chapter Four

The Employment Status of Ministers of Religion[1]

4.1 Employment Law and the Church of England

There are three areas of employment law which a priest might try to use; sex discrimination, unfair dismissal and equal pay. Each area of law has its own test of what constitutes employment. In this Chapter the legal employment status of ministers of religion, traditionally relegated to the fringe of employment law, is examined. Employment status is largely discussed in the context of unfair dismissal as this is the only area where cases have been brought thus far. Church of England priests have usually been held to be office holders with public law rights but not employees with private law rights. Ministers in other Christian denominations and other religions have no defined employment status. Whether a minister could be classified as an employee is a question for the common law. Courts seem particularly reluctant to reverse legal precedent when any issue of religion is involved. It is argued that issues should not be struck off the judicial agenda because they are permeated by religion. The thesis of this Chapter is that religious or spiritual duties are not incompatible with a contract of employment.[2] Additionally, the tendency of courts to treat all religions, and all posts within a religion, as identical is criticised.

The area of law most often under discussion is unfair dismissal. To bring a claim the worker must be classified as an employee. Under section 230 (1) of the Employment Rights Act 1996, an "'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment."[3] Failure to prove employee status means that Church of England priests

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[1] A shorter version of this Chapter was published in the Industrial Law Journal; Brodin, Emma (1996) "The Employment Status of Ministers of Religion" in Industrial Law Journal vol.25, no.3, pp211-224. A copy of this paper is to be found in Appendix A.

[2] The terms religious and spiritual have been used interchangeably, although undoubtedly there is a distinction. Case law uses both terms which accounts for the usage. For simplicity duties are referred to as spiritual unless the term religious has been preferred in a specific judgment, as, for example, in *Coker* v *Diocese of Southwark* [1995] ICR 563

[3] Employment Rights Act 1996; Halsbury's Statutes of England and Wales, Fourth Edition, 1997 Reissue, vol.16

will have to rely on the protections of office holder status and any internal Church protection. For ministers of other Christian denominations or other religions it will mean that they have to rely on their own Church's internal protections.

Focus is on priests in the Church of England.[4] The fragile nature of internal Church protection has meant that increasing numbers are considering the possibility of involving general employment protection rights. The recent cases of *Coker* v *Diocese of Southwark* and *Chalcraft* v *Bishop of Norwich* highlight the debatable legal status of Church of England priests.[5] When discussing the two fundamental questions: is there a contract and is it a contract of employment, case decisions involving ministers of other Christian denominations and other religions are used. Nonconformist ministers from the Methodist Church, the Presbyterian Church and the Salvation Army have had their legal status considered.[6] Sikhism and Islam have been discussed with regard to the same issue.[7] However, it is office holders in the Church of England that have most consistently troubled the courts. A case which attempts to distinguish the different types of office holder is *Barthorpe* v *Exeter Diocesan Board of Finance.*[8] There are essentially three positions which deacons or priests can hold in the Church of England; a curate, a priest-in-charge and an incumbent. The third Holy Order, the episcopate, is not discussed in this thesis. There have been no unfair dismissal cases directly involving an incumbent. Their strong security of tenure is one reason for the lack of cases. One case has been brought concerning a priest-in-charge.[9] A larger body of case law investigates the status of curates.[10] It is possible that curates will be the first group to gain the protections of employment law, perhaps prompting a review of the status of priests-in-charge, incumbents and other ministers of religion. Until this is done there will remain

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[4] Old authorities refer to the priest as he. This has been altered where appropriate to he or she as the case principles now apply to men and women.

[5] *Coker* v *Diocese of Southwark* n.2 supra; *Diocese of Southwark* v *Coker* [1996] ICR 896; *Diocese of Southwark and Others* v *Coker, The Times,* 17th July 1997 (CA); *Chalcraft* v *Bishop of Norwich* 6/11/95 Case Number 32040/95

[6] *President of the Methodist Conference* v *Parfitt* [1984] ICR 176; *Davies* v *Presbyterian Church of Wales* [1986] IRLR 194; *Rogers* v *Booth* [1937] 2 All ER 751 respectively

[7] *Santokh Singh* v *Guru Nanak Gurdwara* [1990] ICR 309; *Guru Nanak Sikh Temple* v *Sharry* EAT 21/12/90 (145/90) reported in IDS Brief 450 August 1991 pp4-6; *Birmingham Mosque Trust Ltd.* v *Alavi* [1992] ICR 435

[8] *Barthorpe* v *Exeter Diocesan Board of Finance* [1979] ICR 900

[9] *Chalcraft* v *Bishop of Norwich* n.5 supra

[10] *Re Employment of Church of England Curates* [1912] Ch2, 563; *Turns* v *(1) Smart (2) Carey (3) Bath and Wells Diocesan Board of Finance,* EAT 17/6/91 (510/90) reported in IDS Brief 450, August 1991 pp4-6; *Coker* v *Diocese of Southwark* n.2 supra

an incoherent assortment of reasons given to prevent the use of employment law amongst a wide variety of "workers".

4.2 Is There a Contract?

Before deciding whether ministers hold a contract of employment the courts have asked is there a contract at all? The arguments used fall into six categories. First, the strong theme that a spiritual relationship is incompatible with a contract. Secondly, the idea that ecclesiastical authority does not signify the existence of a contract. This is confirmed by the complementary third idea that ministers of religion and their Church do not intend to create legal relations. Two further arguments about consideration and consensus ad idem are presented in specific cases. Sixthly, in regard to Church of England priests, the argument that office holders cannot hold a contract is presented.

In *Re Employment of Church of England Curates* the High Court held that the curate did not have a contract of employment.[11] Parker J. stated that the duty of obedience a curate owed to their incumbent was regulated by ecclesiastical authority and not by contract. This is the source of the underlying idea that there is no intention to create legal relations. It is submitted that it might be possible to combine the two types of authority. One could retain ecclesiastical authority either as a part of ecclesiastical law alongside a contract or incorporate it into a contractual document. Parker J. also stated that holding an office prevented the existence of a contract.

Twenty five years after Parker J.'s decision, the question was raised again. In *Rogers* v *Booth* the Court of Appeal held that the relationship between an officer and a general of the Salvation Army was a spiritual one.[12] By its definition, Sir Wilfred Greene MR said, a spiritual relationship lacks the necessary elements for a contract. The intention of the parties when entering the arrangement was not to enter into contractual relations.[13] The two themes; that a spiritual relationship is incompatible with a contract and that

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[11] *Re Employment of Church of England Curates* n.10 supra
[12] *Rogers* v *Booth* n.6 supra
[13] Ibid. at p754, per Greene MR.

ministers of religion and their Church do not intend to create legal relations, are fused together in this judgment.

Sixty years after Parker J.'s judgment came a case which comprehensively dealt with the question, "is there a contract?" The ratio decidendi of *Barthorpe* is that an office holder is not precluded from being an employee.[14] This confirmed the decision in *102 Social Club* v *Bickerton* that some office holders can be concurrently regarded as employees.[15] Barthorpe, a Church of England lay reader, brought a claim for unfair dismissal. The industrial tribunal, applying Parker J.'s reasoning, held that a lay reader was in the same category as a curate, that of an office holder and not an employee. The existence of an office prevented a contract. On appeal the Employment Appeal Tribunal (EAT) were unsure whether a curate was an office holder due to the post's lack of continuity. Disregarding office holder status, they held that the presence of ecclesiastical superiority should not preclude clergy being engaged under a contract.[16]

In 1984 in the influential case of *President of the Methodist Conference* v *Parfitt*, the Court of Appeal held that a Methodist minister was not employed under a contract of employment.[17] The reasoning was similar to that of *Rogers* v *Booth*. Dillon LJ. held that the arrangements were non-contractual: "the spiritual nature of the functions of the minister, the spiritual nature of the act of ordination...make it impossible to conclude that any contract, let alone a contract of service, came into being between the newly ordained minister and the Methodist Church."[18] Dillon LJ. conceded that the undertaking of spiritual work did not necessarily preclude a contractual relationship. A contract of service could perhaps be drafted between a minister and the Church, but this would be a departure from the norm. In the absence of a clear indication of contrary intent in a document, the relationship between the minister and their Church will not be one that is regulated by contract.[19]

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[14] *Barthorpe* v *Exeter Diocesan Board of Finance* n.8 supra
[15] *102 Social Club* v *Bickerton* [1977] ICR 911
[16] *Barthorpe* v *Exeter Diocesan Board of Finance* n.8 supra at p906, per Slynn J.
[17] *President of the Methodist Conference* v *Parfitt* n.6 supra
[18] Ibid. at p182, per Dillon LJ.
[19] Ibid. at p183, per Dillon LJ.

The judgment of May LJ. is less general than that of Dillon LJ. He asks whether the parties in this case intended to create legal relations.[20] It is unclear whether he believes a contract could ever exist between a minister and the Methodist Church, or any other Church. May LJ. believed that the conditions of consideration and consensus ad idem were met. Unfortunately he does not describe what the consideration was and from which parties it flowed. The agreement, he said, was non-contractual as the parties did not intend to create legal relations. A minister's work was incompatible with such a legal relationship.[21] At this point his decision appears less case specific. Rather it is grounded in the traditional reluctance of the courts to find a contract in this sphere. There seems to be no sound policy reason to exclude an intention to create legal relations as there is in arrangements between spouses.

The influence of *Parfitt* was realised two years later in *Davies* v *Presbyterian Church of Wales*.[22] The House of Lords held that there was no contract of employment because no contract existed. Emphasis was placed on the spiritual nature of the pastor's duties preventing a contract. "The duties owed by a pastor to the church are not contractual or enforceable....His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God."[23] Lord Templeman added, but did not develop the point, that in some circumstances an employee or an independent contractor could carry out duties which were exclusively spiritual.[24]

In *Santokh Singh* v *Guru Nanak Gurdwara* the Court of Appeal endorsed the industrial tribunal decision that there was no contract of employment between the Sikh priest and the temple.[25] The tribunal took account of Dillon LJ.'s principle in *Parfitt* that the relationship between a Church and a minister will not usually be a contractual one unless a contrary intent is shown in a document. The labelling of the priest as an employee in the constitution of the temple was not enough to satisfy Dillon LJ.'s idea of contrary intent,[26] although it is arguable that the constitution was not a document in the

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[20] Ibid. at p185, per May LJ.
[21] Ibid. at pp185-186, per May LJ.
[22] *Davies* v *Presbyterian Church of Wales* n.6 supra
[23] Ibid. at p196, per Lord Templeman
[24] Ibid. at p196, per Lord Templeman
[25] *Santokh Singh* v *Guru Nanak Gurdwara* n.7 supra
[26] This line of reasoning was later used in *Birmingham Mosque Trust Ltd.* v *Alavi* n.7 supra at pp440, 444

sense that Dillon LJ. intended: that is as a written agreement between the parties. The Court of Appeal failed to distinguish between religions in its judgment. The cases it applies, *Davies* and *Parfitt*, involve Christian Nonconformist ministers. It is by no means clear, without further argument, that the same principles ought to be applied to all ministers and all posts. The courts are using a reductive approach in order to dispose of these cases. Whether ministers ought to receive the same or different treatment depending upon their religion and post needs clarification.

In *Guru Nanak Sikh Temple* v *Sharry* the industrial tribunal analysed a document which passed between the temple and the Sikh priest which was labelled a contract.[27] They concluded that there was an intention to enter a contractual relationship. Reversing the decision the EAT held that the tribunal should have given greater attention to the parties' understanding of the documents. This could suggest a variety of problems; that the parties were not ad idem, that there was insufficient certainty of terms or that they did not intend to enter into a contractual relationship. It is unclear which factor or factors the EAT believed were missing. The EAT do not discuss Dillon LJ.'s dictum of contrary intent. Was such a discussion deliberately avoided? A definition of the nature and extent of "contrary intent" would be useful. Unless a Church is free to exercise contrary intent and retain its spiritual duties, Dillon LJ.'s words will sound hollow.

Turns v *(1) Smart (2) Carey (3) Bath and Wells Diocesan Board of Finance* in 1990, circumvented the problems of spiritual duties by concentrating on consideration.[28] The industrial tribunal did not state whether Turns, a Church of England curate, was an office holder or not. They held that no consideration passed from the bishop or the incumbent to Turns. Neither the bishop nor the incumbent paid Turns. The Diocesan Board of Finance did pay Turns, but had no control over how he carried out his duties. No contract existed between the parties. The EAT agreed that the consideration point was conclusive in proving that there was no contract. But reference to a lack of consideration alone is unconvincing as an argument against the holding of a contract by a minister of religion. Even if lack of consideration is convincing in one set of

[27] *Guru Nanak Sikh Temple* v *Sharry* n.7 supra
[28] *Turns* v *(1) Smart (2) Carey (3) Bath and Wells Diocesan Board of Finance* n.10 supra

circumstances, it is arguable that consideration could be found or achieved by design in other cases.

In a recent case, *Birmingham Mosque Trust Ltd.* v *Alavi*, the EAT applied a reductive approach to the whole issue of ministers of religion and contracts.[29] Initially the industrial tribunal held that there was a contract of employment between the khateeb and the trust. Their finding was based upon there being sufficient certainty of terms in an exchange of letters and there being an intention to create legal relations.[30] The agreement defined salary, hours of work and the nature of the applicant's duties. They believed that Alavi's appointment was different to that of Parfitt, Davies and Santokh Singh in that it was governed exclusively by the exchange of letters. There was no religious service at which he was appointed or any constitution or other document governing his appointment.[31]

The EAT agreed that the trust could enter into contracts, but were concerned that this should not extend to religious personnel. "The problems arise where religious factors are introduced and it seems to us desirable that the same broad brush approach should be taken by all those faced with this issue."[32] Should such reductionism be followed? Ministers of religion are not homogenous. They all share a spiritual function, agreed, but they do differ in how they are appointed and dismissed and what duties they are required to perform. Also, ministers of the Church of England are the only ministers to enjoy the status of an office holder. Should not the approach be to proceed as specifically as possible with regard to the religion and denomination one is dealing with, appreciating that there will be different posts within that religion or denomination?

Referring to the question; "is there a contract?", Wood J. asked whether there was sufficient certainty of offer and acceptance for the parties to be ad idem? Secondly, was there an intention to create legal relations?[33] The tribunal had failed to find these two points. There is no discussion of whether the parties achieved consensus ad idem. It

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[29] *Birmingham Mosque Trust Ltd.* v *Alavi* n.7 supra
[30] Ibid. at p440
[31] Ibid. at p443
[32] Ibid. at p440, per Wood J.
[33] Ibid. at p441, per Wood J.

might have been thought that they clearly had: Alavi had come to the UK on the invitation of the trust on terms negotiated in a correspondence between them and had worked on these terms until his dismissal. The EAT found that the tribunal had not made a finding on the consensus ad idem point. This returns the focus to contractual intention. The EAT noted the religious nature of the khateeb's duties. The presence of "religious factors" prevented a contract.[34] Although Wood J. quotes Dillon LJ.'s dictum regarding contrary intent, he does not himself expand the point. One is left with the feeling that religious factors will be used in a broad brush way to prevent contracts.

The possibility of a minister of religion holding a contract was given hope in the recent industrial tribunal decision in *Coker*, only to be dashed by the EAT and Court of Appeal decisions which followed.[35] The tribunal chaired by Professor Rideout, held that a curate could have a contract of employment with the Church of England.

Rideout criticised Parker J.'s first argument in *Re Employment of Church of England Curates*, that the duty of obedience emanates from ecclesiastical authority and not contract. The policy reasons given by Parker J. failed to convince Rideout. The fact that the finding of employee status might impose common law liabilities on the incumbent provides no genuine reason to prevent a contract.[36] Additionally, why does Parker J. look only to the incumbent? A more appropriate contracting party, said Rideout, would either be the bishop who has the power of appointment and dismissal, or the diocese who pays the curate. However, Rideout does not firmly state who the employer is. Parker J.'s second argument, that an office prevents a contract, is inconsistent with the decisions of *Bickerton* and *Barthorpe* which state that some office holders can concurrently be employees. This is not pertinent to Rideout's argument as he does not consider a curate to be an office holder.[37]

Rideout interpreted the old authorities as developing a presumption that no contractual relationship was intended in relationships involving religious personnel. He gained more

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[34] Ibid. at p443, per Wood J.
[35] *Coker* v *Diocese of Southwark* n.2 supra
[36] *Re Employment of Church of England Curates* n.10 supra at p570, per Parker J.
[37] Whether curates are office holders is a moot point. *Re Employment of Church of England Curates*, *Bickerton* and the EAT in *Coker* state that a curate is an office holder. *Barthorpe* was unsure as to whether a curate fell within the description of an office holder.

comfort from Lord Templeman in *Davies* who stated that it would be possible for an employee or an independent contractor to carry out exclusively spiritual duties. If Davies could have pointed to a contract between himself and the Church, Rideout believed that the contract might have been a contract of employment. Modern authorities are moving towards the idea that spiritual duties can be the subject of a contract. Rideout held that a contract of employment should be assumed, in the absence of evidence to the contrary, in the case of a Church of England curate.[38]

On appeal the EAT held that the curate was not an employee.[39] Hull J. endorsed Parker J.'s propositions that a curate's duties are not defined by contract but emanate from ecclesiastical authority and that the holding of an office prevents a contract. Hull J. interpreted *Parfitt* and *Davies* as endorsing the former proposition. Rideout, by failing to consider authority and the formularies of the Church of England, made a personal decision based upon what he thought modern policy ought to be. The position of a curate is not res integra. The rights of the curate are not conferred by contract but by ecclesiastical law.[40] This is a novel interpretation of the leading authorities. Discussion had previously centred around spiritual duties preventing a contract. Where does Hull J.'s decision leave the presumption of non-contractual intention? He states that it was not a ground of previous decisions that the spiritual quality of the relationship could not be regulated by contract.[41] But this is what *Parfitt* and *Davies* said.[42]

The ecclesiastical authority argument bypasses the questionable idea of spiritual duties preventing a contract, instead focusing on the source of law which regulates the clergy. Ecclesiastical authority, although not contractual, does have legal significance. Could one concurrently be regulated by ecclesiastical and contractual authority?[43] One must look at the nature of ecclesiastical law. Denning categorised Church of England matters into three groups.[44] First, in its technical sense, ecclesiastical law means law solely administered by ecclesiastical courts and persons. Secondly, law may be exclusively

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[38] *Coker* v *Diocese of Southwark* n.2 supra at p572
[39] *Diocese of Southwark* v *Coker* n.5 supra
[40] Ibid. at p910, per Hull J.
[41] Ibid. at p909, per Hull J.
[42] *President of the Methodist Conference* v *Parfitt* n.6 supra at p182; *Davies* v *Presbyterian Church of Wales* n.6 supra at p196
[43] A parallel can be drawn with the question; can one concurrently be an office holder and an employee?
[44] Denning, A. (1944) "The Meaning of 'Ecclesiastical Law'" in Law Quarterly Review vol.60 p235, 238

administered by the temporal courts, despite its concern with ecclesiastical affairs; an example being the criminal law of blasphemy. Finally, some laws are administered by both ecclesiastical and temporal courts, for example in regard to sequestration. Hull J. classifies clergy discipline as technical ecclesiastical law, implying that this category prohibits the influence of a dual source of authority, such as contract. Whilst this is a persuasive argument, it is arguable that the categories are not static; jurisdiction can be transferred. Temporal courts have jurisdiction regarding divorce which previously was the preserve of the ecclesiastical courts.[45] Additionally, this decision relates only to the established Church with its unique form of ecclesiastical authority. Where does this leave other Christian denominations and other religions? Also what would happen if the Church were disestablished and ecclesiastical law became merely a body of rules agreed by the members of the Church?[46]

On appeal the Court of Appeal likewise held that a curate cannot be an employee for the purposes of unfair dismissal.[47] In the principal judgment, Mummery LJ. upheld the EAT decision, stating that the industrial tribunal decision was legally wrong. The presumption of non-contractual intention was used by Mummery LJ. He joined two complementary themes, intention to create legal relations and ecclesiastical authority, to prevent the existence of a contract. He avoided a discussion of whether spiritual duties prevent a contract.

Mummery LJ. held that the industrial tribunal had wrongly assumed that there was a contract between Coker and the Diocese of Southwark. In fact there was no intention to create legal relations. Although not explicitly analysed in *Parfitt* and *Davies*, Mummery LJ. stated that the reason for the absence of a contract was that there was no intention to create legal relations. Even if the facts of *Coker* do not provide contractual intention, what is to prevent other curates or indeed other ministers of religion from proving contractual intention in particular cases? The prohibitive force is the presumption of non-contractual intention where a minister of religion is involved, unless a clear intention to the contrary is expressed.

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[45] Dale, Sir William (1989) Op. cit., pp118-119
[46] Denning, A. (1944) Op. cit., p235
[47] *Diocese of Southwark and Others* v *Coker* n.5 supra

Mummery LJ. underlined this presumption in his discussion of ecclesiastical authority. He stated that it is of critical significance that a curate is ordained and is called to an office recognised by the law. As a result of this it is unnecessary for a curate to be regulated by contract. The relationship between a curate and his or her diocese is more appropriately regulated by ecclesiastical law. Mummery LJ. cited the authority of Parker J. in *Re Employment of Church of England Curates* which stated that a Church of England curate was not an employee because the relationship was governed by ecclesiastical authority and not by contract. The legal position of a curate is the same in 1997 as it was in 1912. As submitted in relation to the EAT decision in *Coker*, it is arguable that a curate could concurrently be regulated by contractual and ecclesiastical authority. However, Mummery LJ. stated that for a contract to exist in addition to ecclesiastical regulation, it would require clear evidence of an intention to create legal relations. Such an intention was not present either generally on the appointment of a curate or in the specific case of Coker.

The final case which discusses "is there a contract" is *Chalcraft*.[48] An industrial tribunal ruled that a priest-in-charge of the Church of England was not an employee. Coming before the EAT decision in *Coker* the tribunal nevertheless maintained Rideout's decision to be of no assistance. This may be because the decision related only to curates. However, *Chalcraft* is couched in terms applying to all ministers, leaving the impression that Rideout's decision was flawed.

First, the tribunal stated that the applicant had not established an intention to create legal relations with the bishop or any other bodies of the Church. No thought was given to the nature of the relationship until the dispute arose. This reasoning gives ministers and their Churches an opportunity in future to think about their relationships and to argue that they do have an intention to contract. Secondly, consideration was missing from the agreement. The payment received by a Church of England priest was described as a stipend to pursue a calling and not a salary. This is not remuneration in the conventional sense. It was held that the stipend is incapable of establishing consideration.[49]

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[48] *Chalcraft* v *Bishop of Norwich* n.5 supra
[49] Ibid. at p3

The question "is there a contract?" divides the authorities into three camps. The old authorities of *Re Employment of Church of England Curates* (1912) and *Rogers* v *Booth* (1937) use a presumption of non-contractual intention, the former holding that duty emanates from ecclesiastical authority not contract, the latter that a spiritual relationship prohibits a contract. The EAT and Court of Appeal decisions in *Coker* return to this presumptive stance.

Bridging the gap between spiritual duties and contract formation come modern authorities starting with *Parfitt*. Dillon LJ., whilst accepting the usual parameter of non-contractual intention, pointed to a situation where this might be overcome. A similar statement was made in *Davies* by Lord Templeman. Both *Santokh Singh* (1990) and *Sharry* (1990) followed *Parfitt*. Whilst following *Parfitt* and *Davies*, the EAT in *Alavi* (1992) showed a reluctance to detail specific guidelines for ministers of religion.

The third group comprises two cases which have a positive view of contracts and spiritual duties. *Barthorpe* (1979) was progressive for its time, holding that Church of England curates were not prohibited from forming contracts. *Barthorpe* also distinguished different Church of England posts. Not until 1995 and the industrial tribunal decision in *Coker* was another progressive move made. The presumption of non-contractual intention was turned on its head. The significance of the decision has withered following the EAT and Court of Appeal decisions. The hope is that Rideout's arguments will be taken up in a future case.

4.3 Is There a Contract of Employment?

If a contract has been established, one must decide whether it is a contract of employment. Church of England priests, with the possible exception of curates, are already office holders, but does this prevent them holding a contract of employment?

4.3.1 Office Holders

An office holder is neither employed nor self-employed. The classic definition of an office is found in *Great Western Railway Company* v *Bater*: "an office...was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders."[50] In *Edwards* v *Clinch* Lord Lowry added that an office holder holds a specific post which he or she can vacate.[51] The post must be permanent in that it has an existence independent of the person holding it. The continuity required of the post is that it can last beyond the holder leaving it, with the opportunity of a new holder being appointed.[52]

Traditionally office holders have had available the public law action of judicial review. Office holders, including ecclesiastical office holders, are not given express statutory protection by the Employment Rights Act 1996 regarding unfair dismissal. Office holders must argue that they can concurrently be regarded as employees.

Bickerton held that some office holders would be regarded as employees, whilst others would not.[53] One must look at the office and decide whether there is sufficient of the nature of employment to hold that he or she is an employee.[54] Bickerton was the secretary of a social club. The court was concerned with the payment involved. Was it a honorarium or a salary? How large was the payment? Was it fixed in advance? Was the payment made contractually for the services?[55] In *Sharry* it was argued that too much emphasis was being placed on wages, for this on its own does not establish a contract of employment. The EAT said remuneration was a neutral issue.[56] In *Rogers* v *Booth* the court was keen to find that the applicant received maintenance payments and not a wage. This was one reason why the applicant did not have a contract of employment.[57] The main reason for rejecting employee status was that there was no contractual

[50] *Great Western Railway Company* v *Bater* [1920] 3 KB 266 at p274, per Rowlatt J.
[51] *Edwards* v *Clinch* [1981] 3 All ER 543
[52] Ibid. at p558, per Lord Lowry
[53] *102 Social Club* v *Bickerton* n.15 supra
[54] Ibid. at p919
[55] Ibid. at p919. The case was remitted to be heard by a differently constituted tribunal.
[56] *Guru Nanak Sikh Temple* v *Sharry* n.7 supra
[57] *Rogers* v *Booth* n.6 supra at p755

intention. The latter two cases, although not involving office holders, suggest that one should not look to pay alone. *Chalcraft* shows that the courts are still preoccupied with consideration.

Bickerton uses a control criterion to divide office holders into two groups: those who exercise the functions of an independent office, in the way that a curate or a police officer does, and those who are subject to the control and orders of another.[58] The first group only have public law protection. The second group benefit from public and private law. *Bickerton* makes no definition of the term "curate". It may refer to a curate who is an assistant to the incumbent or it might be using the term in its old usage as incumbent. Whichever meaning is intended, both a "curate" and an incumbent are controlled via ecclesiastical authority, so neither is truly independent. A truly independent office is hard to find. *Bickerton* does not clarify which office holders are employees and which are not.

4.3.2 Case Decisions

The element of control has been regarded as of particular importance in cases involving ministers of religion. Most ministers can find someone who controls their work. Additionally, the idea of service seems equally applicable to ministers of religion who arguably serve their Church as well as their God. It is only now that the problem "who is the employer?" can be tackled. When asking "is there a contract?" one has to establish that there are contracting parties that can be identified. The issue of consideration has raised this problem. Who pays the minister? This overlaps with the question "is there a contract of employment?" because one must ask; if X pays Y, does X control Y, or does Y serve X?

In the earliest case considering this question, *Re Employment of Ministers of the United Methodist Church*, the High Court held that Methodist ministers were not employed under a contract of employment.[59] Joyce J. thought that even if they appeared to be

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[58] *102 Social Club* v *Bickerton* n.15 supra at p920
[59] *Re Employment of Ministers of the United Methodist Church* [1912] 107LT 143

employees, it was not possible to identify who was their employer.[60] There could not be a contract of employment as no identifiable employer was found. By definition this meant that a contract could not exist.

Later in 1912 came the ruling in *Re Employment of Church of England Curates* where Parker J. stated that a curate was an office holder and not an employee.[61] The existence of a contract of employment was dismissed by examining the appointment and dismissal of a curate. The appointment of a curate is not made by the incumbent. Rather, the incumbent nominates him or her and the appointment is made by the bishop. The incumbent cannot dismiss the curate without the bishop's consent. Parker J's. reasoning is that the incumbent does not employ the curate. He did not consider whether the bishop or the diocese might employ the curate. The bishop does after all appoint, and if necessary authorise the removal of a curate. The attitude of Parker J. is to work from the premise that a curate cannot have a contract of employment and to find reasons to justify this, rather than looking at the nature of the clerical relationship.

Twenty five years later a rigorous approach to the question "is there a contract of employment?" was still lacking. *Rogers* v *Booth* looked at one factor which might suggest a contract of employment. The money that was regularly paid to the officer was held to be merely maintenance payments and could not be likened to a wage or salary paid under a contract of employment. This seems to suggest that the presence of a wage would be appropriate evidence of a contract of employment. If the court had answered the question "is there a contract?" in the affirmative, the issue of remuneration alone might not have prohibited the existence of a contract of employment. The court in *Rogers* v *Booth* partially answered the question "is there a contract of employment?" when they could have given judgment only on question one: "is there a contract?" The partial answer serves only to cloud the confusion on the status of remuneration as a function of a contract of employment.

In 1979, hope but little substance, was given to the idea that some office holders might have a contract of employment. The EAT in *Barthorpe* believed that the holding of an

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[60] Ibid. at p144, per Joyce J.
[61] *Re Employment of Church of England Curates* n.10 supra at pp568-569, per Parker J.

office did not prevent a person having a contract of employment in some situations. The categories should not be regarded as mutually exclusive.[62] The EAT reviewed office holders whom they believed could not hold a contract of employment; incumbents, bishops and deans.[63] Others engaged in ministry such as curates and lay readers, might be employees and office holders concurrently.[64] However, the EAT gave no clear guidance on when a contract of employment might be found. Their only point was on control and this was vague.[65] There is no adequate explanation of why bishops and incumbents are precluded from having employee status. The court viewed their ecclesiastical superiority as preventing a contract of employment. It is arguable that all priests and bishops belong to one Holy Order of presbyters and nothing should distinguish them.

The notion of a contract of employment was examined in a limited way in *Parfitt.* Dillon LJ. concentrated on the spiritual nature of the duties precluding a contract of employment. An employee serves their employer. A minister serves God, and not the Church, as his master.[66] But as a representative of Christ on earth the priest does serve their congregation and parishioners. It is an interactive ministry, rather than being confined to prayerful devotion as characterised by religious communities of monks.

Likewise, in *Davies* Lord Templeman's emphasis was on the pastor serving God, not an employer. In all religions there is a personal commitment by the minister to serve their God. Lord Templeman had suggested that an employee might carry out exclusively spiritual duties. Does the personal service argument prevent this happening? Spiritual duties, on this interpretation, will always lack the necessary element of service to provide a contract of employment. Taking a wider view of service, there is no reason why a priest serving their Church (their employer) has to prevent a priest serving their God; the two types of service should coincide.

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[62] *Barthorpe* v *Exeter Diocesan Board of Finance* n.8 supra at p904
[63] Ibid. at p904
[64] Ibid. at p906. They were undecided whether a curate was indeed an office holder.
[65] Ibid. at p906
[66] *President of the Methodist Conference* v *Parfitt* n.6 supra at pp182-183, per Dillon LJ.

In both cases involving Sikh priests, evidence potentially pointed to a contract of employment. In *Santokh Singh* the Court of Appeal congratulated the industrial tribunal on its reasoning which rejected the existence of a contract of employment. The tribunal balanced spiritual duties against factors which pointed towards a contract of employment. This is an interesting approach suggesting that if indicators of a contract of employment are strong enough they will outweigh a second presumption: the presumption of no contract of employment where duties are principally spiritual. This "presumption" is not identified as such, but it appears to be applied in case decisions.

In *Sharry* the industrial tribunal failed to distinguish between a contract and a contract of employment. They used a multi-factor approach to decide whether there was contractual intention. They considered; organisation, control, finance and mutuality of obligation, thus collapsing the first and second questions. Emphasis was placed on the fact that the priest was paid. The EAT disapproved of this emphasis on wages. This did not establish a contract of employment. Contracts of employment were not discussed in terms of control or service. The basis on which the EAT decided that there was no contract of employment was by balancing spiritual duties against secular duties. Again there seems to be the unspoken presumption of no contract of employment where duties are principally spiritual. In itself this is bound up with the notions of control and service and how these square with spiritual duties.

The applicant in *Turns* used the control test to argue that he had a contract of employment. The incumbent exercised control over the manner in which Turns carried out his duties and was in a position to discipline Turns if he failed to exercise his duties properly. The industrial tribunal considered that the control the incumbent held over the curate was not materially different from that exercised by the bishop over the incumbent. They believed that because the incumbent was not subject to a contract of employment neither would the curate be. The presence of control was not enough to indicate a contract of employment. What preoccupies the tribunal is the presumption against a contract of employment if a minister is involved.

Turns appealed to the EAT saying that the curate has a different relationship with the incumbent, from that which an incumbent has with the bishop. Turns considered the

curate was under greater control than the incumbent. The EAT, rejecting the appeal, did not examine control as the consideration point was conclusive. On the control point, the industrial tribunal were not arguing that control was not present, rather they said control alone was not enough. Might it be that the EAT were using consideration to sabotage the finding of a contract of employment? Consideration is not usually the hardest contractual feature to find. The use of lack of consideration as the ratio decidendi of *Turns* blocks the control point from being aired.

The control test was pursued by the industrial tribunal in *Alavi*. They held that there was a contract of employment because in the performance of his religious duties he was under the control of the trust. The EAT held that the tribunal had failed to look at the religious nature of the relationship. The khateeb has religious duties and is a religious appointment.[67] *Alavi* uses the presumption of no contract of employment where duties are principally religious.

In *Coker*, Rideout used a balancing approach to conclude that there was a contract of employment. The elements of spirituality were insufficient to outweigh elements of personal service. Service, control and organisation were all present in the relationship.[68] The claim that personal spirituality runs counter to the idea of service is acknowledged by Rideout.[69] It is arguable that they are not conflicting aims, they may not be the same, but this does not mean that they are in conflict. Rideout argues that the Church is involved in dictating the results of that spirituality, thus spirituality does not outweigh the idea of service.[70]

The EAT held that a curate is not employed under a contract of employment but is an office holder. Hull J. made a tentative, but undeveloped, point on the possibility of concurrent employee status. "[I]t is conceivable (but by no means clear) that circumstances might exist in a particular case which showed that such a curate was indeed employed by some person or other."[71] On the issue of whether spiritual duties

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[67] *Birmingham Mosque Trust Ltd.* v *Alavi* n.7 supra at p444
[68] *Coker* v *Diocese of Southwark* n.2 supra at p573
[69] Ibid. at p573
[70] Ibid. at p573
[71] *Diocese of Southwark* v *Coker* n.5 supra at p904, per Hull J.

outweigh personal service, Hull J. describes Rideout as transgressing authority, but adds no extra comments himself on spiritual duties.

The Court of Appeal in *Coker* held that there was no contract, therefore there could be no contract of employment. Nevertheless, the Court did discuss "who is the employer", which necessarily overlaps with the question "is there a contract of employment?" The original respondent was the Diocese of Southwark. However, the appeal tribunal held that the diocese had no legal capacity to sue or be sued. Therefore, it was ordered that the bishop and the Diocesan Board of Finance be added as respondents. Although the Diocesan Board of Finance pay the curate they do not control his or her duties, hence they were not regarded as the employer. The bishop does control the appointment and dismissal of curates. Nevertheless, this control was held to be based upon canonical obedience and had no basis in contract. This approach concentrates on proving the absence of an employer without first evaluating whether factors such as control and service point towards a contract of employment.

Each case denies that a minister of religion can have a contract of employment. The reasons for this can be placed into themes which have developed through the century. The early cases, *Re Employment of Ministers of the United Methodist Church* and *Re Employment of Church of England Curates*, work from the question "who is the employer?" In the former case, Joyce J. held that although Methodist ministers may appear to be employees the absence of an employer prevents a contract of employment. In the latter case, Parker J.'s reasoning is to define the conclusion, that there is no contract of employment and then work backwards to find evidence to support the conclusion. His justification is the absence of an employer.

The leading modern authorities look for evidence which might support a contract of employment. The EAT in *Barthorpe* uses the control test. Dillon LJ. in *Parfitt* and Lord Templeman in *Davies* concentrate on service. In each case the evidence does not match the criteria needed for a contract of employment.

Recent, but less well known, decisions have refined the reasoning process. *Santokh Singh*, *Sharry*, *Alavi* and *Turns* all seem to apply an initial presumption of no contract of

employment where duties are principally spiritual. Is this a throwback to Parker J.'s reasoning? No. The intention is to balance spiritual duties against evidence of a contract of employment. This is very different from deciding on a conclusion and finding evidence to verify this conclusion. The industrial tribunal in *Coker* rebutted the presumption with reference to Church of England curates. Rideout's arguments were then overruled by the EAT and the Court of Appeal who return to Parker J.'s presumptive stance. The modern approach of balancing spiritual duties against indicators of a contract of employment is conveniently ignored by both courts.

4.4 Judicial review

The other cause of action open to Church of England clergy is judicial review of a decision to dismiss.[72] As the established Church, the Church of England is a public body exercising statutory power. Statutory restrictions on the dismissal of clergy are contained in Measures and Canons.[73] The decision to dismiss a minister of a different Christian denomination or religion could not be challenged by way of judicial review. These are free associations, not public bodies, who agree upon their own rules.

Why have Church of England clergy declined to use judicial review? Reasons of expense, location and time limits could provide part of the explanation. A major reason might be the attractiveness of unfair dismissal as a cause of action. In such a case the employer must reveal the reason for dismissal and show that it was a fair reason.[74] The employer should have acted reasonably in treating the reason as a sufficient reason for dismissal.[75] The branch of judicial review termed "irrationality" uses a test of reasonableness.[76] To be capable of being reviewed a decision must be one that no authority properly directing itself on the law and acting reasonably could have reached.[77] It is thought that the test under unfair dismissal is easier for an "employee" to satisfy

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[72] *Ridge* v *Baldwin* [1964] AC 40, held that the decision to dismiss was capable of review.
[73] Statutory restrictions include; Incumbents (Vacation of Benefices) Measure 1977; Incumbents (Vacation of Benefices) (Amendment) Measure 1993; Ecclesiastical Jurisdiction Measure 1963; Church of England (Miscellaneous Provisions) Measure 1976 s 2 (1); Canon C12 paras 1, 5
[74] Employment Rights Act 1996 ss 98 (1), (2)
[75] *Devis* v *Atkins* [1977] ICR 662 at p676, per Viscount Dilhorne
[76] *Council of Civil Service Unions* v *Minister for the Civil Service* [1984] 3 WLR 1174 at p1196, per Lord Diplock
[77] Gordon, R.J.F. (1985) *Judicial Review: Law and Procedure* p19 (London, Sweet & Maxwell)

than the test under judicial review, which could explain the use of private law. One question remains: who would be the respondent? As a parallel to the question, "who would be the employer in private law?" is the question, "who would be the respondent in public law?"

Following *O'Reilly* v *Mackman* the distinction between public and private law has been heightened.[78] The court may now treat it as an abuse of process if an applicant uses private law when it was appropriate to use public law. Conceivably the Church of England might claim this if further private law actions are taken by clergy.

4.5 Sex Discrimination and the Meaning of Employment

To be in employment for the purposes of the Sex Discrimination Act, a person must be employed "under a contract of service or of apprenticeship or a contract personally to execute any work or labour."[79] The test is wider than that under the Employment Rights Act which confines its ambit to employees; those employed under a contract of employment. In *Mirror Group Newspapers Ltd* v *Gunning* the third limb of the definition was discussed.[80] The phrase "a contract personally to execute any work or labour" refers to a contract whose "dominant purpose is that the party contracting to provide services under the contract performs personally the work or labour which forms the subject matter of the contract."[81] In *Quinnen* v *Hovells* it was said that this third limb was included in the definition of employment in order to include those who are outside the normal employee/employer relationship.[82] "A contract for the personal execution of work or labour was intended, in our judgment, on a proper reading of the legislative purpose...to enlarge upon (as opposed merely to supplying an instance of) the ordinary connotation of 'employment' so as to include persons outside the master-servant relationship."[83]In *Quinnen* the contract that was involved was a contract for services. It was held that employment under the Sex Discrimination Act can refer to the self-employed as well as employees. Self-employed persons must pass the *Quinnen* test; that

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[78] *O'Reilly* v *Mackman* [1983] 2 AC 237
[79] Sex Discrimination Act 1975 s 82 (1)
[80] *Mirror Group Newspapers Ltd* v *Gunning* [1986] IRLR 27
[81] Ibid. at p31, per Balcombe LJ.
[82] *Quinnen* v *Hovells* [1984] IRLR 227
[83] Ibid. at p229, per Waite J.

the applicant was engaged in work or labour, was engaged personally and was discharging such functions under terms which were contractual.

Office holders are not generally covered by the Sex Discrimination Act. Sections 85 (2) and 86 (2) make special provision for certain Crown office holders. Provision is not made for ecclesiastical office holders. In *Knight* v *A.G.* the EAT held that the office of justice of the peace is not "employment" within the meaning of the Sex Discrimination Act, nor did it fall under the protection provided by sections 85 (2) or 86 (2).[84] "[A] justice of the peace is appointed to hold an office. He is not employed under a contract of service or apprenticeship, nor does he make with the Crown a contract to execute personally any work or labour."[85] The decision in *Inland Revenue Commissioners* v *Hambrook* was applied.[86] In this case both Denning LJ. and Parker LJ. expressed the view that in ordinary circumstances a Crown official may not be employed under a contract of service. In exceptional circumstances a contract might be found, even a contract of service. The EAT did not believe that exceptional circumstances existed in the case of Knight. Importantly, the EAT added that Parliament, in the Sex Discrimination Act, had assumed a distinction between an office holder and an employee. Otherwise they would not have inserted the specific protections for Crown officials contained in sections 85 (2) and 86 (2).[87] However, the tribunal limited the effect of the decision to justices of the peace and refused to extend it to office holders in general, submitting that there may be distinctions which may need consideration in other cases.[88]

As stated, some Church of England priests may be classified as office holders whilst others, for example curates, may not. Those priests who are held to be office holders must convince the courts that for the purposes of the Sex Discrimination legislation they can concurrently be employees. The unfair dismissal case of Barthorpe could be used to support this position. Once the office holder argument is overcome the priest must then establish that he or she has a contract; either a contract of service or a contract

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[84] *Knight* v *A.G.* [1979] ICR 194
[85] Ibid. at p199, per Slynn J.
[86] *Inland Revenue Commissioners* v *Hambrook* [1956] 2 QB 641
[87] *Knight* v *A.G.* n.84 supra at p199, per Slynn J.
[88] Ibid. at p201, per Slynn J.

personally to execute any work or labour. Under section 19 of the Sex Discrimination Act an exemption from unlawful sex discrimination is given in regard to ministers of religion. The implications of this exemption will be discussed in Chapter Seven.

The Equal Pay Act contains the same extended definition of employment as the Sex Discrimination Act.[89] Again office holders are not generally covered by the Act but provision is made in section 1 (8) for protection to extend to certain Crown office holders. The arguments regarding the employment status of ministers of religion used in unfair dismissal cases and the suggested arguments outlined in relation to sex discrimination would be pertinent in an equal pay context. Unlike the Sex Discrimination Act, the Equal Pay Act does not provide an exemption for ministers of religion in respect of unequal pay.

4.6 Conclusion on the Employment Status of Ministers of Religion

There are approximately 10,000 male and female priests in the Church of England. This is a significant number of workers who are denied employment rights and who have no satisfactory alternative procedure. The use of a broad brush approach to all cases involving the clergy denies a comprehensive understanding of the different posts in the Church of England. MSF acknowledges that the legal status of the clergy cannot be treated in a reductive way. A survey conducted by MSF concerning clergy conditions of service asks whether clergy would like to be classified in future as a homogenous body; as employees. This would be in the interest of unbeneficed clergy (curates and priests-in-charge), 57.5% of whom favoured the reform. This was against 38.1% of beneficed clergy (incumbents). Many incumbents would consider employee status as a diminution of status, if it were in place of freehold status.[90] The abolition of the freehold was mooted and rejected. It appears unlikely that incumbents will be "levelled down" to employee status. The hope remains that unbeneficed clergy will gain employment rights. Ministers of different denominations and religions have neither public nor private law

[89] Equal Pay Act 1970 s 1 (6) (a); Halsbury's Statutes of England and Wales, Fourth Edition, 1997 Reissue, vol.16
[90] MSF (1995b) Op. cit.,

protection. A thorough definition of the legal status of this growing band of workers is urgently required.

Chapter Five

Methodology

5.1 Theory and Practice

The intention of this thesis is to present the theory and practice of sex discrimination law as it relates to the Church of England. From this basis legal reform can be suggested. The aim is to avoid the gulf between theory and practice which legal research sometimes encounters. It is submitted that theory and practice should not be segregated as separate processes but should be blended together. The methodology of the thesis is drawn from this approach. Theoretical ideas are explained before describing women's and men's experience. Experiences may fit with theory or theory may have to be amended to incorporate experience.

5.2 Questionnaire Design

The questionnaire design and data analysis are constructed so as to integrate theory and practice. The previous four chapters define the thesis title: Chapter One - discrimination, Chapter Two - sex, Chapter Three - the Church of England and Chapter Four - employment. Chapter One provides the theoretical ground for questions on sex discrimination. The resultant data is used in conjunction with ideas from Chapters Three and Four to construct recommendations for law reform. On the whole the approach to the research is deductive. Theory is worked with before testing data against theory. However, when analysing data it is permissible and it is submitted, necessary, to sometimes soften the rigid scientific approach and instead use induction to generate ideas.[1]

The choice of research method was to administer a pilot questionnaire followed by a final questionnaire. The pilot questionnaire not only tested the strength of the questionnaire, it provided a test run at data analysis. For a policy to be coherent the

[1] Marsh, Catherine (1982) *The Survey Method* p96 (London, George Allen & Unwin); the reader is referred to 5.7.

theory and practice behind it must fit. The danger of leaving data analysis to the end of data collection is that there will be no fit.[2]

The questionnaire asked specific research questions in order to discover whether sex discrimination was a problem in the Church of England. As a fresh area of study there were no previous empirical studies to compare the results with. In view of this it was difficult to test a specific research hypothesis as one would do in science. Instead a general hypothesis was tested; that a priest's sex contributes to their search for a post and their treatment whilst in post. Stage one of the questionnaire design was to generate research questions from theoretical ideas. The starting point was the meaning of sex discrimination. At present priests are not protected by the Sex Discrimination Act or the Equal Treatment Directive. One is thus inquiring about factual discrimination, not unlawful discrimination. There are two interrelated but distinct questions. First, are priests being badly treated because of their sex? Secondly, does this treatment fall within the definition of sex discrimination, disregarding the exemption contained in the legislation? If so, one can begin to argue that the law needs reforming in order that individuals are given rights where they have a grievance. How does one define sex discrimination in a questionnaire? The foundations of analysis lie in equality. Yet to get direct answers about abstract concepts such as equality of opportunity, equality of treatment or equality of result would be impossible. Instead these concepts are broken down into a series of questions.[3] A definition of sex discrimination was given to avoid the collection of irrelevant data. The phrase, "did you receive less favourable treatment on grounds of your sex?", taken from the Sex Discrimination Act, was used. This only captures direct sex discrimination. It is precisely this type of experience that priests will be able to comment upon. The presence of indirect sex discrimination is less easily investigated by questionnaire. Instead, it is easier to follow the continuing policy of the Church. For example, a recent condition imposed by the House of Bishops is the "45 plus rule".[4] This states that candidates who are over 45 will not be accepted for training for stipendiary ministry. This is arguably indirectly discriminatory to women, bearing in mind the numbers of women previously denied their vocation.[5]

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[2] Marsh, Catherine (1982) Op. cit., p124
[3] The reader is referred to 5.4.
[4] Church Times, 30th June 1995
[5] This is discussed in detail at 7.6.3.

The source and intensity of direct sex discrimination must be identified. Is it an isolated act concerning individual clergy in individual parishes? Or is the attitude entrenched at an individual level, a diocesan level or even at a national level? Is there evidence of indirect sex discrimination in the conditions imposed on priests by their diocese or by the General Synod? One wants to know why sex influences a person's treatment at work. To test causal networks background variables which might influence an individual's treatment were included in the questionnaire. If sex discrimination is present, the next question is what ought to be done? The source of the sex discrimination and the attitudes behind it, lay the basis for reform. Chapter Two provided ideas for challenging sex discrimination. Some of these ideas are difficult to encapsulate in legislation as one is seeking to change people's attitudes. This problem is heightened where religion is involved. On one hand there is legitimate theological objection to women priests, on the other sex discrimination. It is when these categories come close or blur that there is great difficulty. Legislators, like the judiciary in unfair dismissal cases, are unwilling to interfere where matters of religion appear.

5.3 Variables Used in the Questionnaire

Many factors influence the treatment of a priest in the Church of England. To cover all relevant factors the analysis began with a structured level of variables starting with the international level and moving down to the individual level.[6] Located at an international level are policy decisions which span many nations, such as equality of opportunity and the prohibition on reverse discrimination. At a national level lie policy decisions emanating from the General Synod. These decisions include the content and application of the Priests (Ordination of Women) Measure 1993, the current reception process in the Church of England and the increased use of NSMs. Financial considerations may likewise dictate the use of NSMs at a diocesan level. If both spouses are priests some dioceses state that only one may hold a stipendiary post.[7] The bishop exerts tremendous influence over the selection of clergy in his diocese. He appoints the curate and the

[6] This idea was adapted from Strauss and Corbin's description of a conditional matrix. Strauss, Anselm & Corbin, Juliet (1990) *Basics of Qualitative Research* pp161-164 (London, Sage)

[7] The questionnaire revealed this was an accepted practice in the dioceses of Worcester and Guildford. The reader is referred to 6.5. and 7.6.2. for more information on this.

priest-in-charge and retains the right to veto the appointment of an incumbent. The power of the bishop to prohibit women priests in his diocese remains unused.[8] At a parish level a chaotic mix of variables are at work. When selecting an incumbent the patron and the parish representatives act on behalf of the parish. Theological objection to women priests will be expressed in the passing of Resolutions A and/or B. Do the Resolutions reflect the will of the parish as a whole? What influence, if any, does the bishop exert over the parish representatives and/or the patron? Despite Resolutions A and/or B not being in place, is there an unofficial feeling that a priest of a particular sex is wanted? The influence of geography might uncover attitudes to women priests. Where do women priests work? Are women priests found predominantly in (say) an inner city area? If so, is this through chance, choice or because these were the areas most receptive to change? Finally, located within the individual are the background variables which serve to make us individuals. In relation to a priest these include; sex, age, race, disability, churchmanship, pastoral experience, education and clergy connections. Related to, and perhaps a constituent of, a person's sex is their marital status and their responsibility for dependants. Feminists might argue that these two variables are part of the social construction of woman. A man is less likely to have his sex described in relation to his marital status and his responsibility for dependants.

5.4 A Brief Description of the Main Questions

The basic technique was to ask general questions before filtering down to specific questions on a particular topic. To ensure factual validity definitions of concepts were given where appropriate. Sometimes it is difficult to formulate definitions which will cover all cases. Thus open questions allow respondents to write down their experiences which can be classified into themes. This allows for factually irrelevant answers to be screened out. With the exception of a question on mobility in the pilot questionnaire, hypothetical questions were not used. As was discovered with the said question, hypothetical questions are difficult to administer and get reliable results from. The main questions will now be described.

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[8] Priests (Ordination of Women) Measure 1993 s 2 (1); Personal Communication, Professor David McClean 24/2/96

Do all priests have an equal opportunity to compete? The principle is that there should be no exclusion from the competition on grounds other than appropriate and rational ones. Equality of opportunity is most pertinent to job search. Which jobs does one ask about? One cannot just ask about successful outcomes as this defeats the object of discovering sex discrimination. Equally is it possible to ask respondents about each job application? The approach was to ask priests about their present post; what it is, how they got it and how they are presently treated. This serves to locate them now and it stimulates respondents to think about sex discrimination. Past discrimination was then surveyed. Priests were asked about their search for a first curacy, a second curacy and a senior post.

Evidence of equality or inequality of opportunity can be ascertained in a number of ways. The way a post is advertised is crucial. Before administering the questionnaire the fact that informality was part of the Church of England's stock in trade was realised, but the strength of informal channels and unique processes of appointment was underestimated. If advertisement of a post has been informal the race may be won and no interview is needed. In the case of a formal advertisement an interview may be held. What criteria are used to select a short list? Are candidates informed of this? If a candidate does receive an interview, are the interview questions appropriate and rational ones; questions which people from all sections of society could comply with? If the candidate did not obtain the post were reasons given and what were they? Equality of opportunity was examined at different levels of a priest's "career path". One intention was to see whether any particular post had a significant problem with equality of opportunity.

Linked to equality of opportunity is the idea of equality of condition. If conditions are equalised all can compete equally. Education is a prime condition to be equalised. Conditions such as age, race, pastoral ability and churchmanship cannot be equalised. However, they are vital conditions to identify as they enable one to compare like with like on Aristotelian principles. For example, the treatment of male and female priests with a certain level of pastoral experience can be compared. Sex prevents men and women priests competing equally. Biological sex cannot be equalised. Biology has created theological division regarding the issue of women priests. Despite the move to

ordain women priests, theological objection has been preserved in law. Biological sex leads directly to the legal inequality of women. The social construction of woman, which in part builds on biology, involves her marital status, her responsibility for dependants and extends to general attitudes regarding women's roles. Theory suggests that the social construction of woman causes sex discrimination. This aspect of sex can be equalised if attitudes are altered. The questionnaire surveyed the respondents' background variables. When assessing sex discrimination in the Church of England, concentration is placed on the social attitudes which prevent equality of condition rather than on theological arguments against women priests.

Equality of result demands that all disadvantageous variables are swept aside in order to achieve an equal outcome. In the case of employment the outcome will be the holding of a job. The disadvantageous variable is commonly a person's sex. Other disadvantageous variables could include age, race or job experience. In the Church of England an example of equality of result would be an equal number of male and female priests holding specific posts in a diocese. The question would then be, is this chance or is this design? A research objective was to see whether priests were being selected solely on the basis of their sex. In the case of a male priest, his selection could legitimately be based upon the presence of Resolutions A and/or B. If a male priest was required for other reasons this could point to sex discrimination in the form of unequal opportunity to compete. In the case of a female priest being selected solely because of her sex the policy might be one of reverse discrimination. Reverse discrimination is unlawful in Britain.[9] Reverse discrimination is also contrary to EC law, specifically the Equal Treatment Directive 1976.[10] Yet with all good intentions, employers might practise it to achieve equality of result, or as they might put it - a balanced workforce. In a questionnaire men may not openly report sex discrimination. Yet if there is evidence of reverse discrimination, either as an isolated incident or as a diocesan policy, at least some men are being discriminated against; they are not having their interests included in the decision. These may be male priests other than those included in the sample group.

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[9] Sex Discrimination Act (1975) ss 1 (1), 2 (1), 6 (1), 6 (2); The Act does allow reverse discrimination in limited circumstances; s 48. It is offered only in relation to training and not employment. The provision of training is not pertinent to this thesis.

[10] *Kalanke* v *Freie Hansestaadt Bremen* [1995] IRLR 660

Equality of result can crush equality of respect. The latter states that one ought to give equal weight to the interests of others. In an ordinary employment situation the interest of an employer is weighed alongside the interest of candidates. When assessing candidates the employer should not pick out arbitrary factors such as sex or race; they do not form part of a person's interest. In the Church of England the rules are different. The "employer" may or may not count sex as part of their interest. Additionally, the lay and clerical involvement in the appointment of a priest means that there is the problem of weighing several interests. To some a priest's sex is a theological issue, to others it is not. In parishes where Resolutions A and/or B are in place, a priest's sex does form part of an "employer's" interest. Sex is a theological issue and not a mere arbitrary factor. Women will not apply to these parishes. They will apply to places where at least official sanction is given to the appointment of women priests. In these parishes sex should not form part of an employer's interest. In these cases, if women or men receive less favourable treatment on grounds of their sex, their interest is not being weighed properly. Here, a person's sex is arbitrarily used in the decision process.

Throughout this thesis the phrase "treatment of priests" is constantly used. This is a convenient phrase covering the general position of male and female priests; what opportunities they receive, what attitudes they encounter and whether they feel discriminated against. Equality of treatment specifically refers to the equal distribution of some opportunity or resource. It is used in the questionnaire to examine treatment once in post. Once past the hurdle of obtaining a post how are women treated? This brings one back to the equality/difference debate. Do women want equal treatment with men in the way that the Sex Discrimination Act promotes or do they want to be treated differently? What is their perception of how they are treated?

Unequal pay between the sexes is a specific form of sex discrimination. Is this a problem in the Church of England? Without detailed case information no firm statements as to this can be given. Instead, an objective was to gain insight into the patterns of stipendiary and non-stipendiary ministry. Who holds non-stipendiary posts? Are such ministers mainly women? Are they young women at the start of their vocation or women who have served the Church for many years? Are priests in non-stipendiary posts through choice or because of factors beyond their control?

5.5 The Sample

The empirical work is a comparative analysis of the treatment of men and women priests. Focusing solely on women priests would prevent a comparative analysis with male priests and it would prohibit any speculations on what it is to be a female and a female priest.[11] Priests were divided into two groups. Group one comprised male and female priests with relatively little pastoral experience who had been priested since 1994. All would be at curate level. A comparison of like with like is straightforward in this case. The second group posed a greater difficulty. These comprised male and female priests with greater pastoral experience than group one. Whilst waiting for sanction to become priests, women served the Church as licensed women workers, deaconesses and deacons. In some cases women had up to thirty years of pastoral experience. In view of this a bishop has discretion to reduce a woman's curacy to one year to allow her to apply for senior posts. Finding an adequate comparison group of men was difficult. In the pilot questionnaire it was calculated that men who were priested in 1992 would have served their curacy and would be in a position to apply for senior posts. When the questionnaires were returned it was found that most men were still serving their curacy, whilst more women were in senior posts. In the final questionnaire male priests who had been priested since 1988 onwards were sampled.

Priests with posts in the Church of England were sampled. It is necessary to remember that there are those who have trained for the ministry but who do not hold a post. This may be so for a variety of reasons such as; ill health, retirement, lack of mobility, a change of mind or sex discrimination. This is a disparate group of people and a difficult group to compare. Ordinands will have completed their training at many different times, they may never have entered active ministry, if they did they will have left at different times for a variety of reasons. Ascertaining any pattern of treatment would be tortuous. With this in mind plus the problems associated with contacting people, this avenue of

[11] Marsh, Catherine (1982) Op. cit., pp112-113 refers to a study where all the subjects are female. Brown, G.W. & Harris, T. (1978) *The Social Origins of Depression: A Study of Psychiatric Disorder in Women* (London, Tavistock). The survey, Marsh says, can say nothing about the effects of being female.

inquiry was not pursued.[12] The sample only includes clergy. The opinions of those involved in the appointment process such as bishops, patrons or parish representatives were not sought. This is an appropriate methodological step provided it is made clear that the questionnaire answers include the subjective opinions of priests as well as their objective answers.[13]

5.5.1 Pilot Sample

Basic stratified sampling was used in the pilot questionnaire. This requires the study population to be placed into groups called strata. The study population comprises men and women priests.[14] Ripon diocese was chosen as the pilot study population. The relevant strata are the priest's sex and their pastoral experience. A random sample is selected from each stratum. Stratified sampling ensures the representation of groups which are important to the research.[15] In this case it ensures an adequate representation of the sexes and a comparable experience match. Because the number of priests which fell within the population group was only 49 the whole group was sampled. Ripon diocese was thought to provide good conditions for a pilot questionnaire. Diocesan policy appeared moderate on the issue of women priests. Ripon diocese is geographically diverse, including the city of Leeds and the dales of North Yorkshire. It was hoped that the achieved sample would be similar in terms of characteristics such as sex and pastoral experience to that of the initial sample. Naturally, those who were interested in the issue of sex discrimination were more likely to return the questionnaire. Would women, and not men, see it as their issue?

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[12] Attempts were made to locate members of this group. The College of the Resurrection at Mirfield and the Vocations Officer of the Advisory Board of Ministry were contacted. They could provide no records of ordinands who had failed to secure, or stay in, a post in the Church of England.

[13] For the justification of such a method the reader is referred to; Leonard, Alice (1987) *Pyrrhic Victories. Winning Sex Discrimination and Equal Pay Cases in the Industrial Tribunals 1980-84* p8 (London, HMSO)

[14] The term priest is used at 5.5.1. and 5.5.2. to cover both priests and deacons. Where the distinction between the two is relevant this is noted.

[15] For a detailed discussion of stratified sampling the reader is referred to Henry, Gary, T. (1990) *Practical Sampling* pp28-29, 99 (London, Sage)

5.5.2 Final Sample

In order to move from specific case histories to general statements a larger survey of the study population was conducted using stratified sampling. In the next section validity is discussed; the sample sets the scene for validity assessments. The sample is used to represent the study population in order that generalisations can be made. "Given that there is probably a causal relationship from construct A to construct B, how generalizable is this relationship across persons, settings and time?"[16] The dioceses were chosen by examining the range of diocesan attitudes to women priests, ranging from strongly against in Chichester, London and Truro to strongly in favour in Gloucester, Guildford and Worcester. Blackburn and Newcastle were sampled as dioceses with balanced views on women priests. The latter two dioceses were thought to be similar in attitude to Ripon, thus giving three dioceses in each category of attitudes to women priests.[17] The total sample population comprised male and female priests with comparable pastoral experience. All women priests in the diocese and all women deacons ordained in 1994 or 1995 were included in the sample population. "Long term" deacons were not included; that is deacons who have no intention of being priested. A comparable group of male priests was required. Male priests ordained deacon in 1987 and priested in 1988 were canvassed. As women have been able to serve as deacons since 1987 a good experience match was achieved. This experience period gave male priests the opportunity to have obtained a senior post, making them comparable with female priests who have leapfrogged to senior posts. As far as possible only parish priests were sampled. Parochial as opposed to sector ministry is the focus of this thesis. Different working environments and structures are involved in sector ministry such as prison chaplaincy work. Cathedral and other diocesan appointments were likewise avoided. The stipendiary status of the priest could not always be ascertained from the diocesan directories. It was therefore recognised that NSMs would form part of the sample population.

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[16] Ibid. p12

[17] These sampling decisions were made following a personal communication with Professor David McClean, 24/2/96. He suggested these dioceses by reference to the voting pattern at the Synod debate on women priests. As he cautioned, the movement of clergy, and bishops, may have altered the balance of attitudes in a diocese since 1993.

The total sample population of priests was 806, 578 males and 228 females. A final sample size of 400 was decided upon, comprising 200 male and 200 female priests. This was based on the expectation of at least a 50% response rate. From the total sample population 28 female and 378 male priests were deleted. To keep the size of each diocese proportionate in the final sample a percentage calculation was used to decide how many priests to delete from each diocese. The calculation is given in equation (1);

$$A = \frac{X * Y}{Z} \tag{1}$$

where,

- A is the number of male/female priests to delete from the diocese.
- X is the number of male/female priests to delete from the total sample population.
- Y is the number of male/female priests in the diocese.
- Z is the number of male/female priests in the total sample population.
- * = multiplication.

It was necessary to keep the pastoral experience of priests proportionate to the total sample population. Percentage calculations were used again to determine how many priests from each year of priesting ought to be deleted. The calculation is given in equation (2);

$$B = \frac{A * W}{Y} \tag{2}$$

where,

- B is the number of male/female priests to delete from the year in question in the diocese.
- W is the number of males/females priested in the year in question in the diocese.

In the case of the male sample this procedure was used for each year of priesting between 1988 and 1995 and ordination as a deacon in 1994 and 1995. In the case of the female sample the procedure was with reference to priestings and ordinations to the diaconate in 1994 and 1995. The relative size of each diocese was preserved by this

process. The male/female ratio was not preserved as many men were deleted from the population.[18]

5.6 Validity

McNeill makes a distinction between reliability and validity.[19] A method is reliable if anybody else using the method, or the same person using it at another time, would produce the same results. Unlike ethnographic research, a questionnaire can easily be repeated and unless the conditions under investigation were to change there is no reason why the results ought not to be the same. A method is valid if the data represents reality. McNeill believes that validity is a problem when dealing with people's attitudes. He concludes, "It must be accepted that what we are collecting is people's answers to the questions, which isn't necessarily a true picture of their activities."[20] On the whole, the questionnaire used here asks about the experiences of priests. It is only in some open questions and in the optional comment section that attitudes appear.

The majority of the questionnaire consisted of closed questions. Respondents were forced to tick a box or boxes. In terms of validity, closed questions can be criticised for delimiting choice. One wonders, did the respondent really mean what they ticked? To avoid this a choice of categories is provided, importantly including a "don't know" and an "other" category. When a small number of answers are given to closed questions there is a danger of quantitative data manipulation. When put into percentage form data appears more significant than in reality it is. Where the data set is particularly small the approach is to present the figures in ratios. Where data is more substantial percentages are used.

Open-ended questions allow the respondent to say what they mean. Reality is intact. Not all respondents will answer these questions. Leonard notes that it is then difficult to predict whether the responses are representative of that category of respondents. "However the frequency with which a given topic was mentioned can surely serve as

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[18] For the final sample sizes the reader is referred to Appendix C, Table C-1.
[19] McNeill, Patrick (1990) *Research Methods* pp14-15 (London, Routledge)
[20] Ibid. p15

some indication of its typicality; moreover, even regarded strictly as comments from individuals, they provide a wealth of information about applicants' experiences."[21] The use of both open-ended and closed questions in the questionnaire should clarify what people really mean. An over emphasis on open-ended questions could result in individual case studies rather than a comprehensive study of the treatment of male and female priests.

5.7 Data Analysis

The criteria used in the questionnaire design and the sample choice have been described, the choice of data analysis method is now explained. Throughout the research a deductive approach is taken. Theoretical concepts are examined and broken down into questions for an appropriate sample group. The empirical findings are tested against theory in order to make general statements about the phenomena. Phenomenologists argue that concentration on theory ruins the development of inductive, grounded research which produces rich qualitative data taken directly from the field. Admittedly, the conceptual framework of the questionnaire is tight. This will enable the making of cross case comparisons and generalisations. The negative effect of this tight framework could be a loss of context and a lack of qualitative data. In order to combat this, several open-ended questions which produce qualitative data are included. By allowing the subjects to provide their own concepts, albeit guided by the research question, a semi-inductive analysis is achieved. Thus the claim of phenomenologists, that one is asking the wrong questions, is quashed.[22]

Involved in the quantitative v qualitative, deduction v induction debate are feminists. Division as to research technique divides liberals and postmoderns. Liberal feminists employed traditional quantitative techniques to examine women's employment. Armstrong & Armstrong used these techniques in their early work but were frustrated to find that women's experience at work and in the household remained invisible. One was left with cross tabulations regarding sex and employment but nothing to describe the

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[21] Leonard, Alice (1987) Op. cit., pp41-42

[22] For a further discussion of methodological stances the reader is referred to Miles, M.B. & Huberman, A.M. (1984) *Qualitative Data Analysis* pp20-21, 28-33 (London, Sage)

nature and conditions of the work, whether public or private.[23] A backlash to this approach came from radical and postmodern feminists. Both groups promote equality between men and women via a re-examination of gender. Quantitative analysis was shunned as it failed to account for women's experience in the private realm. Instead what was most easily measured became theorised. "What is most difficult to translate into numbers that can be statistically analyzed is women's work experiences outside the formal economy, as well as the nature and conditions of work in all areas."[24] Qualitative methods are used to examine women's experience. Sex difference is located as an explanation of women's experience. Three problems are associated with this approach. First, how should female experience be integrated into theory? Should it replace or work with male experience? Indeed is male experience accurately recorded? Feminists argue that traditional theory simply reflects male experience. Is this correct? Is a new analysis of male experience needed too? The purpose of using male priests in the sample is to record what their experiences actually are. Secondly, the concentration on experience can produce fragmented data which relates only to individual cases. Deep rooted processes of sex discrimination might be lost in the clutter of everyday life experience. The philosophical concept of knowledge is the final problem. Is there one female experience or types of experience or are there many? Which are analytically important experiences and which are not? How does one measure, weigh and compare experience? Many feminists reject the idea of an essential woman. Emphasis is placed on women being different from one another. For example, the experience of motherhood, if experienced at all, differs for each woman. Its effect will range from liberating to confining, with most women located in the middle of the spectrum. Bartlett assesses the validity of feminist knowledge.[25] Radical feminists use standpoint epistemology. Women's position as victims gives them special knowledge, which non-victims cannot participate in. Immediately, the problem of varying perceptions is raised. Additionally, Bartlett believes that the idea of privileged knowledge is misconceived. Her belief is that the experience of oppressors and innocent bystanders should be included in order to gain a complete picture.[26] Postmodernists decry universal

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[23] Armstrong, Pat & Armstrong, Hugh (1990) *Theorizing Women's Work* p135 (Toronto, Garamond Press)
[24] Ibid. p16
[25] Bartlett, Katherine (1994) Op. cit., pp1125-1135
[26] Ibid. pp1127-1129

knowledge, preferring concrete analysis. This poses a paradox, "Adherents are left in the awkward position of maintaining that gender oppression exists while challenging our capacity to document it."[27] Postmodern feminists rely on experiential analysis, working from the ground up. For example, "it insists that the subject, is constituted through multiple structures and discourses that in various ways overlap, intersect, and contradict each other."[28] This is in contrast with abstract universalism which deduces a theory from abstract principles. However, by its rejection of objectivity postmodernism has difficulty in proving the oppression of women and in supplying a reconstructive theory.

This thesis attempts to steer a via media between extreme positions. A middle ground is found between deduction and induction, quantitative and qualitative analysis and objective and subjective knowledge. To obtain an accurate description of the experience of a Church of England priest a complementary blend of quantitative and qualitative methods is used. The data analysis method involves a blend of simple quantitative cross tabulation and exploratory qualitative methods. The aim is to discover what discriminatory practices are being exercised, who are the victims and who are the perpetrators. Processes which are either directly or indirectly discriminatory on grounds of sex are searched for. Quantitative analysis will describe the current treatment of men and women priests in the Church of England. In addition to description one wants an explanation of why this is happening An exploratory, qualitative approach is used to examine general trends and to account for local variation. There is a need to isolate sex as a causal factor. Two methods are used to do this; first by looking at factors other than sex, such as age and churchmanship, to decide whether sex is indeed the causal factor. Secondly by examining the construction of gender. Sex equals anatomy but gender is a growing concept based on perceptions of men and women's roles. Variables such as marital status and responsibility for dependants are tested as separate components of sex. Finally, tentative comments are made on the interaction of sex with other variables, for example, age.

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[27] Rhode, Deborah (1993) "Feminist Critical Theories" in P. Smith (Ed.), *Feminist Jurisprudence* p594, 595 (Oxford, Oxford University Press)

[28] Bartlett, Katherine (1994) Op. cit., p1129

What can be concluded from the quantitative figures and the qualitative analysis? On the descriptive side statistical methods can be used to count the data and to find patterns in the data. Pursuing these patterns further, relationships between variables can be noted. Once this exploratory stage has been reached one can start thinking about cause. This is an emotive word not only in social science but in the natural sciences. Hage & Meeker stress that causality is a probabilistic idea not a deterministic one - thus one makes speculations rather than describing precise laws.[29] There are two distinct aspects of causal thinking. "It is...easy to confuse the theoretical aspect of causal thinking (thinking about why and how something causes something else) with the assessment of evidence for causal thinking (having formulated a hypothesis about a causal process, what data do we look for to support or reject this hypothesis)."[30] The latter is an easier process to operate. For example, when the causal hypothesis is that a person's sex causes their treatment at work, one simply compares the data on sex and treatment at work. The identification of separate causes in a causal network involves inductive work. It requires one to look at the data and ask why was that happening? The open-ended questions are intended to provide data for this sophisticated level of analysis.[31] The concentration on testing and constructing causal networks in this thesis is not just a sociological whim, it is the foundation for law reform. "We cannot make changes without understanding the reasons for a change having one effect rather than another, and the conditions under which the change we want may occur."[32]

5.8 Quantitative Methodology

The first aim of the data analysis is to collect facts. This strengthens the description of the working practices of the Church of England and sets the scene for pattern finding. Quantitative patterns can give credence to qualitative statements too. For example, several respondents might indicate that older women are being discriminated against. This is of no statistical relevance but it shows the general perception of certain respondents. Quantitative analysis can test whether this is the practice of the Church of

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[29] Hage, J. & Foley Meeker, B. (1988) *Social Causality* p5 (Boston, Unwin Hyman)
[30] Ibid. p12
[31] The empirical work in this thesis extends only to questionnaires. This provides a springboard for further research. In future work interviews and case studies could follow to develop the construction of causal networks.
[32] Hage, J. & Foley Meeker, B (1988) Op. cit., p1

England. The opinions of the few may indeed reflect current practices. Again, this is part of the deductive process of hypothesis, testing and deduction.

The next step is to test causal networks. A definition of terms relating to causal networks must be given.[33] A factor that is a cause is an independent variable, an effect is a dependent variable. Both independent and dependent variables are state variables. "[A] state variable is a condition that we can observe, which is stable enough for us to measure, and which is either the beginning or end of a causal process."[34] A state variable, such as sex or age, can usually be refined to form different components. A person's sex is biological but added to this are labels of what it is to be a man or a woman. When comparing variables, especially sex, as it is the focus here, it is important to recognise that variables are layered, and one layer may be a greater cause than other layers. A process variable is the causal mechanism which explains why A causes B. As an interactive process it is difficult to measure. When one asks, "why does being female result in sex discrimination?", one is searching for process variables. Being female does not equal being discriminated against per se. If empirical data shows a greater likelihood of women being discriminated against on grounds of sex in the Church of England, it is necessary to push the analysis forward and ask why.

In science an experimental design can randomly assign variables to cases. The effect of an independent variable on a dependent variable can be accurately recorded. This is not possible with Church of England priests. The closest one can get to an experimental design is to compare like cases with like. This reduces the risk of spurious relationships being formed between variables.[35] The research questions on search for a post and treatment whilst in post are the dependent variables. The independent variables often relate to the attributes of an individual such as sex and age, but also cover factors external to the individual such as geographical location. One outcome often has multiple causes. Sex alone, certainly biological sex, may not be the only cause of less favourable treatment at work. A comparison of the main outcomes and their gravity with the

[33] The following definitions are equally applicable to qualitative methodology, discussed at 5.9.
[34] Hage, J. & Foley Meeker, B. (1988) Op. cit., p19
[35] Ibid. p69

dependent variables of respondents will suggest whether sex discrimination is a problem and which groups of priests, if any, are its victims.

The research methods used to test causal networks must be described. One starts with a theoretical statement, for example, "Female priests are treated less favourably on grounds of their sex." This itself contains a causal assumption. Secondly, one has a statement of initial conditions, which could be a sample set of answers on the treatment of male and female priests. From these two statements one derives a research hypothesis that female priests claim sex discrimination more than male priests do. This represents an empirical regularity not a causal assumption. If the research hypothesis is rejected by the actual data, then one or both of the first two statements must be rejected. One can test whether the initial conditions are accurately represented and whether the hypothesis matches real world conditions, but there is no way of observing the theoretical statement. Even if the research hypothesis is not rejected, the theoretical statement is not necessarily true. If either statement one or two is incorrect a false premise may be derived. For example, if the answers of the clergy are inaccurately recorded it may appear that female priests are claiming sex discrimination more than male priests when in fact they are not.

At this stage one is concerned with finding evidence of a causal relationship between sex and the treatment of priests. The method of cross tabulation was used by J.S. Mill.[36] One derives as many research hypotheses as possible from the first two statements and then tests all the hypotheses against the data. The research hypotheses could be;

(1) Female priests are treated less favourably on grounds of their sex.
(2) Male priests are not treated less favourably on grounds of their sex.
(3) Some female priests are not treated less favourably on grounds of their sex.
(4) Some male priests are treated less favourably on grounds of their sex.

Once relationships between independent and dependent variables are recorded the strength of that relationship must be assessed. Is the relationship direct, indirect or spurious? A spurious relationship is when two variables seem to represent a connected

[36] Mill, J.S. (1872) *A System of Logic* (London, Longmans)

cause and event but are actually caused by the same prior cause. The two variables belong in a causal network, but one does not cause the other. "[T]o find evidence for a spurious causal relationship introduce a control variable which is causally prior to both the independent and dependent variable, and see if the relationship between the independent and dependent variable disappears."[37] Where A and B are causally connected there may be indirect causal links along the chain. Indirect links will provide information on why a priest's sex causes less favourable treatment. One has to think of the reasons why a person's sex might result in less favourable treatment and introduce them into the analysis. An intervening variable might be marital status or childcare responsibilities. Once one introduces this as a control variable one can monitor whether the original relationship changes. After testing various background variables in conjunction with a person's sex and their treatment, one can eliminate those that do not affect the original relationship. They will not form part of the main causal network relating to sex and treatment, but they may form separate networks concerned with different research hypotheses. Causal connections are working theories. They operate as theories until they are disconfirmed or until a change of social conditions removes the problem.

5.9 Qualitative Methodology

When testing causal networks one is essentially confined to quantitative analysis. The construction of causal networks produces a qualitative response to the data. At this level the question is "why" as opposed to "what". Relationships between state variables like sex and treatment of a priest do not describe what process has related these variables. Through the analysis of open-ended questions suggestions are made as to the processes at work.

An open-ended question invites open answers which must be coded. The idea of coding is to create categories into which analytically similar cases are put. If one uses very broad codes, for example, discrimination, important sub-categories will be lost. Conversely, if one creates detailed codes the result will be a multiplicity of codes which will yield no analytical results. The way to construct a useful code, says Fowler, is to

[37] Hage, J. & Foley Meeker, B. (1988) Op. cit., pp58-59

consider what characteristics of answers are of analytic significance. One asks: what are the kinds of differences among answers to each question which are important from a researcher's point of view?[38] Miles & Huberman describe three types of code.[39] A descriptive code can classify what was done and by whom, for example, what act of sex discrimination occurred and by whom. An interpretative code looks for the motive behind an action. An explanatory code suggests an emerging pattern, for example patterns of sex discrimination in certain dioceses. Because a deductive approach is taken many codes are derived from the conceptual framework. It is useful to let some codes appear for themselves. This is the inductive approach that lets reality speak for itself. This allows the researcher to be context sensitive. Conversely, it has the danger of producing non-comparative single case information and data overload.[40] The danger of losing the context of a particular response is significant. When one is using a non-experimental design there will be relevant differences among the respondents. Despite trying to construct a sample group of like men and women there are differences that must be borne in mind during qualitative research.

The final stage is to construct a causal network which explains why a person's sex causes them to be less favourably treated. At this level, focus is on the theoretical idea of causality: why is it that sex causes less favourable treatment? This is not the same as empirical evidence for causality: that a person's sex does cause their treatment. A possible criticism is that only priests are asked for their description of sex discrimination in the Church of England. Those involved in selecting priests for posts are not asked for their comments. Practically speaking, this would be difficult as officials are unlikely to admit to discriminatory practices. Additionally, unlike a court or tribunal, it is not the function of this thesis to inquire into the decision making in a particular case. Officials could at most respond in general terms. Does the elimination of one side of the equation result in a biased causal network? All the causal network can do is indicate the problems that Church of England clergy face and point to areas that are ripe for reform. The best way to introduce change is to understand the initial problem. "If we are to produce

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[38] Fowler, Floyd, J. (1993) *Survey Research Methods* p126 (London, Sage)
[39] Miles, M.B. & Huberman, A.M. (1984) Op. cit., p56
[40] Ibid. p57

change in some variable we must understand both the causal networks that do this and those that work in the opposite direction."[41]

[41] Hage, J. & Foley Meeker, B. (1988) Op. cit., p200

Chapter Six

Data Analysis[1]

6.1 The Pilot Questionnaire

Because there were already fewer men than women in the initial sample, it was hoped that a good male response rate would be achieved. Of the 20 male priests who received questionnaires 13 replied, a response rate of 65%. Of the 29 female priests who received questionnaires 23 replied, a response rate of 79%. In a sample group this small little significance should be placed on percentage values. The major lesson learnt from the sample returns was that there was a lack of information on senior posts and indeed on second curacies, especially in regard to men. In order to rectify this the final questionnaire was sent to men who were priested as far back as 1988.

The pilot survey responses to questions on sex discrimination are briefly charted. Any major or interesting findings are noted. First, it should be noted that no male priests claimed sex discrimination at any point in the questionnaire. The pilot survey was confined to female experiences only. The first question asked, "Whilst working in your present post do you think that you have ever received less favourable treatment on grounds of your sex?" 36% (8/22) of the female sample answered yes, half of whom cited the incumbent as the discriminatory source. As far as search for a first curacy was concerned, results were encouraging. A resounding 77% (17/22) denied sex discrimination with only 4 women making such claims. In this sample, initial entry to the post of curate was on the whole free of sex discrimination. Compared to other results, this is encouraging. Ordinands are given assistance in finding a training parish and this may explain the patterns. One reason why women's experience was positive may have been their established position in a parish. Many women simply transferred from being a deaconess in a parish to being a curate. It will be interesting to see how women who come straight from theological college in search of a post will fare in the

[1] The data analysis is presented in table form in Appendix B (The Pilot Questionnaire) and Appendix C (The Final Questionnaire). In view of the large number of questions asked and cross tabulations performed, only the main data findings are presented in each Appendix.

future. Women's treatment once in their first curacy deteriorated with 33% (6/18) claiming sex discrimination. It is unwise to make generalisations about the data regarding second curacies and senior posts as the data sets are so small. Sex discrimination was reported at these levels. Even with these individual case studies it can be seen that women priests believe that their sex influences their search for, and their treatment in, a post.

A question which was included in the pilot survey, but not in the final questionnaire, concerned reverse discrimination. Whilst men reported no direct sex discrimination, are appointments made which do not weigh their interests? Is equality of respect denied to male priests? Are they discriminated against in this way? The conflicting ideals of equality of result and equality of respect were examined by asking respondents about sex as a criterion of selection for the post. This was a difficult question to ask a respondent. First, it assumes a considerable degree of knowledge about the selection process, which may be why 4/12 men and 9/22 women answered don't know. Secondly, it asks people to admit or deny that they obtained their post because of their sex. In the case of men this may be perfectly legitimate. 6/12 men said that they were selected because of their sex, only 2/12 denied this. It was thought that the most likely reason would be that Resolutions A and/or B were in place. In fact only one priest stated this. Two other answers stated that the PCC wanted a male priest. No indication is given that this desire, whether theological or prejudiced, was enshrined in resolution form. Two other male priests commented that their sex did play a part in the decision but they could not be more specific. On the other side, were women priests being deliberately selected rather than male priests? 4/22 women answered yes, 3 of whom believed the policy to be one of reverse discrimination. In two cases this was the subjective assessment of the respondents. The third described being told informally during the selection process that it was a reverse discrimination policy. Thus male priests who were equally qualified to apply for that position were being discriminated against.

The process of Church appointments was probed in the pilot questionnaire. The apparent air of informality which surrounds the advertisement of, and appointment to, posts was borne out by respondents' informal comments. One respondent stated, "we do not apply for many jobs - there is a more informal appointment system." Another

suggested that one should look at "the way clergy come into post. It is not necessarily by the process of replying to an advertisement and being interviewed. More archaic methods are still practised."

Another method of probing equality of opportunity was to look at the number of applications made to secure a post, whether it was a first curacy, a second curacy or a senior post. Were any patterns revealed among the number of applications made by men and women priests? This might have been an easier task if one was analysing an ordinary employment situation where jobs are publicly advertised and candidates apply and hope to be interviewed. Using the word 'application' in the pilot questionnaire caused difficulty. The question, "how many applications did you make before you received your first curacy?" was left unanswered by some, others commented, "none, we do not apply". A female incumbent in the optional comment section attempted to clarify the situation. "References to applying for posts caused difficulties....In answering the questions I have interpreted 'application' as referring to any post in which I expressed an interest and either applied formally or at least paid a preliminary visit to the parish." In view of the difficulty of interpretation it was not possible to make any reliable statements about this data. Suffice it to say that whilst advertisement and applications for posts can potentially be formal or informal they tend towards the informal. The reasoning behind decisions is all the more difficult to ascertain and attack. In the final questionnaire questions about the number of applications made were not included.

Sex discrimination was examined by asking about the search for and treatment in a post. Less favourable treatment was analysed using two methods. First, who was the source of the discrimination? Was it a clerical or a lay source? This is important in establishing factual sex discrimination. In ordinary employment situations an employer will be liable for their own and their employees discriminatory acts against another employee. If priests were categorised as employees, who would be their employer and who would count as fellow employees? If the discrimination has a clerical source there is at least the possibility of establishing factual sex discrimination. If it emanates from the PCC there is the possibility that the council might count as employer or as agent of the employer. Members of the laity such as congregation members or the general public, usually play no part in the "employment" relationship between a priest and their Church. This source

of discrimination is generally outside the ambit of factual sex discrimination. However, if the laity formally take part in the recruitment process it could be specifically provided that they are agents of the employer. The less formal the recruitment process the more difficult such an interpretation would prove.[2] Secondly, what type of experience did the respondent have? Was it capable of constituting a "detriment" as defined by the Sex Discrimination Act? Was it a concrete incident of ill treatment or was it the perception of attitudes against women in general and/or women priests in particular? Concrete incidents are more likely to fall within factual sex discrimination. Attitudes are a difficult category to examine. Theological attitudes against women priests are permitted by the legislation. Stereotypical attitudes against women which result in less favourable treatment are not legitimised. The problem here would be proof.

Two incidents stemming from a clerical source are recounted as examples. One case concerned the very concrete issue of pay. A female curate, aged 64, described the bishop's attitude to her stipend as discriminatory. "My post is on half stipend. I am sure that if I were a man the bishop would have offered me a full stipend job. My colleague as chaplain now has one." The respondent desires equal treatment with men. Involved in this claim is the lesser but necessary goal of equality of respect. The problem, she says, is a continuing one for women priests in her age group, hereby raising questions about the interaction of sex and age. Another female curate perceived the attitude of her incumbent as discriminatory on the ground of her sex. "He found it hard to accept that I had twenty years of work experience (and life experience) before ordination." The continuing problem was reported to the rural dean and bishop. The solution, her moving post, did not match the problem. The failure to tackle the main problem perhaps illustrates the desire to appease all sides. It means that underlying attitudes, whether discriminatory on grounds of sex or lacking in respect for men or women, remain unresolved.

Two incidents stemming from a lay source are noted as examples. A NSM curate described how the PCC were unwilling to pay expenses incurred by her. The council might be classed as an employer or agent so this was an interesting example. The

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[2] Alternatively they might be construed as third parties. In certain circumstances an employer can be directly liable for the actions of third parties. This is discussed at 7.7.1.

solution of the council, to increase her husband's expense to include the amount of her expense, showed a distinct lack of respect. In another example a female curate described the attitudes of church members. "A few have anti-women priest views, some have stereotypical views of women's roles." Stereotypical views confined to church members prejudices are hurtful but are unlikely to be discriminatory. If these views were to limit the work which she could do, a claim of factual sex discrimination might be made.

6.2 The Final Questionnaire: The Initial Sample and the Achieved Sample

It is useful to compare the characteristics of the initial sample with those of the achieved sample. A 72% overall response rate was achieved. The 69% male response and 74% female response gave quantitative analysis firm foundations. It was encouraging that male priests did not regard the issue of sex discrimination as a female preserve. 6% of men and 9% of women indicated that they could not or would not complete the questionnaire. Non returns totalled, males 24% and females 16%. All dioceses provided a solid response rate between both sexes. The highest rate was 93% by males in Newcastle the lowest was 50% by males in Chichester.[3]

The second vital characteristic was pastoral experience. Did the returns reflect the weighting of pastoral experience included in the initial sample? This was ascertained by collating information about present status and ordination dates. Regarding the former, the status of being a deacon or a priest reflects pastoral experience. A curate spends one year, usually, as a deacon before they are priested. The initial male sample group comprised; 12% deacons and 88% priests. This was closely matched by the initial female sample; 11.5% deacons and 88.5% priests. The achieved sample reflected a balanced return of questionnaires by priests and deacons. The achieved male sample now comprised 10% deacons and 90% priests. The achieved female sample comprised 12% deacons and 88% priests. The slight swing in the male ratio towards priests is probably not due to the lesser response of priests but due to deacons being priested after the compilation of initial sample data. This is a problem when comparing the initial and achieved sample group characteristics. The study population is not static, characteristics change. Comparing like with like can be a tortuous task.

[3] The reader is referred to Appendix C, Table C-2 for a complete breakdown of the response rates.

In the initial sample the ordination of male priests was evenly spread between 1988 and 1994. Each year represented between 10-13% of the total sample. Only 6.5% of the male sample had been priested in 1995.[4] Finally, those males made deacon in 1994 and 1995 accounted for 3% and 9% of the male sample respectively. 79.5% of the initial female sample were ordained to the priesthood in 1994. This was due to the glut of women waiting to be priested. Only 9% were so ordained in 1995. Women made deacons in 1994 and 1995 made up 4.5% and 7% of the sample respectively. The ratios held fairly evenly between the initial and the achieved sample. The ordination of male priests was evenly spread between 1988 and 1994. Each year now represented between 8-15% of the total sample. The highest percentage of male priests (15%) were ordained in 1994. The higher percentage of males priested in 1995 and the lower percentage of deacons reflected a number of priestings since data sample compilation. Similarly regarding the female sample, whilst the ratios held fairly evenly, 18% of female respondents were now found to be priested in 1995.[5]

6.3 Quantitative Analysis

6.3.1 Present Sex Discrimination

To stimulate respondents to think about sex discrimination, the first major question asked, "Whilst working in your present post, do you think that you have ever received less favourable treatment on grounds of your sex?" The solid base of 286 answers gave meaning to the percentage values. Of the male sample 1% answered yes, 3% don't know, with a resounding 96% answering no. The experience of female priests was somewhat different with 30% claiming sex discrimination, as against 66% who denied it and 4% who answered don't know. As far as which dioceses were affected by sex discrimination initially the results ran to form. Leading the table was Chichester with 52% (11/21) of its female priests claiming sex discrimination. This was followed by another anti-women priests diocese, Truro, with 45% (5/11) of its women making claims. Surprisingly the next villain was Blackburn who were thought to be a moderate

[4] However, some deacons may have been priested post data compilation.
[5] The reader is referred to Appendix C, Table C-4 for a complete breakdown of ordination dates.

diocese regarding women priests. Its high 43% female claim rate was due to 3/7 women making claims. The small number base may be viewed as inflating the figures. However, it should be remembered that there were only a handful of female priests to canvass in Blackburn as compared to hosts of male priests, perhaps itself saying something of the situation in Blackburn for women. Also higher than expected was Guildford where 27% of women claimed sex discrimination despite being in a diocese which strongly favours women priests. Holding the middle ground was London. 10 women and 1 man complained of sex discrimination giving its women priests a 23% claim rate. From this point the dioceses ran to form; Newcastle recording a 21% female claim rate, Worcester a 20% female claim rate and finally Gloucester with a low female claim rate of 14%.

The discriminatory source was varied. The incumbent (14%) and the bishop (16%) were prominent sources. Other clergy sources; team ministry members, diocesan officials, area bishop and other clergy colleagues accounted for a further 30% of claims. The laity also figured in the statistics; PCC members (14%), lay church workers (5%) and the wider category of congregation/parishioners (18%). A potential problem for priests is the number of people who are involved in their work. Evidently this is a problem in regard to sex discrimination. There are multiple sources of discrimination, only certain of which could hope to be tackled by employment law. The discrimination was perceived as a continuing problem by the male priest and by 86% of women priests. This perhaps indicates that sex discrimination is deep seated within individuals and possibly that it permeates church structures to a diocesan level. In the majority of cases the problem was reported. Their present post as well as the incident itself determined who respondents spoke to. Some approached officials whilst others approached the "discriminators" themselves. The incumbent provided an important channel for complaint. Interestingly, clergy work groups and work appraisers were mentioned, indicating that the Church is borrowing ideas from secular employment. Remedial action was only taken in 28% of female cases, leaving problems festering for the majority.[6] In 4/10 cases the action prevented a recurrence of the problem as against 5/10 cases where action had no effect. One problem is that there is no uniform way of dealing with disputes between clergy, especially those between a curate and an incumbent.

[6] The type of action taken will be examined in the qualitative section at 6.6.9., 6.6.10. and 6.6.11.

Decisions are made on an ad hoc basis. The advantages of flexibility and the ability to deal with different contexts in turn prevents a coherent system of rights and redress.

6.3.2 Past Sex Discrimination: Search for a First Curacy

The following questions focused on past sex discrimination, starting with a priest's treatment in their search for a first curacy. Information about vacancies were relayed by various methods. Respondents were asked to describe all the ways that they had heard about the post, thus the number of answers given exceeds the number of respondents. 44/138 men and 49/149 women described the bishop helping them find their first curacy. The role of the theological college and principal were relevant to men, with 32/138 men acknowledging their help as against 14/149 women. Only 2 respondents had used newspaper advertisements. The role of NSMs is important to note. 17/138 men and 24/149 women described training as NSMs and returning to their home and training parish as priest. For these respondents the difficulty of searching for a first curacy was non-existent. Likewise this was so for the 15/149 women who were already in post as deaconesses or lay workers and stayed in the same parish when ordained. It is usual practice for the diocese which sponsors an ordinand through theological training to offer the ordinand a title to orders; a first curacy. This will be so whether the training has been stipendiary or non-stipendiary. If this is not possible it is the diocese's duty to release the ordinand so that they can seek a post elsewhere.

Against this factual background, the claims of less favourable treatment during search for a first curacy are examined. Depending upon a respondent's experience this could be as recent as 1996 or as long ago as 1987. 2% of males and 19% of females claimed sex discrimination. The male affirmative response was greater at this level than it had been in regard to present treatment. The female response, although much lower than the 30% in regard to present treatment, must be read in conjunction with the ease of entry into post by female NSMs and deaconesses. The vast majority of males (96%) denied sex discrimination. Female priests were slightly less decisive with 69% answering no and 12% don't know. In the case of the 3 males and most females the discrimination only applied to one post. 4 females described it applying to two posts whilst one described

three or more posts being involved.[7] Female priests identified five main discriminatory sources. The curate's incumbent, perhaps unsurprisingly, came out as the villain; mentioned by 32% of females. The other categories were fairly even; bishop (18%), area/suffragan bishop (18%), lay members (churchwardens, PCC members, parish representatives) (18%) and the diocesan director of ordinands (14%). The heavy clerical involvement in the appointment of first curates would be useful in an employment context as there would be a greater likelihood of an employer being identified.

6.3.3 Past Sex Discrimination: Treatment in a First Curacy

The third major question asked, "Whilst working in your first curacy, do you think that you have ever received less favourable treatment on grounds of your sex?" Respondents were not to answer this question if this was their present post, as they had already provided the requisite information regarding treatment in present post.[8] 2.5% of men and a substantial 48% of women perceived sex discrimination. The remainder of the sample were unequivocal answering no to discrimination, with only 2.5% of the male sample answering don't know. Once in their first curacy women's treatment appears to deteriorate radically. Why is this so? To answer this one must investigate the discriminatory source and the incident itself. The two male priests indicated that the incumbent was the perpetrator. 26% of females likewise described the incumbent as the source. PCC members caused difficulties for female priests, with 19% mentioning them. It is difficult to know whether this was always in their role as PCC members or as congregation members who happen to be PCC members. The role of the PCC can become blurred when they are congregation members also. The bishop (11%) and members of their team ministry (6%) were prominent sources. As the "other" category proved substantial, categories were created out of it. For example, a category labelled congregation/parishioners comprised 13% of complaints. Lay workers, in this case a reader and ministers of sacrament, added to complaints against the laity. Agencies working with the Church, in this case funeral directors and the choir, were mentioned by 4 respondents. Female curates faced multiple sources of sex discrimination. The issues

[7] The instances of sex discrimination will be discussed in the qualitative analysis section at 6.6.3., 6.6.4., 6.6.5., 6.6.9., 6.6.10. and 6.6.11.

[8] This point also applies to questions on treatment in second curacy and in senior post where the person holds that post. The respondent will already have provided information on treatment in that post.

to tackle are; which sources of discrimination can be attacked and by which method ought this be done? As to the nature of the incident it was described as continuing by one male priest and isolated by the other. For female priests problems were deep seated with 86% describing the problem as continuing. As to reporting the incident one male did and one did not. Female priests were ready to report their incidents with 82% doing so. Clerical sources were approached for help including the incumbent, the bishop and the archdeacon. 4 women approached their diocesan adviser for women's ministry. Action was taken in the case of the male priest and in 15/26 (58%) of female cases. The action was only effective in preventing a recurrence of the problem in 6 female cases.

6.3.4 Past Sex Discrimination: Search for a Second Curacy

The next question asked, "To all clergy who have applied for a second curacy, whether successful or not, have you at any stage received less favourable treatment on grounds of your sex?" 37 males and 54 females had sought a second curacy. 2 males and 2 females had been unsuccessful in their search. Male priests were contented with their job search with 94% denying sex discrimination and 6% answering don't know. Female priests were likewise happier. 16% perceived sex discrimination as against a majority of 79% answering no and 5% answering don't know. However, 16% represents 7 women priests who believe sex discrimination was exercised against them. The incumbent was the discriminatory source in 3 cases. The 4 remaining sources were; the bishop, PCC members, those responsible for advertising clergy posts and an incumbent's wife.

6.3.5 Past Discrimination: Treatment in a Second Curacy

Those who were no longer in their second curacies were asked about their past treatment in post. 15 males and 16 females answered the question.[9] Of the male sample 14/15 (93%) denied sex discrimination whilst 1/15 (7%) answered don't know. Answers by the female sample were decisive, 7/16 (44%) perceiving sex discrimination, 8/16 (50%) denying discrimination and 1/16 (6%) answering don't know. Again the pattern appears to be a deterioration of treatment once in post. With the exception of the incumbent, mentioned 4 times, sources were varied. They comprised; bishop, deanery clergy, PCC

[9] The answers are written in ratios as well as percentages as the number base is fairly small.

members, a congregation member and the incumbent's wife. All respondents described it as a continuing problem which they reported. Senior clergy, including the area bishop, the archdeacon, the suffragan bishop and the rural dean were approached. In 2/7 cases action was taken but the problem remained.

6.3.6 Past Sex Discrimination: Search for a Senior Post

The final section asked about senior posts. Senior posts were defined to comprise the posts of vicar/rector, team vicar, team rector and priest-in-charge. 47% of the male sample and 28% of the female sample had sought senior posts. 5 of each sex had been unsuccessful in their searches. Did they encounter sex discrimination during their search? Of the 62 male answers, 3% said yes, 94% no and 3% don't know. For female priests, their experience was diverse. A bishop has the discretion to reduce a woman priest's curacy in this transitional period. This obviously had happened as a substantial number of women held senior posts. Although allowed access to the competition, of the 39 female answers, 39% perceived sex discrimination as against 51% who did not and 10% who did not know. At this job search level the perception of sex discrimination by women is higher than that at first or second curate level. Is there a glass ceiling for women priests which makes them acceptable at curate level but not at senior post level? In fact in the majority of cases less favourable treatment only occurred in regard to one post, giving the impression that there are problem parishes but that women are not completely prevented from obtaining senior posts.[10] However, 1 male and 2 female priests indicated that discrimination arose in regard to three or more posts. Discriminatory sources naturally included those involved in the hiring process; parish representatives were mentioned 7 times illustrating the formidable power of the laity. For the first time the lay patron figured, being mentioned 3 times. The influence of team ministry members in the hiring process had not been fully realised previously. They were labelled as the perpetrator 4 times.

[10] The reader is referred to 6.6.9. where the policy of the Chichester diocese is detailed.

6.3.7 Past Sex Discrimination: Treatment in a Senior Post

Treatment whilst at work in a senior post, other than their present post, was only answered by a small number of respondents. Most respondents were only in their first senior post and had thus given the information regarding present post. Of the 4 male and 2 female answers, 1 female claimed sex discrimination, whilst the 5 others denied it. The details of the less favourable treatment relate to one data set only. The perpetrator was the bishop. It was a continuing incident which was reported. Action was taken but it did not prevent a recurrence of the incident.

6.4 Analysis of Present Treatment

Causal networks were tested by comparing present treatment with independent variables. Respondents' answers to questions such as age and marital status were reliable and relevant to their present status. The same assumption could not be made for past sex discrimination; variables such as age would have changed, variables such as responsibility for dependants might have changed. Present discriminatory treatment was analysed by cross tabulating sex and another chosen variable against claims of present sex discrimination. 1 male (1%) and 30% of females claimed present sex discrimination. When cross tabulating sex, present treatment and a variable it was important to see whether the percentage values varied greatly. If they did it would indicate that the variable was an important influence on treatment. It could be that the interaction of the variable with sex was causing an increase or decrease in the percentage. Secondly, and less likely, it could be that the variable alone was causing the treatment. Being treated less favourably on grounds of sex was the situation asked about. Being male or female was thus always going to be the dominant variable. Additionally, with so few men claiming sex discrimination it seemed more likely that female sex was indeed the dominant variable.[11]

[11] The only difficulty with percentage value comparison is when the number base is so small that it makes comparison with a large number base unwise. These situations have been noted in the text.

6.4.1 Cross Tabulation: Pastoral Experience

The first cross tabulation was between pastoral experience, sex and present treatment. The idea of pastoral experience is important in comparing like with like. Respondents were matched using two main methods; level of present post and ordination dates. The sample group contained the standard parochial offices. 10% of males and 12% of females were deacons serving the first year of their curacy. 45% of males and 63% of females were curates who had been priested. Thus a large part of the sample were in posts under the training and supervision of another. The majority of curates were in their first curacy. 5% of males and 9% of females were priests-in-charge. The office of vicar/rector was held by 27% of men as against only 5% of women. Why is this so? Are women being denied preferment or do they simply not want these posts? Of the female sample who sought senior posts only 5 were unsuccessful. However, the sex discrimination encountered during search was high. 10% of males and 5% of females were team vicars. The only team rector was female (1%). These latter three categories represented incumbent status. 37% of males held incumbent status as against 11% of females. Finally, 3% of males and 5% of females were classified in the "other" category. What was the stipendiary nature of these posts? Of the total sample 21% of males and 39% of females were NSM curates. This was a surprisingly high figure and not one capable of revelation before sampling. Additionally, the issue of NSMs was not properly raised by the pilot survey where only 3 women were NSMs. 2% of both male and females were NSM priests-in-charge. This left 77% of males and 59% of females as stipendiary ministers.

Which were the posts affected by present sex discrimination? All relevant posts from a first curacy through to an incumbency were affected by discrimination. Female deacons reported 29% present sex discrimination and female curates who had been priested reported 31%. Likewise if curacies were subdivided into first and second curacies the figures remained fairly constant. Being a curate was not a dominant factor in less favourable treatment. Information on curacies was also obtained in regard to past sex discrimination. Was there any pattern between present and past discrimination? The treatment of present curates was better than the treatment of female first and second curates in the past. Past discrimination whilst in post had ran at 48% and 44% for female

first and second curates respectively. An explanation for these figures could be that the treatment occurred pre the Synod vote or shortly afterwards when there was concern regarding the implications of women priests. This might suggest that new entrants to the Church are being treated more favourably.[12] Being a priest-in-charge improved the situation for women priests with only 3/13 (23%) claiming present sex discrimination. The small number base involved should lend caution to any general statements here. Similarly the statistic that 3/7 (43%) of female vicars/rectors claimed present sex discrimination should not be distanced from its small number base. Exactly the same statistic was recorded for female team vicars, adding a little more weight to the supposition that female priests receive worse treatment when they are in senior posts. However, when women's treatment in all senior posts was totalled together it was evident that the percentage value only increased slightly to 32% (9/28). Present treatment in senior post cannot be compared with past treatment as there is only one data set available for the latter. Finally, NSM status was cross tabulated with present treatment to see if stipendiary status influenced treatment. Female NSM curates recorded 33% present sex discrimination. This rise above the initial percentage value indicated that NSMs might be a marginalised group. It did not suggest that being a NSM or being a female NSM equalled being discriminated against. Being female remained the dominant characteristic.

In terms of ordination dates the majority of the female sample (70%) were priested in 1994, followed by 18% priested in 1995. Of the 17 female deacons, 2 were priested in 1994 and 15 in 1995. Did date of entry into ministry make any difference to present treatment? Of those priested in 1994, 29% claimed present sex discrimination. The problem of sex discrimination has not disappeared during the reception process. Of those priested in 1995, 38% (10/26) claimed present sex discrimination. However, those made deacon in 1995 only had a claim rate of 27% (4/15). In order to probe pastoral experience in greater depth, experience as a deacon and deaconess was examined. The glut of women priested in 1994 hides their formidable pastoral experience spanning many years. For example, women admitted as deaconesses could have up to thirty years experience of ministry. 28% of the female sample had worked as deaconesses. 24% of these women claimed present sex discrimination. It appeared that those who had worked

[12] However, for an alternative reading the reader is referred to the next paragraph.

for the Church longest were happiest. They have had to fight for change and perhaps now that they have achieved this they are fairly content. New female entrants have not had the pressure of fighting for reform, so perhaps they are more willing to voice their complaints in a Church which ostensibly accepts them. In 1987 women were allowed to become deacons. Each respondent had experience as a deacon, this varied from one year (those made deacon in 1995) to seven years (those made deacon in 1987). 147 women gave their ordination dates to the diaconate. The greatest numbers were ordained in 1987 and 1994. Those who had been ordained deacon longest seemed happier than recent entrants. For example, 23% (12/51) of deacons ordained in 1987 claimed sex discrimination as against 35% (8/23) of those ordained in 1994.

6.4.2 Cross Tabulation: Age

The next cross tabulation was between age, sex and present discrimination. The spread of clergy ages revealed the majority of male clergy (53%) in the 30-39 band. Female clergy represented only 12% in this band. The presence of childcare responsibilities during this age band might explain the statistics. Female priests were found in solid numbers in the next two bands, 40-49 and 50-59. This reflected the fact that women had waited a long time to test their vocations. It might also mean that older women are attracted to the priesthood for a variety of reasons, perhaps when they no longer have responsibility for dependants. Surprisingly 17% were located in the age band 60-69 as against only 8% of men. The only male who claimed present sex discrimination was in age band 50-59. Sex discrimination against females spanned the age bands. In the small band of 20-29, 1 female claimed sex discrimination. The next band, 30-39, saw women priests at their happiest with only 4/17 (24%) claiming sex discrimination. In the next two large age bands, 40-49 and 50-59, 34% and 27% of females claimed sex discrimination respectively. The final band, 60-69, experienced greater sex discrimination. The percentage female value rose to 36% (9/25). 6/9 of these women were also NSMs. Less favourable treatment occurred in all age bands. Being a female priest is still the dominant factor. However, older women priests appear to have a further handicap.

6.4.3 Cross Tabulation: Personal Characteristics

The next series of cross tabulations involved characteristics personal to the respondent, the first of which was disability. Of the sample group 4 males and 6 females described having a disability. 2 female priests then went on to report present sex discrimination. The small figures prevent any causal link between sex, disability and discrimination from being established. The interaction of race with other variables was at the outset thought to be of little significance. Church of England priests are virtually homogenous in their whiteness. 99% of priests were white. The other 1% represents one Afro-Caribbean, one Asian and one priest of mixed race. All claims of present sex discrimination were made by white priests. Race did not appear to be involved in the causal network.

A certain type of churchmanship if often a required characteristic for a post. Parishes might advertise for a priest who can offer "central churchmanship" or "evangelical/charismatic worship". How are priests with different theological views treated? One would expect a priest's present parish to accept his or her churchmanship as they have chosen them for the post. The variable of churchmanship is probably more pertinent to job search. The spread of clergy churchmanship located most male and female clergy in three categories; moderate catholic, central churchmanship and evangelical. Female priests were found in greater number in the moderate catholic category. Male priests were split evenly between moderate catholic and evangelical (33% respectively). 10% of males described themselves as strongly catholic as against 2% of females. The presence of women priests in this category was unexpected, having regard to the catholic stance on women priests. The male priest who claimed present sex discrimination described his churchmanship as central. Of the female sample, the happiest group were the evangelicals with only 24% claiming sex discrimination. This is in contrast with the moderate catholic category where 38% claimed sex discrimination. Why this particular category of churchmanship revealed a greater percentage of sex discrimination is difficult to judge.[13]

[13] Interviews would be needed to gain further insight into this finding.

6.4.4 Cross Tabulation: Family

The next series of tabulations concerned the respondent's family connections and responsibilities. Of the male sample 20% were single and a large majority of 78% were married. Of the female sample, marital status was more diverse; 37% were single, 51% were married, 7% were separated or divorced and 5% were widowed. The male priest who claimed sex discrimination was married. Of the female sample experiences were evenly divided with 30% of single women and 32% of married women claiming sex discrimination. 2/10 separated or divorced women and 3/8 widowed women completed the discrimination statistics. The lack of variation regarding marital status was surprising. It had been thought following the pilot survey that married women priests might fare worse than their single colleagues.

Independently cross tabulated with present treatment was the question, "If you are married does your spouse currently hold a clerical office in the Church of England?" Of the male sample 3 were married to female priests, whilst 20% (15/75) of married women were married to a cleric. The male priest who claimed sex discrimination was not married to a cleric. Claims of present sex discrimination by females fell to 4/15 (27%) when married to a cleric, whereas they rose to 33% when they were not so married. One possible explanation for the percentage fall could be that these women are working as curates with their husband as the incumbent. With this kind of working structure sex discrimination is less likely to happen.

As an exploratory idea the question was asked, "Do you have any other relatives who currently hold a clerical office in the Church of England?" Might clergy connections help or hinder present treatment? Without detailed case histories one cannot make any categorical statements on this. However, it would be interesting to see if there was any general pattern. 18% of the male sample had clergy relatives as against 12% of female priests. The male priest who claimed present sex discrimination did not have clergy relatives. Surprisingly, the existence of such relatives appeared to hinder women priests with 7/17 (41%) claiming present sex discrimination as against 29% of females without clergy relatives. The presence of clergy relatives was previously thought to be a factor which might help women. Again being a woman was the dominant factor.

The next question attempted to operationalise the social construction thesis. Family responsibilities and social roles were tentatively examined by asking about responsibility for dependants. The vast majority of dependants were children. 8 respondents described looking after other relatives. 65% of males and 40% of females had dependants. The lower figure for females is explained by the large number of single women and by the presence of women in the older age bands. By this age women who had responsibility for dependants in the past are free to pursue their vocation. The male priest who claimed present sex discrimination had dependants. The presence or absence of dependants had little effect on the percentage female value. The stereotype of the female priest treated badly because she is neglecting her children/job was not prominent in the statistics.[14]

6.4.5 Cross Tabulation: Education

The next category of cross tabulation concerned education. As a whole the clergy are well educated. Training for the priesthood can be full- or part-time. Courses vary in content, structure and qualifications offered. Often candidates have a degree before theological college, although this is not necessary. Some colleges and courses offer degrees and postgraduate degrees as part of their training. Naturally while the formal qualifications required to become a priest remain diverse, inequality of condition will prevail. However, equality of condition does not necessarily lead to equality of respect or more fundamentally to equal treatment.

The first cross tabulation asked; are there any patterns between the type of training and present sex discrimination? 74% of men but only 40% of women took a full-time course at theological college. The large numbers of women taking the part-time course is largely explained by their NSM status. It is usual for NSMs to take a part-time course. The male who claimed present sex discrimination had undertaken full-time training. There was a discernible difference between female experiences. Those who had trained full-time reported 22% sex discrimination, whilst those on the part-time course reported

[14] However, the reader is referred to the comments made by mothers in the qualitative data section, at 6.6.3., 6.6.5. and 6.6.10.

36%. However, full-time training still did not equalise women's experiences with men, illustrating the idea that equality of condition will not lead to equal treatment or indeed equality of result unless discrimination is eliminated. Equality of condition did not exist regarding the variable of holding a degree. 70% of the male sample held degrees as against 49% of women. The male priest who reported sex discrimination did not hold a degree. Females with or without degrees reported an identical level of 31% sex discrimination. The presence or absence of a degree appears not to influence a priest's treatment. Additionally, holding a degree does not equalise women's experiences with men or with one another. Postgraduate degrees were held evenly between male and female priests at 18% and 16% respectively. The male priest who reported sex discrimination did not hold a postgraduate degree. Expecting the percentage value of female sex discrimination to fall it was surprising to find that it rose to 33% (8/24) where women had postgraduate degrees. Those without such qualifications retained the constant 30% percentage value.

6.4.6 Cross Tabulation: Geographical Location

The next set of cross tabulations involved an exploratory, albeit superficial, investigation of the effect of geographical location on a priest's treatment. The percentage of male and female priests in different geographical locations was evenly matched. By far the highest concentration of priests were found in suburban areas at 34% and 32% for males and females respectively. Solid representation was found in rural areas too; 18% of males and 22% of females. From the answers given to the "other" category a new category of town was created. The two categories of inner city and mixture of inner city and suburbs often did not cover the traditional market/country town. The different regions showed greater sex discrimination variation than other variables. The male priest who indicated sex discrimination worked in an area defined as a suburban and a rural area. Women priests who described their parish as being situated in a town proportionately suffered the most sex discrimination at 55% (6/11). No particular discriminatory source was prominent here, although team ministry members were mentioned 3 times. Such ministries are more likely to be situated in towns. Two words of caution. First, a small number base is involved, therefore generalisations are difficult to make. Secondly, this was a recoded category. It may be

that other respondents in towns ticked inner city or inner city and suburbs. It is possible that this statistic is unnaturally inflated. However, female priests in the inner city likewise suffered proportionately higher sex discrimination at 36% (5/14). These priests were situated in the London and Guildford dioceses. On the whole the discriminatory source was clerical. Perhaps this is inevitable in London diocese, a diocese which is generally less supportive of women priests. In descending order of discriminatory reports are; rural areas, inner city and suburbs and suburban areas all clumped around the 30% constant. Who was the discriminatory source in rural parishes? Did it stem from the laity, who often have considerable influence in rural districts? 7/10 respondents indicated a lay source, confirming the suspicion of lay influence. The area where women are markedly happier is in the mixture of suburban and rural areas, with only 21% (4/19) reporting sex discrimination.[15]

When considering the priest's parish, one must consider their working structure. Do they operate singly as an incumbent, as a two-some of curate and incumbent, as a team ministry or as a group ministry? Did the latter two forms of organisation provide more ammunition for sex discrimination? As regards team ministers, 21% of the male sample and 26% of the female sample were engaged in such work. These were important categories of respondents to investigate. The male priest who claimed sex discrimination was not a team minister nor indeed a group minister. 34% (13/38) of female team ministers claimed present sex discrimination, thus pushing the percentage value up. To discover whether the team ministry structure itself was the problem, or whether this was just a coincidental feature, the discriminatory source was cross tabulated. 7/13 cited team members as the source, suggesting that the team ministry structure was not working well. One reason for this could be the division of team members regarding women priests. Group ministers formed a smaller percentage of the sample, comprising 6% of males and 12.5% of females. Again the female percentage value of present sex discrimination rose, this time to 33% (6/18). However, the discriminatory source was not other group members. The group ministry structure was not the problem area.

[15] This had also been an interesting finding in the pilot study.

6.5 Non-Stipendiary Ministry

The final quantitative area of study was non-stipendiary ministry. With 22% of males and 41% of females working as NSMs it was necessary to look at the factors which decided their stipendiary status. The majority of NSMs were part-time ministers, although some disliked being categorised as a part-time priest. The reasons for part-time posts fell into three categories; retirement ministry, having another job or being designated as a minister in secular employment.[16] The latter's primary focus of concern is their ministry whilst in secular employment rather than their parochial ministry. The vast majority of men had chosen NS ministry rather than being forced to accept it. Women priests were divided in experience. 58% described choosing NS ministry as against 42% who became NSMs because of factors beyond their control. Those who ticked choice were asked to tick all the reasons which motivated their choice. On the practical side many had another job or source of income. Other reasons of choice given by males centred on the importance of NS ministry. Respondents believed that they had a contribution to make to the Church. They viewed NSM status, whether as a straightforward NSM or as a MSE, as a positive model of priesthood. Other reasons of choice given by females covered a wide area. Those who were MSEs promoted NSM as an ideal form of ministry. Others had family commitments and ties which made stipendiary ministry difficult, if not impossible. For example, one stated that family resistance to full-time vicarage life was a factor in her choice to become a NSM. Others gave reasons of "choice" which were in reality connected to church policy. The statements, "Because I married a clergyman," and "There are so few stipendiary jobs given to women in Chichester diocese," are in reality factors beyond their control.

Only 3 males stated that they were in NSM posts because of factors beyond their control, as against 30 women. One male priest gave health as the reason, the other two stated that it was because of their age. Again female answers varied. 5 stated that there were no stipendiary posts which they were qualified for in the area they wanted to apply to. 3 of these respondents came from Newcastle diocese, the other two were from Chichester and Guildford. 2 stated that their spouse is a priest and diocesan policy states that only one spouse may hold a stipendiary post. The one respondent was from

[16] From henceforth the latter will be referred to as a MSE.

Worcester, the other who was from Guildford said, "I do not think there is a 'stated' diocesan policy, but there is an accepted practice." Only one described her applications for stipendiary posts being rejected. Of the 22 answers to "other" factors beyond your control, the one most frequently cited was age. 12 mentioned age acting as a barrier to obtaining a stipendiary post. Respondents explained how age acted as a direct disqualification, "I was past the age limit for stipendiary posts when I started training," and "The Church of England imposed a 45 year limit on new stipendiary clergy, therefore too old." Family commitments such as husband's job and children's schooling acted to limit the geographical area of work available. NSM posts were taken as the area did not offer stipendiary work.

6.6 Qualitative Data Analysis

The codes were derived from the theoretical framework. New themes, stressed by the respondents, were introduced. The analysis began with three broad categories into which sub-categories were placed. The first category covered search for a post and included sub-categories on the way that posts are advertised and the reasons given for non-selection. The second category covered treatment in post. The final category was an expansive one which attempted to locate individual responses and world-views on sex discrimination. The aim was to discover perceptions of women and men through respondents' own experiences. Each sub-category was given a short code name which was written alongside the relevant data. For example, post advertisement is coded as "post-adv". Each code has a research objective. In this case, the aim was to discover how posts are advertised in the Church of England. A fact finding motive is also tied to theoretical interest in the concept of equality of opportunity.

6.6.1 Advertisement of Posts

The first category is post advertisement.[17] The question asked, "how did you hear about your present post?" Respondents were asked to tick all the ways that they had heard

[17] At the pilot questionnaire stage little was known about the way posts were advertised in the Church of England. After this information was obtained the question became a semi-closed one in the final questionnaire.

about the post, thus the number of answers given exceeds the number of respondents. They were given 5 categories; bishop, incumbent, theological college, newspaper advertisement and mailing list. A sixth category "other" in turn provided 5 new categories. In each category male and female respondents were evenly matched. The most usual method of communication was via the bishop, with 61/138 males and 57/149 females citing this source. Newspaper adverts were mentioned by 21 respondents. As such advertisement is less likely for first curacies, this probably applied to second curacies and senior posts. 10 respondents used mailing lists. The most frequently cited was the list of the clergy appointments adviser, Canon Hardaker. 23/149 women described being NSM priests who did not have to apply for their posts, but simply returned to their training parish. 8 male priests but only 1 female priest described the lay patron approaching them. The apparent air of informality which surrounds the advertisement of, and appointment to, posts was borne out by the 2 final categories. 14 male and 11 female respondents gave answers which could be described as the clergy grapevine or informal clergy contacts. For example, 4 males described their post being created for them. Another 2 filled vacancies in the parishes where they were already curates. Female curates likewise transferred from being the curate in a parish to a more senior post. Other female answers included, "approached by dean informally", "husband suggested me to his vicar" and "post in neighbouring parish in which my husband is curate". 11/138 males and 18/149 females gave answers which remained classified in the "other" category. They served to further illustrate the diverse nature of Church of England appointments. For example, female answers included, "request of churchwardens" and "had to be moved because incumbent would not accept women priests."

6.6.2 Job Interviews

The next area of investigation was job interviews. Which posts, if any, operated a system of formal interviews? Who were the interviewers? This was a fact finding exercise, linked to theoretical ideas. The objective was to discover who had the real power of hiring. Potentially this power can be abused in the form of sex discrimination. Unlike secular employment, hiring decisions remain unaccountable. 65% of males and 51% of females received formal interviews for their present post. Bearing in mind the

informal advertisement process this was thought to be a high number. The lower percentage of women interviewed may be explained by their NSM status and their presence in the parish as deaconesses. The majority of interviews were conducted on a sole interviewee, not a short list, basis. However, often the practice of parishes is to select candidates individually for consideration. Candidates come separately to the parish. It may be that 4 or 5 are interviewed before a suitable candidate is found. Therefore, it can be an elongated stream of sole interviewees. When short lists were administered they were used predominantly for the senior posts of vicar/rector and team vicar.

All levels of post used a formal interview. Curates in their first post received the fewest formal interviews, with 48% of males and 41% of females receiving interviews. At second curacy level this rose to 60% of males and 42% of females. The decreased use of interviews at first curacy level can be explained by the informal appointments system at this level and the presence of NSM curates. NSM curates were less likely to be interviewed, although 8/27 males and 10/56 females were. Interviews were increasingly used at senior post level. For example, 89% (33/37) of male vicars/rectors were interviewed. Team vicars likewise came under interview scrutiny. Fewer men were interviewed at this stage. 69% (9/13) of males had interviews as against all 7 female team vicars.

Who administered the interviews? This was worded as an open question. It would have been difficult to make this a closed question, bearing in mind the different posts involved. Respondents recorded all the relevant personnel involved, therefore, the number of answers exceeds the number of respondents. At curate level it was expected that the incumbent of the parish and perhaps the bishop would be present. The former expectation was borne out by both samples. In 32/38 male cases and 33/43 female cases the incumbent was present at the interview. The bishop only attended 3 male and 1 female curate's interviews. The presence of the suffragan bishop, the archdeacon and the area dean at interviews represents the delegation of duties by the bishop. The laity, as well as being officially involved in the appointment of an incumbent, were involved at curate level too. 15/38 males and 20/43 females described the parish representatives being present at the interview. A variety of other personnel were cited including an

incumbent's wife who attended alongside the incumbent, lay readers and in one female curate's case the interview was open to all lay people in the parish.

The principal personnel involved in the interview of a priest-in-charge were; the parish representatives, the bishop, the archdeacon and the patron. In one male respondent's case the present incumbent's wife attended. The parish representatives' presence in all male cases and 9/10 female cases is not surprising as the priest-in-charge is the unbeneficed version of the incumbent. However, the statutory requirements which pertain to the appointment of an incumbent are not necessary in regard to a priest-in-charge.[18] Appointment as an incumbent formally involves the patron, the bishop and parish representatives. Who would conduct the interview? Parish representatives were involved in all 6 female interviews and in 30/33 male interviews. The patron was involved to a lesser extent; interviewing 10/33 males and 3/6 females. The bishop attended some interviews in person, in other cases he delegated his powers to the area dean and the archdeacon. Finally, team vicars were consistently interviewed by the parish representatives, the team rector and other team members such as team curates and NSM team members. Lay involvement at interview is seen at all levels of post. At curate level diverse personnel are involved. It is only at the higher levels of post that a more structured composition of interviewers is found.

6.6.3 Discriminatory Treatment During Search for a First Curacy

The next sub-category was a major one. It was called post search discrimination. The research objective was to discover whether sex discrimination existed during search for a post. This relates to past sex discrimination during search for a first curacy, a second curacy and a senior post.[19] Respondents were asked to tick all the ways in which they felt they received less favourable treatment on grounds of their sex. As regards search for a first curacy, 3 females perceived sex discrimination when not selected for interview. 1 male and 5 females felt likewise when not selected for the post.

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[18] The reader is referred to the provisions relating to the appointment of an incumbent in the Patronage (Benefices) Measure 1986 detailed at 3.3.3.-3.3.7.

[19] As these questions concern past sex discrimination, diocesan trends are not ascertainable, as one has no way of knowing which dioceses are involved.

Discriminatory interview questions, which centred on a woman's role in the family, were reported by 4 women. One was questioned by the diocesan director of ordinands about whether she was going to start a family. Two respondents, who were married to priests, were questioned about their family and workplace roles. One was asked questions about the priority of her husband's ministry and her inability to minister properly because of children. The discriminatory sources were the incumbent, the bishop's representative and lay interviewers. The other was told by the incumbent that she should be staying at home as other clergy wives do, and was asked about plans for a family. The fourth respondent complained of aggressive questioning by PCC members regarding the fact that she was divorced.

Discriminatory informal comments were reported by 3 males and 8 females. Male complaints centred around the preference for women priests or for those supporting women priests. One respondent was told by the area bishop that the "area" had to meet a quota of female appointments and since he was a man this was not helping. In another case the incumbent and his wife made it known that they wanted a pro-women's ordination male curate. The third male respondent was told by the woman curate whom he would be replacing that, "if it were my choice the job would go to a woman rather than you." Of the female answers informal comments covered; not being wanted because of being a woman, social roles and pay. The former reason was mentioned by 3 women. One respondent described how it became clear that her incumbent did not wish to have her as a NSM curate. She thought, but could not prove, that this was on grounds of sex. Another described how the incumbent tried to put her off by saying things like, "Talk to X, she will tell you how awful I am to work with!" The third respondent described how the churchwardens and PCC members made no attempt to sell the post, giving her a distinct feeling that she was unwanted. As far as social roles are concerned, one incumbent gave into stereotypical attitudes by hesitating about the ability of a candidate to manage family and work. Theological justification might have been claimed by one incumbent when he stated to another respondent, that women do not go into the sanctuary. 2 respondents who were married to clergymen were questioned about the need to have two stipends. It was thought that the woman priest ought to work for free if her husband was receiving a stipend. These comments on pay came from; the

diocesan director of ordinands, the incumbent, the bishop's representative and lay interviewers.

Other discriminatory incidents during search for a first curacy were mentioned by 15 female respondents. These reasons have been sub-divided into; diocesan level reasons, parish level reasons and social roles. Starting with the former, complaints involved problems in finding a suitable post because of a lack of information and help from the sponsoring diocese. Comments included, "No posts advertised", "Diocese never sent any details or helped in any way to find a post," and "It was clear that very few parishes in my area were open to me." Problems of lack of communication arose in relation to the sponsoring diocese or area. For example, "My sponsoring bishop's refusal to consider me for any stipendiary post, without formally notifying me that he was releasing me," and "I was made to change from one area diocese to another; no answer to letters to first area bishop or diocesan director of ordinands." One priest experienced negative quota limits, "I was sponsored for training by Stepney area. I received a letter to say that I was not being offered a post in Stepney because there were too many women."

At parish level, despite Resolutions A and/or B not being in place, some incumbents were wary of women curates. One incumbent recommended a woman for training but then became unwilling to have her work in his parish. Another incumbent had experienced difficulty with a female curate in the past and did not want to risk the aggravation again. Would bad experience of a male curate carry such a risk? Another incumbent employed subtle means to prevent working with a female curate; "The incumbent seemed to be too busy to take the time to interview me, as if he was manipulating the situation so that I would feel that it would not be a viable proposition to work there and I would be the one to say 'no' and thus allow him to save face by not having to turn me down."

The final two complaints concerning search for a first curacy involve social roles. One female respondent described how it was seen as more important that her husband found a good post. The source of this attitude was not identified. Another respondent described how the incumbent expected her to work with children as a matter of course.

6.6.4 Discriminatory Treatment During Search for a Second Curacy

In regard to search for a second curacy, respondents were likewise asked to tick all the ways in which they felt they received less favourable treatment on grounds of their sex.[20] One respondent ticked not being selected for interview, another ticked treatment at interview, without specifying the content of the interview questions. The remaining answers related to other discriminatory incidents which were sub-divided into diocesan level reasons and parish level reasons. Regarding the former one respondent complained of a lack of episcopal guidance. She had to take the initiative in finding a second post while she observed that her male colleagues received invitations from the bishop to look at parishes. A second respondent described how a bishop insisted on 100% support from the PCC of the parish she was applying to. She wondered how many male clergy would be in post if 100% PCC support was required.

At parish level incumbents and laity were wary of female curates. One respondent described her search taking place at the time the 1993 Measure went through. She faced less favourable treatment from potential incumbents who were alarmed at, "what they might end up with!" Another respondent described how few parishes were open to her as a woman. Parishes which had not passed Resolutions A and/or B nevertheless stated, "We are in favour of women but would prefer a man this time." The final respondent experienced hostility from lay members of the committee of a daughter church because she was a woman priest. However, she did secure the post and the hostility abated after a short time.

6.6.5 Discriminatory Treatment During Search for a Senior Post

In regard to search for a senior post, it was interesting to see what the complaints were. Were they similar to the experiences of curates, or did different considerations apply at senior post level? 1 male and 5 females complained of not being selected for interview and 7 females described not being selected for the post. Complaints of treatment at

[20] All answers here relate to female priests.

interview fell into 2 main categories; social roles and job description.[21] Regarding the former, stereotypes of single women as well as married women were raised. The difficulty of living alone in a vicarage was questioned in two cases. The questioning came from the lay patron and team ministry members. Three married respondents were asked about their ability to manage the job and their family. Questions were asked about what happens if children are ill. It is often presumed that it is the woman's role to look after sick children. These questions came from parish representatives and the archdeacon. Regarding job description, one respondent was asked about her ability to "fit in" by parish representatives and team ministry members. She was asked whether she would be introducing liturgical change, abandoning the prayer book and conducting same sex marriages. Her belief was that a man would not have been asked these questions. A respondent applying for the position of team vicar was questioned about her ability to do the job. Her attitude to authority was questioned by team ministry members. As a team vicar she would necessarily fall under the control of the team rector. Is it being suggested that she is incapable of having this kind of working relationship? Could this be because she was already "senior" in age or experience?

As regards informal comments, single women were asked informally about their ability to cope alone in a large vicarage. Clearly this reason was related to sex. Did it represent realism or sex discrimination? These comments came from parish representatives and team ministry members. The double standards operating in the Church of England were illustrated by one female respondent who described how the parish representatives told her husband that they were against women priests. They failed to tell her of their position. Other forms of sex discrimination were divided into diocesan and parish level reasons.[22] Women are clearly prohibited from equality of opportunity in Chichester. The bishop will not allow any woman to have responsibility for a parish as incumbent. Additionally, where he is patron he will not appoint a woman to any post. If women want senior posts they must move outside the diocese, which is not always a feasible option. From diocesan policy level to diocesan decision making. In one case 5 candidates were shortlisted, 2 men and 3 women. The two men withdrew, leaving a woman only shortlist. Instead of proceeding to interview, the lay patron and the

[21] All complaints of treatment at interview were made by female respondents.
[22] All answers but one relate to female respondents. The male answer is clearly indicated.

archdeacon (acting for the bishop) re-advertised the post.[23] Perhaps this adds weight to the comment of another woman who said, "You usually get selected for interview because you are a woman, even when they know they won't appoint a woman!"

At parish level divisive views on women priests caused problems. One woman was encouraged to apply for a post with the backing of the parish only to find that the lay patrons would not entertain a woman. In another case pressure from neighbouring churchwardens with a Forward in Faith incumbent prevented a woman securing a post.[24] Why were these latter personnel so influential? A parish ought to be independent as to whom it appoints unless a group ministry is involved. It was unclear whether this was the case or not. One male priest experienced problems at parish level. Ideally the team ministry wanted a woman for the team vicar post. He was a potential candidate already working in the team, but it was considered something of a disadvantage that he was a man. However, in the end he was offered the post and has since had no cause for complaint.

6.6.6 Official Reasons for Non Selection for Post

The next sub-category of post search was "post-reasons"; official reasons for not getting an interview or not being selected for a post, excluding the use of Resolutions A and/or B. The research objective was to discover whether the reasons are appropriate and rational or are they discriminatory. Are the reasons discriminatory in regard to sex or perhaps to other factors such as age? The perception of respondents answering these questions was that they had encountered sex discrimination.[25] 5 respondents stated that their sex alone caused them not to be interviewed or given the post. Whilst objection to women priests is allowed under Resolutions A and/or B it should not otherwise operate as a disqualification.[26] In one case sex did interact with theological reasons. "Eventually...the person concerned admitted that he could not appoint a woman because

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[23] The diocese which made this decision is unknown.

[24] Forward in Faith are an anglo-catholic group in the Church of England who oppose the ordination of women priests.

[25] The reasons are analysed without reference to the level of post unless this is thought necessary. All answers but one relate to females. Where a male respondent is involved this is indicated.

[26] However, the reader is referred to the Priests (Ordination of Women) Measure 1993 s 6 discussed at 7.1.2., 7.1.3. and 7.1.4. for a discussion of the legitimacy of sex discrimination against male and female priests.

of reasons of authority even though he had allowed the church to advertise the job for a man or a woman. He admitted lying to me in order to cover up his reasons for not appointing me." Two women applying for senior posts experienced the "time is not right" syndrome. The reason given to one was that, "at this stage in our development we are not ready for a woman priest." This happened to her at least twice, where the newspaper advert had not indicated men only. The "time is not right" argument parallels the theological argument used against women priests at the Synod debate. Women are now eligible to become priests. Parishes who still believe that the time is not right ought to encapsulate that stance in Resolutions A and/or B, rather than constructing a "glass ceiling" for women priests. A problem emerges where decision makers remain divided over women priests. Three women experienced the "time is not right for another woman" syndrome. Bad experience of one woman priest coloured the judgment when another was considered. The candidate was seen as a woman first and as a priest second. For example, "Recent experience of a woman was a little difficult so they did not want to try again. It was felt that the local community would respond better to a man," and "It seemed to be the case that the incumbent and the previous woman curate had not always found it easy to work together. He seemed worried by the possibility that...a woman might end up in a too senior position in the team. The incumbent seemed to be fearful of his own standing with elements of the congregation who were not entirely happy to have women ministers in the parish." Where women were acceptable one respondent found that there were already enough women in a team ministry, therefore she did not get the post. Conversely, one male respondent discovered that he had applied for a post where being a woman was an advantage because the central Church and diocesan authorities were putting pressure on the parish to appoint a woman. Finally, 2 other factors were mentioned as interacting with sex. Age and divorced status prevented 2 women obtaining interviews.

6.6.7 Candidate's Reasons for Non Selection for Post

The final sub-category of post search were the candidate's own reasons, other than their sex, for not obtaining a post. A research objective was to see if these reasons were totally independent of sex or if they interacted with sex. No patterns emerged. Male priests gave 7 different answers for being unsuccessful in obtaining a post; singleness,

churchmanship, pastoral inexperience, being gay, plans to marry, it not being God's choice and lack of scholarly knowledge. Female priests gave 5 different answers; age, churchmanship, pastoral inexperience, too much competition in response to a newspaper advert and non recognition of priestly abilities.

6.6.8 Discriminatory Treatment in Post

The second broad category was treatment in post. Two sub-categories, treatment in present post and treatment in past posts, had several research objectives. First, what kind of sex discrimination was taking place? Was it factual sex discrimination which would be included under the Sex Discrimination Act but for the exemption regarding ministers of religion? The experience of respondents was also linked to equality of opportunity, equality of respect and equal treatment. Two other sub-categories are action taken in response to present sex discrimination and action taken in response to past sex discrimination. The aim is to see how treatment which is perceived as discriminatory is dealt with internally. It is necessary to see what internal protections the Church offers when there is no private form of legal redress.

6.6.9 Discriminatory Treatment in Present Post

Treatment in present post and the following action response are examined together. A distinction is made between past and present sex discrimination. Variables relating to an individual will be relevant to a priest's present post, whereas they might not apply to a past post. The description of a respondent's present experiences is likely to be accurate and complete. These questions were answered by respondents who perceived that they had encountered sex discrimination in their present post. The less favourable treatment was analysed using three criteria; which diocese did the treatment occur in, what was the nature of the incident and who was the discriminatory source? Only one male priest in London claimed present sex discrimination. He described, "A general imbalance in the sexes towards the feminine over a whole range of issues." No discriminatory source was ticked. From hereon all present sex discrimination incidents relate to women.

(a) Blackburn

In Blackburn diocese there were 3 complaints, all centring around working in the parish. At most concrete was the restriction of a female priest's activities by her incumbent. His prohibition on her celebrating some Eucharist's denies her equal opportunity to exercise her ministry. Another encountered "bad behaviour" from male colleagues which was tolerated by her incumbent and the bishop. The third respondent reported rudeness and belittling from congregation members.

(b) Chichester

Chichester diocese recorded the highest rate of present sex discrimination. Incidents were divided into; diocesan level incidents, parish level incidents (working relationships), and parish level incidents (theological objection). The bishop fought hard to prevent women priests. His approach now is to ignore women priests where possible and make their inclusion in Church life difficult when their presence is inevitable. Three areas of difficulty were mentioned; clothing, ordination as a priest and access to senior posts. At a specific level women are prohibited from wearing a priest's stole at bishop's services, for example at confirmations and inductions. This is another way to diminish women's equal status with men as priests. Women deacons complained about the bishop's attitude to their impending priesting. They were given additional interviews for priesting which the men did not have to undergo. The bishop will not ordain women priests or allow his suffragans to do so. They will be priested by a visiting bishop after the male deacons have been priested. "The men being priested this summer have known since last autumn the times and dates. The women have had to wait months to know, and their priesting is delayed for four weeks past the traditional Petertide date when the men are being ordained." This respondent said to one diocesan officer that it felt as though she was "persona non grata" in the diocese and he agreed that she was! Finally, as already noted, Chichester diocese does not allow women access to senior posts, they must remain at curate level.

As far as parish working relationships went there were numerous complaints. Many focused on problems caused by the negative attitude of clergy colleagues to women

priests. One woman simply stated, "I work with Forward in Faith clergy", which should be enough to indicate that her working relationships are strained. There were instances where work experience was limited. One woman described how she was passed over for public/combined services by clergy colleagues. Two male clergy who came later were asked immediately. However, when no male priest was available for VJ Day she was asked. Another respondent believed that funeral directors might be reducing her opportunities to take funerals by asking the bereaved, "Do you mind having a woman?" She has asked them to rephrase the question to include men, that is, "Do you mind whether it is a man or a woman?", but has no means of ensuring that this is done. At parish level, theological objection to women priests is evident amongst the laity. However, only one respondent described this as the only type of sex discrimination which she faced. Although women priests are concerned about lay attitudes, it is clear that they do not generally classify these attitudes as discriminatory, rather it is viewed as a matter of personal conscience.

(c) Gloucester

Gloucester diocese saw only 2 complaints of sex discrimination. The first incident concerned theological objection by sidespersons so seemed unlikely to fall under factual sex discrimination. Action was taken in this case. There was a mutual agreement that the sidespersons should transfer to the next parish. The second incident concerned the concrete issue of maternity pay. Maternity pay is a new issue which the Church has to face at diocesan level. The respondent had problems sorting out eligibility for maternity pay, "because the diocese did not seem to have a clue."

(d) Guildford

In Guildford diocese only one incident was reported at diocesan level. The respondent described how clergy couples are difficult to place. Against her wishes the bishop did not consider her for stipendiary ministry.[27] Two incidents during parochial work highlighted a fear held by incumbents that women would not be acceptable in parishes.

[27] For a discussion of indirect sex discrimination in relation to Church policy on married clergy couples the reader is referred to 7.6.2.

In one case, the incumbent waited 9 months before inviting the woman priest to celebrate the Eucharist on the grounds that a few potential objectors could get to know her first. The incumbent had increasing pressure from the PCC so he stopped his delaying tactics. She now celebrates there monthly with no overt complaints, his fears appearing groundless. Was this realism or sex discrimination? The lack of discriminatory motive does not prevent a claim of direct sex discrimination being made out.[28] In the second case the incumbent and a congregation member were the connected problem. The latter did not recognise the woman as a priest. The incumbent appeared to collude with this by not timetabling her for the man's favourite service. The incumbent did not admit to taking any action, but the current rota appears to ignore the man's wishes. Theological objection by the laity was cited by 2 respondents. Whilst refusal to accept communion is quite acceptable, being heckled and verbally abused in the street by parishioners and PCC members is pushing at the boundaries of theological objection.

(e) London

In London diocese it was expected that, as a diocese which is anti-women priests, complaints might arise at diocesan level. This was only so in one case. The respondent described how the bishop and diocesan parsonages board officials ignored her security needs and her requests for information regarding ongoing building works to the vicarage. Her belief was that a male priest would not have been treated in this way. Action was taken in that the relevant people were spoken to, but the problem remained unresolved. Parish working relationships between female curates and their incumbents suffered in two cases because of the reluctance of the incumbent to give the curate any responsibility. In one case the incumbent justified his decision on grounds of evangelical headship. In 3 other cases working relationships faltered because of a refusal by one party to work constructively with the female priest. In 2 cases the sacristan found it difficult to work with and help the priest. For example, one sacristan attempted to undermine the respondent's authority by informing parishioners that "she [the respondent] is not in charge when the vicar is away." The third respondent described how she was unable to get colleagues to take services during her vacation. Also when she asked for help in a specialist field she was refused. The discriminatory sources were

[28] The reader is referred to 7.4.2.

the incumbent, clergy colleagues in the deanery and the area dean. Theological objection was mentioned in 4 cases. Additionally, instances of rudeness and insults by male clergy were mentioned twice. Are these attitudes based on theology or prejudice? Even if they are based on the former, surely this is not what was expected during the reception process? In one case action was taken. The respondent received an apology from a senior priest on behalf of the other clergy.

(f) Newcastle

In Newcastle diocese there were 2 instances of present sex discrimination both at parish level. The first incident illustrates two themes; theological objection leading to inequality of opportunity and secondly the problems caused by divided team ministries. In the first case the opposition of a fellow team curate means that the respondent is not allowed to robe and assist or preside at team clergy Eucharist's. For the first time when examining treatment in post, social roles are touched upon. The second respondent complained about, "The general attitude of some older people towards a professional woman. Some male chauvinism amongst male colleagues towards me as a member of bishop's staff meetings."

(g) Truro

In Truro two complaints were made. The first concerned the non-recognition of the respondent as a deacon (let alone a priest) by congregation members, retired clergy and a server. She is not allowed to act as deacon in one church more than once a month except for saints days and other special occasions. The churchwarden continues to press the incumbent to allow her to act as deacon all the time and to fulfil a full priestly ministry when priested. After her priesting she will only be acting as deacon in the aforementioned church. The second respondent described the anti-women priests attitude of clergy chapter members. The brief description does not clarify whether this is solely theological or if it is grounded in prejudice.

(h) Worcester

In Worcester diocese problems were located at parish level. Two cases involved parish working relationships. In one case there was a lack of consultation in decision making by team ministry and PCC members. Team ministry members were likewise involved in the second case. They "refused to do certain things" if the respondent was present. The 2 other cases involved theological objection by parishioners. This was compounded in 1 case by chapter clergy ignoring the presence of the female priest. Clearly, even though women are legally part of the Church of England, they are still made to feel invisible and excluded.

6.6.10 Discriminatory Treatment in First Curacy

The next major sub-category is past treatment whilst in post, starting with a first curacy.[29] Two male respondents reported sex discrimination at this level. Both described female preferment causing them less favourable treatment. "My female colleague when I arrived became incumbent after priesting. My ordination as priest was before hers and this caused resentment," and "It was politically expedient for my woman colleague to be made senior curate when in terms of time it should have been me." In the former case the male priest was assisted to move. A less sinister explanation for female preferment is that they might have greater pastoral experience than men, despite not being priested until 1994. If preferment is only seen in terms of priesting dates it may distort the picture in this interim period.

Many female answers refer back to when women were first made deacon in 1987. For many female respondents this was their first "curacy", although they were unable to become priests until 1994. Two major themes were identified: female exclusion from certain areas of parochial ministry and secondly female inclusion in Church life made difficult. However, before focusing on the parish, diocesan decisions are examined. The most concrete example of a diocesan decision resulting in perceived sex discrimination concerned responsibility for a parish. "In the interregnum the bishop would not consider me for deacon in charge position, saying it was his policy never to put curates in charge

[29] The answers given do not relate to identifiable dioceses.

of the parish where they had trained. This he has since done with several men in the area." In 2 cases lack of pastoral support by the bishop was mentioned. This related back to the struggle of women to become priests. The lack of contact by the bishop left women feeling ignored. Finally, at diocesan level, one respondent felt discriminated against because of the bishop's attitude to her stipend. Until the birth of her children she held a stipendiary post. At this point the bishop held that she was non-deployable and cut her stipend.

A problem which 9 women faced in their first curacies was exclusion from certain areas of parochial ministry. This took three forms. First, ignoring the woman's ministry altogether was one tactic of exclusion. One woman described how the deanery chapter failed over a period of 4 years to discuss her area of ministry or even ask about it socially. Her problem was resolved through patient negotiation with the new rural dean. She now has the opportunity to present her work as a MSE. Secondly, limitations were placed on the work curates were allowed to do. This involved limitations on leading worship and preaching. One woman described how at times she was not trusted with the same jobs as male curates in the team by the incumbent. Another described not being nominated for diocesan committees by members of the deanery chapter. In one case the curate complained to her incumbent that she was not being given enough responsibility. He had good intentions about giving her greater responsibility for worship and preaching but in the event she saw no significant change. Thirdly, exclusion during decision making was mentioned by 4 respondents. At one level was an implicit, general exclusion of women. The respondent stated that team ministry and PCC members often overlooked her in decision making but it was, "A question of the use of language and terms rather than a conscious decision to discriminate." At the other extreme were explicit, specific cases of exclusion. For example, an incoming incumbent refused to hold staff meetings, engage in teamwork or listen to what the female curate and previous incumbent had done before. The curate believed that this was on the ground of her sex. Another respondent was unsure as to whether her sex was the cause of the treatment. She stated, "Not included in team staff meetings, ostensibly because NSM, perhaps because of sex?" Finally, one incident highlighted how lack of thought causes women to remain invisible. "On one occasion when I was due to celebrate a member of the congregation whose birthday it was asked specifically to have a man and the team

agreed without me." She pointed out the lack of consultation to the team, who were apologetic and refrained from making that mistake again.

When women priests are not being blatantly excluded from parochial ministry it appears that their inclusion is not an easy one. This can be split into three overlapping themes. First, a general obstruction of duties was reported by two women. In one case the source was a fellow curate, a founder member of Forward in Faith, in the other it was a congregation member. Secondly, the competency of women priests was questioned on 3 occasions. The discriminatory sources were the incumbent, the bishop, PCC members and parishioners. In one case a steady psychological assault and fault finding by an incumbent, with the support of the bishop, brought a woman priest to breaking point. A rescheduling of her duties did not resolve the problem. Another woman stated that parishioners and PCC members made comments about her, "These were never voiced openly in a public forum where I could have answered them, and I allowed them to undermine my confidence." She met, at the incumbent's invitation, with the churchwardens and their wives (one of whom was a principal antagonist). It helped, but did not completely resolve the problem. Thirdly, various instances of personal comments were recorded. Rudeness, humiliation, patronising comments, sexist jokes and offensive remarks were the words used to describe the less favourable treatment. The sources of the personal comments were; the incumbent, diocesan clergy, the deanery chapter (twice mentioned), and the PCC. In one case the curate received bullying and verbal abuse from her incumbent. The only way to resolve the problem was to move to another parish.

Most publicity has focused on theological objection to women priests. However, between 1987-1994 women deacons suffered theological objection too. For example, "Incumbent refused to accept that I was clergy, asked to leave 6 months after deacon's ordination." Theological objection to women priests followed the 1992 Synod vote. In some cases women deacons were forced to move parishes if they desired ordination to the priesthood. For example, "I had to leave my first parish when a new priest came because he would not accept my intended ordination to the priesthood," and "After the vote for women priests my then incumbent told me he could not work with me if I desired ordination to the priesthood." In the latter case she was moved to another parish

by her bishop and not priested until July 1995. In another case the fair administration of the 1993 Measure was doubted. The respondent described PCC members making derogatory comments about women's ministry when the PCC were about to vote on Resolution A. Inclusion of women in Church life was made difficult by clergy colleagues whose theological position led them to treat women priests less favourably. In one case a curate, who was also a diocesan youth officer, spent more time doing youth work and guesting at other parishes in the diocese because of her incumbent's views on women priests. The diocesan director of education was informed and it was agreed that she should avoid the situation and get on with diocesan work. Another respondent described various instances of a lack of courtesy from clergy colleagues, including one particular incident. "An invitation to my incumbent and me to attend a festival service at another church was withdrawn when the priest found out I was a woman." She understands that the bishop later reprimanded the priest. Clerical objection is strongest amongst Forward in Faith members. Their presence at clergy meetings causes problems. For example, "Members of Forward in Faith in chapter meetings ignored me, refused to share the peace, would not appear on a photograph with a woman priest." 9 respondents mentioned the laity as the source of theological objection. However, 4/9 of these respondents mentioned additional incidents which were not based upon theological conscience. Thus the final statistics are not unduly inflated by genuine theological objection.

The sex discrimination perceived by 4 respondents involved social roles. One curate experienced a general ethos connected to tradition and hierarchy coupled with pervasive non-specific sexism which made it hard for women, lay or ordained, to flourish. A second experienced a confusion of roles. She believed that she was being treated as secretary, mother and confidante and not as a priest. Another found her expected role was pre-defined by her incumbent. "My incumbent expected my role to be a pastoral and a supportive one, as his wife's role in their marriage. There was also a male curate in his first title curacy and we were treated quite differently, using the incumbent's stereotyped images of male and female roles. When an ordinand came on placement in the second year of our curacy, he was placed with the male curate. Only after my angry objection was it suggested he might work shadow me at all....The incumbent became so angry when I pointed out my role and my marriage were not like his wife's, that he

eventually got rid of me, telling the congregation that they could not afford me. It was a lie, as they have continued to have 2 curates, at least until December 1995." The fourth respondent faced cultural opposition. Her Asian congregation could not come to terms with a woman as a leader. In view of this she transferred to a different parish.

6.6.11 Discriminatory Treatment in Second Curacy

Incidents of past sex discrimination whilst in a second curacy were likewise investigated.[30] 7/16 women reported sex discrimination at this level. 6 described the incidents. Only one located the problem at diocesan level. She ran an interregnum when the incumbent was ill. No support was given by the bishop apart from the suggestion that he send a retired, "caretaker" priest, who was opposed to women priests, for the whole interregnum. Most frequently cited were incidents involving parish working relationships. On a personal level one curate reported being ignored, and when not ignored, patronised, by deanery clergy. Another described how the PCC refused to pay her working expenses. Her belief was that a man would not have been treated in this way. 3 respondents described limitations being placed on their work by their incumbent. For example, "I was not allowed to take baptisms nor weddings in spite of up to 5 years experience as a deacon. I was not allowed to help in marriage preparation, despite being happily married myself and having a celibate incumbent. I was not involved in baptism preparation unless it became necessary when the incumbent was on holiday." In this and another case it was clear that the limitation on duties actually flowed from theological objection. The reason why this objection was not encapsulated in Resolutions A and/or B was because the women were already serving in the parish before the 1993 Measure was passed. Resolutions A and/or B cannot be considered if a woman priest or deacon is already present in the benefice.[31] The only way to show one's objection is to limit her duties and fail to acknowledge her vocation to the priesthood, thus forcing the woman to move. The line between straightforward theological objection and unfavourable parish working relationships is fine. It is especially so when one is considering limitations placed on a priest's duties. Straightforward theological objection from clergy sources was mentioned by two respondents. In one case the respondent was a deacon at the time

[30] Answers relate to women priests only.
[31] Priests (Ordination of Women) Measure 1993 s 3 (3)

the ordination of women was being discussed. Her incumbent held meetings against the ordination of women to the priesthood, with no space for the opposing view. She described the working atmosphere as, "a continuing fearful attitude which increasingly hardened." In the second case, the respondent's incumbent became the deanery clergy representative for Forward in Faith. He could not accept a woman as a priest. She informed her area bishop that she would need to be moved to another parish if she were to have her vocation to the priesthood acknowledged. It took over a year to find another parish. Finally, one woman described how her incumbent believed that all women were inferior beings. Whether this was related to theology, in the form of the creation stories, or whether it was founded on prejudice was not explained.

Past treatment whilst at work in a senior post was only answered by 6 respondents. Only 1 female priest claimed past sex discrimination. The description of the less favourable treatment, unfortunately, was unclear.

6.7 Sex as a Cause of Discrimination

The final category has two sub-categories. The first sub-category covers comments on sex as a cause of discrimination, the second covers the interaction of sex with other factors. In the first sub-category many disparate comments and ideas were located which involved sex discrimination as the common factor. These are divided into two groups; working conditions in the Church of England and general attitudes to sex discrimination.

6.7.1 Working Conditions in the Church of England

A research objective was to discover what working conditions are like in the Church of England. Substantial comment has already been made regarding search for a post and treatment whilst in a post. These comments and extra remarks provided by respondents in the optional comment section are drawn on to build a picture of the problems that men and women priests face. Comments were made regarding appointment to posts, working conditions in post and pay.

Respondents highlighted problems of appointment which emanate from diocesan level. Clearly Chichester diocese has its own problems. All women priests hold an archbishop's licence and are ordained by a commissary. There are no women incumbents or canons in the diocese. Stipendiary women are leaving the diocese not because they want to but because they have to if they want posts parallel with men of similar experience. Forward in Faith clergy from outside the diocese are filling vacancies in Chichester. One respondent stated that one-third of clergy in Chichester belong to Forward in Faith. Male priests who accept women priests are sometimes told that there is no vacancy for them in the diocese. The situation in Truro, a diocese with the reputation of being anti-women priests, seemed somewhat better. "Women have been given posts in recognition of their experience. In the main they are 'difficult' parishes, which others have refused. But that does not mean that we are only given the dregs. It may be that only a woman's touch can heal years of bitterness." The appointment of women in Worcester, a diocese with the reputation of being pro-women priests, was expected to be favourable. However, one respondent described a different situation. "It is denied by the hierarchy but perceived by a number of women...that women are nevertheless not getting equal job opportunities. Our guess is that there is a prejudice in favour of employing men which the diocese does little formally to combat so the balance is still against us." A direct reply to this complaint came from a female respondent who is a member of the Bishop's staff meeting in Worcester. She warned against biased perceptions. "I know, for a fact, that there are very few situations in which a woman priest has failed to find a post in this diocese because of her sex. However, several women feel, or perceive, that this is a reason." She continued, "The male priests answering the questionnaire will not, I suspect, reply that they feel they were discriminated against in failing to find a post because they were men, but I know that there are at least as many men having difficulty in moving from one post to another as there are women."

Respondents highlighted particular problems which hamper appointment to posts. First, the number of parishes open to women priests is restricted beyond those who have passed Resolutions A and/or B. This is at the incumbent's discretion and is supported by the 1993 Measure, section 6. Secondly, some posts appear reserved for women. Reverse discrimination in recruitment is not supported by the Sex Discrimination Act or the

1993 Measure. If sex discrimination legislation applied to Church of England priests male priests could question the use of reverse discrimination. Thirdly, in cases where pastoral experience is counted from the date of priesting and diaconal and pre-diaconal experience is ignored, women are disqualified as being too old and without sufficient experience. This should be combated by the discretionary power of the bishop to appoint women to senior posts despite their short priestly experience. A number of respondents who were happily working in curacies wondered if their experiences would have been different if they had applied for senior posts. Clearly there is a feeling that ambitious women have to struggle. A research objective was to uncover the willingness or unwillingness of parishes, including those in favour of women priests, to accept a woman as an incumbent. The instances of less favourable treatment in search for a senior post have already been charted. It is important to mention positive experiences in this respect. For example, "When applying for a senior post, I made some 20 inquiries, 12 firm job applications, and was shortlisted for 6 and offered 2. I was not aware of any bias, in fact, after the experience of my curacy, was surprised by the open mindedness I found. I did not use Canon Hardaker's list, relying solely on advertisement, and answering those where it was indicated that a woman could apply." As regards the number of women in senior posts, one male priest warned against quick conclusion drawing. The low numbers of women priests in senior posts may not indicate a lack of preferment but may reflect how women view the priesthood. "Many women clergy who are friends of mine have no desire to become incumbents and senior office holders. This may well reflect a much more laudable and appropriate work ethic than that of the career ladder, i.e., the ability to do the job described in the ordination service....In my experience to date, women are more ready to lay the kudos of office aside in pursuit of their true vocation." However, one should not quickly accept this explanation as, unless widely expressed by women priests, it can mask sex discrimination.

Good working conditions were described by 6 respondents in the optional comment section. The working of team ministries had been doubted, but for 2 male and 2 female respondents their structure was beneficial. The cohesion of the team in decision making and the support for team members was advantageous. A female priest in Guildford stated, "As a member of a team with four men I have found them very supportive and protective. They are not patronising about this, merely resistant to allowing situations to

arise where opposition would occur, i.e., with clergy in a neighbouring parish." A male priest in Chichester stated, "As a team we unite in that any discrimination against one is rejected by all. We would not participate in a service in which one of our number is excluded on grounds of sex." Women priests recounted favourable treatment in other working conditions. A female priest in Guildford praised the diocese's treatment of her following childbirth. The maternity leave arrangements, once clarified, were most favourable. A part-time post was found for her to suit her needs. Another female respondent believed that she had positively benefited from being a woman. "I have found being a woman in the Church of England means I get extra attention/jobs....Male curates did not get this 'accelerated promotion.'"

As far as less favourable treatment in post went, much has already been discussed. 3 respondents questioned whether being female is the problem or whether being a curate is the real problem. The curate is under the control of the incumbent, who may have little training in acting as a supervisor. This can cause problems on both sides. One respondent described how several priests have said to him that, "The worst period of life is when one is a curate," and "there is only one thing worse than being a curate and that is having one." He described how a female colleague had a difficult time with her incumbent, to the extent that she had a nervous breakdown. He assumed that it was an example of sex discrimination. However, the male curate who followed her found the incumbent difficult to work with and likewise moved. He now believes that the first curate was experiencing a straightforward personality clash, as did her successor. This is certainly not to say that all problems are free from sex discrimination. Rather, "It is just that male curates seem to have difficulties with vicars as well. Clergy appear for the most part to operate most easily in a solo situation."

Pay is another area which might deteriorate working conditions. Each diocese appears fairly autonomous in its policy decisions as regards stipendiary status. At one stage dioceses could prohibit a priest moving from non-stipendiary status to stipendiary status. By the time this policy was altered many women were too old to contemplate stipendiary positions. Marital status dictated stipendiary status in at least one diocese. A female priest was non-stipendiary because the diocese would not employ married women, whether married to a cleric or not, in full-time posts. She became a stipendiary

minister when the policy changed. A woman priest in Truro believed that marital status was a consideration in her deployment even if it was not acknowledged officially as a policy. "The fact that I have a husband who supports me must have influenced the thinking of the bishop and the staff involved in deploying me, they did not need to find me a stipend." When one is married to a priest the situation becomes even more difficult. Some dioceses do not allow a married clergy couple to receive two full stipends.[32] London diocese has a policy of not allowing married couples to work together, in other dioceses this is happily permitted.[33] A female priest married to a priest described being paid a one-third stipend for full-time work, as compared to her husband's full stipend. A female priest in London commented, "It seems that when a woman cleric is married to a male cleric then generally it is the woman who loses out....I felt my area bishop was more concerned about my husband's job." She described the confusion over policies concerning married clergy couples. "The Church of England has not thought out how it will deal with women. Dioceses have differing policies, if they have them at all. Where are these policies written down?" Appointment decisions in Chichester diocese mean that stipendiary women are leaving the diocese and new women entrants are being deployed into NSM posts. Gradually, a suffocation on stipendiary posts for women in the diocese will mean that most women are NSMs and are thus less prominent in the diocese.

6.7.2 General Attitudes to Sex Discrimination

A substantial number of respondents made general comments on sex discrimination in employment within the Church of England. These cover; denying the relevance of sex discrimination to the Church, the interpretation of less favourable treatment, Church attitudes to sex discrimination and legal reform. On the catholic wing, indication was given that the issue of women priests is not one of sex discrimination. This was a strong point at the Synod debate, and it was a true one; the debate was about theology and not equal opportunities. But now women have been ordained the matter can be associated with sex discrimination, albeit at a factual not a legal level.

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[32] The reader is referred to 6.5. where non-stipendiary ministry is discussed.
[33] For example, in Ripon.

The interpretation of the phrase "less favourable treatment" was questioned by 3 respondents. First, it requires a comparison to be made with a priest of the opposite sex, which is not always an easy task. Second, once this judgment has been made the less favourable treatment can be either real or wrongly perceived. Unsuccessful candidates might feel unfairly treated and hence claim sex discrimination. Subjective judgments will of course only tell one side of the story. What is important is the perception of respondents, who after all have nothing to gain by claiming sex discrimination on an anonymous questionnaire. 7 respondents gave broad descriptions of the form that less favourable treatment takes in the Church of England. Three themes emerged. First, less favourable treatment was subtle rather than blatant. For example, "Mostly discrimination is by innuendo, or under guise of other issues, like concern for family," and "It's very hard to quantify sex discrimination....There are nuances in other people's conversations, questions, attitudes which I'm sure would not be there if a male clergy person were being addressed." Secondly, the less favourable treatment was characterised in informal, not formal, structures. A male respondent suggested that much sex discrimination is unseen because of the conscious or sub-conscious preference which is exercised by the passing on or withholding of information about posts. The way that informal networks work may not be discriminatory in intent but their effect amounts or could be seen to amount to sex discrimination. Thirdly, the inclusion of women in a male orientated system was seen as problematic. At an implicit level women remain invisible, an example of this being the use of exclusive language in meetings. Conformation by women priests to the male norm was suggested by another female respondent. "There are expectations that women who become priests will 'join the boys' i.e., behave 'male' like, instead of developing a priestly role within their own self defined sexuality." A male respondent thought that problems involved not a male norm but a gender free norm. "The most insidious [sex discrimination] being the discrimination against a person of either gender who dares to be what they are - man or woman - in favour of a neutered, politically-correct clergy-clone."

The attitude of the Church of England to sex discrimination is varied. The attitude was described as, "a peculiar mixture of enlightened and extremely prejudiced attitudes towards discrimination. Certainly the Church does not speak with one voice on attitudes to discrimination, and so each individual's opinions are shaped by factors that are

essentially random." The experience of clergy in other careers as well as their personal background and theological beliefs will mould their attitudes. One female respondent summarised the situation, which probably applies to women in all spheres of life, "There is I feel a prevalent difference in people's heads and hearts. Many believe in women's equal status intellectually but yet continue to engage in behaviour that is inconsistent with equality." It is submitted that even if equal intellectual status is not accepted, equality of respect ought to be carried out both in thought and action. A worry was that remedial action might be taken which could result in sex discrimination against men. The use of reverse discrimination in selection procedures was a concern of one male respondent.

Whilst sex discrimination was acknowledged as an issue in need of attention, respondents were cautious as to how this might happen. Admittedly, respondents were not asked to consider the feasibility of law reform. One respondent stated that a change of legislation and an exposure of sex discrimination has to come. She and others warned against trying to change deep seated attitudes by legislation. A male respondent, who returned his questionnaire uncompleted, was unequivocal in his response to law reform, "I regard the idea of the intrusion of...sex discrimination laws into the working out of a vocation to the diaconate or the priesthood as grotesque."

6.7.3 The Interaction of Sex with Other Variables

The final sub-category is the interaction of sex with other variables. The idea of age interacting with sex has already been aired. Although women's retirement age in the Church has been extended to 65, one respondent believes that it is still harder for a woman in her 50's to obtain a post, than for a man in his 50's, despite the experience gained prior to being priested. A male priest in Chichester described discrimination on grounds of age in his diocese. The stipend cuts in Chichester, he says, have partly led to many older women being given NSM posts.[34] Being single was mentioned by 3 respondents as a factor affecting appointment decisions. This affected men as well as women. For example, a male respondent stated, "Incredible things are said and posts blocked if one is single." A female respondent stated, "Older [clergy] and unmarried

[34] The reader is referred to 6.6.9. and 6.7.1. for a discussion of other factors at work in Chichester diocese.

clergy [of] any age (especially men) are discriminated against more, I suspect than women." Less favourable treatment on the grounds of legitimately held views concerning women priests is another form of discrimination. Both clergy supporters and clergy opponents of women priests perceive discrimination. It is sometimes male clergy who fully accept and work with female colleagues who are discriminated against. A male priest in Chichester who will be seeking a second curacy has already been warned that there are parishes in the diocese where he will not be acceptable because he has worked with a female priest and is thus "contaminated". This is a particular problem for those in the catholic wing of the Church, who by their support for women priests risk limiting their own equality of opportunity. Finally, in 2 cases the combination of disability and being female and sexual orientation and being female led to a perception of sex discrimination. Both respondents were unsure whether it was their sex that was the dominant factor in their treatment.

Chapter Seven

Sex Discrimination Law and the Church of England

The application of the Sex Discrimination Act 1975 and/or the Equal Treatment Directive to Church of England priests poses three overlapping questions. First, should such priests be protected by the legislation? Secondly, can they be protected by the legislation? Thirdly, if included under the legislation what particular problems would priests face trying to use the legislation? The first two questions have partly been examined in Chapter Four when the employment status of ministers of religion was considered. Additional arguments from national and EC law will be discussed in relation to these questions. Then the accommodation of Church of England priests within sex discrimination legislation will be discussed in light of the questionnaire data.

7.1 Inclusion of Church of England Priests Under the National Legislation

Section 19 (1) states;

> "Nothing in this Part applies to employment for purposes of an organised religion where the employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers."

It will be argued below that when priests were excluded from the national legislation, it was not because of their employment status, but was because of doctrine. Additionally, the scope of section 19 (1) will be examined. Whether section 19 (1) is still applicable to Church of England priests depends on whether the section is given a wide or a narrow interpretation.

7.1.1 Sex Discrimination Act 1975 section 19 (1)

Judicial arguments regarding the employment status of Church of England priests, and ministers of religion generally, are crucial to establishing a claim for inclusion under the legislation. However, these arguments can sometimes cloud the purpose of the

legislation. What was the legislator's intention when section 19 (1) was passed? Does the Priests (Ordination of Women) Measure 1993 render section 19 (1) inapplicable to the Church of England? How does section 6 of the 1993 Measure fit into the picture?

The White Paper, "Equality for Women", which preceded the Sex Discrimination Act, outlined the specific exceptions to be made from the employment and training provisions of the Act.[1] No indication was made that ministers of religion were to be exempted from the legislation because of their office holder status. Discussion proceeded on the basis that ministers were capable of employment for the purposes of the wider definition of employment contained in section 82 (1) of the Sex Discrimination Act. It is unlikely that they were regarded as employees who held contracts of employment. It is more likely that they were regarded as capable of having a contract personally to execute any work or labour. For example, the section 19 exemption was said to refer to, "the clergy and religious orders whose membership involves employment."[2] At the third reading of the Sex Discrimination Bill it was explained that section 19 had been extended further to cover other cases where employment is, "for the purposes of an organised religion."[3] The very fact that the Sex Discrimination Bill contained an exemption in relation to employment for the purposes of an organised religion suggests it was thought that priests could be in employment for the purposes of section 82 (1). Whether this was the reason for the inclusion of section 19 remains an inconclusive point. Additionally, the different posts within the Church of England could cause difficulties in determining whether a priest was in employment.

The employment emphasis increases if one looks at the amendments to section 19 suggested at the third reading.[4] The proposed amendments had three aims. First, they sought to limit the exemption from the provisions of the Act to employment in the ministries of religious bodies. The ambit of section 19 ought only to apply to ministers of religion and not to other employees of an organised religion. Mr Clemitson objected to the heading "Ministers of Religion etc." which accompanies section 19. In his view

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[1] "Equality for Women" Cmnd. 5724
[2] Ibid. p10
[3] Official Report Fifth Series Parliamentary Debates [Commons] 1974-75 vol.893 Jun 9 - Jun 20 1429 at col.1539 Dr Summerskill
[4] Ibid. cols.1535-1542. The amendments were put up by Mr Ivor Clemitson (Luton, East) and Mr Walker (Kingswood)

"etc." had the potential to encompass a wide variety of personnel. The phrase "Ministers of Religion" at least could be defined. This was the appropriate category of personnel to be covered by section 19. Secondly, the phrase, "offending the religious susceptibilities of a significant number of its followers" was questioned on the ground that this could legitimise sex discrimination where inappropriate. Again emphasis was placed on a definition of terms. Whilst the doctrines of the religion are quite capable of definition, Mr Clemitson suggested that the religious susceptibilities of its followers are not. Thirdly, the restriction of the exemption to those religious bodies which had submitted their reasons for exemption to the Equal Opportunities Commission was sought. It was hoped that this amendment would enable only bona fide religions and doctrines to operate outside sex discrimination law.

All three amendments were rejected. The reasons given highlight that section 19 is there because of doctrine and not because of any inability of ministers of religion to be classified as in employment under the Sex Discrimination Act. Regarding the first amendment, it was explained that the exemption should cover all cases where employment is for the purposes of an organised religion. The exemption would only extend to personnel other than ministers of religion, "where the tasks to be performed are such that their performance by a person of the other sex offends against the religious doctrine or susceptibilities."[5] An example of this would be a gardener in an enclosed order. Those employed in a post where the sex of the worker did not offend doctrine or religious susceptibilities would be covered by the Act. An example of this would be a secretary working for the Church in question. Regarding the second amendment, little was said other than that the wording was as good as the drafters could manage in regard to difficult clauses. It was stated that section 19 is reserved for religions and doctrines where it is central that the person employed is of the appropriate sex. "The main purpose of the exemption is to ensure that the Bill does not cut across the doctrinal requirements of any organised religion."[6] Arguments on the question of the religious susceptibilities of the followers of a religion were avoided. The submission of doctrinal reasons to the Equal Opportunities Commission in order to substantiate the use of section 19 was

[5] Ibid. col.1539 Dr Summerskill
[6] Ibid. col.1541 Dr Summerskill

considered to be inappropriate. It is not their function to adjudicate on matters of doctrine. The motivation behind section 19 is to respect doctrine.

Section 19 (1) prevents sex discrimination being unlawful in all employment situations where the employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers. The Sex Discrimination Act is applicable to men and women equally.[7] Section 19 (1) is not in place because ministers of religion are office holders. Indeed only Church of England priests are office holders. It is in place because of doctrine. The Church of England seemingly has put itself outside section 19 (1) by allowing women priests. Taking a wide interpretation of section 19 (1), it is arguable that the section no longer applies to the Church of England. If "employment" as a minister is interpreted as meaning the general position which the Church of England holds on the sex of its priests then section 19 (1) is irrelevant. If employment as a minister is interpreted narrowly as meaning employment in a particular post in a particular parish section 19 (1) might remain operative. A parish could use the "religious susceptibilities" argument of section 19 (1) to act as an exemption to a claim by a woman priest relating to recruitment. It is possible, but less likely, that the narrow interpretation could also apply to dismissal. This situation would occur if a female priest was dismissed in order that a male priest could be appointed. However, if the parish had previously accepted a woman priest it would be difficult to show that the reason for the dismissal was to "avoid offending the religious susceptibilities of a significant number of its followers." A narrow interpretation of section 19 (1) would not act as an exemption to a claim of sex discrimination relating to working conditions. It is submitted that the narrow interpretation is an unlikely construal of section 19 (1).[8] If section 19 (1) is inapplicable, and ignoring for the moment the 1993 Measure, a further question would need to be answered. Which posts, all or only some, would be capable of being defined as employment for the purposes of the Sex Discrimination Act?

[7] Sex Discrimination Act s 2 (1)
[8] Personal Communication, Hilary Slater, 1/11/96, 19/3/97

7.1.2 Priests (Ordination of Women) Measure 1993 section 6

The focus of discussion turns to section 6 of the Priests (Ordination of Women) Measure 1993. The wording of section 6 reflects the uncertain status of section 19 of the 1975 Act. It states:

> "Without prejudice to section 19 of the Sex Discrimination Act 1975, nothing in Part II of that Act shall render unlawful sex discrimination against a woman in respect of-
> (a) her ordination to the office of priest in the Church of England;
> (b) the giving to her of a licence or permission to serve or officiate as such a priest;
> (c) her appointment as dean, incumbent, priest-in-charge or team vicar or, in the case of a woman ordained to the office of priest, as assistant curate."

The drafters of the Measure were perhaps unsure as to the applicability of section 19 post the Synod vote. Regardless of the status of section 19, section 6 acts as an exemption to sex discrimination against women priests regarding ordination and recruitment. Section 6 is a defence to the passing of Resolutions A and/or B. Section 6 only applies to women priests. There is no equivalent provision to that of the Sex Discrimination Act section 2 (1) which states that the provisions of the Act are to be read to apply equally to men and women. It was presumably not thought necessary for section 6 to apply to men as the Resolutions can only be passed against women. There was therefore perceived to be no need for an exemption to sex discrimination against male priests. However, if section 19 is no longer applicable to the Church of England, this conclusion might be doubtful, and the possibility of actionable sex discrimination against male priests is raised.[9]

Does section 6 cover all Holy Orders? It does not need to cover bishops, as women are still prohibited from becoming bishops. It clearly covers priests up to the level of dean. It does not cover the senior posts of archdeacon and residentiary canon which women

[9] This is discussed at 7.1.4. The data analysis confirms that some male priests perceived that they were being discriminated against.

are now eligible to apply for. The legal status of deacons raises an interesting point of statutory interpretation. Section 6 only applies to priests. The first year of a curacy is spent as a deacon. Only after this period can the curate be priested. Section 6 (c) specifically restricts its ambit to those curates who have been priested. Section 6 does not apply to curates who are deacons. The Deacons (Ordination of Women) Measure 1986 carries no provision regarding the status of section 19 (1). Therefore, if section 19 (1) is inapplicable it would appear that male and female deacons could make claims of sex discrimination regarding recruitment, working conditions and dismissal. A woman's legal position changes once she is priested. This is a strange state of affairs, when the intention of most deacons is to be priested. However, it is consistent with the Church's position on women clergy; quite content with women as deacons, but still divided over women priests.

Women may be employed by the Church of England in a lay position, for example, as a licensed lay worker or a reader. Such lay workers may find sex discrimination claims easier to bring. First, the establishment of employment status is likely to be more straightforward. Secondly, their employment is not limited to one sex so as to comply with doctrine or avoid offending religious susceptibilities. Thirdly, they are not covered by section 6 of the 1993 Measure.

7.1.3 Legal Position of Women Priests Under the National Legislation

What is the position of women priests under the legislation if section 19 (1) is inapplicable and they are deemed to be in employment for the purposes of section 82 (1)? Section 6 only legitimises sex discrimination in relation to ordination and recruitment to a post. Section 6 does not cover less favourable treatment whilst working in a post. It would require a strained interpretation for the giving of a licence and appointment to a post to be read as including dismissal. Therefore, it would appear that the Sex Discrimination Act and the Equal Pay Act do apply once a woman has a post subject to the status of section 19 (1) and her employment position. Regarding ordination and importantly recruitment, no sex discrimination claims are possible under

national law because of section 6. Any claims would need to be made under the Equal Treatment Directive.[10]

Regarding recruitment, section 6 applies very widely. It means that regardless of the presence of Resolutions A and/or B, sex discrimination against a female priest during selection for a post is legitimised. Theological objection encapsulated in concrete Resolutions relies on doctrine and belief. However, parishes which do not pass the Resolutions can rely on the wider protection of section 6 which legitimises preference for a male priest, whether based on theology or prejudice. Section 6 may be relied upon not only by the PCC, but others involved in the hiring process; for example, bishops, other clergy and the patron.

The wide application of section 6 is useful when the Resolutions cannot be passed. Resolution A cannot be considered by a PCC if the incumbent, priest-in-charge, team vicar or assistant curate is a woman priest.[11] However, under section 6 the refusal to appoint another woman priest to the same parish would be legitimised, despite Resolution A not being in place. The passing of Resolutions A and/or B appeared to be a useful benchmark for prospective job candidates. Section 6 defeats the usefulness of these Resolutions. Under section 6 opportunities can be restricted in a less formal manner and with no legal redress. Any claim of sex discrimination would not appear possible in national law under the present structure until a woman priest is in post or has been dismissed from her post. The whole process of recruitment is side-stepped by the legislation.

7.1.4 Legal Position of Male Priests Under the National Legislation

Section 6 does not apply to male priests. If section 19 (1) is inapplicable and if priests are deemed to be employed for the purposes of section 82 (1) male priests could use the Sex Discrimination Act if they encounter sex discrimination in recruitment, working conditions or dismissal. If a male priest was refused a particular post in favour of a woman, there would be a possible exemption if the sex of the priest was a genuine

[10] EC Council Directive 76/207 (Equal Treatment)
[11] Priests (Ordination of Women) Measure 1993 s 3 (3)

occupational qualification. Under section 7 (2) (d) of the Sex Discrimination Act it might be argued that the nature of the establishment requires the work to be done by a woman priest, for example, a chaplaincy post in an all female prison or hospital. This would be a problematic argument as men have traditionally been priests in all types of post. Under section 7 (2) (e) of the Act the argument might be made out that the post requires the provision of personal services promoting welfare or education which can most effectively be provided by a woman. For example, under this heading might come a Diocesan Officer for Women's Ministry. This argument is more likely to succeed than arguments based on 7 (2) (d) as the presence of women priests has created new posts in the Church of England such as the aforementioned one. Regarding contractual pay and benefits a male priest, as for a woman priest, would have a potential claim under the Equal Pay Act.[12]

7.1.5 Comparison of Priests' Legal Rights

Before women priests were permitted, the issue of sex discrimination did not arise. Male priests were in the protected position of an all male priesthood, where no sex discrimination could take place. Women had no rights in domestic sex discrimination law as the law prevented them from being priests. Under EC law the priesthood was identified as an excluded occupation for the purposes of Article 2 (2) of the Equal Treatment Directive.[13] Now that women priests are permitted, if section 19 (1) is inapplicable and if priests are in employment under the 1975 Act, male priests have potential rights under the Sex Discrimination Act in all employment situations. Women priests have fewer potential rights under the Act than male priests. Their potential rights are confined to working conditions and dismissal. Claims regarding ordination and recruitment would need to be brought under the Equal Treatment Directive. Both male and female priests have potential rights under the Equal Pay Act.

The only difference in potential legal rights between men and women concerns ordination and recruitment. One can see why the difference is present because it preserves theological objection to women priests. The problem comes where sex

[12] This is discussed in detail at 7.8.
[13] This is discussed at 7.2.2.

discrimination in ordination and recruitment is not for theological reasons but is because of prejudice against women.

7.2 Inclusion of Church of England Priests Under Community Law

The inclusion of Church of England priests has been discussed with reference to national law. Now the focus turns to European Community law. What status, if any, do priests have under Community law? This question is answered by examining three aspects of EC employment law; the meaning of an employee, the derogation against the Equal Treatment Directive contained in Article 2 (2) and the purpose of EC employment law. When examining the Equal Treatment Directive special reference will be made to the difficulties a priest might encounter when trying to rely on the Directive. The doctrine of direct effect will be discussed with reference to the concept of "emanation of the state". The ways in which the Directive might be enforced will be discussed.

7.2.1 The Meaning of Employee in Community Law

The employment status of ministers of religion, particularly Church of England priests, has been discussed with reference to national definitions of an employee. Does EC employment law provide its own definition of an employee? Directives are silent as to a precise definition. It appears that Member States are often allowed to interpret terms such as "worker" and "employee" in their own way. For example, in the Pregnant Workers Directive, Article 2 defines a pregnant worker to mean, "a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice."[14] When the British government implemented this Directive in the Trade Union Reform and Employment Rights Act 1993, now restated in the Employment Rights Act 1996, a pregnant worker became defined as a pregnant employee. Under section 230 (1) of the 1996 Act an employee means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. By allowing a Member State to define such terms there is the risk of a narrow interpretation of Community law.

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[14] EC Council Directive 92/85 (Pregnant Workers)

In relation to the meaning of worker for the purposes of Article 48 of the Treaty of Rome, dealing with free movement of workers, the ECJ gave a Community meaning to "worker".[15] "Objectively defined, a 'worker' is a person who is obliged to provide services to another in return for monetary reward and who is subject to the decision or control of the other person as regards the way in which the work is done."[16] Because Article 48 contained one of the fundamental principles of the Community, the term "worker" in the Article should not be interpreted differently according to the law of each Member State but was to be given a Community meaning.[17] The nature of the legal relationship between employee and employer was said to be immaterial as regards the application of Article 48.[18] The relationship might be one founded in a private law contract or it might be one of public law rights.[19] In *Steymann* the applicant did not claim that his activities were those of an employed or a self-employed person.[20] Rather the case involved the EC concept of freedom to provide services. The question before the ECJ was whether activities performed by members of a religious community were economic activities as defined by Article 2 of the Treaty of Rome. The pursuit of an activity as an employed person or the provision of services for remuneration is regarded as an economic activity within the meaning of Article 2.[21] The ECJ held that the activities performed by the members of the community constitute economic activities, "in so far as the services which the community provides to its members may be regarded as the indirect quid pro quo for genuine and effective work."[22] Additionally, the Commission in its opinion considered that the activities of a religious community might be regarded as employed activities within the meaning of Article 48. A member of the community fulfils the criteria characterising an employment relationship set out in *Lawrie Blum*. "The employment relationship in this case is comparable, in particular, to a contract of employment for an indefinite period, namely the length of stay in the community....the reference to the rules of the community implies that the members of the community are subordinated to a certain extent to the community as a whole.

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[15] Case 66/85 *Deborah Lawrie Blum* v *Land Baden-Wurttemberg* [1986] ECR 2121
[16] Ibid. at p2143
[17] Ibid. at p2144
[18] Article 48 applies to free movement of employed persons and Article 52 applies to self-employed persons.
[19] *Deborah Lawrie Blum* n.15 supra at p2145
[20] Case 196/87 *Udo Steymann* v *Staatssecretaris van Justitie* [1988] ECR 6159
[21] Case 13/76 *Dona* v *Mantaro* [1976] ECR 1333
[22] *Udo Steymann* v *Staatssecretaris van Justitie* n.20 supra at p6173

Finally, what is involved in this case is services provided for remuneration."[23] Alternatively, they thought that Mr Steymann might be regarded as a person pursuing a self-employed activity within the meaning of Article 52.[24] It was not necessary for the ECJ to decide whether the applicant was employed or self-employed. Another case held that a missionary priest was self-employed for the purposes of social security for migrant workers.[25] The national social security provisions at issue had been adopted to guarantee freedom of movement for workers; both employed and self-employed persons. The question was whether a priest who is not paid by his order but is maintained by his parishioners is self-employed in regard to the free movement of workers. It was held that, "the concept of 'self-employed person' is intended to guarantee to such persons the same protection as is accorded to employed persons and must therefore be interpreted broadly."[26] To establish self-employment here the person must be engaged in an occupation in respect of which they receive an income which can meet all or some of their needs, even if this is paid by a third party, as in this case.[27]

These cases refer to the free movement of workers. There is no Community definition of employment in regard to the Equal Treatment Directive. Although an important part of EC law it is not one of the fundamental principles contained in the Treaty of Rome. It is arguable that the ECJ would allow the term "employment" contained in the Directive to be interpreted according to the law of each Member State.

However, a British case does attempt to draw principles from the Equal Treatment Directive regarding the meaning of employment. The issue in *Jepson* v *Labour Party* was whether section 13 of the Sex Discrimination Act covered adoption as a prospective parliamentary candidate.[28] It was held that it did because the adoption of a prospective candidate involves an "authorisation" which "facilitates engagement in a particular profession". Section 13 is not confined to sex discrimination in employment but is drafted to cover any vocation, occupation or business.[29] The industrial tribunal stated

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[23] Ibid. at pp6164-6165
[24] Ibid. at p6165
[25] Case 300/84 *A.J.M. Roosmalen* v *Bestur de Bedrijfsvereniging voor de Gezonheid, Geestelijke en Maatschappelijke Belagen* [1986] ECR 3097
[26] Ibid. at p3123
[27] Ibid. at p3124
[28] *Jepson* v *Labour Party* [1996] IRLR 116
[29] Sex Discrimination Act 1975 ss 13 (1), 82 (1)

that support for a wide interpretation of the term employment is to be found in the Equal Treatment Directive.[30] The Directive, stated the Chairman, can be used as an aid to construction of the national legislation provided, as Lord Keith emphasised in *Webb* v *Emo Air Cargo (UK) Ltd*, that in doing so we do not distort the meaning of the British legislation.[31] Whilst the Directive frequently uses the ordinary word "employment", Article 3 invites a wide interpretation of the term: "Application of the principle of equal treatment means that there should be no discrimination whatsoever on grounds of sex in the conditions including selection criteria for access to all jobs or posts whatever the sector or branch of activity and to all levels of the occupational hierarchy." Article 3 was held to support the wide interpretation of section 13. However, whether Article 3 could be used to support a wide interpretation of the meaning of employment in sections 1 and 6 of the Sex Discrimination Act is a moot point. An Article 177 preliminary ruling might be necessary to decide whether a wide interpretation of employment can be used to include ministers of religion within national legislation.

7.2.2 The Equal Treatment Directive

The purpose of the Equal Treatment Directive is to ensure the equal treatment of men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions.[32] The Directive applies to all types of employment, including employment in the public service.[33] Article 2 (1) prohibits any, "discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."

By way of recap, section 19 (1) of the Sex Discrimination Act is now arguably inapplicable to Church of England priests. Section 6 of the 1993 Measure only exempts sex discrimination against women in regard to ordination and appointment; it does not cover working conditions and dismissal. With this in mind, it is possible to review the potential impact of the Equal Treatment Directive on Church of England priests. There

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[30] *Jepson* v *Labour Party* n.28 supra at p118

[31] *Webb* v *Emo Air Cargo (UK) Ltd* [1993] IRLR 27 at p32. For a further discussion of the interpretation of national law using EC law the reader is referred to 7.2.5.

[32] Equal Treatment Directive Article 1

[33] Case 248/83 *Commission* v *Germany* [1985] ECR 1459

are three exceptions to the principle of equal treatment: where the sex of the worker constitutes a determining factor, where because of pregnancy or maternity women need protection and where the state has implemented a positive action programme.[34] It is considered by the British government that the former exception covers Church of England priests. Member States are allowed to, "exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor."[35] The British government has excluded ministers of religion from the operation of the Directive. The exclusion predated the Synod vote to allow women priests. It is arguable that the inclusion of ministers of religion under the derogation suggests that they are capable of inclusion under the Directive in the first place. It is not the type of job (being a minister) which prohibits protection but the fact that sex is a determining factor.

The existence of an exemption does not automatically provide a defence to claims brought under the Equal Treatment Directive. An exemption may be set aside if it exceeds the limits of the exceptions permitted by Article 2 (2).[36] An exemption is justified if it comes within either of two situations. First, does the nature of the work mean that the sex of the worker is a determining factor? Or second, does the context of the work mean that the sex of the worker is a determining factor? In regard to the Church of England, whilst an all male priesthood existed, the sex of the worker did constitute a determining factor. The nature of the priesthood required that a priest was male. Following the 1993 Measure, what is the status of this exemption? This depends on how "context" and "determining factor" are interpreted. In parishes which have passed Resolutions A and/or B the sex of the worker is a determining factor. In other parishes a male or a female priest is welcomed. Is theological objection enough to satisfy "context" under Article 2 (2)? Does Article 2 (2) suggest that the exemption is permissible if the sex of the priest is a determining factor in some, but not all, parishes? This would square with the provisions of section 6 of the 1993 Measure. This

[34] Equal Treatment Directive Article 2 (2), (3), (4)
[35] Ibid. Article 2 (2)
[36] Case 165/82 *Commission* v *UK* [1983] ECR 3431

interpretation of context would justify the exemption to operate as long as the sex of the worker is a determining factor some of the time.

Case law provides some guidance on the interpretation of Article 2 (2). However, the idea of "determining factor" remains vague. The predictability of a case decision in this area is problematic. The Commission instituted infraction proceedings against the UK for failure to fulfil its obligations under Article 2 (2).[37] Three areas of exemption were under scrutiny; employment in a private household, employment in small undertakings with not more than 5 employees and employment as a midwife. The first two exemptions were held to go beyond the limits of Article 2 (2) because they were too general in their application.[38] In relation to employment in a private household it was stated that the provision at issue was intended to reconcile the principle of equality of treatment with the principle of respect for private life. It was argued that reconciliation of that kind is one of the factors which must be taken into account when determining the scope of Article 2 (2). The ECJ replied, "Whilst it is undeniable that, for certain kinds of employment in private households, that consideration may be decisive, that is not the case for all the kinds of employment in question."[39] The private household exemption was subsequently narrowed down in the Sex Discrimination Act.[40] On this basis it could be argued that whilst particular posts in particular parishes require a male priest, this is not the case for all the kinds of posts in question. The generality of the exemption regarding ministers of religion would provide a ground of objection. As a result of this the exemption might be narrowed to cover only posts and parishes where the Resolutions are in place.

At the time of the Commission action midwives were excluded from the general protection of the Sex Discrimination Act. The ECJ held that the UK government had not gone beyond the scope of Article 2 (2) in relation to midwives. At that time the restriction on male midwives was about to be lifted. However, the present legislation which discriminated against men in this field was under scrutiny. The UK government believed that the introduction of male midwives and the accompanying idea of equal

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[37] Ibid.
[38] Ibid. at p3448
[39] Ibid. at p3448
[40] Sex Discrimination Act 1975 s 7 (2) (ba) as amended by the Sex Discrimination Act 1986 ss 1 (1), 1 (2)

treatment in the occupation of midwife should be introduced gradually, in order to take account of the sensitivities and beliefs of different cultural groups in Britain.[41] The Commission suggested that account could be taken of the preferences of women in confinement and added that male midwives would remain a small group anyway. The Advocate General likewise agreed with the Commission, believing that free choice was sufficient to allay the fears of the UK government. The reply of the UK was that this tended to permit sex discrimination "in practice" but not in law.[42] The ECJ did think that the exemption was justifiable, stating, "It must however be recognized that at the present time personal sensitivities may play an important role in relations between midwife and patient."[43] An analogy could be drawn between male midwives and women priests. Traditionally members of the opposite sex have filled these posts. Once a mixed sex profession is accepted in principle, practical problems of accommodation appear. The Commission and the Advocate General attempted to embrace change by including midwives under the legislation with the balancing factor of freedom of choice. This argument could be used to support the inclusion of ministers of religion under the legislation with the balancing factor of theological objection.

The best guidance on the meaning of "context" and "determining factor" was given in *Johnston* v *The Chief Constable of the Royal Ulster Constabulary*.[44] Mrs Johnston was employed by the RUC on a fixed term contract. It was the policy of the Chief Constable of the RUC not to issue women with firearms or give them training in their use because of the perceived risk of assassination. It was decided that women would not be offered contracts of full-time employment in the RUC. This was because a substantial part of general police duties involved the use of firearms. Mrs Johnston's contract was not renewed, as a result of which she brought a sex discrimination claim under the Sex Discrimination (Northern Ireland) Order 1976 in relation to her employment and access to training. Policing in Northern Ireland was open to men and women, therefore the nature of the occupational activity was not at issue. The Commission in their opinion stated that a derogation must be justified in relation to specific duties and not in relation

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[41] *Commission* v *UK* n.36 supra at p3459
[42] Ibid. at p3460
[43] Ibid. at p3449
[44] *Johnston* v *The Chief Constable of the Royal Ulster Constabulary* [1986] IRLR 263

to an employment considered in its entirety.[45] The ECJ examined the context in which the duties were performed. They held, "it should first be observed that that provision, being a derogation from an individual right laid down in the Directive, must be interpreted strictly. However, it must be recognised that the context in which the occupational activity of members of an armed police force are carried out is determined by the environment in which that activity is carried out....the context of certain policing activities may be such that the sex of police officers constitutes a determining factor for carrying them out."[46] The ECJ added that in determining the scope of the derogation, the principle of proportionality must be observed. The exemptions must remain within the limits of what is appropriate and necessary for achieving the aim in view.[47] If there are other non-discriminatory means for achieving this aim these should be used. It was for the national court to decide whether the reasons for the Chief Constable's decision were justified and based on proportionality. Ellis believes that the Johnston decision leaves a great deal of discretion in the hands of national courts to decide which situations are permitted by Article 2 (2).[48]

In *Commission* v *France* the practice of using a quota based on sex for recruitment into different ranks of the police force was at issue.[49] It was held that exemptions provided for in Article 2 (2) may only relate to specific activities. The fact that certain police functions cannot be performed by both men and women does not justify discriminatory treatment in admission to the police force in general. "The application of Article 2 (2) of the directive cannot be based on a general assessment of police activities as a whole; it requires a specific consideration of the specific duties to be performed in individual cases."[50] The exemption must be "sufficiently transparent" so as to permit effective supervision by the Commission. In principle the exemption must be capable of being adapted to social developments.[51] These arguments could be applied to the exemption covering Church of England priests. Just because some parishes have passed Resolutions A and/or B does not mean that there should be a general exemption from

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[45] Ibid. at p276
[46] Ibid. at p277
[47] Ibid. at p277
[48] Ellis, Evelyn (1991) *European Community Sex Equality Law* p166 (Oxford, Clarendon)
[49] Case 318/86 *Commission* v *France* [1988] ECR 3559
[50] Ibid. at p3580
[51] Ibid. at p3581

unlawful sex discrimination against priests. Rather the exemption should cover the specific case of theological objection to women priests. This complements the adaptation to social developments argument.

The idea of review has been mentioned in case law, it is also part of the Equal Treatment Directive. Article 9 (2) of the Equal Treatment Directive requires Member States to periodically assess the excluded occupational activities in order to decide, in the light of social developments, whether there is justification for maintaining the exemptions concerned. They must notify the Commission of the results of their assessment. This two-fold supervision ought to eliminate out-dated exemptions. In terms of law reform through review, the individual priest must hope that the Synod vote is seen as a social development which in turn requires priests to be included in the principle of equality.

The scope of Article 2 (2) in relation to occupations of a religious nature has not been considered by the ECJ. It is impossible to tell whether the ministers of religion exemption would be successful in any action. In a report requested by the European Commission which looked at excluded occupations, exemptions made within a religious framework were not considered.[52] It was thought that these occupations were incapable of assessment by a layman. It is possible that the ECJ might take a similar approach when faced with a religious occupation, and thus hold that the exemption was permitted by Article 2 (2).[53]

Article 3 (1) of the Directive, with its wide interpretation of employment, prohibits sex discrimination regarding access to jobs or posts.[54] Section 6 of the 1993 Measure is justified by Article 2 (2), as is section 19 (1) of the Sex Discrimination Act. Respect for differing opinions on women priests is a necessary feature if Church unity is to be preserved. However, the wide provisions of section 6 are unnecessary to achieve this aim. Therefore, it might be possible to argue that a breach of Article 3 is not justified by

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[52] Commission of the European Communities (1981) *Protective Measures and the Activities not Falling within the Field of Application of the Directive on Equal Treatment, Analysis and Proposals*, Monique Halpern 331.1094 COM

[53] Personal Communication, Hilary Slater, March 1995

[54] The reader is referred to 7.2.1. for a discussion of Article 3 (1)

Article 2 (2).[55] The hoped for result would be a modified section 6 which only allowed sex discrimination in access to employment where a conscience clause was operative.

Working conditions and unfair dismissal are covered by Article 5 (1) which states, "Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex." As section 6 of the 1993 Measure does not cover working conditions and dismissal it is arguable that but for the current derogation provision and the uncertain employment status of Church of England priests, Article 5 (1) might be used by priests in their national courts.

7.2.3 Direct Effect

How might the Directive be relied upon by an individual priest? First, the doctrine of direct effect will be considered. Direct effect is a doctrine whereby an individual can invoke Community law against the state (vertical direct effect) and against other individuals (horizontal direct effect). The type of law determines whether direct effect operates at all and if it does whether it is horizontal as well as vertical. *Van Duyn* v *Home Office* established that Directives could be directly effective against the state.[56] For this to be so the Directive must be unconditional and sufficiently precise following the principles enunciated in *Van Gend en Loos*.[57] A Directive is not directly effective against an individual or other body. If an individual believes that a Directive has been improperly implemented, he or she can rely on the provisions of the Directive against the state. In the case of the Equal Treatment Directive, the principle of equal treatment as applied to access to jobs under Article 3 (1) and working conditions under Article 5 (1) was held to be directly effective against the state.[58] If it is not possible to use direct effect it may be possible to use the doctrine of indirect effect developed in *Marleasing*.[59] *Marleasing* held that the national courts have a duty to interpret national law in accordance with Community law. The *Marleasing* principle brings Community rights to

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[55] Procedure under the Equal Treatment Directive is discussed at 7.2.5.
[56] Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337
[57] Case 26/62 *Van Gend en Loos* v *Nederlandse Belastingadministratie* [1963] ECR 1
[58] *Marshall* v *Southampton and South-West Hants AHA* [1986] IRLR 140
[59] Case C-106/89 *Marleasing* v *La Commercial International de Alimentacion SA* [1990] ECR I-4135

the citizen indirectly through national law. This is an indirect way of achieving horizontal direct effects.[60] The successful use of the *Marleasing* principle by Church of England priests is reduced when one looks at the level of obligation placed on the national courts. They are only obliged to interpret national law "as far as possible" in the light of Community law.[61]

7.2.4 Emanation of the State

In *Foster* v *British Gas* the ECJ defined the state in a wide sense to include "emanations of the state."[62] It was held that, "unconditional and sufficiently precise provisions of a Directive could be relied on against organisations or bodies which were subject to the authority or control of the state or had special powers beyond those which result from the normal rules applicable to relations between individuals."[63] The ECJ added that a Directive would have direct effect against, "a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals."[64] How is the test set out in *Foster* to be interpreted? Is the first more general test followed or is the second test involving three specific criteria followed? In *Doughty* v *Rolls Royce* the Court of Appeal favoured the latter approach.[65] Mustill LJ. adopted the three stage test set out above. First, was the body made responsible, pursuant to a measure adopted by the state, for providing a public service? Secondly, was the service it provided at the material time under the control of the state? Thirdly, did the body possess or claim to exercise any special powers? Therefore, the power of control is only one criterion in deciding whether a body is an emanation of the state. If all three criteria are met it will be difficult to argue that the body is not an emanation of the state. If one criterion is missing, this does not prevent such status being achieved. However, it will require the addition of another factor, not present in the *Foster* formula,

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[60] Barnard, Catherine (1995) *EC Employment Law* p38 (Chichester, John Wiley)
[61] *Marleasing* v *La Commercial International de Alimentacion SA* n.59 supra at p4159
[62] *Foster* v *British Gas* [1990] IRLR 353 at p356
[63] Ibid. at p356 para 18
[64] Ibid. at p356 para 20
[65] *Doughty* v *Rolls Royce* [1992] IRLR 126

to achieve such status.[66] Mustill LJ. believed that if there is any inconsistency between the two paragraphs, paragraph 20 should prevail.[67] This view is not shared by Rubenstein who believes that paragraph 20 was inserted so as to reflect the status of British Gas at the relevant time and was not meant to alter the statement made at paragraph 18.[68] The control test of paragraph 18 can be applied fairly easily believes Rubenstein. The control test and the three stage test are both used to establish that a body can be compared to the state. An alternative approach, says Rubenstein, is to abandon state comparison and instead establish that the body is not a private one. "[T]he better starting point is at the other end: Directives cannot bind private undertakings or persons, but...they can be relied upon against everyone other than a private undertaking or person."[69] As private and public are natural opposites a private test is arguably going to encounter as many problems as a public test. Because the line between public and private has been blurred in some cases, for example privatised public utilities, a test based upon the public or private nature of an undertaking will be difficult. In *Griffin* v *South West Water Services* the three stage test was applied.[70] Because South West Water were a privatised utility the focus was on whether the company was under the control of the state. It was held that, "The question is not whether the body in question is under the control of the State but whether the public service in question is under the control of the State."[71] Therefore, the legal form of the privatised company was irrelevant.

Whether the Church of England is an institution which can be classified as an "emanation of state" is a question for the national courts. The problem for a priest would be two-fold. First, an employer needs to be identified and second that employer would need to be classified as an emanation of the state. The diocesan bishop or the Diocesan Board of Finance are the most likely candidates for employer status. If the employer hurdle is cleared it is likely that the court would employ the three stage test to establish whether either the bishop or the board were an emanation of state. The Legal Advisory Commission of the General Synod believe that such a finding is unlikely.[72] It is

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[66] Ibid. at p132, per Mustill LJ.
[67] Ibid. at p132, per Mustill LJ.
[68] Rubenstein, Michael (1992) "Editorial Comment" IRLR p106
[69] Ibid. p106
[70] *Griffin* v *South West Water Services Ltd* [1995] IRLR 15 at p25, per Blackburne J.
[71] Ibid. at p27, per Blackburne J.
[72] Legal Advisory Commission of the General Synod (1994) Op. cit., p232

submitted that the conditions required to satisfy the three stage test do exist. First, the Church of England has been made responsible, pursuant to a measure made by the state, for the provision of a public service. As a result of the Act of Supremacy 1558 the Church of England is the established Church in England.[73] The state has accepted the Church of England as the religious body truly teaching the Christian faith in England.[74] The Church is providing a public service of teaching the Christian faith. Archbishops and bishops are appointed by the Crown through Parliament to further this end.[75] Secondly, the service is under the control of the state. The Church of England must conform to the limitations placed on it by Parliament. For example, because Church legislation is part of the law of the land it requires parliamentary and royal assent. The state has the final say in Church matters. The Church is not a completely independent organisation; senior Church officials are appointed by the state and the state has the power to interfere in the passage of Church legislation. Thirdly, the Church does possess special powers. The Synodical Government Measure 1969 established the General Synod as the principal ruling body of the Church of England. The Synod has the power to formulate and pass (subject to state approval) Church legislation which will become part of the law of the land. No other religious body in England has such power. Instead they rely on private law to regulate their institutions. As a result of the established status of the Church of England, their priests would be better placed to establish a state employer than ministers in other religions and denominations. Failing this if a priest could identify a private employer (which seems less likely than establishing a state employer) they might be able to use the doctrine of indirect effects developed in *Marleasing*.

7.2.5 Enforcement

There are various ways in which the Equal Treatment Directive might be enforced. If EC law is involved and British law is unclear an industrial tribunal or court may make a reference to the ECJ under Article 177. If British law is clear but there is a conflict with

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[73] For more information on establishment the reader is referred to 3.1.
[74] *Marshall* v *Graham Bell* [1907] 2 KB 112 at p126, per Phillimore J.
[75] Appointment of Bishops Act 1533

EC law one must ask whether there is direct effect. If there is, individual proceedings can be initiated, arguing that the Equal Treatment Directive is directly effective.[76]

If there is no direct effect two options are available, depending upon whether the conflict of law can be overcome. Where there is no direct effect it is the task of the national court to interpret domestic legislation in the light of the wording and the purpose of the Directive.[77] However, national interpretation must not distort the meaning of the domestic legislation.[78] Individual proceedings based on British law can be brought, arguing interpretation in line with EC law.[79] In *Marleasing* the ECJ held that in applying national law, whether the provisions in question were adopted before or after the Equal Treatment Directive, the national court called upon to interpret it is required to do so, as far as possible in the light of the wording and for the purpose of the Directive in order to achieve the result pursued by the Directive. The distortion argument was unsuccessfully pursued by the respondents in a gender identity disorder case.[80] They argued that the incorporation of gender identity disorder into the Sex Discrimination Act was a distortion of the national legislation. The tribunal held that this could be applied without distortion to the 1975 Act, as according to the ECJ such discrimination is based essentially, if not exclusively, on the sex of the person concerned.[81]

If British law remains incompatible the national court cannot apply EC law. It would rest with the government to introduce legislation to bring Britain into compliance. In the meantime it is left to the individual to bring an action for *Francovich* damages.[82] If an individual is not employed by the state but has suffered loss as a result of the Member State's failure to implement a Directive they can sue the Member State for damages. For

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[76] *Marshall* v *Southampton and South-West Hants AHA* n.58 supra
[77] Case 18/83 *Von Colson and Kamman* v *Land Nordrhein-Westfalen* [1984] ECR 1891
[78] *Duke* v *GEC Reliance Ltd* [1988] IRLR 118; *Webb* v *Emo Air Cargo (UK) Ltd* [1993] n.31 supra. For further information on the doctrine of indirect effect and the decision in *Duke* the reader is referred to Fitzpatrick, Barry (1989) "The Significance of EEC Directives in UK Sex Discrimination Law" in Oxford Journal of Legal Studies vol.9 pp336-355; Howells, Geraint (1991) "European Directives - the Emerging Dilemmas" in Modern Law Review vol.54 pp456-463
[79] *Marleasing* v *La Commercial International de Alimentacion SA* n.59 supra
[80] *Elmes* v *(1) Exeter and District Council (2) Home Office (3) Exeter and North Devon Health Authority* Case Number 1548/95 (Industrial Tribunal)
[81] *P* v *S and Cornwall County Council* [1996] IRLR 347
[82] Cases C-6 and C-9/90 *Francovich* v *Italy* [1991] ECR I-5357

example, under Articles 3, 4 and 5 of the Equal Treatment Directive the state is obliged to abolish laws which contravene the Directive; failure to do this could result in a *Francovich* action. There must be a causal link between the breach of the State's obligations and the damage suffered. As Barnard notes the degree of fault on the part of the Member State is left unspecified by *Francovich.* If the ECJ were to unexpectedly include Church of England priests under the protections of the Directive, liability for their former exclusion by the British government might seem unduly harsh. A *Francovich* action might be accompanied with a judicial review claim, which is discussed below. Alternatively, there is the possibility (albeit unlikely) of Commission proceedings against the UK under Article 169, for failure of a state to fulfil its obligations under the Treaty.

The EOC also help to enforce the Directive. They have a duty to keep the national law under review.[83] Such review will involve an examination of the principles of the Equal Treatment Directive in relation to the Sex Discrimination Act. The EOC or indeed any other individual or body granted locus standi can bring a judicial review action in the Divisional Court to enforce Community rights.[84] A judicial review action can be used to obtain a ruling as to whether provisions of national legislation and/or administrative practices are contrary to the Equal Treatment Directive. *R* v *Secretary of State for Employment, ex p EOC*, held that it falls to national law to determine what type of organisations have the necessary standing in a particular case to request judicial review.

7.2.6 The Purpose of European Community Law

It is likely that the ECJ would be wary of claims brought by Church of England priests. Economic objectives form the basis of Community law. Laws which regulate social policy, although influenced by human rights, are ingrained with economic considerations, such as the promotion of a competitive market place. Priests do not fit comfortably into this structure,[85] but neither do public service employees like teachers, nurses and social workers. These employees are given protection by the Equal

[83] Sex Discrimination Act 1975 s 53 (1) (c)
[84] *R* v *Secretary of State for Employment, ex p EOC* [1994] IRLR 171
[85] In relation to the free movement of workers, cases involving religious workers have been examined by the ECJ; *A.J.M. van Roosmalen* n.25 supra; *Udo Steymann* n.22 supra

Treatment Directive. It is arguable that this Directive moves away from the competitive model to a human rights model. One could argue for the inclusion of priests under the Directive on the ground that they are human beings and that the purpose of the Directive is to give protection to human beings when they are working. This may be difficult in the European Community where Catholicism is the norm and where such priests may be even less likely to be classified as employees.

One hope for Church of England priests is that the ECJ has adopted a purposive approach which is to be contrasted with the narrow approach of employment law in Britain. The purposive approach was established in *Van Gend en Loos*.[86] A recent case which uses the purposive approach is *P* v *S and Cornwall County Council*.[87] The Equal Treatment Directive, stated the ECJ, has economic and social justice goals. Its aim is to ensure equal treatment between workers. "Moreover...the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure."[88] In view of its purpose and the nature of the rights it covers, the Directive should cover all workers, including those who have undergone gender reassignment surgery.

Can the purpose behind Directives help explain how priests fit into the structure? Directives are used to achieve the approximation of national laws within the Community. The law on a certain topic may vary slightly from state to state. Absolute uniformity is unnecessary as long as the general provisions of the Directive are implemented. This enables national traditions to shape the implementation of Community law. This explains how the Pregnant Workers Directive has been implemented in Britain to apply to employees only. It is traditional that Church of England priests are regulated by ecclesiastical law and not generally by secular law. When implementing Community law this is one of the traditions the British government takes account of. We return to the argument that the traditional view of priests' employment ought to be reviewed and replaced with secular employment protection.

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[86] *Van Gend en Loos* n.57 supra
[87] *P* v *S and Cornwall County Council* n.81 supra
[88] Ibid. at p354

The absence of Community legislation regarding religious matters can be explained by the principle of subsidiarity. This states that the Community should only legislate where Community action will be more effective than individual Member State action.[89] The European Commission can argue that employment protection for ministers of religion is best provided by individual Member States. The subsidiarity principle operates with reference to law making not interpretation. The principle should not be invoked to prevent legal interpretation of a tricky issue. However, the ECJ might use Article 2 (2) of the Directive to leave religious problems to national tradition.

7.3 Accommodation of Church of England Priests Under the Legislation

The possible inclusion of Church of England priests under national and Community legislation has been discussed. Whether the problems of priests can successfully be accommodated by the legislation is the focus of the next sections. This will be done by examining four main headings; direct sex discrimination, indirect sex discrimination, vicarious liability and equal pay. Under direct sex discrimination areas of examination will be; intention, detriment and pregnancy. Under indirect sex discrimination areas of examination will be; policies involving married clergy couples and age rules on admission to training.

A problem which affects sex discrimination cases generally, and which could affect Church of England priests to a greater extent than ordinary employees, is the problem of proof. The informal appointments procedure often used when recruiting to Church posts compounds the usual problems of proof.[90] Candidates may not know why they have been rejected. They may be unaware of who obtained the post and whether they had comparable qualifications with the successful applicant. There is the selector's difficulty of how to choose the best candidate based upon merit. What does merit involve: qualifications, pastoral experience, seniority? Women priests pose a particular problem when applying a merit test. Their prohibition from the priesthood has limited their pastoral experience and their seniority. As stressed in the data analysis, it is difficult to compare like with like. Once candidates have been evenly matched the use of an

[89] Barnard, Catherine (1995) Op. cit., p26
[90] The reader is referred to 6.6.1. where the data findings on job advertisement are presented.

interview is a good tool to differentiate between candidates. The very tool of an interview goes some way to promoting fair procedure. In the questionnaire data a large proportion of priests were not interviewed for their present posts.[91]

An interview will only promote fair opportunity if the interview itself is fair. Interview questions regarding family responsibilities and plans to have children were cited by respondents as instances of perceived sex discrimination. The EAT in *Saunders* v *Richmond* established that the asking of such gender related questions is not in itself discriminatory.[92] However, the questions may supply evidence of discriminatory attitudes. If a candidate is refused or deliberately omitted from an employment offer he or she can use this evidence to bring a sex discrimination claim under section 6 (1) (c) of the 1975 Act. On the other hand, the questions will not provide evidence of discriminatory attitudes if they are appropriate because they are related to the candidate's ability to do the job. The EOC Code of Practice recommends that interview questions should be confined to the requirements of the job.[93] Questions about marriage plans or plans to have children should not be asked as this might be construed as discriminatory against women. The problem area is where such questions are relevant to a person's ability to do the job. In *Hurley* v *Mustoe* a blanket ban on employing women with small children was held to be discriminatory.[94] However, it was stated that properly worded questions regarding family responsibilities were permissible to ascertain a woman's ability to attend work regularly. The Code states that where personal circumstances will affect job performance, this should be objectively discussed without questions based on assumptions about marital status and family responsibilities. It is submitted that without further detail this is a difficult test for employers to apply. This is reflected in the fact that the Code only gives guidance and is not binding on employers.

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[91] 49% of female priests and 35% of male priests were not interviewed formally.
[92] *Saunders* v *Richmond BC* [1977] IRLR 362
[93] *Equal Opportunities Commission Code of Practice for the Elimination of Discrimination on the Grounds of Sex and Marriage and the Promotion of Equal Opportunity in Employment*, para 23 (c)
[94] *Hurley* v *Mustoe* [1981] IRLR 208

7.4 Direct Sex Discrimination

7.4.1 Definition of Direct Sex Discrimination

The questionnaire used the terminology of direct sex discrimination, borrowed from the Sex Discrimination Act. Section 1 (1) (a) defines direct sex discrimination;

> "A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if (a) on the ground of her sex he treats her less favourably than he treats or would treat a man."

The Act only makes sex discrimination unlawful in regard to specified areas. Part II of the Act covers sex discrimination in the employment field. The purpose is to hold employers liable, either directly or vicariously, for discriminatory acts that are employment related.

Section 6 (1) covers discrimination in recruitment;

> "It is unlawful for a person in relation to employment by him at an establishment in Great Britain, to discriminate against a woman-
> (a) in the arrangements he makes for the purpose of determining who should be offered that employment, or
> (b) in the terms on which he offers her that employment, or
> (c) by refusing or deliberately omitting to offer her that employment."

Section 6 (2) of the Act covers sex discrimination in regard to working conditions and dismissal;

> "It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her-
> (a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to any such opportunities; or

(b) by dismissing her, or subjecting her to any other detriment."

Section 6 (2), especially 6 (2) (b), offers greater potential to clerical complainants than section 6 (1) as it covers working conditions which are not mentioned by the 1993 Measure.

Section 3 (1) of the Sex Discrimination Act covers direct marriage discrimination in the employment field. Discrimination will be unlawful if, on the ground of marital status, a person is treated less favourably than an unmarried person of the same sex would be treated. Discrimination against single people on the ground of their marital status is not unlawful. Discrimination against a single person will only be unlawful if it is on the ground of sex and not on the ground of singleness per se.

7.4.2 On the Ground of her Sex

The phrase "on the ground of her sex" has potential problems for women priests. Women priests have two interconnected identities. The first identity is as a woman who is capable of comparison with a man. The second identity is as a priest. To some people the two identities are irreconcilable: according to doctrine women are incapable of being priests. To others the fusion of the two identities remains uncomfortable: a woman priest is viewed with trepidation. Finally, there are those who find the two identities compatible. The three way division of thought in the Church makes an analysis of less favourable treatment "on the ground of her sex" a tortuous task. Can theological objection and/or uncertainty about women priests be used as arguments against sex discrimination protection? In this way only sex discrimination by those openly in favour of women priests would be actionable: an unhelpful scenario! The way to address this problem is to divide the motive from the act of discrimination, using the principles enunciated in *James* v *Eastleigh*.[95] To make *James* easier to apply to the Church of England, section 6 of the 1993 Measure needs reforming.

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[95] *James* v *Eastleigh BC* [1990] 2 AC 751; see also *Brennan* v *J.W. Dewhurst Ltd* [1984] ICR 52; *Grieg* v *(1) Community Industry (2) Ahern* [1979] ICR 356

The meaning of "on the ground of her sex" was resolved by a 3-2 majority in the House of Lords in *James*. Mr and Mrs James were both 61. Mrs James was allowed free admission to a swimming pool, Mr James had to pay for admission. Free admission was only permitted to those who had reached state pension age; 60 for women and 65 for men. Eastleigh Borough Council did not intend to discriminate on grounds of sex. *James* laid down an objective test to determine whether the action is done on the ground of sex. Direct sex discrimination is present if the action causes less favourable treatment of one sex, or the less favourable treatment would not have occurred but for the complainant's sex. The intention, motive or purpose of the discriminator is irrelevant to the issue of liability. In the principal judgment, Lord Bridge followed the authority of the House of Lords in *R* v *Birmingham City Council, ex p EOC.*[96] In *James* he applied a simple "but for" test. The question to ask is, would Mr James, a man of 61, have received the same treatment as his wife but for his sex? Clearly the answer is yes. Lord Bridge continued, "the purity of the discriminator's subjective motive, intention or reason for discriminating cannot save the criterion applied from the objective taint of discrimination on the ground of sex."[97] Lord Goff explained the extent of the but for test; "it embraces both the case where the treatment derives from the application of a gender-based criterion, and the case where it derives from the selection of the complainant because of his or her sex."[98] A gender-based criterion would include state pension age and pregnancy. Theological objection to women as priests is arguably a gender-based criterion. The latter case would cover all other situations where a male or a female priest are not selected because of their sex. For example, where a woman priest is not appointed because of uncertain feelings about women priests. Lord Goff did not state that the but for test was an absolute bar to intention being discussed in some cases. The test, "avoids, in most cases at least, complicated questions relating to concepts such as intention, motive, reason or purpose, and the danger of confusion arising from the misuse of those elusive terms."[99] This leaves open the door for theological objection to be regarded as a relevant motive in a discussion of the phrase, "on the ground of her sex".

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[96] *R* v *Birmingham City Council, ex p EOC* [1989] AC 1155
[97] *James* v *Eastleigh BC* n.95 supra at pp765-766, per Lord Bridge
[98] Ibid. at p774, per Lord Goff
[99] Ibid. at p774, per Lord Goff

Fredman describes the Sex Discrimination Act as a symmetrical model of formal justice, where justice is decided in abstraction from the substantive cause of the discrimination.[100] The minority view of Lord Griffiths in *James* uses a substantive view of justice by examining why the sex discrimination occurred. The criterion of pensionable age was used for a reason. The intention of the council was to give free admission to pensioners and not to people because they were men or women.[101] The fact that the state pension was discriminatory itself was a separate issue. He believed that the but for test was an insufficient test for determining less favourable treatment "on the ground of her sex" in all cases. Although the motive behind an action is not determinative, motive may need to be considered in some cases.[102] In a race discrimination case, *R* v *Commission for Racial Equality, ex p Westminster City Council*, Woolf J. held that motive may be relevant in some circumstances. "Motive may often be substantial evidence of why an action was taken and therefore indicate the grounds on which it was taken. However, I fully accept that you can have discrimination on racial grounds without there being an intention to discriminate on that ground."[103] Similarly in *James*, Lord Lowry in dissent pointed to the failure of the causative construction to ask "why"? Lowry focuses on the natural meaning of "on the ground of sex". He describes a ground as a reason why a person acts in a certain way.[104] He states that a ground must not be confused with intention.[105] He is aiming to produce a test which is narrower than the but for test but not as narrow as intention to discriminate. The faults of the causative construction are that it, "not only gets rid of unessential and often irrelevant mental ingredients, such as malice, prejudice, desire and motive, but also dispenses with an essential ingredient, namely, the ground on which the discriminator acts. The appellant's construction relieves the complainant of the need to prove anything except that A has done an act which results in less favourable treatment for B by reason of B's sex, which reduces to insignificance the words 'on the ground

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[100] Fredman, Sandra (1996) "Positive Action After Kalanke" Paper Delivered at SPTL Labour Law Meeting, 27th April 1996, Cambridge

[101] *James* v *Eastleigh BC* n.95 supra at p767, per Lord Griffiths

[102] Ibid. at p768, per Lord Griffiths

[103] *R* v *Commission for Racial Equality, ex p Westminster City Council* [1984] ICR 770 at p777, per Woolf J.

[104] James v Eastleigh BC n.95 supra at p775, per Lord Lowry

[105] Ibid. at p778, per Lord Lowry

of.'"[106] The but for test is too wide as it disregards the fact that the less favourable treatment must occur on the ground of her sex.

A recent EAT case involving dismissal on the ground of pregnancy uses the but for test.[107] A distinction between pregnancy per se and pregnancy in the circumstances of the case as motives was dismissed as legally erroneous. Pregnancy always has surrounding circumstances. In this case all the other factors were related to the fact that she was pregnant. Applying an objective test of causal connection it was held that the plaintiff was dismissed on the ground of pregnancy, and therefore on the ground of sex. The pregnancy need not be the only or even the main cause of the dismissal, though it must provide more than just the occasion for the result complained of. It is enough if it is an effective cause.[108]

When assessing sex discrimination in employment within the Church of England one can arguably make a distinction between the act of discrimination and the motive for the discrimination. Prejudice against women as women, prejudice against women as priests and theological objection to women as priests are all motives which fuel the act of discrimination. If one applies the but for test the less favourable treatment will be on the ground of her sex. The primary aim of section 6 of the 1993 Measure and the accompanying Resolutions is to allow sex discrimination in recruitment based on theological conscience. It allows one motive to override the but for test. However, on its present construction it allows two other motives to override the but for test; prejudice against women and prejudice against women priests. At present the principles of *James* cannot be applied to sex discrimination in recruitment within the Church of England. Arguably they could be applied to working conditions and dismissal. It will be necessary to reform section 6 and the Resolutions to allow *James* to operate at the recruitment stage. Reform is needed to make theological objection a distinct and meaningful motive, otherwise it will blur into prejudice against women and the Church will gain nothing.

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[106] Ibid. at pp779-780, per Lord Lowry
[107] *O'Neill* v *(1) Governors of St Thomas More RCVA Upper School (2) Bedfordshire County Council* [1996] IRLR 372
[108] Ibid. at p377, per Mummery J.

British law prohibits justification in direct sex discrimination cases. The prohibition on justification, although potentially there, is not as entrenched in EC jurisprudence. In *Birds Eye Walls Ltd* v *Roberts* the ECJ showed that they were prepared to look at the purpose of an action.[109] The company paid larger bridging pensions to male employees than to female employees in order to combat the unequal treatment of men under the discriminatory pension structure. The Court held that this arrangement was not contrary to Article 119 of the Treaty of Rome. The ECJ did not lay down a general principle that direct sex discrimination could be objectively justified under EC law. Instead the Court distinguished the financial position of men and women between the ages of 60 and 65 who had to retire because of ill health. The principle of equal treatment contained in Article 119 presupposes that men and women are in identical situations. Because their situations were not identical the arrangements were not discriminatory.[110] "[Moreover,] given the purpose of the bridging pension, to maintain the amount for women at the same level as that which obtained before they received the state pension would give rise to unequal treatment to the detriment of men who do not receive the state pension until the age of 65."[111] The ratio of *Roberts* appears to be that there is no sex discrimination where the effect of the challenged act is to produce substantive equality.[112] Is this really distinguishable from justification for direct sex discrimination? Effectively the ECJ is saying that direct sex discrimination can be justified.[113] The opinion of the European Commission in *Roberts* supports the use of justification. The concept of direct sex discrimination does not prohibit the use of justification, "since the very concept of discrimination, whether direct or indirect, involves a difference of treatment which is unjustified."[114] Ellis does not believe that *Roberts* can be interpreted in this way.[115] She believes that the ECJ dislike the idea of direct sex discrimination being justifiable. In order to prevent this argument succeeding, the Court used the "similarly situated" distinction to avoid the concept of justification being used. In *Dekker* v *VJV-Centrum* the ECJ refused to consider justification, where on the facts there was a case for the

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[109] *Birds Eye Walls Ltd* v *Roberts* [1994] IRLR 29
[110] Ibid. at p32
[111] Ibid. at pp32-33
[112] Rubenstein, Michael (1994) "Editorial Comment" IRLR p1
[113] Personal Communication, Hilary Slater 1/11/96
[114] *Birds Eye Walls Ltd* v *Roberts* n.109 supra at p32
[115] Ellis, Evelyn (1996) "Gender Discrimination Law in the European Community" in J. Dine & B. Watt (Eds.), *Discrimination Law: Concepts, Limitations and Justifications* p14, 19 (London, Longman)

appropriate use of justification.[116] The ECJ stated that the only defences to direct sex discrimination were those contained in Article 2 (2) of the Equal Treatment Directive.

In *Roberts* the ECJ had the opportunity to clearly state the EC jurisprudence on justification and direct sex discrimination. It chose not to do so. It is submitted that the ECJ does not want to introduce justification in direct sex discrimination cases under EC law. Such an extension might open the floodgates for defences against sex discrimination. In certain cases, such as *Roberts*, the factual situation dictates that the purpose of an action is relevant. In *Roberts*, as Ellis described above, the ECJ found a way of treating the case which avoided the use of justification. Such tactics prevent justification being used (at least openly) in direct sex discrimination cases.

The *James* but for test is favourable to complainants. It supports the tortious notion which underpins sex discrimination law: the law is concerned with remedial action for the victims of sex discrimination. A revision of the *James* test from causative construction to subjective construction could work against clergy applicants. The emphasis on substantive cause and asking why might be used by defendants to explain that the less favourable treatment was on the ground of women as priests and not women as women.

For completeness discrimination on the ground of another person's sex needs to be mentioned. Male priests voiced fears that they might encounter discrimination because of their support for women priests. If less favourable treatment did occur, for example not being appointed to a post, it would not be on the ground of their sex but because of the sex of another. Under the Race Relations Act section 1 (1) (a) discrimination on racial grounds covers any action based upon race. The complainant's race may not be at issue. It is sufficient if the race of another has caused the complainant to be treated less favourably.[117] Under the Sex Discrimination Act section 1 (1) (a) discrimination on the ground of sex must be founded upon the sex of the complainant, it does not extend to the sex of another. The male respondents would therefore not be covered by the sex discrimination legislation in this respect.

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[116] *Dekker* v *VJV-Centrum* [1991] IRLR 27. The reader is referred to 7.5. for a discussion of *Dekker*.
[117] *Showboat Entertainment Centre* v *Owens* [1984] 1 WLR 384

7.4.3 Detriment

In order to establish sex discrimination one of the detriments specified in section 6 (1) or 6 (2) of the Sex Discrimination Act must have occurred. In turn this is dependent upon whether an action is employment related, if done by the employer, and in the course of employment, if done by the employee.[118] If the act is not done in these contexts it does not come within the remit of the Sex Discrimination Act and cannot be a detriment under the Act. This is the first problem which clergy complainants would face. As will be seen, the approach of the courts to the test of course of employment has been a restrictive one. If the complainant has been treated less favourably on the ground of sex and the act is within the employment context one must ask, did the complainant suffer a detriment contrary to section 6 (1) or 6 (2)? This covers job offers, access to promotion and dismissal. In many cases involving working conditions the complainant will rely on section 6 (2) (b) which prohibits sex discrimination which gives rise to "any other detriment".

Respondents were asked whether they had experienced less favourable treatment on the ground of their sex when searching for a post, excluding the use of Resolutions A and/or B. Section 6 allows sex discrimination against women priests in recruitment regardless of the presence of Resolutions A and/or B. As the law stands incidents relating to recruitment will not be able to be classified as detriments to women priests, although they would so count for male priests. Disregarding section 6 and proceeding on a factual basis, some answers which accompanied these questions could amount to a detriment under section 6 (1) (a) of the Sex Discrimination Act. This holds that it is unlawful for an employer to discriminate "in the arrangements he makes for the purpose of determining who should be offered that employment." Many women priests described non-selection for interview as a detriment. One respondent described how parishes which had not passed Resolutions A and/or B said, "We are in favour of women priests but would prefer a man this time." Another incident involved a post being readvertised when the male candidates shortlisted withdrew leaving a women only short list. Interview questions were perceived as detrimental. Women priests were asked about

[118] Vicarious liability is discussed at 7.7.

how they would cope with a family and a priest's post, whether they had any marriage intentions and how they would cope living alone in a large vicarage. A court might interpret these questions as evidence of discriminatory attitudes, or the questions might be seen as necessary to ascertain the candidate's ability to do the job. At a diocesan level women priests complained of a lack of information and help from their diocese regarding finding a post. Rather more concrete arrangements for the purpose of determining who should be offered employment were found in the Chichester diocese. The bishop will not allow any woman to have responsibility for a parish as incumbent, despite the fact that he has not made use of the bishop's declaration contained in the 1993 Measure. Additionally, where he is patron he will not appoint a woman to any post.

It is unlawful for an employer to discriminate in the terms on which he or she offers employment.[119] Once "employed" any disparity in pay or conditions will be covered by the Equal Pay Act. Several respondents mentioned problems relating to stipend at the recruitment stage. The precise factual circumstances of these cases are unclear. For example, two women priests who were married to male priests were questioned about the need to have two stipends. It was thought that the woman priest ought to work for free if her husband was receiving a stipend. It was unclear whether they were offered posts on these terms or whether this viewpoint was merely discussed. If it were the former a detriment as defined by section 6 (1) (b) might be established. It is unlawful for an employer to discriminate by refusing or deliberately omitting to offer a candidate that employment.[120] 12 females and 1 male perceived a detriment when they were not selected for a post.

To enable a detriment to be established at the recruitment stage for women as well as men, section 6 must be narrowed to cover only theological objection enshrined in a conscience clause. In this way women priests would be able to point to detriments at the recruitment stage which were not linked to theological objection to women priests but which were discriminatory against women.

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[119] Sex Discrimination Act 1975 s 6 (1) (b)
[120] Ibid. s 6 (1) (c)

Theological objection to a woman priest is legitimate when recruiting. Once in post this attitude is not a justification for treating women less favourably so that they suffer a detriment. Section 6 does not legitimate sex discrimination against a woman once in post. If women are treated less favourably one must look at the type of incident and ask; is it a detriment? The source of the treatment must be examined; is the source an employer, an agent of the employer or a fellow employee?

It is unlawful for an employer to discriminate by dismissing an employee or subjecting him or her to any other detriment.[121] No respondents had been dismissed from their posts once priests. Some women deacons were required to move post when they declared their intention to be priested. This detriment, although appearing to be constructive dismissal, would probably be covered by section 6 of the Measure which states that sex discrimination will not be unlawful in respect of "her ordination to the office of priest in the Church of England". In other words, it was her intention to be ordained which caused her the detriment of dismissal. Respondents were asked whether they had received less favourable treatment whilst in post. Answers covered less favourable working conditions which fell short of dismissal. The appropriate section to examine here is the latter half of section 6 (2) (b) which refers to "any other detriment".

In *Ministry of Defence* v *Jeremiah* the Court of Appeal held that detriment means to be put "under a disadvantage".[122] A race discrimination case provided further guidance on the test for establishing detriment. *De Souza* v *The Automobile Association* held that a racial insult alone is not enough to be a detriment.[123] The less favourable treatment and the detriment suffered by the complainant are not located in the abuse itself but in the effect of that abuse. The treatment must be such that a reasonable employee would or might have felt disadvantaged in the circumstances or conditions of their employment. May LJ. held that if the working conditions or environment were affected this could be enough to constitute a detriment.[124] Establishing a detriment involves an inquiry into the effect of the treatment. It is a questioning approach, which softens the blanket but for test regarding causation. Detriments concerning working conditions have been grouped

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[121] Ibid. s 6 (2) (b)
[122] *Ministry of Defence* v *Jeremiah* [1980] ICR 13
[123] *De Souza* v *The Automobile Association* [1986] IRLR 103
[124] Ibid. at p107, per May LJ.

to illustrate on the one hand concrete detriments and on the other less classifiable attitudes. First, the negative attitude of male colleagues to women priests has caused restrictions to be placed on women priests' work. For example, women priests have not been given the opportunity to do certain tasks, such as celebrating Communion and taking occasional offices such as funerals, weddings and baptisms. It is arguable that a detriment could be established under section 6 (2) (b). Once a woman is in post her parish ought to accept her as a priest, therefore any less favourable treatment is not protected by theological objection. However, the less favourable treatment often comes from colleagues outside the immediate parish unit as the next set of examples illustrates. Women priests perceived exclusion from aspects of Church life. For example, they were excluded from deanery committees. When they were on committees their voices were not listened to. Others reported a general lack of support at diocesan level. This illustrates the problem of working together when the Church is divided. Theological objection is only supposed to operate in regard to ordination and recruitment, but it will affect working conditions too. What do you do to regulate this? The Church of England does not want sex discrimination law to be used. Instead the General Synod has passed the Episcopal Ministry Act of Synod 1993, the aim of which is respect for the integrity of differing beliefs and positions concerning women priests. An Act of Synod only has moral force, it does not give the individual priest any protective legal rights.

Negative attitudes to women and women as priests came from clergy and laity alike. Some attitudes were based upon theological objection others on stereotypical views of women's roles. The detriments complained of included; sexist jokes, patronising comments, rudeness and belittling. Whether these would be sufficient to count as a detriment would be determined by first looking at the effect of the abuse on the individual priest. The subjective test requires the employee to establish that he or she was disadvantaged in relation to his or her employment conditions. Did the employee actually suffer a disadvantage? The treatment must then fall within the reasonable employee test of *De Souza*: would a reasonable employee have suffered a disadvantage? The problem with this type of detriment is that it is often difficult to quantify. For example, one respondent complained that the general ethos of her working conditions was one of pervasive non-specific sexism. This is a difficult situation to tackle by the use of law.

As well as establishing a detriment, the complainant must show that he or she has been treated less favourably than an actual or hypothetical comparator in the same or similar relevant circumstances.[125]

7.5 Sex Discrimination and Pregnancy

The Church of England faces the prospect of coping with pregnant priests. Because of the requirement for a hypothetical comparator under section 5 (3) of the Sex Discrimination Act, cases involving the gender specific criterion of pregnancy have caused problems for the courts.[126] The issue of comparison was resolved by the ECJ in a recruitment case, *Dekker* v *VJV-Centrum.*[127] The ECJ held that it was direct sex discrimination contrary to Article 3 (1) not to appoint the best candidate to a post on the ground of her pregnancy. "As employment can only be refused because of pregnancy to women, such a refusal is direct discrimination on grounds of sex."[128] The national court had to ask; was the ground of the refusal to recruit the fact that the woman was pregnant?[129] Therefore, where a person receives less favourable treatment for a gender specific reason, that treatment is direct sex discrimination. There is no need to make a comparative analysis in these circumstances.[130]

7.5.1 Pregnancy and Recruitment

There are three situations where a woman priest's pregnancy might provoke less favourable treatment: recruitment, working conditions and dismissal. Unlike the statutory protection against dismissal[131] there is no comparable protection against failure to recruit; complainants must use the Sex Discrimination Act or the Equal Treatment Directive. Section 6 of the 1993 Measure prevents a woman priest using the Sex Discrimination Act in relation to ordination and recruitment. The primary aim of section

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[125] Sex Discrimination Act 1975 s 5 (3)
[126] For the early approach of the courts to this issue the reader is referred to *Turley* v *Alders* [1980] ICR 66; *Hayes* v *Malleable WMC* [1985] ICR 703
[127] *Dekker* v *VJV-Centrum* n.116 supra
[128] Ibid. at p29
[129] Ibid. at p30
[130] The comparison point was confirmed in *Webb* v *Emo Air Cargo (UK) Ltd (No.2)* [1995] IRLR 645
[131] The reader is referred to 7.5.3.

6 is to act as a defence to conscience clauses, yet as it stands it could be used to legitimate sex discrimination on the grounds of pregnancy. In a survey in the Church Times evidence of problems relating to ordination and recruitment were given. One respondent was refused ordination as a deacon because she was pregnant. "Nothing was ever said, but I think there was then a fear among some bishops about ordaining a pregnant woman: what happens to the baby during the ordination?"[132] Another respondent was refused a licence when she was pregnant because she was told it would be too upsetting for her to take funerals while she was pregnant. If a woman priest is the best candidate for a post and she is not appointed on the ground of her pregnancy her only potential protection is the Equal Treatment Directive.

7.5.2 Pregnancy, Working Conditions and Dismissal

Sex discrimination in working conditions and dismissal on the ground of pregnancy are not legitimised by section 6. Women priests have potential rights under the Sex Discrimination Act in this regard. These areas were mentioned as problem areas in the Church Times survey. It was stated by a Bishop's Officer for Women's Ministry that there is anecdotal evidence that some bishops expect the priest to resign when they have a baby. Others met resistance when they suggested continuing in paid work after having a baby.

The problem of less favourable working conditions and dismissal on the ground of pregnancy has been greatly eased for most women since the implementation of the Pregnant Workers Directive in the form of the Employment Rights Act 1996. These statutory protections mean that complainants need not use the Sex Discrimination Act, with the complications of section 5 (3), to make claims concerning working conditions and dismissal. Recruitment is not covered by the Directive or the Employment Rights Act, therefore the law as stated in *Dekker* is still applicable to this area. However, as will be seen, women priests might find the Sex Discrimination Act, with its wider definition of employment, easier to use than the new statutory protections.

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[132] Church Times, 9th August 1996

The aim of the Pregnant Workers Directive is to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breast feeding. A definition of these three types of worker is given by reference to national law and practice and will always be dependent on the worker informing her employer of her condition.[133] It is noticeable that Article 11 (2) refers to "employment rights" and 11 (2) (a) specifies "the rights connected with the employment contract of workers", suggesting that a contract of employment is expected. Protection against unfair dismissal during pregnancy or maternity leave is required by Article 10. The Directive protects working conditions by requiring maternity leave and maternity pay.[134]

7.5.3 Protection Against Dismissal

The national law on pregnancy and dismissal, maternity leave and maternity pay will now be discussed. Statutory protection regarding dismissal is provided by the Employment Rights Act 1996. Section 99 renders all dismissals on the ground of pregnancy automatically unfair regardless of the length of service or the length of the contract, provided that there is a causal link between the pregnancy related reason and the dismissal. A male comparator is not needed under the Act. The type of worker given protection under national legislation is an employee. This is defined by section 230 (1) to be, "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." This is narrower in scope than the definition of an employee used in the Sex Discrimination Act which includes additionally, "a contract personally to execute any work or labour." It is arguable that the purpose of the Pregnant Workers Directive is to protect all workers from dismissal on the ground of pregnancy. The Employment Rights Act should protect all workers, including those covered by the extended definition of employment used in the Sex Discrimination Act. Office holders are a distinct class of worker. They might also come within the extended definition of employment contained in the 1975 Act. The Employment Rights Act does specifically extend to some office holders, for example to Crown employment.[135] No mention is made of ecclesiastical office holders or ministers

[133] Pregnant Workers Directive, Article 2
[134] Ibid. Article 8, Article 11
[135] Employment Rights Act 1996 s 191 (3)

of religion in general in any part of the Act. Why is this so? It would have been possible to formally exclude them from the operation of the Act, as is the case with police officers.[136] Is this an oversight or are ministers of religion deliberately left in an ambiguous position under the Act because of their uncertain employment status?

7.5.4 Maternity Leave

Maternity leave is a problem which the Church is beginning to tackle. Some guidance has been given to dioceses by the Church Commissioners on this issue. They are recommended to follow guidelines adopted by the civil service system. Dioceses are then free to make their own arrangements based on this.[137] The Church of England is responding on an ad hoc basis to maternity provision. The Synod vote was a great victory for women. However, the debate and the following legislation failed to consider the practicalities of their incorporation into the Church.

The Employment Protection Act 1975 introduced maternity leave whereby an employee could return to work 6 months after childbirth. In order to qualify for this period of statutory maternity leave the employee needed 2 years of continuous service. The Pregnancy Directive required that all women workers are given at least 14 weeks maternity leave. This was implemented in the Trade Union Reform and Employment Rights Act 1993. Both rights are now found in the Employment Rights Act 1996. The latter right is found in section 73. During the maternity leave period the employee is entitled to all benefits under her contract of employment except pay which is dealt with separately under the maternity pay provisions. The former right is preserved by section 79. Article 8 (2) of the Pregnancy Directive required that maternity leave must include compulsory maternity leave of at least two weeks. This was implemented by the Maternity (Compulsory Leave) Regulations 1994.[138] All maternity leave provisions, including the latter health and safety regulations, require the woman to be an employee as defined by section 230 (1) of the Employment Rights Act.

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[136] Ibid. s 200 (1)
[137] Church Times, 9th August 1996
[138] Maternity (Compulsory Leave) Regulations 1994, S.I. 1994 No.2479

Are Church of England priests entitled to maternity leave? To answer this one must establish the basis for the right. As they are not employees, the Employment Rights Act cannot be used as the basis of the right to maternity leave. Independent of the statutory protections of the 1996 Act may lie contractual maternity leave rights. If these are more favourable than those under the Act or if no rights are given to the individual under the Act, the contractual rights may be relied upon.[139] These rights may exist under "a contract of employment or otherwise". Case law denies that Church of England priests can hold contracts of employment. Their maternity leave rights must arise under the "or otherwise" category. This would probably cover holding a contract personally to execute any work or labour, the type of contract which priests are more likely to be classified as holding. If a priest cannot establish private contractual rights, she might be able to establish her right to these protections by using sex discrimination law. Instead of using the 1996 Act and the Pregnant Workers Directive she might use the Sex Discrimination Act and also the Equal Treatment Directive if necessary. In *BP Chemicals Ltd* v *(1) Gillick (2) Roevin Management Services Ltd* a contract worker employed by Roevin who carried out work for BP was dismissed by the employment agency following a short period of maternity leave.[140] The contract worker did not come within the new national maternity legislation so she proceeded using the Sex Discrimination Act. The EAT held that there was no direct contractual relationship between the worker and BP, as required by the extended definition of employment contained in section 82 (1). Instead the provisions of section 9 of the Sex Discrimination Act which give contract workers protection against sex discrimination, including not allowing a woman to do the work or continue to do so, are the relevant provisions. These provisions cover dismissal following maternity leave.[141] In this way maternity rights can be claimed under the sex discrimination legislation by those workers who are not classified as employees under the Employment Rights Act. Women priests would need to establish that they are employed by the Church of England using the extended definition of section 82 (1). They would additionally need to establish that section 19 (1) is no longer applicable.

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[139] Employment Rights Act 1996 s 78

[140] *BP Chemicals Ltd* v *(1) Gillick (2) Roevin Management Services Ltd* [1995] IRLR 128

[141] The case was remitted to the Industrial Tribunal to proceed to a hearing on the merits.

Under sex discrimination law if a woman is not recruited or is dismissed because she is pregnant there is no need for a comparator.[142] If a woman is subjected to a detriment in her working conditions on the ground of pregnancy, such as not being granted maternity leave or not being allowed to take a funeral, is a comparator still required? The position is unclear. EC decisions to date only relate to recruitment and dismissal. However, the general tenor of EC law in regard to the sex specific criterion of pregnancy is that a comparator is not needed.

7.5.5 Maternity Pay

The national provisions on maternity pay are contained in the Social Security Contributions and Benefits Act 1992. There are two types of entitlement. First, under Part XII of the Act, statutory maternity pay is payable to an employee who has fulfilled the requisite conditions.[143] The meaning of an employee under this Part is wide. An employee means a woman who is, "gainfully employed in Great Britain either under a contract of service or in an office (including elective office) with emoluments chargeable to income tax under Schedule E."[144] The clergy pay tax under Schedule E.[145] If the woman cannot claim statutory maternity pay she can claim state maternity allowance.[146]

A female priest is classified as an employee for the purposes of maternity pay. This is not mirrored by maternity leave arrangements and protections against dismissal on grounds of pregnancy. It is not unusual to be classified as an employee for tax and national insurance purposes but not for other purposes. Whether priests could be protected under the Sex Discrimination Act in regard to dismissal and maternity leave or whether they must rely on private contractual arrangements is a judicial issue.

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[142] *Dekker* v *VJV-Centrum* n.116 supra; *Webb* v *Emo Air Cargo (UK) Ltd (No.2)* [1995] n.130 supra
[143] Social Security Contributions and Benefits Act 1992 s 164
[144] Ibid. s 171 (1) (a)
[145] Halsbury's Laws of England, Fourth Edition, Reissue vol.23 paras 654, 693; Income and Corporation Taxes Act 1988 s 19 (1) Schedule E, para 1; Personal Communication with HM Inspector of Taxes (North East Three) 7/10/96
[146] Social Security Contributions and Benefits Act 1992 s 35

7.6 Indirect Sex Discrimination

7.6.1 Definition of Indirect Sex Discrimination

The definition of indirect sex discrimination is contained in section 1 (1) (b) of the Sex Discrimination Act;

> "A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if-
> (b) he applies to her a requirement or condition which he applies or would apply equally to a man but-
> (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
> (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
> (iii) which is to her detriment because she cannot comply with it."

Indirect marriage discrimination is covered by section 3 (1) (b). Indirect sex discrimination only arises where the requirement or condition used by the employer is applied equally to persons of both sexes. It occurs where an employer uses a barrier that a particular group find more difficult to overcome than others. Indirect sex discrimination may occur against persons of one sex, even though a (proportionately smaller) group of persons of the opposite sex are also adversely affected in the same way.[147] In *Perera* v *Civil Service Commission* the Court of Appeal held that a criterion for recruitment should not be regarded as a requirement or condition unless it constituted an absolute bar to appointment if one did not meet it.[148] In a later Court of Appeal case it was stated, obiter, that the absolute bar test of *Perera* might not be consistent with the tenor of the Sex Discrimination Act and that the law might need reform.[149]

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[147] *James* v *Eastleigh BC* n.95 supra at p774, per Lord Goff
[148] *Perera* v *Civil Service Commission* [1983] IRLR 187
[149] *Meer* v *London Borough of Tower Hamlets* [1988] IRLR 399

The necessity of establishing a requirement or condition was questioned in *Enderby* v *Frenchay Health Authority*, an equal pay case.[150] It was claimed that the pay structures of the authority favoured male employees over female employees. Although no specific requirement or condition was applied, the applicants claimed indirect sex discrimination under Article 119 of the Treaty of Rome. The ECJ held that where there is a prima facie case of sex discrimination, Article 119 requires the employer to show that the difference in pay is based on objectively justified factors unrelated to any discrimination on the ground of sex. No mention was made of establishing a requirement or condition. The approach of the ECJ was to see whether the jobs were of equal value. When this was shown it was necessary for the employer to justify the difference in pay levels. As a result of *Enderby*, disparate impact alone will lead to an employer's liability, under EC equal pay legislation.

Could the principles of *Enderby* be applied to indirect sex discrimination, either under national law or under the Equal Treatment Directive? *Enderby* was construed narrowly in *Bhudi* v *IMI Refiners.*[151] The EAT ruled that there was still a need to find a requirement or a condition under section 1 (1) (b) of the Sex Discrimination Act, notwithstanding the decision in *Enderby. Enderby* was solely concerned with the interpretation of Article 119 and the Equal Pay Directive.[152] Rubenstein argues that there is no reason in Community law why the same considerations cannot apply in equal pay and equal treatment cases.[153] He criticises Mummery J. in *Bhudi*, for pursuing a literal interpretation of British law. The focus of *Enderby* is on a functional interpretation of the issues of sex discrimination. Using a functional or purposive interpretation one can read section 1 (1) (b) in the light of *Enderby.* One must ask; is a policy or practice disadvantaging women so that they suffer disparate impact compared with men? If the answer is yes one must ask, can the policy be justified?[154]

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[150] *Enderby* v *Frenchay Health Authority* [1993] IRLR 591
[151] *Bhudi* v *IMI Refiners* [1994] IRLR 204
[152] EC Council Directive 75/117 (Equal Pay)
[153] Rubenstein, Michael (1994) "Editorial Comment" IRLR p203
[154] Ibid. p203

The employer has a defence if the requirement or condition is justifiable.[155] The ECJ has stated that the test is one of objectively justified economic grounds.[156] A practice will be objectively justifiable on economic grounds where the means chosen for achieving that objective correspond to a real need on the part of the undertaking and are appropriate with a view to achieving the objective and are necessary to that end. The defence will not succeed if there are reasonable, alternative means available to the employer to achieve the objective.

7.6.2 Church Policy to Married Clergy Couples

The questionnaire data revealed one or two possible instances of indirect sex discrimination. The first example is when a woman priest, who is married to a male priest, is refused a stipendiary post or a full-stipendiary post because she is married to a male priest. The potential problem here is when it is not a stated diocesan policy but it is an accepted practice. The informal appointments procedure may mean it is difficult to identify this policy as a requirement or condition. The approach of EC law to indirect sex discrimination, discussed below, may be of more use to women priests; this would be especially so if the approach of *Enderby* was adopted.

Section 6 of the 1993 Measure prevents sex discrimination against women priests being unlawful in regard to recruitment. A woman priest could not use the Sex Discrimination Act to argue that the spouses policy is discriminatory, although a male priest might be able to. The Equal Treatment Directive would be the only recourse for a woman priest. EC law on indirect sex discrimination is unencumbered by the need to establish a requirement or condition. It is free to establish adverse impact in whatever way is appropriate in the circumstances. Ellis describes the ECJ referring to pay "practices" as indirectly discriminatory.[157]

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[155] For early case decisions on the meaning of justifiable the reader is referred to; *Steel* v *Union of Post Office Workers* [1978] ICR 181; *Singh* v *Rowntree Mackintosh* [1979] IRLR 199; *Ojutiku* v *Manpower Services Commission* [1982] IRLR 418

[156] *Bilka-Kaufhaus GmbH* v *Weber von Hartz* [1986] IRLR 317

[157] Ellis, Evelyn (1996) Op. cit., pp23-24; *Bilka-Kaufhaus GmbH* v *Weber Von Hartz* n.156 supra; Case 109/88 *Forbund I Danmark* v *Dansk Arbejdsgiverforening (acting for Danfoss)* [1989] ECR 3199

Regardless of the impact of section 6 of the 1993 Measure, the possible use of indirect sex discrimination under national law will be discussed. If a woman priest is offered a non-stipendiary post or a part-stipendiary post because of the spouses policy she might claim direct marriage discrimination[158] or indirect sex discrimination. The latter is the focus of concern. The requirement or condition for being offered a stipendiary or full-stipendiary post is not being married to a priest who already has a stipendiary post. One would want to know whether this is an absolute bar, thus satisfying the *Perera* test. The requirement could equally be applied to a male priest. The proportion of women who can comply must be considerably smaller than the proportion of men who can comply. The pool for comparison can be established by applying the principles of *Jones* v *University of Manchester.*[159] One starts with the total of male and female priests who can comply with all the other requirements of the post, for example this could be pastoral experience, qualifications and churchmanship. Then one sees how many can comply with the requirement of not being married to a priest already in a stipendiary post. Those who can comply with the requirement are to be considered as a proportion of the total of male and female priests to whom the requirement is or would be applied. If there is a significant difference between these proportions a discriminatory effect is established. The Court of Appeal has given guidance on how to assess disproportionate impact.[160] It held that, "there must be a considerable difference in the number or percentage of one sex in the advantaged or disadvantaged group as against the other sex and not simply a difference which is more than de minimis."[161] The Court continued, "It is true that the test laid down by the European Court is whether a 'considerable difference' exists. But the underlying principle is equal treatment....Accordingly, the weight to be attached to the word 'considerable' must not be exaggerated."[162] The case was sent to the House of Lords who referred the case to the ECJ for a preliminary ruling on certain questions on the construction of Article 119.[163] The ECJ ruling is still awaited. Because there are many more male than female priests, more male than female priests will be able to comply with all the other requirements of the post. It is likely that a larger proportion of male priests could comply with the requirement of not being

[158] Sex Discrimination Act 1975 s 3 (1) (a)
[159] *Jones* v *University of Manchester* [1993] IRLR 218
[160] *R* v *Secretary of State for Employment, ex p Seymour-Smith and Perez* [1995] IRLR 464
[161] Ibid. at p475, per Neill LJ.
[162] Ibid. at p476, per Neill LJ.
[163] *R* v *Secretary of State for Employment, ex p Seymour-Smith and Perez* [1997] IRLR 315 (HL)

married to a priest already in a stipendiary post. Because women have only been ordained as priests since 1994, and hence there are many older women who became priests, it is likely that their husbands, if priests, will already hold stipendiary posts. If the woman priest has accepted the post, but is still not happy with it, she might try to claim indirect pay discrimination using the Equal Pay Act.

7.6.3 Age Rules on Admission to Training

The second example concerns age rules on admission to training for stipendiary ministry.[164] In 1995 the House of Bishops ruled that candidates for training for the stipendiary ministry must be under 45. It is arguable that this is indirect sex discrimination against women. Training for the priesthood is now open to both men and women. In view of this can sections 1 (1) (b) and 13 of the Sex Discrimination Act be used by women priests to render this policy unlawful?

Section 13 states;

> "It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against a woman-
> (a) in the terms on which it is prepared to confer on her that authorisation or qualification, or
> (b) by refusing or deliberately omitting to grant her application for it, or
> (c) by withdrawing it from her or varying the terms on which she holds it."

Profession is defined to include "any vocation or occupation".[165] Instead of struggling with the definition of employment, section 13 is concerned with a qualification. Arguably, Church of England priests could come within this section.

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[164] This thesis is primarily concerned with employment and not training, therefore only a brief outline will be given.
[165] Sex Discrimination Act 1975 s 82(1)

The 1975 Act has built in protection in the form of section 19 (2) which reads;

> "Nothing in section 13 applies to an authorisation or qualification (as defined in that section) for purposes of an organised religion where the authorisation or qualification is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers."

It is submitted that section 19 (2) is inapplicable to the Church of England. The same reasoning as was applied to section 19 (1) can be used here.[166] Can section 6 of the 1993 Measure be used to prevent discriminatory admission rules being unlawful? Section 6 (a) states that it will not be unlawful to discriminate against a woman in respect of her ordination to the office of priest. Does "ordination" only refer to the act of ordination by a bishop or does it extend back to the training leading to ordination? If it uses the former meaning then a woman could use national law to claim that the admission policy was indirectly discriminatory. If it uses the latter meaning a woman could not use national law and would have to rely on the Equal Treatment Directive.

If national law were to be used, the requirement or condition for being admitted to training for stipendiary ministry is being under 45. This is an absolute bar and is applicable to men and women. It is possible that the proportion of women who can comply is considerably smaller than the proportion of men. Two factors can be identified as affecting women's ability to fulfil the requirement. First, because of their childcare responsibilities women may be unable to enter the priesthood until these responsibilities have lessened. Secondly, the prohibition on women priests until 1994 has left a glut of women wanting to train for the priesthood, many of whom have waited for years to be priested. It is arguable that because the rule was not introduced until 1995 this glut of older women have already had the opportunity to train and become priests following the Synod vote and hence the second reason is inapplicable. A possible justification for both the spouses policy and the training policy would be budget cuts resulting in stipend cuts which are a real need on the part of the Church and which are unrelated to the sex of the priest.

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[166] The reader is referred to 7.1.1.

7.7 Vicarious Liability

When discussing detriment it was seen that the sex discrimination must be employment related to be actionable. The aim of the legislation is to hold the employer liable for employment related sex discrimination. If the discrimination emanates from the employer they can be held directly liable. Often the source of the discrimination is an employee or agent of the employer. The principles of vicarious liability are extended to employment law in order that the employer may be held liable.

> "Anything done by a person in the course of his employment shall be treated for the purposes of this Act as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval."[167]

Similarly if a person is acting as an agent for another person that person will be vicariously liable for the agent's acts.[168] For example, persons involved in the hiring process will not necessarily be the employer. When an incumbent is chosen the parish representatives and the patron are involved. They could both be construed as agents of the employer, whether this be the bishop, the Diocesan Board of Finance or any other Church of England body. The employer will not be liable if they can prove that they took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of employment acts of that description.[169] A bishop would need to establish that, other than in cases of theological objection, appointment procedures were framed so as to prevent sex discrimination. Evidence of training or instructions given to appointees about sex discrimination would help establish the section 41 (3) defence. Regarding discriminatory treatment whilst in post, the Church would benefit from a centralised or a diocesan based equal opportunities policy. Some respondents did mention the current use of these policies in their dioceses. The employee remains directly liable for their actions: "an employee or agent for whose act the employer or principal is liable under section 41 (or would be so liable but for section

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[167] Sex Discrimination Act 1975 s 41
[168] Ibid. s 41 (2)
[169] Ibid. s 41 (3)

41(3)) shall be deemed to aid the doing of the act by the employer or principal."[170] The aider is held liable as the actor.[171]

7.7.1 Course of Employment

If the act is not done in the course of employment there will be no liability under sex or race discrimination law. Until the Court of Appeal decision in *Jones* v *Tower Boot Company Ltd* the meaning of course of employment in discrimination legislation was held to be the same as it is in tort law.[172] Legal texts endorsed this approach.[173] Employment law cases approved the test set out in *Salmond on Torts.*[174] This states that whether the employer is vicariously liable depends upon whether the act was an unauthorised or prohibited mode of doing an authorised act (employer liable) or an act which is outside the sphere of employment (employer not liable). Whether an act is in the course of employment depends on how the court construes the employment relationship. The court must ask; what is it that the employee is employed to do? This may or may not be under the employer's control. A restrictive approach was taken in *Irving* v *The Post Office.* A letter sorter wrote a racial insult on the front of a letter he was sorting. The Court of Appeal held that the act was not an unauthorised mode of performing an authorised act. The employment only provided the opportunity for the misconduct. The EAT in *Bracebridge Engineering Ltd* v *Darby* referred to the wide approach of *Rose* v *Plenty* where Scarman LJ. spoke of the need to look at employment in the round rather than at the individual components of a job.[175] In *Bracebridge* the abuse of authority by an employee in a supervisory position was held to be sufficiently connected to the task of supervision as to be a mode of performing the authorised duties. In these cases the common law definition of course of employment was used. Vicarious liability was seen as a product of tort law. Sex and race discrimination are statutory

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[170] Ibid. s 42 (2)

[171] Ibid. s 42 (1). For a case which discusses these principles the reader is referred to *Read* v *Tiverton District Council* [1977] IRLR 202

[172] *Jones* v *Tower Boot Company Ltd* [1997] IRLR 168

[173] Ellis, Evelyn (1988) *Sex Discrimination Law* p142 (Aldershot, Gower); Smith, I.T. & Thomas, G.H. (1996) *Smith and Wood's Industrial Law*, Sixth Edition, p224 (London, Butterworths)

[174] Heuston, R.F.V. & Buckley, R.A. (1996) *Salmond and Heuston on the Law of Torts*, Twenty-First Edition, p443 (London, Sweet & Maxwell); *Aldred* v *Nacanco* [1987] IRLR 292; *Irving* v *The Post Office* [1987] IRLR 289

[175] *Bracebridge Engineering Ltd* v *Darby* [1990] IRLR 3 at p5, per Wood J.; *Rose* v *Plenty* [1976] IRLR 60 at p63, per Scarman LJ.

torts. Therefore, it appeared logical that tort principles ought to apply to vicarious liability under the discrimination legislation. The application of the common law test troubled the courts. In reality arguments regarding whether to use a wide or narrow interpretation of the test derived from the tension between tort law and discrimination law. *Irving* applied a restrictive, tort-based approach, whereas *Bracebridge* acknowledged that a purposive approach to vicarious liability was required in a discrimination law context. It is submitted that principles regarding vicarious liability in discrimination law should be developed independently from the common law. The Sex Discrimination Act and the Race Relations Act contain a statutory definition of vicarious liability which the drafters need not have included. The courts could have applied the ordinary common law principles of vicarious liability without using a specific definition in the Act. The inclusion of a statutory definition suggests that employment law wished to develop its own principles regarding vicarious liability. Indeed a recent Court of Appeal case has used this approach.[176]

Two recent cases have taken a purposive approach to employer liability. In *Jones* v *Tower Boot Company Ltd* an employee suffered severe racial harassment from fellow employees. The EAT, using the common law test of course of employment, held that the acts complained of, including deliberate branding with a hot screwdriver and racial insults, could not be described as an improper mode of performing authorised tasks. The Court of Appeal held that the EAT had erred by applying the restrictive common law test for course of employment in a discrimination law context. Rather the phrase should be interpreted using its everyday meaning.[177] In deciding upon the relevant test, Waite LJ. used two guiding principles; the purposive construction and the linguistic construction. Regarding the former he stated that a statute is to be construed according to its legislative purpose. Therefore, section 32 of the Race Relations Act and section 41 of the Sex Discrimination Act which govern vicarious liability ought to be given a broad interpretation. In view of this course of employment must not "be construed in any sense more limited than the natural meaning of those everyday words would allow."[178] The purpose of these sections is to deter discrimination in the workplace by widening the net

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[176] *Jones* v *Tower Boot Company* Ltd n.172 supra
[177] Ibid. at p172, per Waite LJ.
[178] Ibid. at p171, per Waite LJ.

of responsibility to cover the employer as well as the perpetrator. This will encourage employers to operate policies which will prevent discrimination occurring in the first place or at least provide them with a "reasonable steps defence" if it does occur. If course of employment is interpreted using the common law test the result would be that "the more heinous the act of discrimination, the less likely it will be that the employer would be liable."[179] This, submitted Waite LJ., is entirely inconsistent with the purpose of the legislation.

The linguistic construction requires that words are to be given their normal, everyday meaning unless the context requires a special or technical meaning. The issue was whether there was sufficient similarity between the two contexts, tort and discrimination law, to allow the phrase course of employment to be read as interpreted under the common law. It was held that the two contexts are different. For example, vicarious liability in tort requires that the act is done with the authorisation of the employer. To be vicariously liable in discrimination law the act may be done with or without the employer's knowledge or approval.[180] The Court of Appeal distinguished their previous decision in *Irving*. Waite LJ. held that *Irving* did not decide that course of employment must be interpreted using the common law test. There was no discussion of the relationship between the common law and the statutory definition of vicarious liability.[181]

The test of everyday meaning must be applied as a question of fact by the tribunal. A factual test by which to ascertain the ordinary meaning of course of employment is suggested by Rubenstein. He suggests that course of employment means, "while performing, or in connection with, the employee's job responsibilities."[182]

The second case concerned the test for establishing an employer's liability for third party harassment. In *Burton and Rhule* v *De Vere Hotels* two black waitresses were subjected to racial harassment whilst at work by third parties.[183] The issue before the

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[179] Ibid. at p172, per Waite LJ.
[180] Ibid. at p172, per Waite LJ.
[181] Ibid. at p172, per Waite LJ.
[182] Rubenstein, Michael (1997) "Editorial Comment" IRLR p139
[183] *Burton and Rhule* v *De Vere Hotels* [1996] IRLR 596

EAT was; did the employers discriminate against the applicants by subjecting them to racial harassment from third parties in the course of their employment? Because the treatment came from a third party vicarious liability was not appropriate. Instead the question was whether the employer had subjected the person to the detriment. Smith J. held that the word "subjecting" used in section 4 (2) (c) of the Race Relations Act 1976 connotes control.[184] An employer subjects an employee to the detriment of racial harassment if he or she causes or permits harassment which amounts to a detriment to occur in circumstances which he or she can control. It was unnecessary to introduce any particular degree of foresight on the part of the employer. Indeed the EAT were keen to avoid the use of tort concepts in a discrimination context.[185] Rather one should look to see whether the event was sufficiently under the control of the employer, that he or she could, by the application of good employment practice, have prevented or reduced the discriminatory treatment. If the parish representatives and the patron are not construed as agents of the bishop (as employer) they might be construed as third parties. If the "employer" causes or permits discrimination by a third party to occur in circumstances which he or she can control, the employer will be liable. In this way the bishop could be held accountable for the discriminatory hiring decisions of the parish representatives and the patron.

Rubenstein believes that the judgment in *De Vere* goes far wider than liability for third party harassment.[186] It introduces a new test for establishing an employer's liability for discrimination. It allows an employer to be held directly liable for subjecting an employee to discrimination, if the event was under the control of the employer. On this test the conduct complained of may be outside the course of employment or may be engaged in by a third party. If the employer could have prevented the discrimination taking place by good employment practice he or she can be held liable. If one accepts Rubenstein's interpretation of *De Vere* then two tests exist for establishing an employer's liability for the actions of employees and third parties; vicarious liability and control. Under vicarious liability if an act is done in the course of employment the employer will be liable even if it was beyond his or her control. Under the *De Vere* test

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[184] Ibid. at p600, per Smith J.
[185] Ibid. at p600, per Smith J.
[186] Rubenstein, Michael (1996) "Editorial Comment" IRLR p593

if the act is within the control of the employer he or she will be liable regardless of whether the act was in the course of employment. If *De Vere* is not appealed, the scope of the decision might nevertheless be narrowed. *De Vere* could perhaps be distinguished where the perpetrators of the discrimination were employees rather than third parties. However, would this be a valid distinction? The idea of employer control is equally applicable to employees as it is to third parties, indeed it is probably more so. The influence of the decision may be less important following the purposive construction of course of employment. Rubenstein considered that the *De Vere* test had filled the gap left by the restrictive meaning of course of employment. It is submitted that the control test will remain confined to third party discrimination. The decision in *Tower Boot* ensures that the discriminatory acts of employees can be caught by the course of employment test as envisaged by the statutory scheme.

The tenor of both cases is that tort concepts are unhelpful in a discrimination law context. Additionally, the decisions ensure that the purpose of the legislation is fulfilled. A purposive construction of the legislation enables the employer to be held liable for the actions of employees, agents and third parties. Therefore, the onus is on the employer to take "reasonable steps" or use "good employment practice" to prevent discrimination occurring.

7.8 Equal Pay

7.8.1 Introduction to Equal Pay

Once a priest has accepted a post any complaint regarding pay or contractual benefits would need to be brought under the Equal Pay Act. For example, some respondents complained that they were receiving a half or one-third stipend for full-time work. They perceived that their treatment was on the ground of sex.

Article 119 of the Treaty of Rome contains a basic principle of equality for men and women: "Each Member State shall during the first stage and subsequently maintain the application of the principle that men and women should receive equal pay for equal

work."[187] Article 119 has horizontal and vertical direct effect.[188] After joining the European Community, the Equal Pay Act was seen as sufficient (alongside the Sex Discrimination Act) to fulfil UK obligations under Article 119. If the Equal Pay Act proves to be too narrow, a complainant could rely upon Article 119 before the national courts, or if necessary have his or her case referred to the ECJ for a preliminary ruling.

The Equal Pay Act aims to eliminate sex discrimination against men and women in basic rates of pay and in all other contractual terms such as working hours and holiday entitlement. If a claim involves the payment of money it must always be brought under the Equal Pay Act as the Sex Discrimination Act does not extend to this.[189] If the claim involves other contractual benefits, one must determine if like work, work rated as equivalent or work of equal value to an actual comparator is present. If it is proceedings must be instituted under the Equal Pay Act. If it is not established, a claim could be made under the Sex Discrimination Act, alleging that the complainant had been treated less favourably than a hypothetical man would have been treated.[190] The individual must have a contract with their employer for the Act to apply. The definition of employed is the wider definition used in the Sex Discrimination Act.[191] If priests can come within this definition they will be able to use the Act provided that they can satisfy its other requirements. Unlike the Sex Discrimination Act, no specific exemption is given to ministers of religion in respect of equal pay claims. Could the exemptions contained in the Sex Discrimination Act be read into the Equal Pay Act? That the two Acts are complementary and should be construed as one Code was the view expressed by Bridge LJ. in *Coomes E. (Holdings)* v *Shields*. "[T]he provisions of the Sex Discrimination Act and the Equal Pay Act...provide in effect a single comprehensive code....both Acts should be construed and applied as a harmonious whole and in such a way that the broad principles which underlie the whole scheme of legislation are not frustrated by a narrow interpretation or restrictive application of particular provisions."[192] Despite this broad interpretation the two Acts do use different principles. For example, the Sex

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[187] The reader is also referred to the Equal Pay Directive n.152 supra
[188] *Defrenne* v *SABENA (No.2)* [1976] ICR 547
[189] Sex Discrimination Act 1975 s 6 (6)
[190] For a fuller discussion of the practical relationship between the Equal Pay Act and the Sex Discrimination Act the reader is referred to Bourn, Colin & Whitmore, John (1996) *Anti-Discrimination Law in Britain* pp185-187 (London, Sweet & Maxwell)
[191] Equal Pay Act 1970 s 1 (6) (a)
[192] *Coomes E. (Holdings)* v *Shields* [1978] IRLR 263 at p269, per Bridge LJ.

Discrimination Act allows hypothetical comparison whilst the Equal Pay Act does not. The Equal Pay Act covers money payments whereas the Sex Discrimination Act does not. Although the purpose of the Acts are the same, it is legitimate for the Acts to differ in the methods employed to achieve this end. It might be argued that the exclusion of ministers of religion from protection is a broad principle of sex discrimination legislation which should prevail in both Acts. It is submitted that this is an unlikely principle. As discussed at 7.1.1. the purpose of section 19 is to exclude on the basis of doctrine, not employment status. Therefore, it would be quite legitimate for Church of England priests to be covered by the equal pay legislation, now the priesthood is open to both sexes. There is no provision in the 1975 Act which expressly incorporates section 19 into the Equal Pay Act, despite Schedule 1 of the 1975 Act incorporating some amendments to the 1970 Act.

7.8.2 Like Work

If Church of England priests are employed as defined by section 1 (6) (a) they must then establish that they are engaged on like work or work of equal value with an opposite sex comparator in the same employment. There must be no genuine material difference between their situations other than sex. Under section 1 (1) of the Act a worker's contract is deemed to include an equality clause. If the worker's contract contains a less favourable term than a similar term in a comparator's contract or if it does not contain a beneficial term which is included in the comparator's contract, then the contract should be modified so that the terms are equal. To bring the equality clause into action the complainant must either be employed on like work, work rated as equivalent or work of equal value to that of a comparator in the same employment.[193] Section 1 (4) defines like work to be work "of the same or a broadly similar nature". Differences between the jobs must not be of "practical importance in relation to terms and conditions of employment." When considering whether work is the same or broadly similar, tribunals should take a wide view.[194] The duties carried out should be viewed in general terms, as opposed to examining specific tasks. A similarly broad approach should be taken when deciding whether any differences are of practical importance. Such a difference concerns

[193] Equal Pay Act 1970 s 1 (2) (a), 1 (2) (b), 1 (2) (c)
[194] *Capper Pass Ltd* v *Lawton* [1977] ICR 83

the actual work done by the man and the woman. Tribunals should look at the duties actually performed as well as examining the contractual obligations.[195] An example of a difference of practical importance would be differing degrees of responsibility involved in two otherwise broadly similar jobs.[196] Differences will not be of practical importance unless they are such that the tribunal would expect that different terms and conditions of employment would be reflected in practice.[197] One or two female respondents described doing full-time work for a half or one-third stipend. If they could establish that they had a contract and that they were engaged on like work with a male priest in the same employment, such priests could use the like work provisions to claim equal pay. This would be subject to any defence the Church might bring under section 1 (3).

7.8.3 Equal Value

A complainant can bring an equal pay claim if he or she is employed in a job which, although different to the comparator's job, has been given an equal value under a job evaluation scheme.[198] Equal value is assessed by examining the demands made on the worker using headings such as effort, skill and decision.[199] The Church of England does not have a job evaluation scheme. As an alternative or addition to using the like work provisions, a woman priest could use the equal value provisions. If a complainant believes that he or she is employed on work of equal value to a comparator in the same employment then an equal pay claim can be brought.[200] Again the value of the job is assessed in terms of the demands made on the worker by using headings such as effort, skill and decision.

A difficult area to discuss in relation to pay is non-stipendiary ministry. Because NSMs are unpaid it may be even harder to establish a contract for the purposes of section 1 (6) (a) of the Equal Pay Act or section 82 (1) of the Sex Discrimination Act than it is for stipendiary priests. If a priest is offered a non-stipendiary post against their wishes he or she may be able to make a sex discrimination claim. It will be difficult to claim equal

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[195] *Dance* v *Dorothy Perkins Ltd* [1978] ICR 760; *Coomes E. (Holdings)* v *Shields* n.192 supra
[196] *Eaton Ltd* v *Nutall* [1977] ICR 272
[197] *Capper Pass Ltd* v *Lawton* n.194 supra at pp87-88, per Phillips J.
[198] Equal Pay Act 1970 s 1 (2) (b)
[199] Ibid. s 1 (5)
[200] Ibid. s 1 (2) (c) as introduced by Equal Pay (Amendment) Regulations 1983, S.I. 1983 No.1794

pay once working in non-stipendiary ministry as NSM status has implications regarding responsibility and the type of ministry itself. It would be difficult to put in a like work claim. Who should a NSM priest use as a comparator in this situation? A NSM priest does the same work, but their unpaid status prevents useful comparison. A stipendiary minister is likely to have different responsibilities. A more favourable approach would be for a NSM to compare themselves to a stipendiary minister using the equal value provisions. The problem here might be challenging differentials which are too great. For example, the stipendiary minister may have more duties which prevents there being an equal value comparison. It could be argued that the greater duties prevent equal value but are not enough to justify the difference between the pay of the stipendiary minister and the NSM. If a comparison cannot be made using one of the three tests, the equal pay legislation is powerless to challenge such differentials.

7.8.4 In the Same Employment

In order to compare two jobs, the two workers must be of the opposite sex. The complainant must be "in the same employment" as the comparator. This means that they must be, "employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes."[201] The ECJ held that a woman has the right under Article 119 to compare herself with her predecessor, provided that the nature of the job has not changed substantially.[202] The EAT have held that a complainant can compare herself with her successor, provided that the successor's contract was so proximate to her own as to render him an effective comparator.[203]

Usually the complainant will make the comparison with a suitable comparator at the same establishment at which he or she is employed. If the same employer and same establishment are used there is no requirement to establish common terms and conditions of employment.[204] If there is not a suitable comparator working at the same

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[201] Equal Pay Act 1970 s 1 (6)
[202] *Macarthys Ltd* v *Smith* [1980] IRLR 210
[203] *Diocese of Hallam Trustee* v *Connaughton* [1996] IRLR 505
[204] *Lawson* v *Britfish Ltd* [1988] IRLR 53

establishment a complainant may make a comparison with a comparator employed by his or her employer, or any associated employer, at a different establishment. In this situation common terms and conditions of employment are required. A novel case on same employment is *Scullard* v *(1) Knowles and (2) Southern Regional Council for Education and Training*.[205] One way to establish same employment is to point to an associated employer where common terms and conditions exist. The meaning of an associated employer was examined by the EAT in relation to Article 119. British law defined an associated employer as an associated company.[206] Public sector employees could not make an associated employer comparison. Mummery J. stated that the class of comparators defined in section 1 (6) (c) is narrower than that under Article 119. The scope of comparison under Article 119 was discussed in *Defrenne* v *SABENA* which stated that the comparator must be employed in the "same establishment or service" as the applicant. No distinction was made in *Defrenne* between the work carried out in the same establishment or service of limited companies and of other employers.[207] The narrow definition of section 1 (6) (c) to associated employers was held to be displaced by the wide "same service" provision of Article 119.[208] Whilst trying to equalise the rights of public and private sector workers, *Scullard* is open to criticism in that it fails to define the "same service" provision of Article 119.[209]

Little statutory guidance is given on the meaning of an "establishment". In the context of redundancy, where the term is similarly not defined, the EAT has applied a common sense approach.[210] The tribunal must decide whether it is an establishment by using common sense with regard to the particular facts of the case. "[I]t may be very difficult to say what the line is which distinguishes an establishment from something which is not an establishment, but perfectly easy to say on which particular side of the line any particular set up falls."[211] The ECJ gave more guidance as to the interpretation of the term, holding that the protective intent of the redundancy legislation must not be

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[205] *Scullard* v *(1) Knowles and (2) Southern Regional Council for Education and Training* [1996] IRLR 344

[206] Equal Pay Act 1970 s 1 (6) (c)

[207] *Scullard* v *(1) Knowles and (2) Southern Regional Council for Education and Training* n.205 supra at p346, per Mummery J.

[208] The case was remitted on its facts to the industrial tribunal.

[209] Bourn, Colin & Whitmore, John (1996) Op. cit., p216

[210] *Barratt Developments (Bradford) Ltd* v *UCATT* [1977] IRLR 403

[211] Ibid. at p404, per Bristow J.

hindered by a narrow construal of establishment.[212] The ECJ described the employment relationship which exists because of the link between the employee and the part of the undertaking to which he or she is assigned to carry out his or her duties. The term establishment in Article 1 (1) (a) of the Collective Redundancies Directive must be interpreted as meaning the unit to which the worker is assigned to carry out his or her duties.[213] The Equal Pay Act does not define establishment. Halsbury's Statutes state that the term is to be construed in accordance with the Sex Discrimination Act section 10.[214] This states that employment is to be regarded as being at an establishment in Great Britain unless the employee does his work wholly or mainly outside Great Britain. Section 10 (4) states, "Where work is not done at an establishment it shall be treated for the relevant purposes as done at the establishment from which it is done or (where it is not done from any establishment) at the establishment with which it has the closest connection." There seems to be no reason why case law on establishment in redundancy consultation ought not be relevant to establishment in equal pay. Both sets of legislation have a protective intent towards workers. The purposive thrust of *Rockfon* could be applied to the further interpretation of "same establishment or service" as enunciated in *Defrenne v SABENA*.

If the case involves a comparison of jobs at two different establishments then common terms and conditions of employment are required. In *Leverton* v *Clwyd County Council* the construction of the phrase, "at which common terms and conditions of employment are observed either generally or for employees of the relevant classes" was examined.[215] The issue was; between whose terms and conditions should the comparison be made? The House of Lords held that the correct construction involved comparing the terms and conditions at the establishment at which the complainant is employed with those of the establishment at which the comparator is employed. These terms and conditions may be applicable to all the workers at the relevant establishments or to a certain class of workers to which the complainant and the comparator belong. The incorrect approach is to compare the individual terms and conditions as between the complainant and the

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[212] *Rockfon AS* v *Nielsen* [1996] IRLR 168 at p175
[213] Ibid. at p175
[214] Halsbury's Statutes of England and Wales, Fourth Edition, 1997 Reissue, vol.16, note accompanying Equal Pay Act 1970 section 1 (1)
[215] *Leverton* v *Clwyd County Council* [1989] IRLR 28

comparator. *Leverton* identified the relevant parties for comparison of terms and conditions. What is meant by common terms and conditions of employment was the question at issue in *British Coal Corporation* v *Smith.*[216] Did common terms and conditions mean that there was complete identity of terms and conditions, subject to de minimis exceptions, between the comparator at his establishment and those which applied or would apply to a similar male worker at her establishment? Or did the phrase require that the terms and conditions were sufficiently similar for a fair comparison to be made?[217] Lord Slynn held that the purpose of the legislation was to require comparison of terms on a broad basis. It did not require the same terms and conditions to exist subject only to de minimis differences.

A woman priest bringing an equal pay claim would need to establish that she was in the same employment as a male priest comparator. First, one must ask who is the employer? Second, one must ask what is an establishment? If the employer is defined as "the Church of England" then all priests have the same employer. On this basis a woman priest could choose a male comparator from any parish or diocese. It is less likely that the Church of England as a whole would be construed as one establishment. The Church of England as an organisation is split into dioceses which possess considerable financial and organisational autonomy. It is likely that a diocese would be construed as an establishment. Therefore, if her comparator came from the same diocese as her she would not have to establish common terms and conditions because she is employed by the same employer (the Church of England) at the same establishment (the diocese). If her comparator came from a different diocese she would need to establish common terms and conditions because she is employed by the same employer (the Church of England) but at a different establishment to that of her comparator (another diocese). If the employer is defined as the diocesan bishop or the Diocesan Board of Finance then all priests in that diocese share the same employer. A comparator chosen from the same diocese would have the same employer and be employed at the same establishment (the diocese), hence common terms and conditions would not be necessary. A possible argument would be that the diocese is not an establishment. Instead the parish should be construed as an establishment. In this case priests in the same diocese would share the

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[216] *British Coal Corporation* v *Smith* [1996] IRLR 404
[217] Ibid. at p408, per Lord Slynn

same employer but would work at different establishments, hence common terms and conditions would be required. Finally, if the bishop or the Diocesan Board of Finance is the employer any comparison made outside the diocese will involve a different employer. Whether a bishop or a Diocesan Board of Finance could be construed as an associated employer is a moot point. If *Scullard* remains good law then arguably they could be so construed. If *Scullard* is successfully appealed and section 1 (6) (c) remains, associated employer status is highly unlikely. Clergy terms and conditions of employment are not regulated by a collective agreement. Because a priest's post is considered as a vocation they are less likely to have uniform terms and conditions such as working hours and holiday entitlement. Thus it may be difficult to establish that common terms and conditions exist either between two different dioceses or two different parishes. The informal job structure makes employment rights more difficult to establish.

7.8.5 Genuine Material Difference

Even if a complainant satisfies the comparative requirements, an equal pay claim may fail if the employer has a defence under section 1 (3) of the Equal Pay Act. The defence is made out if the employer can show that the variation in terms and conditions is due to a genuine material difference other than sex. The defence allows the employer to show the reasons for the difference in treatment between the man and the woman. On a strict construction the defence differs depending upon which category of comparison the complainant is using. If a claim of like work or work rated as equivalent is brought the employer must show that a genuine material factor is a material difference between the woman's treatment and the man's treatment. If the claim is one of equal value the employer only has to show that the variation is a genuine material factor.[218] However, it is considered that as a result of the House of Lords judgment in *Rainey* v *Greater Glasgow Health Board* the gap between a "material difference" and a "material factor" has been effectively removed.[219]

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[218] Equal Pay Act 1970 s 1 (3) (a), 1 (3) (b)

[219] *Rainey* v *Greater Glasgow Health Board* [1987] IRLR 26; Smith, I.T. & Thomas, G.H. (1996) Op. cit., p243. From hereon only the phrase material difference will be used.

Personal differences which a worker brings to a job can constitute genuine material differences. For example, experience and qualifications may lead to one worker being placed on a higher grade than another. The courts have refused to include certain personal differences under the defence. For example, motherhood is not a genuine material difference other than sex.[220] It is factors beyond the individual which cause problems for the courts. These have included; economic needs of the undertaking, financial constraints and part-time work.

In *Rainey* the employers argued that market forces required those entering employment in a NHS department to be paid more than those already in the department. The new entrants were all male and the existing workers were predominantly female. The complainant's equal pay claim failed because the employers established the section 1 (3) defence. The House of Lords held that the defence covered objectively justified grounds for women being paid less. Lord Keith held that the test under section 1 (3) is the same as under the Sex Discrimination Act section 1 (1) (b) (ii) for the justification of indirect sex discrimination.[221] This is the test set out in *Bilka*.[222] Lord Keith stated that he thought the *Bilka* test, "would not exclude objectively justified grounds which are other than economic, such as administrative efficiency in a concern not engaged in commerce or business."[223] The courts have taken a strict approach to the establishment of objectively justified grounds.[224]

A genuine material difference which might be claimed by diocesan bishops is financial constraint. In *Benveniste* v *University of Southampton* financial constraints on a university was held to be a defence to paying the complainant a lower salary than was normal.[225] However, once the financial constraints were removed the genuine material difference defence could no longer be made out. Neill LJ. added obiter, that, "There may be cases where the evidence will establish that, though the financial position of a university or other employer improved after the date of appointment, some financial constraints persisted, which made salaries at a lower scale imperative either for certain

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[220] *Coyne* v *Exports Credit Guarantee Department* [1981] IRLR 51
[221] *Rainey* v *Greater Glasgow Health Board* n.219 supra at p31, per Lord Keith
[222] The reader is referred to 7.6.1.
[223] *Rainey* v *Greater Glasgow Health Board* n.219 supra at pp30-31, per Lord Keith
[224] *North Yorkshire County Council* v *Ratcliffe* [1995] ICR 833
[225] *Benveniste* v *University of Southampton* [1989] IRLR 122

categories of staff or generally."[226] Thus once dioceses are no longer financially constrained they will be unable to justify pay differentials between male and female priests working full-time.

Whether part-time work could be a genuine material difference was examined in *Jenkins* v *Kingsgate*.[227] The applicant claimed that a difference in pay between full-time and part-time workers was prohibited by Article 119. The employers raised the section 1 (3) defence. The ECJ held that being a part-time worker will only be a genuine material difference if the employer can establish that the lower rate of pay for part-timers is reasonably necessary to achieve some objective (probably economic) which is unrelated to the sex of the worker.[228] The discussion of the section 1 (3) defence in *Jenkins* introduced the idea of indirect discrimination into equal pay. The concept of indirect discrimination was not expressly enacted in the Equal Pay Act. As a result of *Jenkins* the Act is read to include indirect discrimination.[229] If a difference operates against significantly more women than men the employer will only have a defence if the difference is based on objectively justified factors other than the sex of the worker.

The introduction of the distinction between direct and indirect discrimination in the Equal Pay Act was disapproved in *North Yorkshire County Council* v *Ratcliffe*.[230] There is no provision in the Sex Discrimination Act which incorporates the distinction into the Equal Pay Act. As a result of *Jenkins* and *Bilka*, EC law required objective justification to be established in cases of indirect pay discrimination. National law was to use the test in regard to cases of indirect pay discrimination, but did the test apply to direct pay discrimination? *Ratcliffe* states that the objective justification test is to be applied to the Equal Pay Act without bringing in the distinction between direct and indirect pay discrimination.[231]

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[226] Ibid. at p126, per Neill LJ.
[227] *Jenkins* v *Kingsgate* [1981] IRLR 228
[228] Ibid. at p234
[229] The reader is referred to the next paragraph for a further discussion of indirect pay discrimination.
[230] *North Yorkshire County Council* v *Ratcliffe* n.224 supra at p839, per Lord Slynn; the distinction was also avoided in *British Coal Corporation* v *Smith* n.216 supra
[231] *North Yorkshire County Council* v *Ratcliffe* n.224 supra at p839, per Lord Slynn

In equal pay cases discrimination must be on the ground of sex. This has caused problems in "gender-plus" cases before the ECJ, where it has been argued that discrimination on other grounds, unrelated to sex, does not contravene Article 119. The ECJ has recognised that "gender-plus" cases are within the ambit of Article 119.[232] For example, in *Liefting* the contributions of an employer to a pension scheme discriminated against women civil servants who were married to male civil servants.[233] The pay of male civil servants was different to that of female civil servants whose husbands were also civil servants. The claim involved a particular category of female civil servants and not women generally. It was held that the specific category was capable of protection under Article 119.[234] This is a situation that women priests who are married to male priests find themselves in. Because of their marital status they are required to accept non-stipendiary or part-stipendiary posts. This sometimes means working in a part-time post, sometimes it involves full-time work on a part-time stipend. Women priests might claim pay discrimination in this situation, using the principles set out in *Jenkins*. If being married to a priest operates against significantly more women than men the employer will only have a defence if the difference is based on objectively justified factors other than the sex of the worker. The bishop or Diocesan Board of Finance would probably try to rely on financial constraint as a defence.

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[232] Barnard, Catherine (1995) Op. cit., p181

[233] Case 23/83 *W.G.M. Liefting* v *Directie van het Academisch Ziekenhuis bij de Universiteit van Amsterdam* [1984] ECR 3225

[234] For other "gender-plus" cases the reader is referred to; Case C-7/93 *Besturr van het Algemeen Burgerlijk Pensioenfonds* v *G.A. Beune* [1994] ECR I-4471; Case C-128/93 *Fisscher* v *Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel* [1994] ECR I-4583

Conclusion

The questionnaire highlighted the perceived problem of sex discrimination in employment within the Church of England. The sex of a priest was an important factor in their treatment when seeking a post and when working in a post.[1] How can the law intervene to improve the position of priests? Ministers of religion, including Church of England priests, are excluded from sex discrimination legislation. Is this coherent with the aim of the legislation which is to provide equality in the workplace? It is submitted that once the priesthood became mixed, the exclusion of priests from the legislation became unjustified. Inclusion under the legislation would not only provide priests with a remedy against sex discrimination, it might change attitudes towards the treatment of priests. The non-protection of priests in secular law fuels the perception that because the discriminatory actions of "employers" and co-workers are not open to challenge they are justified. The legal recognition of a priest's rights in sex discrimination law might result in improved working conditions in the Church of England, without recourse to court action. Their inclusion under the legislation would act as a deterrent to those who currently benefit from the present structure.

Ministers in other denominations and religions are also not protected by employment legislation. In certain denominations and religions sex discrimination rights are inapplicable as ministers are required by doctrine to be male. However, their lack of protection against unfair dismissal has created problems. The public law protection which Church of England office holders possess does not extend to these ministers. Instead they must rely on their own organisation's internal procedures governing dismissal. It is submitted that statutory protection against unfair dismissal and, where appropriate, sex discrimination, for all ministers of religion would ensure that private regulation is not abused by "employers".

The uncertain employment status of Church of England priests requires a resolution. The problem has two facets: first, the difference in internal protection given to beneficed and unbeneficed clergy and secondly the denial that Church of England priests can hold a contract of employment. The present division of the clergy into beneficed and

[1] The term priest is used in the Conclusion to cover both deacons and priests.

unbeneficed under ecclesiastical law creates a two tier approach to "employment" protection within the Church. Freeholders have a strong security of tenure whilst unbeneficed clergy have limited safeguards attached to their licences. The proposed abolition of the freehold was abandoned. It is submitted that the mooted abolition was not tackling the real problem which is the lack of security of unbeneficed clergy. The Hawker Report acknowledges that changes need to be made to the licensing system in order that unbeneficed clergy, as well as beneficed clergy, have access to an internal disciplinary system. Whilst these changes to internal procedures are vital if unbeneficed clergy are to be given protection against unfair dismissal, they do not provide an adequate replacement for the private law protection against sex discrimination. Internal actions under the Incumbents (Vacation of Benefices) Measure 1977 and the Ecclesiastical Jurisdiction Measure 1963 provide only limited opportunities for dealing with sex discrimination claims. The only way for sex discrimination claims to be dealt with adequately is to include Church of England clergy within the Sex Discrimination Act.

The first step to inclusion under the Sex Discrimination Act requires that priests are classified as in employment for the purposes of section 82 (1) of the Act. This requires that a person must be employed "under a contract of service or of apprenticeship or a contract personally to execute any work or labour." In Chapter Four unfair dismissal cases were discussed in an analysis of the employment status of ministers of religion. The division of legal reasoning into two questions; "is there a contract?" and "is there a contract of employment?" is useful when one comes to apply the reasoning to a sex discrimination context.

Barthorpe and the industrial tribunal decision in *Coker* held that a contract was not incompatible with spiritual duties. *Parfitt* and *Davies* pointed to circumstances where the usual parameter of non-contractual intention might be overcome.[2] The establishment of a contract personally to execute any work or labour is sufficient for the wide definition of employment contained in the Sex Discrimination Act and the Equal Pay Act. It is submitted that if a sex discrimination action were to be brought by a Church of

[2] The reader is referred to 4.2.

England priest the arguments on "is there a contract?" might be successfully developed in a sex discrimination context.

It is not necessary to establish a contract of employment for the purposes of the Sex Discrimination Act (unless it is not possible to establish a contract personally to execute any work or labour). However, a contract of employment is required when unfair dismissal is alleged. Hence it is required if a claim involves unfair dismissal on the ground of pregnancy under the Employment Rights Act 1996. A contract of employment likewise is required to establish statutory maternity rights under the Employment Rights Act. Case law has denied that ministers of religion can hold contracts of employment. It is submitted that spiritual duties are not incompatible with a contract of employment. It is to be hoped that the arguments of Professor Rideout, in the industrial tribunal in *Coker* v *Diocese of Southwark*, on this question will be taken up in a future case and applied to all posts in the Church of England, not just the post of curate.[3]

If Church of England priests cannot be classified as in employment under the Sex Discrimination Act, then it is submitted that they ought to be specifically included in the Act, in the way that Crown office holders are included.[4] Likewise they ought to be included under the Equal Pay Act and the Employment Rights Act. In such a situation their employment status would probably be that of an ecclesiastical office holder. If this were so it would be necessary to define all Church of England clergy as office holders. At present, whether curates are office holders is a moot point. However, for such specific inclusion under the Act to work effectively, all classes of clergy must receive protection.

The second step which is required for inclusion under the Sex Discrimination Act is a judicial ruling on the status of section 19 (1) of the Act following the ordination of women priests. The motivation behind section 19 (1) is not concerned with whether ministers of religion are employees, self-employed persons or office holders. Section 19 (1) operates to protect and respect doctrinal belief. Therefore, in isolation from their

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[3] *Coker* v *Diocese of Southwark* [1995] ICR 563 reversed by *Diocese of Southwark and Others* v *Coker*, *The Times*, 17th July 1997 (CA); *Diocese of Southwark* v *Coker* [1996] ICR 896 (EAT)
[4] Sex Discrimination Act 1975 ss 85 (2), 86 (2)

uncertain employment status, it is submitted that section 19 (1) is inapplicable now that the priesthood is mixed. The section remains operative to all other religions and denominations where the employment is limited so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers.

Regardless of the status of section 19 (1), section 6 of the Priests (Ordination of Women) Measure 1993 acts as an exemption to sex discrimination against women priests in ordination and recruitment. It does not justify sex discrimination in working conditions and dismissal. Section 6 acts as a defence to the passing of Resolutions A and/or B. However, section 6 can be relied upon to justify sex discrimination against a woman in recruitment, regardless of the presence of Resolutions A and/or B. It is the wide application of section 6 which is in need of amendment. The passing of the Resolutions shows a commitment by a parish to a certain theological position. The whole tenor of the Synod debate and the Episcopal Ministry Act of Synod supports respect for theological integrity. Sex discrimination beyond the boundaries of what is set down in resolution form seems manifestly unfair. A parish, via its PCC, has the opportunity to declare its position on women priests. The absence of both Resolutions would appear to indicate a willingness to consider male and female candidates. When the reality is less favourable treatment, not on theological grounds, but on the ground of her sex, the woman priest is denied legal redress.

With the Church of England still divided on the issue of women priests differing doctrinal beliefs are vital to the selection process. There must be a justification in the legislation for holding these views. Section 6 justifies the use of the Resolutions. It is submitted that the exemption contained in section 6 should be narrowed to cover only theological objection to women priests enshrined in declarations, in the case of bishops, or in Resolutions, in the case of PCCs. This would prevent sex discrimination in recruitment being lawful in situations where the declarations or Resolutions are not in place. Women priests could then apply for posts in parishes where the Resolutions were not in place without fear that double standards were operating. This might encourage PCCs to discuss the issue of women priests properly, with the result that firm decisions would be made as to the necessity or non-necessity of the Resolutions in a parish.

As seen in the questionnaire data, different people are involved in the hiring process. In the case of an incumbent the bishop, parish representatives and patron are formally involved. The appointment of unbeneficed clergy is less formal but is likely to include the bishop, other clergy presently working in the parish and lay representatives. The bishop and the PCC have the power formally to object to a woman priest on grounds of theology under the legislation. Thus, certain personnel involved in the hiring process have had the opportunity to declare their theological position as members of the PCC. The present incumbent of the benefice is the council chairman and all clerks in Holy Orders beneficed or licensed to the parish are members of the council. In this way many of the clergy involved in recruitment decisions have stated their position on women priests. Similarly, lay members of the PCC who are involved in recruitment decisions have had the opportunity to declare their position.[5] There are many others involved in the hiring process who may or may not have had the opportunity to express their views in resolution form. The patron is formally involved in the appointment of an incumbent. However, unless the patron is also the bishop or a member of the PCC he or she is unable to express views on women priests in resolution form. Senior clergy such as rural deans and archdeacons are involved at the recruitment stage. They are not given the opportunity to express their views in resolution form. Other lay personnel appeared to be influential, such as readers and clergy wives. They too, unless members of the PCC, cannot formally declare their position on women priests. This makes the idea of narrowing section 6 problematic, because it would leave these people without a defence to sex discrimination claims.

The solution would be to widen the use of the Resolutions. It would be necessary to identify who is accountable for hiring decisions in order to decide who should be asked to declare their theological position. Any person or body who could be construed as an "employer", an agent of the "employer" or an "employee" of the Church of England would come into this category, for it would be the decisions of these people which could be challenged as discriminatory. Arguably the use of the Resolutions would need to be extended to the patron (as an agent of the employer) and to senior clergy involved in appointments (as employees of the Church of England). Patrons are involved with

[5] It is to be noted that lay members may only hold office for three years.

specific appointments to benefices. A Resolution in line with the PCC Resolution under section 3 of the 1993 Measure would be appropriate in this context. In the case of senior clergy such as archdeacons and rural deans who operate outside the specific parish unit and who regularly make appointment decisions in their respective areas, a new Resolution C could be created. This would state their position in regard to the appointment of women priests in their deanery or archdeaconry. The use of Resolutions would not extend to "third parties" such as members of the laity who are not PCC members. A register of Resolutions could be held in each diocese, to be updated regularly. The result of narrowing section 6 to cover only theological objection and widening the use of the Resolutions might be increased formal opposition to women priests. This would be preferable to the current position whereby women priests are unsure as to which parishes and personnel support or oppose their vocation. A comprehensive survey of the theological views of those involved in the appointment process would reduce the mystique of Church appointments.

Provided that employment status is satisfied and section 19 (1) is inapplicable, the narrowing of section 6 would facilitate increased employment rights for women priests. If discriminatory treatment in recruitment occurred in a parish where neither Resolution was in place, a woman priest could claim under the Sex Discrimination Act. The employer would be directly liable for his or her discriminatory treatment, vicariously liable for the actions of employees and agents in the hiring process and potentially directly liable for the actions of third parties involved in the hiring process. The latter category might include laity such as clergy wives and readers. If the actions of third parties could be controlled by the employer, the employer would be liable for any resulting discriminatory treatment.

An alternative option would be to provide an exemption to sex discrimination in recruitment when the action was on the ground of theological objection to women priests. In relation to the Church of England this would be a specific provision in the Sex Discrimination Act. That the more general terms of section 19 (1) are inapplicable to the Church of England would need confirmation. Justifying sex discrimination in this way might prove difficult. The secular courts would be faced with religious issues. The problems this causes have been seen in relation to unfair dismissal. To make things

more problematic the court would need to separate theological objection from prejudice against women. Questions of motive would become an integral part of the exemption. Although it would be difficult for a secular court to evaluate a theological objection, there is no reason why they should not be able to assess whether or not the objection is genuine. In fact, industrial tribunals were required to perform such a task in relation to trade union legislation. In the past it was unfair to dismiss an employee for not belonging to a trade union where there was a closed shop. In 1980 an exemption was introduced which made the dismissal of an employee in such circumstances unfair if he or she genuinely objected on the grounds of conscience or other deeply held personal conviction to being a member of any trade union whatsoever or of a particular trade union.[6] This covered religious objection. Industrial tribunals were required to assess whether the objection was genuine, whether it was a matter of conscience or personal conviction and whether it was deeply held.[7] Thus, there is a precedent for the assessment of the genuineness of religious/theological objection by tribunals.

To relieve the problems of proof, the two options could be combined; that is the increased use of Resolutions and an exemption for the Church of England in the Sex Discrimination Act. This would strengthen the narrowing of section 6. The Resolutions passed by the various parties would be justified not only by section 6 but by the new exemption in the Sex Discrimination Act. In turn the Resolutions would provide the requisite proof needed under the new exemption.

Amendments to national sex discrimination legislation would need to be mirrored in EC law. Therefore, it is submitted that the exclusion of Church of England priests from the operation of the Equal Treatment Directive be amended. The exclusion by the British government predated the Synod vote to allow women priests. It is strongly arguable that the sex of the worker is only a "determining factor" in parishes which have passed either of the Resolutions. This interpretation of determining factor would square with the reforms suggested in relation to section 6. The exemption from the Equal Treatment Directive would only be justified in regard to parishes or posts where a Resolution had

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[6] Employment Protection (Consolidation) Act 1978 (as amended) s 58 (3). This was widened by the Employment Act 1980 but finally repealed by the Employment Act 1988.
[7] *Home Delivery Services Ltd* v *Shackcloth* [1984] IRLR 470; *Sakals* v *United Counties Omnibus Company Ltd* [1984] IRLR 474

been passed by a designated person or body. If no Resolution is in place and discriminatory treatment occurs on the ground of sex a priest could try to use the Equal Treatment Directive to establish sex discrimination rights. This might be necessary if, for example, their employee status was questioned under national law.

In some areas the Church of England is taking a more secular approach to employment problems. Is the Church moving closer to applying ordinary employment law practices to their priests despite not being required to do so by law? For example, in regard to maternity provision the Church is beginning to tackle the issue. Despite initial difficulties it appears that women priests are receiving favourable provision. This is so despite the lack of guidance on the actual legal basis for maternity rights for women priests. The reform of clergy disciplinary procedures as recommended by the Hawker Report borrows ideas from secular employment, most notably the establishment of a national tribunal to deal with disciplinary actions. It is submitted that there are other areas of employment practice where the Church of England could take lessons from the secular world.

A principal theme which ran through the questionnaire data was the informal appointment system of the Church of England. Clergy do not necessarily come into post by replying to an advertisement and being interviewed. This means that the reasoning behind appointment decisions is difficult to establish and hence criticise. It is difficult to ascertain whether sex discrimination is taking place. It is submitted that changes could be made to the appointment system which would make recruitment decisions more transparent. This transparency would ease problems of proof if a sex discrimination claim were to be made.

The data revealed the diverse way in which vacancies are communicated. First curacies are rarely publicly advertised. Most candidates rely on the contacts of bishops and theological colleges. Sex discrimination during search for a first curacy was a lower figure for women respondents (19%) than at other stages in their "career path". This might suggest that the informal appointment system works well. It is submitted that this figure should be treated with caution, as many women respondents simply transferred from being NSMs or deaconesses in a parish to holding their first curacy in the same

parish. A more meaningful analysis at this level could only be made by assessing the women who had to search for a post as opposed to transferring to a post in their present church. Formal channels, such as newspaper advertisements and clergy bulletins, are more likely to be used in relation to senior posts. The use of formal channels ought to be increased for all posts. As a result notice of vacancies could reach a much wider audience thus promoting equality of opportunity. Additionally, advertisements ought to specifically state whether the parish has passed Resolutions A and/or B. In this way it is clear at the outset whether a post is open to a woman.

35% of males and 49% of females did not receive a formal interview for their present post. Most formal interviews were conducted on a sole interviewee basis. Short lists tend to be used more at a senior post level. The use of formal interviews with short lists is recommended for all levels of post. The use of such interviews not only promotes fair procedure but it promotes the transparency of decisions. If a sex discrimination action were to be brought evidence of discrimination might be easier to establish (or refute) if an interview had been used. The use of a short list system would also save the Church a great deal of time which is otherwise spent interviewing a succession of unsuitable sole interviewees. It is recommended that training should be given to those involved in the interview and appointment process. In the questionnaire, interview questions were cited as instances of discriminatory treatment. In order to remedy this interviewers should be made familiar with the guidelines on interview questions provided by the EOC Code of Practice. The structure of personnel involved in interviewing for a senior post is fairly well defined. At curate level an eclectic mix of personnel are involved. As regards training, the variety of personnel involved might cause problems, but this would not be insurmountable. However, it does lead on to another question: who should be involved in the appointment process? Should there be stricter guidelines regarding which personnel are involved or should the Church retain its discretion in this area? Does the involvement of the laity help or hinder the process?

The involvement of the laity is a useful and necessary check on the power of the bishop, the patron and other clergy. It also represents the independence that a parish has to appoint whom they wish. Lay personnel are likely to have a close working relationship with the priest, therefore it is important that they are involved in selection. However, it

could be argued that their decisions are less easily held to be accountable. Unless they are employees or agents of the employer they cannot be held directly liable for their actions under the Sex Discrimination Act. It could be specifically provided that all lay persons, not just PCC members and the lay patron, are agents when formally taking part in the recruitment process. However, for such a classification to work it would require all such agents to state their theological position in resolution form, as detailed above. This might become a cumbersome, impractical task. Additionally, if lay involvement is informal such personnel are unlikely to be agents of the employer. In this situation an employer will only be liable for their actions if the tests of *Burton and Rhule* v *De Vere Hotels* are satisfied. If decision making were left solely to the clergy, decisions might prove narrowly ecclesiastical.[8] However, if a dispute arose their decisions are more easily held to be accountable. It is submitted that lay, as well as clerical involvement, is a necessary feature of the appointment process. To ensure that all decisions are accountable, only lay members who are classifiable as employees or agents of the employer should be involved. Hence this would include a lay patron and PCC members but it would probably not include those members of the laity who are not on the PCC.

If a Church of England priest perceives less favourable treatment on the ground of sex he or she cannot use private law to gain a remedy. Ecclesiastical law does not provide any adequate channels of redress. The questionnaire data revealed that the Church does not have an adequate internal grievance procedure for dealing with allegations of sex discrimination. When respondents reported their complaints, often no action was taken or when it was taken the remedy did not match the problem. It is submitted that in addition to inclusion under the Sex Discrimination Act, clergy should have access to an internal grievance procedure, which deals specifically with claims of sex discrimination. This might prevent recourse to private law. The Hawker Report goes some way to achieving this objective. It recommends that in addition to the formal disciplinary process for ecclesiastical offences there should be an internal grievance procedure.[9] However, this is aimed at clergy bringing complaints against senior clerics regarding an aspect of their conditions of service. It does not extend to complaints against the patron or the PCC. The report also does not mention the specific issue of sex discrimination.

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[8] The reader is referred to 3.3.7.
[9] The Hawker Report (1996) Op. cit., pp131-135

With many women priests perceiving sex discrimination, perhaps this is an area which ought to have been specifically addressed.

By allowing both integrities to operate in the Church of England the Priests (Ordination of Women) Measure 1993 enshrines the principle of equality of respect. Because of this women priests do not receive equal treatment when compared with male priests. However, the wide application of section 6 combined with the provisions of section 19 of the Sex Discrimination Act and a priest's uncertain employment status mean that even equality of respect is denied to women priests. The arbitrary factor of sex is still allowed to influence decision making. Until the law is amended women priests will be denied even this minimal principle of equality.

APPENDIX A
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RECENT CASES

COMMENTARY

The Employment Status of Ministers of Religion*

1. INTRODUCTION

In this paper the legal employment status of ministers of religion, traditionally relegated to the fringe of employment law, is examined. Church of England priests have usually been held to be office holders with public law rights but not employees with private law rights. Ministers in other Christian denominations and other religions have no defined employment status. Whether a minister could be classified as an employee is a question for the common law, but courts seem particularly reluctant to re-examine legal precedent when any issue of religion is involved. However, issues should not be struck off the judicial agenda because they are permeated by religion. The thesis of the paper is that religious or spiritual duties are not incompatible with a contract of employment.[1] Additionally, the tendency of courts to treat all religions, and all posts within a religion, as identical is criticised.

The area of law most often under discussion is unfair dismissal. To bring a claim the worker must be classified as an employee. Under section 153 (1) of the Employment Protection (Consolidation) Act 1978, an "'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." Failure to prove employee status means that Church of England ministers will have to rely on the protections of office holder status and any internal Church protection. For ministers of other Christian denominations or other religions it will mean that they have to rely on their own Church's internal protections.

The focus here is on priests in the Church of England.[2] The fragile nature of internal Church protection has meant that increasing numbers are considering the possibility of involving general employment protection rights. The recent cases of *Coker v Diocese of Southwark* and *Chalcraft v Bishop of Norwich* highlight the debatable legal

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* The author would like to thank Gwyneth Pitt for her help with this paper.

[1] The terms religious and spiritual have been used interchangeably, although undoubtedly there is a distinction. Case law uses both terms which accounts for the usage. For simplicity duties are referred to as spiritual unless the term religious has been preferred in a specific judgment, as, for example, in *Coker v Diocese of Southwark* [1995] ICR 563

[2] When discussing priests in the Church of England the priest is referred to as he or she. Since 1994 women have been ordained to the priesthood. Old authorities refer to the priest as he. This has been altered where appropriate to he or she as the case principles now apply to men and women.

status of Church of England priests.[3] When discussing the two fundamental questions: is there a contract and is it a contract of employment, case decisions involving ministers of other Christian denominations and other religions are used. Nonconformist ministers from the Methodist Church, the Presbyterian Church and the Salvation Army have had their legal status considered.[4] Sikhism and Islam have been discussed with regard to the same issue.[5] However, it is office holders in the Church of England that have most consistently troubled the courts. A case which attempts to distinguish the different types of office holder is *Barthorpe v Exeter Diocesan Board of Finance*.[6] There are essentially three types of ecclesiastical post in the Church of England; a curate, a priest-in-charge and an incumbent, with no cases directly involving the latter post. An incumbent may be a rector or a vicar. He or she possesses a freehold living; consequently they cannot be dismissed at will. Their strong security of tenure is one reason for the lack of cases. Priests-in-charge and curates do not possess a freehold living. They are admitted to their post by a bishop's licence. A bishop has power to revoke the licence either by notice or by will if reasonable grounds are provided. One case has been brought concerning a priest-in-charge.[7] A larger body of case law investigates the status of curates.[8] It is possible that curates will be the first group to gain the protections of employment law, perhaps prompting a review of the status of priests-in-charge, incumbents and other ministers of religion. Until this is done there will remain an incoherent assortment of reasons given to prevent the use of employment law amongst a wide variety of workers.

2. IS THERE A CONTRACT?

Before deciding whether ministers hold a contract of employment the courts have asked is there a contract at all? The arguments used fall into six categories. First, the strong theme that a spiritual relationship is incompatible with a contract. Secondly, the idea that ecclesiastical authority does not signify the existence of a contract. This is confirmed by the complementary third idea that ministers of religion and their Church do not intend to create legal relations. Two further arguments about consideration and consensus ad idem are presented in specific cases. Sixthly, in regard to Church of England priests, the argument that office holders cannot hold a contract is presented.

In *Re Employment of Church of England Curates*[9] the High Court held that the curate did not have a contract of employment. Parker J. stated that the duty of obedience a curate owed to his incumbent was regulated by ecclesiastical authority and not by contract. This is the source of the underlying idea that there is no intention to create legal relations. However, it might be possible to combine the two types of authority,

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[3] *Coker v Diocese of Southwark* n.1 supra; *Diocese of Southwark v Coker* 25/3/96 Case Number EAT/374/95, The Times 4th April 1996; *Chalcraft v Bishop of Norwich* 6/11/95 Case Number 32040/95.

[4] *President of the Methodist Conference v Parfitt* [1984] ICR 176; *Davies v Presbyterian Church of Wales* [1986] IRLR 194; *Rogers v Booth* [1937] 2 All ER 751 respectively.

[5] *Santokh Singh v Guru Nanak Gurdwara* [1990] ICR 309; *Guru Nanak Sikh Temple v Sharry* EAT 21/12/90 (145/90) reported in IDS Brief 450 August 1991 pp4-6; *Birmingham Mosque Trust Ltd. v Alavi* [1992] ICR 435

[6] *Barthorpe v Exeter Diocesan Board of Finance* [1979] ICR 900

[7] *Chalcraft v Bishop of Norwich* n.3 supra

[8] *Re Employment of Church of England Curates* [1912] Ch2, 563; *Turns v (1) Smart (2) Carey (3) Bath and Wells Diocesan Board of Finance*, EAT 17/6/91 (510/90) reported in IDS Brief 450, August 1991 pp4-6; *Coker v Diocese of Southwark* n.1 and n.3 supra

[9] *Re Employment of Church of England Curates* n.8 supra

with ecclesiastical authority retained either as a part of ecclesiastical law alongside the contract or incorporated into the contractual document. Parker J. also stated that holding an office prevented the existence of a contract.

Twenty five years after Parker J.'s decision, the question was raised again. In *Rogers v Booth*[10] the Court of Appeal held that the relationship between an officer and a general of the Salvation Army was a spiritual one. By its definition, Sir Wilfred Greene MR said, a spiritual relationship lacks the necessary elements for a contract. The intention of the parties when entering the arrangement was not to enter into contractual relations.[11] The two themes; that a spiritual relationship is incompatible with a contract and that ministers of religion and their Church do not intend to create legal relations, are fused together in this judgment.

Sixty years after Parker J.'s judgment came a case which comprehensively dealt with the question, "is there a contract?" The ratio decidendi of *Barthorpe*[12] is that an office holder is not precluded from being an employee. This confirmed the decision in *102 Social Club v Bickerton* that some office holders can be concurrently regarded as employees.[13] Barthorpe, a Church of England lay reader, brought a claim for unfair dismissal. The industrial tribunal, applying Parker J.'s reasoning, held that a lay reader was in the same category as a curate, that of an office holder and not an employee. The existence of an office prevented a contract. On appeal the EAT held that the lay reader was an office holder who potentially could hold a contract of employment. They were unsure whether a curate was an office holder due to the post's lack of continuity. Disregarding office holder status, they held that the presence of ecclesiastical superiority should not preclude clergy being engaged under a contract.[14]

In 1984 in the influential case of *President of the Methodist Conference v Parfitt*,[15] the Court of Appeal held that a Methodist minister was not employed under a contract of employment. The reasoning was similar to that of *Rogers v Booth.* Dillon LJ. held that the arrangements were non-contractual: "the spiritual nature of the functions of the minister, the spiritual nature of the act of ordination...make it impossible to conclude that any contract, let alone a contract of service, came into being between the newly ordained minister and the Methodist Church."[16] Dillon LJ. conceded that the undertaking of spiritual work did not necessarily preclude a contractual relationship. A contract of service could perhaps be drafted between a minister and the Church, but this would be a departure from the norm. In the absence of a clear indication of contrary intent in a document, the relationship between the minister and their Church will not be one that is regulated by contract.[17]

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[10] *Rogers v Booth* n.4 supra
[11] Ibid. at p754
[12] *Barthorpe v Exeter Diocesan Board of Finance* n.6 supra
[13] *102 Social Club v Bickerton* [1977] ICR 911
[14] *Barthorpe v Exeter Diocesan Board of Finance* n.6 supra at p906
[15] *President of the Methodist Conference v Parfitt* n.4 supra
[16] Ibid. at p182, per Dillon LJ.
[17] Ibid. at p183

The judgment of May LJ. is less general than that of Dillon LJ. He asks whether the parties in this case intended to create legal relations.[18] It is unclear whether he believes a contract could ever exist between a minister and the Methodist Church, or any other Church. May LJ. believed that the conditions of consideration and consensus ad idem were met. Unfortunately he does not describe what the consideration was and from which parties it flowed. The agreement, he said, was non-contractual as the parties did not intend to create legal relations. A minister's work was incompatible with such a legal relationship.[19] At this point his decision appears less case specific. Rather it is grounded in the traditional reluctance of the courts to find a contract in this sphere. Yet there seems to be no sound policy reason to exclude an intention to create legal relations here as there is in arrangements between spouses.

The influence of *Parfitt* was realised two years later in *Davies v Presbyterian Church of Wales*.[20] The House of Lords held that there was no contract of employment because no contract existed. Emphasis was placed on the spiritual nature of the pastor's duties preventing a contract. "The duties owed by a pastor to the church are not contractual or enforceable....His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God."[21] Lord Templeman added, but did not develop the point, that in some circumstances an employee or an independent contractor could carry out duties which were exclusively spiritual.[22]

In *Santokh Singh v Guru Nanak Gurdwara*[23] the Court of Appeal endorsed the industrial tribunal decision that there was no contract of employment between the Sikh priest and the temple. The tribunal took account of Dillon LJ.'s principle in *Parfitt* that the relationship between a Church and a minister will not usually be contractual unless a contrary intent is shown in a document. The labelling of the priest as an employee in the constitution of the temple was not enough to satisfy Dillon LJ.'s idea of contrary intent,[24] although it is arguable that the constitution was not a document in the sense that Dillon LJ. intended: that is, a written agreement between the parties. The Court of Appeal failed to distinguish between religions in its judgment. The cases it applies, *Davies* and *Parfitt*, involve Christian Nonconformist ministers. It is by no means clear, without further argument, that the same principles ought to be applied to all ministers and all posts. The courts are using a reductive approach in order to dispose of these cases. Whether ministers ought to receive the same or different treatment depending upon their religion and post needs clarification.

In *Guru Nanak Sikh Temple v Sharry*[25] the industrial tribunal analysed a document which passed between the temple and the Sikh priest which was labelled a contract. They concluded that there was an intention to enter a contractual relationship. Reversing the decision the EAT held that the tribunal should have given greater attention to the parties' understanding of the documents. This could suggest a variety of

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[18] Ibid. at p185
[19] Ibid. at pp185-186
[20] *Davies v Presbyterian Church of Wales* n.4 supra
[21] Ibid. at p196, per Lord Templeman
[22] Ibid. at p196
[23] *Santokh Singh v Guru Nanak Gurdwara* n.5 supra
[24] This line of reasoning was later used in *Birmingham Mosque Trust Ltd. v Alavi* n.5 supra at pp440, 444
[25] *Guru Nanak Sikh Temple v Sharry* n.5 supra

problems; that the parties were not ad idem, that there was insufficient certainty of terms or that they did not intend to enter into a contractual relationship. It is unclear which factor or factors the EAT believed were missing. The EAT do not discuss Dillon LJ.'s dictum of contrary intent. Was such a discussion deliberately avoided? A definition of the nature and extent of "contrary intent" would be useful. Unless a Church is free to exercise contrary intent and retain its spiritual duties, Dillon LJ.'s words will sound hollow.

Turns v (1) Smart (2) Carey (3) Bath and Wells Diocesan Board of Finance[26] in 1990, circumvented the problems of spiritual duties by concentrating on consideration. The industrial tribunal did not state whether Turns, a Church of England curate, was an office holder or not. They held that no consideration passed from the bishop or the incumbent to Turns. Neither the bishop nor the incumbent paid Turns. The Diocesan Board of Finance did pay Turns, but had no control over how he carried out his duties. No contract existed between the parties. The EAT agreed that the consideration point was conclusive in proving that there was no contract. But reference to a lack of consideration alone is unconvincing as an argument against the holding of a contract by a minister of religion. Even if lack of consideration is convincing in one set of circumstances, it is arguable that consideration could be found or achieved by design in other cases.

In a recent case, *Birmingham Mosque Trust Ltd. v Alavi*,[27] the EAT applied a reductive approach to the whole issue of ministers of religion and contracts. Initially the industrial tribunal held that there was a contract of employment between the khateeb and the trust. Their finding was based upon there being sufficient certainty of terms in an exchange of letters and there being an intention to create legal relations.[28] The agreement defined salary, hours of work and the nature of the applicant's duties. They believed that Alavi's appointment was different to that of Parfitt, Davies and Santokh Singh in that it was governed exclusively by the exchange of letters. There was no religious service at which he was appointed or any constitution or other document governing his appointment.[29]

The EAT agreed that the trust could enter into contracts, but were concerned that this should not extend to religious personnel. "The problems arise where religious factors are introduced and it seems to us desirable that the same broad brush approach should be taken by all those faced with this issue."[30] Should such reductionism be followed? Ministers of religion are not homogenous. They all share a spiritual function, agreed, but they do differ in how they are appointed and dismissed and what duties they are required to perform. Also, ministers of the Church of England are the only ministers to enjoy the status of an office holder. Shouldn't the approach be to proceed as specifically as possible with regard to the religion and denomination one is dealing with, appreciating that there will be different posts within that religion or denomination?

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[26] *Turns v (1) Smart (2) Carey (3) Bath and Wells Diocesan Board of Finance* n.8 supra
[27] *Birmingham Mosque Trust Ltd. v Alavi* n.5 supra
[28] Ibid. at p440
[29] Ibid. at p443
[30] Ibid. at p440, per Wood J.

Referring to the question; "is there a contract?", Wood J. asked whether there was sufficient certainty of offer and acceptance for the parties to be ad idem. Secondly, was there an intention to create legal relations?[31] The tribunal had failed to decide these two points. There is no discussion of whether the parties achieved consensus ad idem. It might have been thought that they clearly had: Alavi had come to the UK on the invitation of the trust on terms negotiated in a correspondence between them and had worked on these terms until his dismissal. The EAT found that the tribunal had not made a finding on the consensus ad idem point. This returns the focus to contractual intention. The EAT noted the religious nature of the khateeb's duties. The presence of "religious factors" prevented a contract.[32] Although Wood J. quotes Dillon LJ.'s dictum regarding contrary intent, he does not himself expand the point. One is left with the feeling that religious factors will be used in a broad brush way to prevent contracts.

The possibility of a minister of religion holding a contract was given hope in the recent industrial tribunal decision in *Coker*, only to be dashed by the EAT decision which followed.[33] The tribunal, chaired by Professor Rideout, held that a curate could have a contract of employment with the Church of England.

Rideout criticises Parker J.'s first argument in *Re Employment of Church of England Curates*, that the duty of obedience emanates from ecclesiastical authority and not contract. The policy reasons given by Parker J. fail to convince Rideout. The fact that the finding of employee status might impose common law liabilities on the incumbent provides no genuine reason to prevent a contract.[34] Additionally, why does he look only to the incumbent? A more appropriate contracting party, says Rideout, would either be the bishop who has the power of appointment and dismissal, or the diocese who pays the curate, although he does not firmly state who the employer is. Parker J.'s second argument, that an office prevents a contract, is inconsistent with the decisions of *Bickerton* and *Barthorpe* which state that some office holders can concurrently be employees. This is not pertinent to Rideout's argument as he does not consider a curate to be an office holder.[35]

Rideout interprets the old authorities as developing a presumption that no contractual relationship was intended in relationships involving religious personnel. He gains more comfort from Lord Templeman in *Davies* who stated that it would be possible for an employee or an independent contractor to carry out exclusively spiritual duties. If Davies could have pointed to a contract between himself and the Church, Rideout believes that contract might have been a contract of employment. Modern authorities are moving towards the idea that spiritual duties can be the subject of a contract. Rideout held that a contract of employment should be assumed, in the absence of evidence to the contrary, in the case of a Church of England curate.[36]

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[31] Ibid. at p441
[32] Ibid. at p443
[33] *Coker v Diocese of Southwark* n.1 supra
[34] *Re Employment of Church of England Curates* n.8 supra at p570
[35] Whether curates are office holders is a moot point. *Re Employment of Church of England Curates*, *Bickerton* and the EAT in *Coker* state that a curate is an office holder. *Barthorpe* was unsure as to whether a curate fell within the description of an office holder.
[36] Ibid. at p572

On appeal the EAT held that the curate was not an employee.[37] Hull J. endorsed Parker J.'s propositions that a curate's duties are not defined by contract but emanate from ecclesiastical authority and that the holding of an office prevents a contract. Hull J. interprets *Parfitt* and *Davies* as endorsing the former proposition. Rideout, by failing to consider authority and the formularies of the Church of England, made a personal decision based upon what he thought modern policy ought to be. The position of a curate is not res integra. Hull J. held that the rights of the curate are not conferred by contract but by ecclesiastical law.[38] This is a novel interpretation of the leading authorities. Discussion had previously centred around spiritual duties preventing a contract. Where does Hull J.'s decision leave the presumption of non-contractual intention? He states that it was not a ground of previous decisions that the spiritual quality of the relationship could not be regulated by contract.[39] But this is what *Parfitt* and *Davies* said.[40]

The ecclesiastical authority argument bypasses the questionable idea of spiritual duties preventing a contract, instead focusing on the source of law which regulates the clergy. Ecclesiastical authority, although not contractual, does have legal significance. Could one concurrently be regulated by ecclesiastical and contractual authority?[41] One must look at the nature of ecclesiastical law. Denning categorised Church of England matters into three groups.[42] First, in its technical sense, ecclesiastical law means law solely administered by ecclesiastical courts and persons. Secondly, law may be exclusively administered by the temporal courts, despite its concern with ecclesiastical affairs; an example being the criminal law of blasphemy. Finally, some laws are administered by both ecclesiastical and temporal courts, for example in regard to sequestration. Hull J. classifies clergy discipline as technical ecclesiastical law, implying that this category prohibits the influence of a dual source of authority, such as contract. Whilst this is a persuasive argument, it is arguable that the categories are not static; jurisdiction can be transferred. Temporal courts have jurisdiction regarding divorce which previously was the preserve of the ecclesiastical courts.[43] Additionally, this decision relates only to the established Church with its unique form of ecclesiastical authority. Where does this leave other Christian denominations and other religions? Also what would happen if the Church were disestablished and ecclesiastical law became merely a body of rules agreed by the members of the Church?[44]

The final case which discusses "is there a contract" is *Chalcraft*.[45] An industrial tribunal ruled that a priest-in-charge of the Church of England was not an employee. Coming before the EAT decision in *Coker* the tribunal nevertheless maintained Rideout's decision to be of no assistance. This may be because the decision related only

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[37] *Diocese of Southwark v Coker* n.3 supra
[38] Ibid. at p17
[39] Ibid. at p16
[40] *President of the Methodist Conference v Parfitt* n.4 supra at p182; *Davies v Presbyterian Church of Wales* n.4 supra at p196
[41] A parallel can be drawn with the question; can one concurrently be an office holder and an employee?
[42] Denning, A. (1944) "The Meaning of Ecclesiastical Law" 60 LQR 235 at p238
[43] Dale, Sir William (1989) *The Law of the Parish Church* pp118-119 (London, Butterworths)
[44] Denning, A. (1944) Op. cit., p235
[45] *Chalcraft v Bishop of Norwich* n.3 supra

to curates. However, Chalcraft is couched in terms applying to all ministers, leaving the impression that Rideout's decision was flawed.

First, the tribunal stated that the applicant had not established an intention to create legal relations with the bishop or any other bodies of the Church. No thought was given to the nature of the relationship until the dispute arose. This reasoning gives ministers and their Churches an opportunity in future to think about their relationships and to argue that they do have an intention to contract. Secondly, consideration was missing from the agreement. The payment received by Church of England priest was described as a stipend to pursue a calling and not a salary. This is not remuneration in the conventional sense. It was held that the stipend is incapable of establishing consideration.[46]

The question "is there a contract?" divides the authorities into three camps. The old authorities of *Re Employment of Church of England Curates* (1912) and *Rogers v Booth* (1937) use a presumption of non-contractual intention, the former holding that duty emanates from ecclesiastical authority not contract, the latter that a spiritual relationship prohibits a contract. The EAT decision in *Coker* returns to this presumptive stance.

Bridging the gap between spiritual duties and contract formation come modern authorities starting with *Parfitt*. Dillon LJ., whilst accepting the usual parameter of non-contractual intention, pointed to a situation where this might be overcome. A similar statement was made in *Davies* by Lord Templeman. Both *Santokh Singh* (1990) and *Sharry* (1990) followed *Parfitt*. Whilst following *Parfitt* and *Davies*, the EAT in *Alavi* (1992) showed a reluctance to detail specific guidelines for ministers of religion.

The third group comprises two cases which have a positive view of contracts and spiritual duties. *Barthorpe* (1979) was progressive for its time, holding that Church of England curates were not prohibited from forming contracts. *Barthorpe* also distinguished different Church of England posts. Not until 1995 and the industrial tribunal decision in *Coker* was another progressive move made. The presumption of non-contractual intention was turned on its head. The significance of the decision has withered following the EAT decision. The hope is that Rideout's arguments will be taken up in a future case.

3. IS THERE A CONTRACT OF EMPLOYMENT?

Once a contract has been established, one must decide whether it is a contract of employment. Church of England priests, with the possible exception of curates, are already office holders, but does this prevent them holding a contract of employment?

A. Office holders

An office holder is neither employed nor self-employed. The classic definition of an office is found in *Great Western Railway Company v Bater*: "an office...was a subsisting, permanent, substantive position, which had an existence independent of the

[46] Ibid. at p3

person who filled it, and which went on and was filled in succession by successive holders."[47] In *Edwards v Clinch*[48] Lord Lowry added that an office holder holds a specific post which he or she can vacate. The post must be permanent in that it has an existence independent of the person holding it. The continuity required of the post is that it can last beyond the holder leaving it, with the opportunity of a new holder being appointed.[49]

Traditionally office holders have had available the public law action of judicial review. Office holders, including ecclesiastical office holders, are not given express statutory protection by the Employment Protection (Consolidation) Act 1978 regarding unfair dismissal. Office holders must argue that they can concurrently be regarded as employees.

Bickerton[50] held that some office holders would be regarded as employees, whilst others would not. One must look at the office and decide whether there is sufficient of the nature of employment to hold that he or she is an employee.[51] Bickerton was the secretary of a social club. The court was concerned with the payment involved. Was it a honorarium or a salary? How large was the payment? Was it fixed in advance? Was the payment made contractually for the services?[52] In *Sharry* it was argued that too much emphasis was being placed on wages, for this on its own does not establish a contract of employment. The EAT said remuneration was a neutral issue.[53] In *Rogers v Booth* the court was keen to find that the applicant received maintenance payments and not a wage. This was one reason why the applicant did not have a contract of employment.[54] The main reason for rejecting employee status was that there was no contractual intention. The latter two cases, although not involving office holders, suggest that one should not look to pay alone. *Chalcraft* shows that the courts are still preoccupied with consideration.

Bickerton uses a control criterion to divide office holders into two groups: those who exercise the functions of an independent office, in the way that a curate or a police officer does, and those who are subject to the control and orders of another.[55] The first group only have public law protection. The second group benefit from public and private law. *Bickerton* makes no definition of the term curate. It may refer to a curate who is an assistant to the incumbent or it might be using the term in its old usage as incumbent. Whichever meaning is intended, both a "curate" and an incumbent are controlled via ecclesiastical authority, neither is truly independent. A truly independent office is hard to find. *Bickerton* does not clarify which office holders are employees and which are not.

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[47] *Great Western Railway Company v Bater* [1920] 3 KB 266 at p274, per Rowlatt J.
[48] *Edwards v Clinch* [1981] 3 All ER 543
[49] Ibid. at p558, per Lord Lowry
[50] *102 Social Club v Bickerton* n.13 supra
[51] Ibid. at p919
[52] Ibid. at p919. The case was remitted to be heard by a differently constituted tribunal.
[53] *Guru Nanak Sikh Temple v Sharry* n.5 supra
[54] *Rogers v Booth* n.4 supra at p755
[55] *102 Social Club v Bickerton* n.13 supra at p920

B. Case decisions

The element of control has been regarded as of particular importance in cases involving ministers of religion. Most ministers can find someone who controls their work. Additionally, the idea of service seems equally applicable to ministers of religion who arguably serve their Church as well as their God. It is only now that the problem "who is the employer?" can be tackled. When asking "is there a contract?" one has to establish that there are contracting parties that can be identified. The issue of consideration has raised this problem. Who pays the minister? This overlaps with the question "is there a contract of employment?" because one must ask; if X pays Y, does X control Y, or does Y serve X?

In the earliest case considering this question, *Re Employment of Ministers of the United Methodist Church*,[56] the High Court held that Methodist ministers were not employed under a contract of employment. Joyce J. thought that even if they appeared to be employees, it was not possible to identify who was their employer.[57] There could not be a contract of employment as no identifiable employer was found. By definition this meant that a contract could not exist.

Later in 1912 came the ruling in *Re Church of England Curates*. Parker J. stated that a curate was an office holder and not an employee.[58] The existence of a contract of employment was dismissed by examining the appointment and dismissal of a curate. The appointment of a curate is not made by the incumbent. Rather, the incumbent nominates him or her and the appointment is made by the bishop. The incumbent cannot dismiss the curate without the bishop's consent. Parker J's. reasoning is that the incumbent does not employ the curate. He did not consider whether the bishop or the diocese might employ the curate. The bishop does after all appoint, and if necessary authorise the removal of a curate. The attitude of Parker J. is to work from the premise that a curate cannot have a contract of employment and to find reasons to justify this, rather than looking at the nature of the clerical relationship.

Twenty five years later a rigorous approach to the question "is there a contract of employment?" was still lacking. *Rogers v Booth* looked at one factor which might suggest a contract of employment. The fact that money was regularly paid to the officer was held to be merely maintenance payments and could not be likened to a wage or salary paid under a contract of employment. This seems to suggest that the presence of a wage would be appropriate evidence of a contract of employment. If the court had answered the question "is there a contract?" in the affirmative, the issue of remuneration alone might not have prevented the existence of a contract of employment. The court in *Rogers v Booth* partially answered the question "is there a contract of employment?" when they could have given judgment only on question one: "is there a contract?" The partial answer serves only to cloud the confusion on the status of remuneration as a function of a contract of employment.

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[56] *Re Employment of Ministers of the United Methodist Church* [1912] 107LT 143
[57] Ibid. at p144
[58] *Re Employment of Church of England Curates* n.8 supra at pp568-569

In 1979, hope but little substance, was given to the idea that some office holders might have a contract of employment. The EAT in *Barthorpe* believed that the holding of an office did not prevent a person having a contract of employment in some situations. The categories should not be regarded as mutually exclusive.[59] The EAT reviewed office holders whom they believed could not hold a contract of employment; incumbents, bishops deans.[60] Others engaged in ministry such as curates and lay readers, might be employees and office holders concurrently.[61] However, the EAT gave no clear guidance on when a contract of employment might be found. Their only point was on control and this was vague.[62] There is no adequate explanation of why bishops and incumbents are precluded from employee status. The court viewed their ecclesiastical superiority as preventing a contract of employment. It is arguable that all priests and bishops belong to one Holy Order of presbyters and nothing should distinguish them.

The notion of a contract of employment was examined in a limited way in *Parfitt*. Dillon LJ. concentrated on the spiritual nature of the duties precluding a contract of employment. An employee serves their employer. A minister serves God, and not the Church, as his master.[63] But as a representative of Christ on earth the priest does serve their congregation and parishioners. It is an interactive ministry, rather than being confined to prayerful devotion as characterised by religious communities of monks.

Likewise, in *Davies* Lord Templeman's emphasis was on the pastor serving God, not an employer. In all religions there is a personal commitment by the minister to serve their God. Lord Templeman had suggested that an employee might carry out exclusively spiritual duties. Does the personal service argument prevent this happening? Spiritual duties, on this interpretation will always lack the necessary element of service to provide a contract of employment. Taking a wider view of service, there is no reason why a priest serving their Church (their employer) has to prevent a priest serving their God; the two types of service should coincide.

In both cases involving Sikh priests, evidence potentially pointed to a contract of employment. In *Santokh Singh* the Court of Appeal congratulated the industrial tribunal on its reasoning which rejected the existence of a contract of employment. The tribunal balanced spiritual duties against factors which pointed towards a contract of employment. This is an interesting approach suggesting that if indicators of a contract of employment are strong enough they will outweigh a second presumption: the presumption of no contract of employment where duties are principally spiritual. This "presumption" is not identified as such, but it appears to be applied in case decisions.

In *Sharry* the industrial tribunal failed to distinguish between a contract and a contract of employment. They used a multi-factor approach to decide whether there was contractual intention. They considered; organisation, control, finance and mutuality of obligation, thus collapsing the first and second questions. Emphasis was placed on the fact that the priest was paid. The EAT disapproved of this emphasis on wages. This did not establish a contract of employment. Contracts of employment were not discussed in

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[59] *Barthorpe v Exeter Diocesan Board of Finance* n.6 supra at p904
[60] Ibid. at p904
[61] Ibid. at p906. They were undecided whether a curate was indeed an office holder.
[62] Ibid. at p906
[63] *President of the Methodist Conference v Parfitt* n.4 supra at pp182-183

terms of control or service. The basis on which the EAT decided that there was no contract of employment was by balancing spiritual duties against secular duties. Again there seems to be the unspoken presumption of no contract of employment where duties are principally spiritual. In itself this is bound up with the notions of control and service and how these square with spiritual duties.

The applicant in *Turns* used the control test to argue that he had a contract of employment. The incumbent exercised control over the manner in which Turns carried out his duties and was in a position to discipline Turns if he failed to exercise his duties properly. The industrial tribunal considered that the control the incumbent held over the curate was not materially different from that exercised by the bishop over the incumbent. They believed that because the incumbent was not subject to a contract of employment neither would be the curate. The presence of control was not enough to indicate a contract of employment. What preoccupies the tribunal is the presumption against a contract of employment if a minister is involved.

Turns appealed to the EAT saying that the curate has a different relationship with their incumbent, from that which an incumbent has with their bishop. Turns considered the curate was under greater control than the incumbent. The EAT, rejecting the appeal, did not examine control as the consideration point was conclusive. On the control point, the industrial tribunal were not arguing that control was not present, rather they said control alone was not enough. Might it be that the EAT were using consideration to sabotage the finding of a contract of employment? Consideration is not usually the hardest contractual feature to find. The use of lack of consideration as the ratio decidendi of *Turns* blocks the control point being aired.

The control test was pursued by the industrial tribunal in *Alavi*. They held that there was a contract of employment because in the performance of his religious duties he was under the control of the trust. The EAT held that the tribunal had failed to look at the religious nature of the relationship. The khateeb has religious duties and is a religious appointment.[64] *Alavi* uses the presumption of no contract of employment where duties are principally religious.

In *Coker*, Rideout used a balancing approach to conclude that there was a contract of employment. The elements of spirituality were insufficient to outweigh elements of personal service. Service, control and organisation were all present in the relationship.[65] The claim that personal spirituality runs counter to the idea of service is acknowledged by Rideout.[66] It is arguable that they are not conflicting aims, they may not be the same, but this does not mean that they are in conflict. Rideout argues that the Church is involved in dictating the results of that spirituality, thus spirituality does not outweigh the idea of service.[67]

The EAT held that a curate is not employed under a contract of employment but is an office holder. Hull J. made a tentative, but undeveloped, point on the possibility of

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[64] *Birmingham Mosque Trust Ltd. v Alavi* n.5 supra at p444
[65] *Coker v Diocese of Southwark* n.1 supra at p573
[66] Ibid. at p573
[67] Ibid. at p573

concurrent employee status. "[I]t is conceivable (but by no means clear) that circumstances might exist in a particular case which showed that such a curate was indeed employed by some person or other."[68] On the issue of whether spiritual duties outweigh personal service, Hull J. describes Rideout as transgressing authority, but adds no extra comments himself on spiritual duties.

Each case denies that a minister of religion can have a contract of employment. The reasons for this can be placed into themes which have developed through the century. The early cases, *Re Employment of Ministers of the United Methodist Church* and *Re Church of England Curates*, work from the question "who is the employer?" In the former case, Joyce J. held that although Methodist ministers may appear to be employees the absence of an employer prevents a contract of employment. In the latter case, Parker J.'s reasoning is to define the conclusion; that there is no contract of employment and then work backwards to find evidence to support the conclusion. His justification is the absence of an employer.

The leading modern authorities look for evidence which might support a contract of employment. The EAT in *Barthorpe* use the control test. Dillon LJ. in *Parfitt* and Lord Templeman in *Davies* concentrate on service. In each case the evidence does not match the criteria needed for a contract of employment.

Recent, but less well known, decisions have refined the reasoning process. *Santokh Singh*, *Sharry*, *Alavi* and *Turns* all seem to apply an initial presumption of no contract of employment where duties are principally spiritual. Is this a throwback to Parker J.'s reasoning? No. The intention is to balance spiritual duties against evidence of a contract of employment. This is very different from deciding on a conclusion and finding evidence to verify this conclusion. The industrial tribunal in *Coker* rebutted the presumption with reference to Church of England curates. Rideout's arguments were then overruled by the EAT who return to Parker J.'s presumptive stance. The modern approach of balancing spiritual duties against indicators of a contract of employment is conveniently ignored by the EAT.

4. JUDICIAL REVIEW

The other cause of action open to Church of England clergy is judicial review of a decision to dismiss.[69] As the established Church, the Church of England is a public body exercising statutory power. Statutory restrictions on the dismissal of clergy are contained in Measures and Canons.[70] The decision to dismiss a minister of a different Christian denomination or religion could not be challenged by way of judicial review. These are free associations, not public bodies, who agree upon their own rules.

Why have Church of England clergy declined to use judicial review? Reasons of expense, location and time limits could provide part of the explanation. A major reason might be the attractiveness of unfair dismissal as a cause of action. In such a case the

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[68] *Diocese of Southwark v Coker* n.3 supra at pp9-10, per Hull J.

[69] *Ridge v Baldwin* [1964] AC 40, held that the decision to dismiss was capable of review.

[70] Statutory restrictions include; Incumbents (Vacation of Benefices) Measure 1977; Incumbents (Vacation of Benefices) (Amendment) Measure 1993; Ecclesiastical Jurisdiction Measure 1963; Church of England (Miscellaneous Provisions) Measure 1976 s 2 (1); Canon C12 paras 1, 5

employer must reveal the reason for dismissal and show that it was a fair reason.[71] The employer should have acted reasonably in treating the reason as a sufficient reason for dismissal.[72] The branch of judicial review termed "irrationality" uses a test of reasonableness.[73] To be capable of being reviewed a decision must be one that no authority properly directing itself on the law and acting reasonably could have reached.[74] It is thought that the test under unfair dismissal is easier for an "employee" to claim than the test under judicial review, which could explain the use of private law. One question remains: who would be the respondent? As a parallel to the question, "who would be the employer in private law?" is the question, "who would be the respondent in public law?"

Following *O'Reilly v Mackman*[75] the distinction between public and private law has been heightened. The court may now treat it as an abuse of process if an applicant uses private law when it was appropriate to use public law. Conceivably the Church of England might claim this if further private law actions are taken by clergy.

5. CONCLUSION

There are approximately 10,000 male and female priests in the Church of England. This is a significant number of workers who are denied employment rights and who have no satisfactory alternative procedure. The use of a broad brush approach to all cases involving the clergy denies a comprehensive understanding of the different posts in the Church of England. The MSF union, who have a clergy section, acknowledge that at present the legal status of the clergy cannot be treated in a reductive way. A survey conducted by MSF concerning clergy conditions of service asks whether clergy would like to be classified in future as a homogenous body; as employees. It is in the interest of unbeneficed clergy (curates and priests-in-charge), 57.5% of whom favoured the reform. This was against 38.1% of beneficed clergy (incumbents). Many incumbents would consider employee status as a diminution of status, if it were in place of freehold status.[76] The abolition of the freehold was mooted and rejected. It appears unlikely that incumbents will be "levelled down" to employee status. The hope remains that unbeneficed clergy will gain employment rights. Ministers of different denominations and religions have neither public or private law protection. A thorough definition of the legal status of this growing band of workers is urgently required.

EMMA BRODIN
University of Huddersfield

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[71] Employment Protection (Consolidation) Act 1978 ss 57 (1), (2)
[72] *Devis v Atkins* [1977] ICR 662 at p676
[73] *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 WLR 1174 at p1196
[74] Gordon, R.J.F. (1985) *Judicial Review: Law and Procedure* p19 (London, Sweet & Maxwell)
[75] *O'Reilly v Mackman* [1983] 2 AC 237
[76] MSF (1995) "What do Church of England Clergy think about their Conditions of Service?"

APPENDIX B

The Pilot Questionnaire: Ripon Diocese

Questionnaire One

Male and Female Clergy in Church of England Ministry

Please tick ☑ **ONE** box only in each question unless the question asks you to tick **ALL** answers that are relevant to you. Other questions require short answers. If there is inadequate space for any of your answers please continue on the blank side of the questionnaire, indicating which question you are answering.

Please do not be put off by the length of the questionnaire. The questions are directed to clergy at different levels of experience. Thus you will not be required to answer every question. Instead the questions have been filtered so that you only answer questions relevant to your circumstances. I have made the questionnaire as short as possible, and each question has been used with a particular research objective in mind.

I hope that you will be able to complete all the relevant questions. However, if you are unable or unwilling to answer a particular question please leave it blank and move onto the next question. If there are details that you cannot remember exactly then please give estimates when you can do so with reasonable confidence, otherwise leave blank.

Your answers will remain absolutely **CONFIDENTIAL.** Names will not be associated with responses.

SECTION ONE: To be completed by **ALL CLERGY** replying to the questionnaire.

1.1 Sex Male ☐ Female ☐

1.2 What was your age last birthday?.....

1.3 Description of present office held

Deacon (serving first year of curacy) ☐ Team Rector ☐
Curate (who has been priested) ☐ Team Vicar ☐
Priest-in-charge ☐ NSM (Curate) ☐
Vicar/Rector ☐ NSM (Priest-in-charge) ☐
Other (please specify).....

1.4 Status of office

Beneficed ☐ Licensed for a term of years ☐
Licensed under the bishop's discretion ☐
Other (please specify).....

1.5 Dates of ordination. Please fill in month and year of ordination as applicable.

Deaconess (Admitted).....
Deacon (Ordained).....
Priest (Ordained).....

1.6 How many clerical posts have you held in the Church of England? Please **DO NOT** include work as a deaconess.....

1.6.a How many of these posts were stipendiary posts?.....

1.7 Have you previously worked in a different occupation(s)? Yes ☐ No ☐

1.7.a If you answered YES please give a brief description of the occupation(s).....
.....

Education

1.8 How old were you when you left school?.....

1.8.a Was your theological training; Full time ☐ Part time ☐

1.8.b Do you hold a university degree? Yes ☐ No ☐
1.8.c Do you hold a postgraduate degree, such as a Masters degree, MPhil or PhD?
Yes ☐ No ☐

Family

1.9 Marital status. Are you;
Single ☐ Separated or divorced ☐
Married ☐ Widowed ☐

1.9.a If you are **MARRIED** does your spouse currently hold a clerical office in the Church of England? Yes ☐ No ☐

1.9.b Do you have any other relatives who currently hold a clerical office in the Church of England? Yes ☐ No ☐

1.9.c Have you any dependants? Yes ☐ No ☐
Are these your children or other relatives?.....

You

1.10 Do you have a disability? Yes ☐ No ☐

1.11 Which broad ethnic group do you belong to?
White ☐ Asian ☐
Afro-Caribbean ☐
Other (please specify).....

1.12 How would you describe your churchmanship?
Strong catholic ☐ Central churchmanship ☐
Moderate catholic ☐ Evangelical ☐

Other (please specify).....

Mobility
(Please tick **ALL** answers which are relevant to you.)

Clergy who have held **MORE THAN ONE** post, **GO TO** 1.13.
Clergy who have held **ONLY ONE** post, **GO TO** 1.14

1.13 After leaving your first post where did you go to? If you have held several posts, please tick all the boxes which apply to your different posts. Did you;
a) Stay within the same benefice ☐
b) Move to a different part of the deanery you were already in ☐
c) Move outside the deanery, but inside the same diocese, you were already in ☐
d) Move to a different diocese ☐
e) Other (please specify).....

Now **GO TO** 1.14

1.14 Present mobility
(Please tick **ONE** box for each question)

If a suitable post was offered to you now, could you take it if it were;
a) Within the same benefice. Yes ☐ No ☐
b) In a different part of the deanery you were already in. Yes ☐ No ☐
c) Outside the deanery, but inside the same diocese you were already in. Yes ☐ No ☐
d) In a different diocese. Yes ☐ No ☐

If you answered **NO** to any question why is this? Please tick **ALL** answers which are relevant to you.
a) Spouse's job ☐
b) Children's schooling ☐
c) Responsibility for dependants other than children ☐
d) Because you do not want to leave the area you live in ☐
e) Other reasons (please specify).....

Now go to section two

SECTION TWO: YOUR PRESENT POST: to be completed by **ALL CLERGY** replying to the questionnaire.

The Benefice (tick **ONE** box only)

2.1 How would you describe your present benefice;
a) An inner city area ☐
b) A suburban area ☐
c) A rural area ☐
d) A mixture of (a) and (b) ☐
e) A mixture of (b) and (c) ☐

f) Other (please specify).....

2.2 Is the benefice;
a) A single benefice with one parish or separate parishes ☐
b) A single benefice with parishes united into one ☐
c) A single benefice with some parishes united and others left separate ☐
d) Benefices held in plurality ☐
e) Other arrangement (please specify).....

2.3 How many parishes are you responsible for?.....
2.3.a Are you involved in a team ministry? Yes ☐ No ☐
2.3.b Are you involved in a group ministry? Yes ☐ No ☐

2.4 How did you hear about the post? If you heard about it in several ways please tick **ALL** the relevant boxes.
Informal contacts ☐ Advertisement in a newspaper ☐
Other (please specify).....

2.5 Did you have a formal interview? Yes ☐ No ☐
2.5.a If you did, who was present at the interview? Please indicate their status, e.g. incumbent, parish representatives, not their individual names.....
.....

2.6 Was your sex used as a criterion of **SELECTION** for the job?
Yes ☐ (**GO TO** 2.7 if you are a man/ 2.8 if you are a woman)
No ☐ Don't Know ☐ (**GO TO** 2.11)

2.7 Was this because;
(Please tick **ALL** answers which are relevant to you.)
a) Diocesan bishop's declaration against women priests in place ☐
b) Resolutions A and/or B in place ☐
c) Other reasons (please specify) ☐
d) You don't know ☐

Now **GO TO** 2.11

2.8 Was this a reverse discrimination policy?
Yes ☐ (**GO TO** 2.9)
No ☐ Don't Know ☐ (**GO TO** 2.11)

2.9 What makes you think that reverse discrimination was occurring?
a) This is your subjective assessment of the situation ☐ (**GO TO** 2.11)
b) You were told that the policy was in operation ☐ (**GO TO** 2.10)

2.10 When were you told about the policy?
(Please tick **ALL** answers which are relevant to you.)
a) In the job advertisement ☐
b) Formally at the interview ☐

c) Formally after being selected ☐
d) Informally during the selection process ☐
e) Informally after being selected ☐

2.11 TREATMENT WHILST AT WORK

Whilst **WORKING** in your present post, do you think that you have ever received less favourable treatment on grounds of your sex? (Excluding the use of the bishop's declaration and Resolutions A and/or B)
Yes ☐ (**GO TO** 2.12)
No ☐ Don't Know ☐ (**GO TO** 2.14)

2.12 Who was the source of the less favourable treatment? If it came from more than one source tick the relevant boxes accordingly.
Your incumbent ☐
Your diocesan bishop ☐
Members of your team ministry ☐
Members of your group ministry ☐
The patron of the benefice ☐
Parochial church council members ☐
Others (please specify status).....

2.13 If you ticked any of the boxes, please give brief details of the incident(s).....
.....
.....

2.13.a Is it a continuing problem or an isolated incident?.....

2.13.b Did you speak to anyone about the incident? Yes ☐ No ☐
Who?.....
If yes, was any action taken? Yes ☐ No ☐ Don't Know ☐
If yes, what action was taken?.....
.....
Has this action prevented the treatment you complained of recurring?
Yes ☐ No ☐ Don't Know ☐

2.14 Financial position regarding present post.

If you are a **NON-STIPENDIARY** minister **GO TO** 2.15.
If you are a **STIPENDIARY** minister **GO TO** section three

2.15 Is your non-stipendiary ministry; Full Time ☐ Part Time ☐
Are you in a non-stipendiary post through;
a) Choice ☐ (**GO TO** 2.16)
b) Factors beyond your control ☐ (**GO TO** 2.17)

2.16 Is it because;
(Please tick **ALL** answers which are relevant to you.)

i) You have another job ☐
ii) You have another source of income (either savings or a partner's income or a pension) ☐
iii) Other reasons of choice (please specify).....
.....
Now **GO TO** section three

2.17 Is it because;
(Please tick **ALL** answers which are relevant to you.)
i) Your applications for stipendiary posts were rejected ☐
ii) There were no stipendiary posts which you were qualified for in the area you wanted to apply to ☐
iii) Your spouse is a priest and diocesan policy states that only one spouse may hold a stipendiary post ☐
iv) Other factors beyond your control (please specify).....
.....

Now **GO TO** section three

SECTION THREE: FIRST CURACY - To be completed by **ALL CLERGY** replying to the questionnaire

3.1 How many applications did you make before you received your first curacy?.....

3.2 At **ANY** stage in your **SEARCH** for a first curacy did you receive less favourable treatment on grounds of your sex? (Excluding the use of the bishop's declaration and Resolutions A and/or B)
Yes ☐ (**GO TO** 3.2.a)
No ☐ Don't Know ☐ (**GO TO** 3.3)

3.2.a Did this happen in regard to;
One post ☐ Three or more posts ☐
Two posts ☐

3.2.b Please tick **ALL** the ways in which you feel you received less favourable treatment on grounds of your sex. If this happened to you several times please tick **ALL** the instances which you believe apply to you;
a) Not being selected for interview ☐
b) Treatment at interview (for example interview questions) ☐
c) Informal comments ☐
d) Not being selected for the post ☐
e) Other reasons (please specify).....
.....

3.2.c If you ticked (a) were reasons for non-selection for interview given?
Yes ☐ No ☐ Can't Remember ☐ In some cases yes in others no ☐

If **YES** what were they? If this happened to you several times please cite as many examples as possible.....
.....

3.2.d If you ticked (d) were reasons for non-selection for the job given?
Yes ☐ No ☐ Can't Remember ☐ In some cases yes in others no ☐

If **YES** what were they? If this happened to you several times please cite as many examples as possible.....
.....

3.2.e Who was the source(s) of the less favourable treatment?
(Please tick **ALL** boxes which are relevant to you)
The incumbent ☐
The diocesan bishop ☐
Others (please specify their status).....

3.3 TREATMENT WHILST AT WORK in first curacy. **DO NOT** answer this question if this is your **PRESENT POST**, instead go to the end of the questionnaire)

Whilst **WORKING** in your first curacy, do you think that you have ever received less favourable treatment on grounds of your sex? (Excluding the use of the bishop's declaration and Resolutions A and/or B)
Yes ☐ (**GO TO** 3.4)
No ☐ Don't Know ☐ (**GO TO** section 4)

3.4 If you answered **YES**, who was the source of the less favourable treatment? If it came from more than one source tick the relevant boxes accordingly.
Your incumbent ☐ Members of your group ministry ☐
Your diocesan bishop ☐ The patron of the benefice ☐
Members of your team ministry ☐ Parochial church council members ☐
Others (please specify status).....

3.5 If you ticked any of the boxes, please give brief details of the incident(s).....
.....

3.5.a Was it a continuing problem or an isolated incident?.....

3.5.b Did you speak to anyone about the incident? Yes ☐ No ☐
Who?.....
If yes, was any action taken? Yes ☐ No ☐ Don't Know ☐
If yes, what action was taken?.....
.....
Did this action prevent the treatment you complained of recurring? Yes ☐
No ☐ Don't Know ☐

Now go to section four

SECTION FOUR: SECOND CURACY - to be completed by **ALL CLERGY** who have applied for a second curacy

4.1 Have you applied for a second curacy? Yes ☐ No ☐
If you answered **NO** go to end of questionnaire
If you answered **YES**, were you successful?
Yes ☐ (**GO TO** 4.2)
No ☐ (**GO TO** 4.3)

4.2 How many applications did you make before you got your post?.....(**GO TO** 4.4)

4.3 How many applications have you made so far?.....

4.3.a Are there reasons **OTHER THAN YOUR SEX**, why you might have been unsuccessful? E.g. your experience or style of churchmanship. Please give details.....
.....
.....(**GO TO** 4.4)

4.4 To **ALL CLERGY** who have applied for a second curacy, whether **SUCCESSFUL OR NOT**, have you at **ANY** stage in your search for a second curacy received less favourable treatment on grounds of your sex? (Excluding the use of the bishop's declaration and Resolutions A and/or B)

Yes ☐ (**GO TO** 4.4.a)
No ☐ Don't Know ☐ (**GO TO** 4.5)

4.4.a Did this happen in regard to;
One post ☐
Two posts ☐
Three or more posts ☐

4.4.b Please tick **ALL** the ways in which you feel you received less favourable treatment on grounds of your sex. If this happened to you several times please tick **ALL** the instances which you believe apply to you;
a) Not being selected for interview ☐
b) Treatment at interview (for example interview questions) ☐
c) Informal comments ☐
d) Not being selected for the post ☐
e) Other reasons (please specify).....
.....

4.4.c If you ticked (a) were reasons for non-selection for interview given?
Yes ☐ No ☐ Can't Remember ☐ In some cases yes in others no ☐

If **YES** what were they? If this happened to you several times please cite as many examples as possible.....

.....

4.4.d If you ticked (d) were reasons for non-selection for the job given?
Yes ☐ No ☐ Can't Remember ☐ In some cases yes in others no ☐

If **YES** what were they? If this happened to you several times please cite as many examples as possible.....
.....

4.4.e Who was the source(s) of the less favourable treatment?
(Please tick **ALL** boxes which are relevant to you)
The incumbent ☐ The diocesan bishop ☐
Others (please specify their status).....

4.5 TREATMENT WHILST AT WORK in second curacy. **DO NOT** answer this question if this is your **PRESENT POST**, instead go to end of questionnaire.

Whilst **WORKING** in your second curacy, do you think that you have ever received less favourable treatment on grounds of your sex? (Excluding the use of the bishop's declaration and Resolutions A and/or B)
Yes ☐ (**GO TO** 4.6)
No ☐ Don't Know ☐ (**GO TO** section 5)

4.6 Who was the source of the less favourable treatment? If it came from more than one source tick the relevant boxes accordingly.
Your incumbent ☐ Members of your group ministry ☐
Your diocesan bishop ☐ The patron of the benefice ☐
Members of your team ministry ☐ Parochial church council members ☐
Others (please specify status).....

4.7 If you ticked any of the boxes, please give brief details of the incident(s).....
.....

4.7.a Was it a continuing problem or an isolated incident?.....

4.7.b Did you speak to anyone about the incident? Yes ☐ No ☐
Who?.....
If yes, was any action taken? Yes ☐ No ☐ Don't Know ☐
If yes, what action was taken?.....
.....
Did this action prevent the treatment you complained of recurring? Yes ☐
No ☐ Don't Know ☐

Now go to section five

SECTION FIVE: SENIOR POSTS. To be completed by all clergy who have applied for senior posts; vicar/rector, team vicar, team rector, priest-in-charge

5.1 Have you ever applied for any of the above posts? Yes ☐ No ☐
If you answered NO go to end of questionnaire
If you answered YES were you successful?
Yes ☐ (**GO TO** 5.2)
No ☐ (**GO TO** 5.3)

5.2 How many applications did you make before you got your post?.....(**GO TO** 5.4)

5.3 How many applications have you made so far?.....

5.3.a Are there reasons **OTHER THAN YOUR SEX**, why you might have been unsuccessful? E.g. your experience or style of churchmanship. Please give details.....
.....(**GO TO** 5.4.)

5.4 To ALL CLERGY who have applied for a senior post, **WHETHER SUCCESSFUL OR NOT**, have you at **ANY** stage in your search for a senior post received less favourable treatment on grounds of your sex? (Excluding the use of the bishop's declaration and Resolutions A and/or B)
Yes ☐ (**GO TO** 5.4.a)
No ☐ Don't Know ☐ (**GO TO** 5.5)

5.4.a Did this happen in regard to;
One post ☐ Two posts ☐
Three or more posts ☐

5.4.b Please tick **ALL** the ways in which you feel you received less favourable treatment on grounds of your sex. If this happened to you several times please tick **ALL** the instances which you believe apply to you;
a) Not being selected for interview ☐
b) Treatment at interview (for example interview questions) ☐
c) Informal comments ☐
d) Not being selected for the post ☐
e) Other reasons (please specify).....
.....

5.4.c If you ticked (a) were reasons for non-selection for interview given?
Yes ☐ No ☐ Can't Remember ☐ In some cases yes in others no ☐

If **YES** what were they? If this happened to you several times please cite as many examples as possible.....
.....

5.4.d If you ticked (d) were reasons for non-selection for the job given?
Yes ☐ No ☐ Can't Remember ☐ In some cases yes in others no ☐

If **YES** what were they? If this happened to you several times please cite as many examples as possible.....
.....

5.4.e Who was the source(s) of the less favourable treatment?
(Please tick **ALL** boxes which are relevant to you)
The diocesan bishop ☐
Patron (if different than the bishop) ☐
Parochial church council representatives ☐
Members of the group ministry ☐
Members of the team ministry ☐
Others (please specify their status).....

5.5 TREATMENT WHILST AT WORK in senior post. **ONLY** answer this question regarding senior posts held **OTHER** than your **PRESENT POST**, otherwise go to end of questionnaire.

Whilst **WORKING** in your senior post, do you think that you have ever received less favourable treatment on grounds of your sex? (Excluding the use of the bishop's declaration and Resolutions A and/or B)
Yes ☐ (**GO TO** 5.6)
No ☐ Don't Know ☐ (go to end of questionnaire)

5.6 Who was the source of the less favourable treatment? If it came from more than one source tick the relevant boxes accordingly.
Your incumbent ☐ Members of your group ministry ☐
Your diocesan bishop ☐ The patron of the benefice ☐
Members of your team ministry ☐ Parochial church council members ☐
Others (please specify status).....

5.7 If you ticked any of the boxes, please give brief details of the incident(s).....
.....

5.7.a Was it a continuing problem or an isolated incident?.....

5.7.b Did you speak to anyone about the incident? Yes ☐ No ☐
Who?.....
If yes, was any action taken? Yes ☐ No ☐ Don't Know ☐
If yes, what action was taken?.....
.....
Did this action prevent the treatment you complained of recurring? Yes ☐
No ☐ Don't Know ☐

End of questionnaire: **TO ALL RESPONDENTS**

Thank you for your time spent in answering this questionnaire. Could I ask you to check that no answers relevant to you have been left out. Please return the questionnaire in the prepaid envelope. If research time permits I would like to conduct a sample set of interviews. Please indicate whether you would be willing to participate in a short interview with me.
Yes ☐ No ☐

Space is provided below for additional comments on sex discrimination in employment within the Church of England. Please feel free to comment on the questionnaire design too. (E.g. questions which I could have asked, badly worded or ill designed questions, layout of questionnaire.)

Pilot Questionnaire Data Analysis

(1) Sample Size: Males 20, Females 29, Total Priests 49

(2) Response Rate: Males 13/20 = 65%, Females 23/29 = 79%, Total Priests 36/49 = 73%

Table B-1 *Perceptions of sex discrimination whilst working in and searching for a post*

	YES	NO	DON'T KNOW
Working in present post			
Males	0/13	10/13 = 77%	3/13 = 23%
Females	8/22 = 36%	12/22 = 55%	2/22 = 9%
Search for a first curacy			
Males	0/13	10/13 = 77%	3/13 = 23%
Females	4/22 = 18%	17/22 = 77%	1/22 = 5%
Working in first curacy			
Males	0/4	3/4 = 75%	1/4 = 25%
Females	6/18 = 33%	10/18 = 56%	2/18 = 11%
Search for a second curacy			
Males	0/1	1/1 = 100%	0/1
Females	2/12 = 16%	7/12 = 58%	3/12 = 25%
Working in second curacy			
Males	–	–	–
Females	1/2 = 50%	1/2 = 50%	0/2
Search for a senior post			
Males	0/2	0/2	2/2 = 100%
Females	3/9 = 33%	4/9 = 45%	2/9 = 22%

	YES	NO	DON'T KNOW
Working in senior post			
Males	–	–	–
Females	1/2 = 50%	1/2 = 50%	0/2

Table B-2 *Was sex used as a criterion of selection for your present post?*

	YES	NO	DON'T KNOW
Males	6/12 = 50%	2/12 = 17%	4/12 = 33%
Females	4/22 = 18%	9/22 = 41%	9/22 = 41%

APPENDIX C

The Final Questionnaire

Male and Female Clergy in Church of England Ministry

Please tick ☑ **ONE** box only in each question unless the question asks you to tick **ALL** answers that are relevant to you. Other questions require short answers. If there is inadequate space for any of your answers please continue on the blank side of the questionnaire, indicating which question you are answering.

Please do not be put off by the length of the questionnaire. The questions are directed to clergy at different levels of experience. Thus you will not be required to answer every question. Instead the questions have been filtered so that you only answer questions relevant to your circumstances. I have made the questionnaire as short as possible, and each question has been used with a particular research objective in mind.

I hope that you will be able to complete all the relevant questions. However, if you are unable or unwilling to answer a particular question please leave it blank and move onto the next question. If there are details that you cannot remember exactly then please give estimates when you can do so with reasonable confidence, otherwise leave blank.

Your answers will remain absolutely **CONFIDENTIAL.** Names will not be associated with responses. In order to get a balanced return I would urge male as well as female clergy, to return the questionnaire. I am concerned with the presence or absence of discrimination in regard to both sexes.

SECTION ONE: To be completed by **ALL CLERGY** replying to the questionnaire.

1.1 Sex Male ☐ Female ☐

1.2 Which age band do you fall within?

20-29 ☐ 50-59 ☐

30-39 ☐ 60-69 ☐

40-49 ☐

1.3 Description of present office held

Deacon (serving first year of curacy) ☐ Team Rector ☐

Curate (who has been priested) ☐ Team Vicar ☐

Priest-in-charge ☐ NSM (Curate) ☐

Vicar/Rector ☐ NSM (Priest-in-charge) ☐

Other (please specify).....

1.3.a If you are a curate is this your first or second curacy?.....

1.4 Status of office

Beneficed ☐ Licensed for a term of years ☐

Licensed under the bishop's discretion ☐

Other (please specify).....

1.5 Dates of ordination. Please fill in month and year of ordination as applicable.
Deaconess (Admitted).....
Deacon (Ordained).....
Priest (Ordained).....

1.6 How many clerical posts have you held in the Church of England, including your present post? Please **DO NOT** include work as a deaconess.....

1.6.a How many of these posts were stipendiary posts?.....

1.7 Pre-Diaconal Experience. Please give details of experience as a lay worker or a deaconess or other Church work before ordination
.....
.....
.....

Education

1.8. Was your theological training; Full time ☐ Part time ☐

1.8.a Do you hold a university degree? Yes ☐ No ☐
1.8.b Do you hold a postgraduate degree, such as a Masters degree, MPhil or PhD?
Yes ☐ No ☐

Family

1.9 Marital status. Are you;
Single ☐ Separated or divorced ☐
Married ☐ Widowed ☐

1.9.a If you are **MARRIED** does your spouse currently hold a clerical office in the Church of England? Yes ☐ No ☐

1.9.b Do you have any other relatives who currently hold a clerical office in the Church of England? Yes ☐ No ☐

1.9.c Have you any dependants? Yes ☐ No ☐
Are these your children or other relatives?.....

You

1.10 Do you have a disability? Yes ☐ No ☐

1.11 Which broad ethnic group do you belong to?
White ☐ Asian ☐
Afro-Caribbean ☐

Other (please specify).....

1.12 How would you describe your churchmanship?
Strong catholic ☐ Central churchmanship ☐
Moderate catholic ☐ Evangelical ☐
Other (please specify).....

Now go to section two

SECTION TWO: YOUR PRESENT POST: to be completed by **ALL CLERGY** replying to the questionnaire.

The Parish (tick **ONE** box only)

2.1 How would you describe your present parish(es);
a) An inner city area ☐ **d)** A mixture of (a) and (b) ☐
b) A suburban area ☐ **e)** A mixture of (b) and (c) ☐
c) A rural area ☐
f) Other (please specify).....

2.2 Are you involved in a team ministry? Yes ☐ No ☐
2.3. Are you involved in a group ministry? Yes ☐ No ☐

2.4 How did you hear about the post? If you heard about it in several ways please tick **ALL** the relevant boxes.
Diocesan bishop ☐ Theological College ☐
Incumbent ☐ Newspaper Advertisement ☐
Mailing List (please specify which).....
Other (please specify).....

2.5 Did you have a formal interview? Yes ☐ No ☐
2.5.a If you did, were you interviewed as part of a short list or were you the sole interviewee?.....
.
2.5.b Who was present at the interview? Please indicate their status, e.g. incumbent, parish representatives, not their individual names
.....
.....

2.6 TREATMENT WHILST AT WORK

Whilst **WORKING** in your **PRESENT** post, do you think that you have ever received less favourable treatment on grounds of your sex? (Excluding the use of Resolutions A and/or B)
Yes ☐ (**GO TO** 2.7)
No ☐ Don't Know ☐ (**GO TO** 2.9)

2.7 Who was the source of the less favourable treatment? If it came from more than one source tick the relevant boxes accordingly.
Your incumbent ☐
Your diocesan bishop ☐
Members of your team ministry ☐
Members of your group ministry ☐
The patron of the benefice ☐
Parochial church council members ☐
Others (please specify status).....

2.8 If you ticked any of the boxes, please give details of the incident(s).....
.....
.....

2.8.a Is it a continuing problem or an isolated incident?.....

2.8.b Did you speak to anyone about the incident? Yes ☐ No ☐
Who?.....
If yes, was any action taken? Yes ☐ No ☐ Don't Know ☐
If yes, what action was taken?.....
.....
Has this action prevented the treatment you complained of recurring?
Yes ☐ No ☐ Don't Know ☐

2.9 Financial position regarding present post.

If you are a **NON-STIPENDIARY** minister **GO TO** 2.10.
If you are a **STIPENDIARY** minister **GO TO** section three

2.10 Is your non-stipendiary ministry; Full Time ☐ Part Time ☐
Are you in a non-stipendiary post through;
a) Choice ☐ (**GO TO** 2.11)
b) Factors beyond your control ☐ (**GO TO** 2.12)

2.11 Is it because;
(Please tick **ALL** answers which are relevant to you.)
i) You have another job ☐
ii) You have another source of income (either savings or a partner's income or a pension) ☐
iii) Other reasons of choice (please specify).....
.....
Now **GO TO** section three

2.12 Is it because;
(Please tick **ALL** answers which are relevant to you.)
i) Your applications for stipendiary posts were rejected ☐
ii) There were no stipendiary posts which you were qualified for in the area you wanted to apply to ☐

iii) Your spouse is a priest and diocesan policy states that only one spouse may hold a stipendiary post ☐
iv) Other factors beyond your control (please specify).....
.....

Now **GO TO** section three

SECTION THREE: FIRST CURACY - To be completed by **ALL CLERGY** replying to the questionnaire

3.1 Describe how you obtained your first curacy. Was it suggested to you by the diocesan bishop or a college principal? Please give details
.....
.....

3.2 At **ANY** stage in your **SEARCH** for a first curacy did you receive less favourable treatment on grounds of your sex? (Excluding the use of Resolutions A and/or B)
Yes ☐ (**GO TO** 3.2.a)
No ☐ Don't Know ☐ (**GO TO** 3.3)

3.2.a Did this happen in regard to;
One post ☐ Three or more posts ☐
Two posts ☐

3.2.b Please tick **ALL** the ways in which you feel you received less favourable treatment on grounds of your sex. If this happened to you several times please tick **ALL** the instances which you believe apply to you;
a) Not being selected for interview ☐
b) Not being selected for the post ☐
c) Treatment at interview, for example interview questions.(please specify).....
.....
d) Informal comments (please specify) .....
.....
e) Other reasons (please specify) .....
.....

3.2.c If you ticked (a) were reasons for non-selection for interview given?
Yes ☐ No ☐ Can't Remember ☐ In some cases yes in others no ☐

If **YES** what were they? If this happened to you several times please cite as many examples as possible .....
.....
.....

3.2.d If you ticked (b) were reasons for non-selection for the job given?
Yes ☐ No ☐ Can't Remember ☐ In some cases yes in others no ☐

If **YES** what were they? If this happened to you several times please cite as many examples as possible.....
.....
.....

3.2.e Who was the source(s) of the less favourable treatment?
(Please tick **ALL** boxes which are relevant to you)
The incumbent ☐
The diocesan bishop ☐
Others (please specify their status).....

3.3 TREATMENT WHILST AT WORK in first curacy. **DO NOT** answer this question if you are still in your first curacy, instead go to section four)

Whilst **WORKING** in your first curacy, do you think that you have ever received less favourable treatment on grounds of your sex? (Excluding the use of Resolutions A and/or B)
Yes ☐ (**GO TO** 3.4)
No ☐ Don't Know ☐ (**GO TO** section 4)

3.4 If you answered **YES**, who was the source of the less favourable treatment? If it came from more than one source tick the relevant boxes accordingly.
Your incumbent ☐ Members of your group ministry ☐
Your diocesan bishop ☐ The patron of the benefice ☐
Members of your team ministry ☐ Parochial church council members ☐
Others (please specify status).....

3.5 If you ticked any of the boxes, please give details of the incident(s)
.....
.....
.....

3.5.a Was it a continuing problem or an isolated incident?.....

3.5.b Did you speak to anyone about the incident? Yes ☐ No ☐
Who?.....
If yes, was any action taken? Yes ☐ No ☐ Don't Know ☐
If yes, what action was taken?.....
.....

Did this action prevent the treatment you complained of recurring? Yes ☐
No ☐ Don't Know ☐

Now go to section four

SECTION FOUR: SECOND CURACY - to be completed by **ALL CLERGY** who have applied for a second curacy

4.1 Have you sought a second curacy? Yes ☐ No ☐
If you answered **NO** go to section five
If you answered **YES**, were you successful?
Yes ☐ (**GO TO** 4.3)
No ☐ (**GO TO** 4.2)

4.2 Are there reasons **OTHER THAN YOUR SEX**, why you might have been unsuccessful? E.g. your experience or style of churchmanship. Please give details
.....
.....
.....(**GO TO** 4.3)

4.3 To **ALL CLERGY** who have applied for a second curacy, whether **SUCCESSFUL OR NOT**, have you at **ANY** stage in your search for a second curacy received less favourable treatment on grounds of your sex? (Excluding the use of Resolutions A and/or B)

Yes ☐ (**GO TO** 4.3.a)
No ☐ Don't Know ☐ (**GO TO** 4.4)

4.3.a Did this happen in regard to;
One post ☐ Three or more posts ☐
Two posts ☐

4.3.b Please tick **ALL** the ways in which you feel you received less favourable treatment on grounds of your sex. If this happened to you several times please tick **ALL** the instances which you believe apply to you;
a) Not being selected for interview ☐
b) Not being selected for the post ☐
c) Treatment at interview, for example interview questions. (please specify)
.....
.....
d) Informal comments (please specify) .....
.....
.....
e) Other reasons (please specify) .....
.....
.....

4.3.c If you ticked (a) were reasons for non-selection for interview given?
Yes ☐ No ☐ Can't Remember ☐ In some cases yes in others no ☐

If **YES** what were they? If this happened to you several times please cite as many examples as possible .....
.....
.....

4.3.d If you ticked (b) were reasons for non-selection for the job given?
Yes ☐ No ☐ Can't Remember ☐ In some cases yes in others no ☐

If **YES** what were they? If this happened to you several times please cite as many examples as possible .....
.....
.....

4.3.e Who was the source(s) of the less favourable treatment?
(Please tick **ALL** boxes which are relevant to you)
The incumbent ☐ The diocesan bishop ☐
Others (please specify their status).....

Those who were **UNSUCCESSFUL** in obtaining a second curacy **GO TO** section five.
Those who did obtain a second curacy **GO TO** 4.4

4.4 TREATMENT WHILST AT WORK in second curacy. **DO NOT** answer this question if this is your second curacy, instead go to section five.

Whilst **WORKING** in your second curacy, do you think that you have ever received less favourable treatment on grounds of your sex? (Excluding the use of Resolutions A and/or B)
Yes ☐ (**GO TO** 4.5)
No ☐ Don't Know ☐ (**GO TO** section 5)

4.5 Who was the source of the less favourable treatment? If it came from more than one source tick the relevant boxes accordingly.
Your incumbent ☐ Members of your group ministry ☐
Your diocesan bishop ☐ The patron of the benefice ☐
Members of your team ministry ☐ Parochial church council members ☐
Others (please specify status).....

4.6 If you ticked any of the boxes, please give details of the incident(s)
.....
.....
.....

4.6.a Was it a continuing problem or an isolated incident?.....

4.6.b Did you speak to anyone about the incident? Yes ☐ No ☐
Who?.....
If yes, was any action taken? Yes ☐ No ☐ Don't Know ☐
If yes, what action was taken?.....
.....
Did this action prevent the treatment you complained of recurring? Yes ☐
No ☐ Don't Know ☐

Now go to section five

SECTION FIVE: SENIOR POSTS. To be completed by all clergy who have applied for senior posts; vicar/rector, team vicar, team rector, priest-in-charge

5.1 Have you sought any of the above posts? Yes ☐ No ☐
If you answered NO go to end of questionnaire
If you answered YES were you successful?
Yes ☐ (**GO TO** 5.3)
No ☐ (**GO TO** 5.2)

5.2 Are there reasons **OTHER THAN YOUR SEX**, why you might have been unsuccessful? E.g. your experience or style of churchmanship. Please give details.....
.....(**GO TO** 5.3.)

5.3 To ALL CLERGY who have applied for a senior post, **WHETHER SUCCESSFUL OR NOT**, have you at **ANY** stage in your search for a senior post received less favourable treatment on grounds of your sex? (Excluding the use of Resolutions A and/or B)
Yes ☐ (**GO TO** 5.3.a)
No ☐ Don't Know ☐ (**GO TO** 5.4)

5.3.a Did this happen in regard to;
One post ☐ Two posts ☐
Three or more posts ☐

5.3.b Please tick **ALL** the ways in which you feel you received less favourable treatment on grounds of your sex. If this happened to you several times please tick **ALL** the instances which you believe apply to you;
a) Not being selected for interview ☐
b) Not being selected for the post ☐
c) Treatment at interview, for example interview questions. (please specify)
.....
.....
d) Informal comments (please specify) .....
.....
.....

e) Other reasons (please specify) .....
.....
.....

5.3.c If you ticked (a) were reasons for non-selection for interview given?
Yes ☐ No ☐ Can't Remember ☐ In some cases yes in others no ☐

If **YES** what were they? If this happened to you several times please cite as many examples as possible .....
.....
.....

5.3.d If you ticked (b) were reasons for non-selection for the job given?
Yes ☐ No ☐ Can't Remember ☐ In some cases yes in others no ☐

If **YES** what were they? If this happened to you several times please cite as many examples as possible .....
.....
.....

5.3.e Who was the source(s) of the less favourable treatment?
(Please tick **ALL** boxes which are relevant to you)
The diocesan bishop ☐
Patron (if different than the bishop) ☐
Parochial church council representatives ☐
Members of the group ministry ☐
Members of the team ministry ☐
Others (please specify their status).....

Those who were **UNSUCCESSFUL** in obtaining a senior post **GO TO** end of questionnaire.
Those who did obtain a senior post **GO TO** 5.4

5.4 TREATMENT WHILST AT WORK in senior post. **ONLY** answer this question regarding senior posts held **OTHER** than your **PRESENT POST**, otherwise go to end of questionnaire.

Whilst **WORKING** in your senior post, do you think that you have ever received less favourable treatment on grounds of your sex? (Excluding the use of Resolutions A and/or B)
Yes ☐ (**GO TO** 5.5)
No ☐ Don't Know ☐ (go to end of questionnaire)

5.5 Who was the source of the less favourable treatment? If it came from more than one source tick the relevant boxes accordingly.

Your incumbent ☐	Members of your group ministry ☐
Your diocesan bishop ☐	The patron of the benefice ☐
Members of your team ministry ☐	Parochial church council members ☐

Others (please specify status).....

5.6 If you ticked any of the boxes, please give details of the incident(s)
.....
.....

5.6.a Was it a continuing problem or an isolated incident? .....

5.6.b Did you speak to anyone about the incident? Yes ☐ No ☐
Who?.....
If yes, was any action taken? Yes ☐ No ☐ Don't Know ☐
If yes, what action was taken?.....
.....
Did this action prevent the treatment you complained of recurring? Yes ☐
No ☐ Don't Know ☐

End of questionnaire: **TO ALL RESPONDENTS**

Thank you for your time spent in answering this questionnaire. Could I ask you to check that no answers relevant to you have been left out. Please return the questionnaire in the prepaid envelope. If research time permits I would like to conduct a sample set of interviews. Please indicate whether you would be willing to participate in a short interview with me.
Yes ☐ No ☐

Space is provided below for additional comments on sex discrimination in employment within the Church of England. Please feel free to comment on the questionnaire design too. (E.g. questions which I could have asked, badly worded or ill designed questions, layout of questionnaire.)

Final Questionnaire Data Analysis

Table C-1 *Sample size*

	MALES	FEMALES	TOTAL PRIESTS
Blackburn	26	10	36
Chichester	36	21	57
Gloucester	19	25	44
Guildford	23	29	52
London	57	57	114
Newcastle	14	19	33
Truro	13	12	25
Worcester	12	27	39
TOTAL SURVEY	200	200	400

Table C-2 *Response rate*

	MALES	FEMALES	TOTAL PRIESTS
Blackburn			
Response rate	17/26 = 65%	7/10 = 70%	24/36 = 67%
Uncompleted returns	3/26 = 12%	2/10 = 20%	5/36 = 14%
Non returns	6/26 = 23%	1/10 = 10%	7/36 = 19%
Chichester			
Response rate	18/36 = 50%	17/21 = 81%	35/57 = 61%
Uncompleted returns	3/36 = 8%	1/21 = 5%	4/57 = 7%
Non returns	15/36 = 42%	3/21 = 14%	18/57 = 32%
Gloucester			
Response rate	15/19 = 79%	14/25 = 56%	29/44 = 66%
Uncompleted returns	1/19 = 5%	5/25 = 20%	6/44 = 14%
Non returns	3/19 = 16%	6/25 = 24%	9/44 = 20%

	MALES	FEMALES	TOTAL PRIESTS
Guildford			
Response rate	18/23 = 78%	22/29 = 76%	40/52 = 77%
Uncompleted returns	1/23 = 4%	5/29 = 17%	6/52 = 11.5%
Non returns	4/23 = 18%	2/29 = 7%	6/52 = 11.5%
London			
Response rate	40/57 = 70%	44/57 = 77%	84/114 = 74%
Uncompleted returns	3/57 = 5%	1/57 = 2%	4/114 = 3%
Non returns	14/57 = 25%	12/57 = 21%	26/114 = 23%
Newcastle			
Response rate	13/14 = 93%	14/19 = 74%	27/33 = 82%
Uncompleted returns	0/14	4/19 = 21%	4/33 = 12%
Non returns	1/14 = 7%	1/19 = 5%	2/33 = 6%
Truro			
Response rate	9/13 = 69%	11/12 = 92%	20/25 = 80%
Uncompleted returns	1/13 = 8%	0/12	1/25 = 4%
Non returns	3/13 = 23%	1/12 = 8%	4/25 = 16%
Worcester			
Response rate	8/12 = 67%	20/27 = 74%	28/39 = 72%
Uncompleted returns	1/12 = 8%	0/27	1/39 = 2%
Non returns	3/12 = 25%	7/27 = 26%	10/39 = 26%
TOTAL SURVEY			
Response rate	138/200 = 69%	149/200 = 74.5%	287/400 = 72%
Uncompleted returns	13/200 = 6.5%	18/200 = 9%	31/400 = 8%
Non returns	49/200 = 24.5%	33/200 = 16.5%	82/400 = 20%

Table C-3 *Pastoral experience of initial and achieved sample: present status*

	INITIAL SAMPLE	ACHIEVED SAMPLE
Deacons		
Males	24/200 = 12%	14/136 = 10%
Females	23/200 = 11.5%	17/147 = 12%
Priests		
Males	176/200 = 88%	122/136 = 90%
Females	177/200 = 88.5%	130/147 = 88%

Table C-4 *Pastoral experience of initial and achieved sample: ordination dates*

	INITIAL SAMPLE	ACHIEVED SAMPLE
Males		
Priested in 1988	21/200 = 10.5%	12/134 = 9%
Priested in 1989	23/200 = 11.5%	19/134 = 14%
Priested in 1990	25/200 = 12.5%	16/134 = 12%
Priested in 1991	20/200 = 10%	11/134 = 8%
Priested in 1992	23/200 = 11.5%	16/134 = 12%
Priested in 1993	24/200 = 12%	13/134 = 10%
Priested in 1994	27/200 = 13.5%	20/134 = 15%
Priested in 1995	13/200 = 6.5%	13/134 = 10%
Deacon in 1994	6/200 = 3%	1/134 = 0%
Deacon in 1995	18/200 = 9%	13/134 = 10%
Females		
Priested in 1994	159/200 = 79.5%	104/148 = 70%
Priested in 1995	18/200 = 9%	26/148 = 18%
Priested in 1996	0	1/148 = 1%
Deacon in 1994	9/200 = 4.5%	2/148 = 1%
Deacon in 1995	14/200 = 7%	15/148 = 10%

Table C-5 *Perceptions of sex discrimination whilst working in and searching for a post*

	YES	NO	DON'T KNOW
Working in present post			
Males	1/138 = 1%	133/138 = 96%	4/138 = 3%
Females	45/148 = 30%	97/148 = 66%	6/148 = 4%
Search for a first curacy			
Males	3/128 = 2%	123/128 = 96%	2/128 = 2%
Females	24/128 = 19%	89/128 = 68%	15/128 = 12%
Working in first curacy			
Males	2/82 = 2.5%	78/82 = 95%	2/82 = 2.5%
Females	36/75 = 48%	39/75 = 52%	0/75
Search for a second curacy			
Males	0/35	33/35 = 94%	2/35 = 6%
Females	7/43 = 16%	34/43 = 79%	2/43 = 5%
Working in second curacy			
Males	0/15	14/15 = 93%	1/15 = 7%
Females	7/16 = 44%	8/16 = 50%	1/16 = 6%
Search for a senior post			
Males	2/62 = 3%	58/62 = 94%	2/62 = 3%
Females	15/39 = 39%	20/39 = 51%	4/39 = 10%
Working in senior post			
Males	0/4	4/4 = 100%	0/4
Females	1/2 = 50%	1/2 = 50%	0/2

Table C-6 *Present sex discrimination cross tabulated with diocese*

	MALES	FEMALES
Blackburn	–	3/7 = 43%
Chichester	–	11/21 = 52%
Gloucester	–	2/14 = 14%
Guildford	–	6/22 = 27%
London	1/40 = 2.5%	10/44 = 23%
Newcastle	–	3/14 = 21%
Truro	–	5/11 = 45%
Worcester	–	4/20 = 20%

Table C-7 *Characteristics of the sample group*

	MALE PRIESTS	FEMALE PRIESTS
Parochial offices		
Deacon	14/136 = 10%	17/147 = 12%
Curate (priested)	61/136 = 45%	93/147 = 63%
Priest-in-charge	7/136 = 5%	13/147 = 9%
Vicar/rector	37/136 = 27%	7/147 = 5%
Team vicar	13/136 = 10%	7/147 = 5%
Team rector	–	1/147 = 1%
Other	4/136 = 3%	8/147 = 5%
Stipendiary status		
NSM curate	28/136 = 21%	57/147 = 39%
NSM priest-in-charge	3/136 = 2%	3/147 = 2%
Stipendiary clergy	105/136 = 77%	87/147 = 59%
Experience as a deaconess		
Experience as a deaconess	–	41/149 = 28%
No experience as a deaconess	–	108/149 =72%

	MALE PRIESTS	FEMALE PRIESTS
Age		
Band 20-29	2/138 = 1%	3/147 = 2%
Band 30-39	73/138 = 53%	17/147 = 12%
Band 40-49	32/138 = 23%	47/147 = 32%
Band 50-59	20/138 = 15%	55/147 = 37%
Band 60-69	11/138 = 8%	25/147 = 17%
Disability		
Disability	4/138 = 3%	6/147 = 4%
No disability	134/138 = 97%	141/147 = 96%
Ethnic group		
White	137/138 = 99%	144/146 = 99%
Afro-Caribbean	0/138	1/146 = 0.5%
Asian	0/138	1/146 = 0.5%
Other	1/138 = 1%	0/146
Churchmanship		
Strong catholic	14/135 = 10%	3/145 = 2%
Moderate catholic	45/135 = 33%	55/145 = 38%
Central churchmanship	25/135 = 19%	42/145 = 29%
Evangelical	45/135 = 33%	34/145 = 23%
Catholic/evangelical	5/135 = 4%	7/145 = 5%
Other	1/135 = 1%	4/145 = 3%
Marital status		
Single	28/137 = 20%	54/147 = 37%
Married	107/137 = 78%	75/147 = 51%
Separated or divorced	2/137 = 2%	10/147 = 7%
Widowed	0/137	8/147 = 5%
Spouse a cleric	3/107 = 3%	15/75 = 20%
Spouse not a cleric	104/107 = 97%	60/75 = 80%
Other family relationships		
Clergy relatives	24/137 = 18%	17/140 = 12%

	MALE PRIESTS	FEMALE PRIESTS
Relatives not clerics	113/137 = 82%	123/140 = 88%
Dependants	88/136 = 65%	56/141 = 40%
No dependants	48/136 = 35%	85/141 = 60%
Education		
Full-time theological training	102/138 =74%	59/147 = 40%
Part-time theological training	36/138 = 26%	88/147 = 60%
Degree	96/138 = 70%	72/147 = 49%
No degree	42/138 = 30%	75/147 = 51%
Postgraduate degree	25/138 = 18%	24/147 = 16%
No postgraduate degree	113/138 = 82%	123/147 = 84%
Parish		
Inner city	15/138 = 11%	14/148 = 9%
Suburban area	47/138 = 34%	47/148 = 32%
Rural area	25/138 = 18%	32/148 = 22%
Mixture of inner city and suburbs	23/138 = 17%	20/148 = 14%
Mixture of suburbs and rural	14/138 = 10%	19/148 = 13%
Town	9/138 = 6%	11/148 = 7%
Other	5/138 = 4%	5/148 = 3%
Team minister	29/135 = 21%	38/144 = 26%
Not a team minister	106/135 = 79%	106/144 = 74%
Group minister	8/135 = 6%	18/144 = 12.5%
Not a group minister	127/135 = 94%	126/144 = 87.5%

Table C-8 *Characteristics of the sample group cross tabulated with present sex discrimination*

	ANSWERED YES TO PRESENT SEX DISCRIMINATION - MALE PRIESTS	ANSWERED YES TO PRESENT SEX DISCRIMINATION - FEMALE PRIESTS
Parochial offices		
Deacon	–	5/17 = 29%
Curate (priested)	–	29/93 = 31%
Priest-in-charge	–	3/13 = 23%
Vicar/rector	1/37 = 3%	3/7 = 43%
Team vicar	–	3/7 = 43%
Team rector	–	–
Other	–	1/8 = 12.5%
NSM curate	–	19/57 = 33%
NSM priest-in-charge	–	1/3 = 33%
First curates	–	23/71 = 32%
Second curates	–	11/35 = 31%
Ordination dates to the priesthood*		
1988	1/12 = 8%	–
1994	–	30/104 = 29%
1995	–	10/26 = 38%
Ordination dates to the diaconate		
1987	1/12 = 8%	12/51 = 23%
1988	–	1/7 = 14%
1989	–	3/7 = 43%
1990	–	3/8 = 37.5%
1991	–	7/13 = 54%

* See Table C-4 for the spread of ordination dates in the sample.

	ANSWERED YES TO PRESENT SEX DISCRIMINATION - MALE PRIESTS	ANSWERED YES TO PRESENT SEX DISCRIMINATION - FEMALE PRIESTS
1992	–	3/16 = 19%
1993	–	4/8 = 50%
1994	–	8/23 = 35%
1995	–	4/15 = 27%
Experience as a deaconess	–	10/41 = 24%
Age		
Band 20-29	–	1/3 = 33%
Band 30-39	–	4/17 = 24%
Band 40-49	–	16/47 = 34%
Band 50-59	1/20 = 5%	15/55 = 27%
Band 60-69	–	9/25 = 36%
Disability		
Has a disability	–	2/6 = 33%
Ethnic group		
White	1/137 = 1%	44/144 = 31%
Afro-Caribbean	–	–
Asian	–	–
Other	–	–
Churchmanship		
Strong catholic	–	1/3 = 33%
Moderate catholic	–	21/55 = 38%
Central churchmanship	1/25 = 4%	11/42 = 26%
Evangelical	–	8/34 = 24%
Catholic/evangelical	–	2/7 = 29%
Other	–	1/4 = 25%
Marital status		
Single	–	16/54 = 30%

	ANSWERED YES TO PRESENT SEX DISCRIMINATION - MALE PRIESTS	ANSWERED YES TO PRESENT SEX DISCRIMINATION - FEMALE PRIESTS
Married	1/107 = 1%	24/75 = 32%
Separated or divorced	–	2/10 = 20%
Widowed	–	3/8 = 37.5%
Spouse a cleric	–	4/15 = 27%
Spouse not a cleric	1/104 = 1%	20/60 = 33%
Other family relationships		
Clergy relatives	–	7/17 = 41%
Relatives not clerics	1/113 = 1%	36/123 = 29%
Dependants	1/88 = 1%	17/56 = 30%
No dependants	–	26/85 = 31%
Education		
Full-time theological training	1/102 = 1%	13/59 = 22%
Part-time theological training	–	32/88 = 36%
Degree	–	22/72 = 31%
No degree	1/42 = 2.5%	23/75 = 31%
Postgraduate degree	–	8/24 = 33%
No postgraduate degree	1/113 = 1%	37/123 = 30%
Parish		
Inner city	–	5/14 = 36%
Suburban area	–	13/47 = 28%
Rural area	–	10/32 = 31%
Mixture of inner city and suburbs	–	6/20 = 30%
Mixture of suburbs and rural	1/14 =7%	4/19 = 21%
Town	–	6/11 = 55%
Other	–	1/5 = 20%
Team minister	–	13/38 = 34%

	ANSWERED YES TO PRESENT SEX DISCRIMINATION - MALE PRIESTS	ANSWERED YES TO PRESENT SEX DISCRIMINATION - FEMALE PRIESTS
Not a team minister	1/106 = 1%	31/106 = 29%
Group minister	–	6/18 = 33%
Not a group minister	1/127 = 1%	38/126 = 30%

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