



Isle of Man
Government

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Council of Ministers

Consultation on the draft Equality Bill

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Foreword by the Chief Minister

The Equality Bill is one of the most important pieces of social legislation to be progressed in the Isle of Man in recent times.

The Bill is a reflection of the priority given by this Government to the protection of the vulnerable. It embodies the values of fairness and tolerance that are the foundation stones of any decent, civilised society.

I believe that these values are shared by the overwhelming majority of people in our Island, but sadly we are not immune to incidents of discrimination. The proposed legislation should act as a deterrent against such behaviour and provide a means of redress for its victims.

Equality, however, is not about giving preference to certain sections of society or minority groups. It seeks to ensure fair and equal treatment for all, in a way that allows everyone to play their part in the social and economic life of the community.

Externally, the passage of a comprehensive equality law would send out a strong message confirming that the Isle of Man is a modern, inclusive nation which complies with international standards of social justice. It would help to dispel the negative perceptions that have damaged the Island's reputation in the past.

This is a substantial Bill, building upon and superseding existing legislation which offers some protection against discrimination, mainly in the field of employment.

Subject to a number of exceptions, the Equality Bill makes it unlawful for anyone to discriminate, in the provision of goods and services as well as in employment, on the grounds of specified characteristics including age, disability, gender, race, religion and sexual orientation.

The Bill, which would replace the Disability Discrimination Act 2006, also requires organisations to make reasonable adjustments to accommodate the needs of disabled people.

The Bill is largely based on the United Kingdom's Equality Act 2010 but with some Isle of Man adaptations, principally in respect of the enforcement structure. The UK legislation provides a comprehensive equality framework that has been tested and adjusted, that comes with a large body of guidance and case-law, and which should be familiar to businesses or individuals with experience of operating in both jurisdictions.

It is appreciated that the draft Equality Bill is lengthy and detailed, and for this reason the Council of Ministers has agreed to an extended period of public consultation lasting three months.

Given the scope and significance of the Bill, I would encourage the fullest possible engagement with the consultation, to help us make sure that the final form of this legislation is fair, effective and right for the Isle of Man.

Hon Allan Bell MHK
Chief Minister

1. Background and introduction

- 1.1 An Employment Equality Bill had been included in the Isle of Man Government's legislative programme for several years and a public consultation on the general principles of such a Bill was carried out by the former Department of Trade and Industry (DTI) in 2008. As might be expected, a range of views were expressed but in general there was support for the principle of the Bill and following consideration of the responses to the consultation the Council of Ministers agreed that the Bill should be drafted. However, due to resource issues, including a reduction in legislation officer staff in the DTI, and competing priorities the Bill was not progressed at that time.
- 1.2 In November 2011 the Council of Ministers considered a paper submitted by the Chief Secretary, with input from the Department of Economic Development, which drew Council's attention to gaps in the protection from discrimination for the people of the Island and Council was advised of developments in the United Kingdom, in particular the Equality Act 2010¹ ("the UK 2010 Act") which provided, in a single Act of Parliament, comprehensive protection against discrimination in respect of both employment and the provision of goods and services on a wide range of grounds.
- 1.3 The Council of Ministers agreed that a broad Equality Bill instead of the Employment Equality Bill should be progressed and that the former Chief Secretary's Office (now part of the Cabinet Office) should have overall responsibility for the draft Bill, but it should work with the Department of Economic Development (DED) in respect of the employment law aspects of the Bill, and with other relevant Departments as appropriate.
- 1.4 Unfortunately, again due to competing legislative priorities and limited resources, progress on this Bill was quite limited until May 2013 when an incident of discrimination led to significant adverse publicity for the Island and the Chief Minister asked for the drafting of the Bill, based on the UK 2010 Act, to be accelerated. It should be noted that this Bill does not introduce marriage for same sex couples in the Island.
- 1.5 As a result of close collaboration between officers from the Cabinet Office, DED and the Attorney General's Chambers, and with input from a number of other Departments and bodies from across Government, successive working drafts of the Bill have been prepared and refined. Following an initial period of consultation within Government, a public consultation draft of the Bill was prepared for the Council of Ministers to consider. At its meeting on 31 July 2014 the Council of Ministers agreed that the Bill should be issued for a three month period of public consultation.
- 1.6 Because of the length of the Bill this document tries to help readers by drawing attention to some of the more significant issues in the Bill and also to the main differences between the Bill and the UK 2010 Act. The document includes a number of specific questions and you may wish to answer (some or all) of these questions but we will be happy to receive comments on anything about the Bill or about equality and discrimination generally.
- 1.7 Although a very considerable amount of work on the Equality Bill has already taken place, it should be stressed that the draft which has been published for consultation is still a work in progress and not the finished article. The Bill may still include drafting

¹ This Act was largely a consolidation exercise and even prior to its enactment the UK had a stronger and more comprehensive framework against discrimination than presently exists in the Island.

and typographical errors and if you find any such errors we would be grateful if you could tell us about these in addition to any comments that you may have about the policy issues in the Bill or the broader issues of equality and discrimination.

- 1.8 Whilst there may be some costs from certain of the provisions of the Bill there will also be benefits – social, financial and reputational – and it is believed that in overall terms this legislation will be beneficial for the Island.
- 1.9 If you would like further information or clarification about any part of Bill please contact the Cabinet Office using the address below.

2. Consultation Process

- 2.1 Any comments or questions should be submitted in writing to:

Ms Anne Shimmin
Cabinet Office
Government Office
Bucks Road
Douglas
Isle of Man
IM1 3PN

or by email to: equality@gov.im

- 2.2 However, if by reason of a disability you are unable to respond or get in touch in writing please telephone 685202.
- 2.3 The closing date for the receipt of comments is **Friday 14 November 2014**.
- 2.4 When submitting your views please indicate if you are responding on behalf of an organisation.
- 2.5 To ensure that the process is transparent and consistent with the Government's Code of Conduct on Consultation² responses can only be accepted if you provide your name with your response.
- 2.6 The purpose of consultation is not to be a referendum but an information, views and evidence gathering exercise from which to take an informed decision. In any consultation exercise the responses received do not guarantee changes will be made to what has been proposed.
- 2.7 A summary of the responses will be published after the consultation has closed.
- 2.8 Unless specifically requested otherwise, any responses received may be published either in part or in their entirety along with the name of the person or body that has submitted the response. Please mark your response clearly if you wish your response and/or name to be kept confidential. Confidential responses will be included in any statistical summary and numbers of comments received.

² http://www.gov.im/lib/docs/cso/consultations/code_of_practice_on_consultation_200.pdf

3. The basics of the draft Bill

Overview

- 3.1 The draft Bill is to a large degree based on the UK's Equality Act 2010³ with some Isle of Man adaptations. This means that the Bill is necessarily quite lengthy and detailed. Indeed, any comprehensive framework against discrimination whether set out in a single piece of legislation or several pieces of legislation would inevitably need to be quite lengthy and detailed. It is simply not practical or advisable to have a very short legislative framework – such as “discrimination is prohibited”. It would provide no certainty to employers, employees, service providers or service users; what constituted “discrimination” would be much more open to personal interpretation; there will always need to be a range of exceptions to the general rule; and the only way to settle disagreements would be by the courts (e.g. Petition of Doleance).
- 3.2 The Bill consists of 15 Parts (which in some cases are sub-divided) and 24 Schedules⁴. The structure of the Bill is as follows:

PART	SUMMARY
Part 1	Introductory provisions relating to the short title, commencement, general interpretation and further interpretation in respect of maternity leave.
Part 2 and Schedule 1	Establishes the key concepts on which the Bill is based including: <ul style="list-style-type: none">• the characteristics which are protected (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation);• the definitions of direct discrimination (including because of a combination of two relevant protected characteristics), discrimination arising from disability, indirect discrimination, harassment and victimisation. These key concepts are then applied in the subsequent Parts of the Bill.
Part 3 and Schedules 2 and 3	Makes it unlawful to discriminate against, harass or victimise a person when providing a service (which includes the provision of goods or facilities) or when exercising a public function.
Part 4 and Schedules 4 and 5	Makes it unlawful to discriminate against, harass or victimise a person when disposing of (for example, by selling or letting) or managing premises.
Part 5 and Schedules 6, 7, 8 and 9	Makes it unlawful to discriminate against, harass or victimise a person at work or in employment services. Also contains provisions relating to equal pay between men and women; and pregnancy and maternity pay. It also contains provisions restricting the circumstances in which potential employees can be asked questions about disability or health.
Part 6 and Schedules 10, 11, 12 and 13	Makes it unlawful for education bodies to discriminate against, harass or victimise a school pupil or student or applicant for a place.
Part 7 and Schedules 14 and 15	Makes it unlawful for associations (for example, private clubs and political organisations) to discriminate against, harass or victimise members, associates or guests.

³ As it currently stands following a number of amendments that have been made since its enactment.
<http://www.legislation.gov.uk/ukpga/2010/15/contents>

⁴ A further Schedule will be added to the end of the Bill to provide a glossary of terms when the Bill has been finalised after the consultation.

PART	SUMMARY
Part 8	Prohibits other forms of conduct, including discriminating against or harassing of an ex-employee or ex-pupil, for example: instructing a third party to discriminate against another; or helping someone discriminate against another. Also determines the liability of employers and principals in relation to the conduct of their employees or agents.
Part 9 and Schedules 16 and 17	Deals with enforcement of the Act's provisions through the proposed Employment and Equality Tribunal and related matters.
Part 10	Makes terms in contracts, collective agreements or rules of undertakings unenforceable or void if they result in unlawful discrimination, harassment or victimisation.
Part 11	Establishes a general duty on public authorities to have due regard, when carrying out their functions, to the need: to eliminate unlawful discrimination, harassment or victimisation; to advance equality of opportunity; and to foster good relations. Also contains provisions which enable an employer or service provider or other organisation to take positive action to overcome or minimise a disadvantage arising from people possessing particular protected characteristics.
Part 12	Requires taxis, other private hire vehicles and public service vehicles (such as buses) to be accessible to disabled people and to allow them to travel in reasonable comfort.
Part 13 and Schedule 18	Deals with consent to make reasonable adjustments to premises and improvements to let dwelling houses.
Part 14 and Schedules 19 and 20	Establishes exceptions to the prohibitions in the earlier parts of the Act in relation to a range of conduct, including action required by an enactment; protection of women; educational appointments; national security; the provision of benefits by charities and sporting competitions.
Part 15 and Schedules 21, 22, 23, 24 and 25	Contains miscellaneous and closing provisions including powers for codes of practice; an enabling power for the Council of Ministers to be able to take steps to promote the legislation; the effect of the Bill in respect of Manx ships and seafarers; the Bill's Crown application; information society services; power to make future amendments to harmonise with UK equality legislation; it introduce the Schedules containing consequential amendments, additional employment law amendments and repeals; and the Tynwald procedure for subordinate legislation.

(Drafting note: in relation to public sector employment the present draft of the Bill is based on the assumption that the Public Services Commission Bill will be passed in its current form, obtain Royal Assent and be brought into operation prior to the enactment of this Bill.)

3.3 It was considered that the UK 2010 Act represented a practical, pragmatic and appropriate starting point for developing Manx legislation for a number of reasons:

- the UK Act brought together and replaced a number of separate pieces of legislation which in some cases had been in operation for a significant number of years and so had been tried, tested and amended; so people will be able to find all equality provisions in a single place (subject to any necessary subordinate legislation);
- starting entirely from scratch in trying to develop legislation against discrimination in the Island would have been a considerably more complex, resource intensive and time consuming task;

- businesses that operate both in the UK and in the Island should already have a general awareness of the UK 2010 Act; and
- it will be possible to draw on and adapt the considerable amount of existing UK guidance and case-law concerning the operation of the UK legislation.

Q1. Do you have any comments about comprehensively dealing with discrimination in the Island?

Q2. Do you have any comments about the Island's Equality Bill being based on the UK's Equality Act 2010?

"Protected characteristics"

3.4 The basic concept of the legislation is that discrimination against a person who has certain "protected characteristics" is prohibited unless there is an objectively justifiable⁵ reason for the different treatment or a valid exception applies. The list of protected characteristics in the Bill is identical to that in the UK 2010 Act. The following characteristics are protected characteristics—

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

Q3. Do you have any comments on the list of "protected characteristics"?

Areas covered by the Bill

3.5 In broad terms, the Bill prohibits discrimination relating to the protected characteristics in two main areas (in the public, private and voluntary sectors) which impact on the lives of every person in the Island in one way or another:

- **Employment** (including recruitment, during employment, retirement and employer pensions); and
- **Provision of Goods and Services**, including for example—
 - Education;
 - Benefits;
 - Health care and social care;
 - Housing;
 - Retail services;
 - Insurance;
 - Transport;
 - Pensions.

⁵ There is guidance on the internet about this: e.g. <http://www.stammeringlaw.org.uk/discrimination/justification.htm>

3.6 The exceptions that apply in relation to particular protected characteristics and in particular areas are set out in the Bill. For example, there are exceptions in respect of race/national origin in order to allow the Island’s immigration and work permit legislation to continue to operate.

Current protection against discrimination

3.7 The table below sets out in the left hand column the protected characteristics under the Bill in respect of which discrimination will be unlawful (with some limited exceptions) and it shows whether (✓) or not (X) there is currently protection against discrimination in these areas in the Island. The Bill will provide comprehensive legal protection against discrimination in the Island across all of the protected characteristics.

PROTECTED CHARACTERISTIC	EXISTING PROTECTION IN THE ISLAND?		
	EMPLOYMENT Employees protected against dismissal.	EMPLOYMENT Protection at recruitment and during employment for employees and other workers	GOODS AND SERVICES Protection against discrimination by those who provide goods and services
Age	X	X	X
Disability	X	X	X ⁶
Gender reassignment	X	X	X
Marriage / Civil Partnership	✓	✓	X
Race	✓	X	✓
Religion / belief	✓	X	X
Sex	✓	✓	X
Sexual Orientation	✓	X	X

Q4. Do you have any comments about the coverage of the Bill?

Prohibited Conduct

3.8 The following conduct will be prohibited by the Bill:

- Direct discrimination;
- Discrimination arising from disability;
- Indirect discrimination;
- Harassment; and
- Victimisation.

3.9 **Direct discrimination** occurs where the reason for one person being treated less favourably than another person is a protected characteristic. It is defined (in clause 14) in a way that is broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example, is disabled), or because the victim is wrongly thought to have it (for example, a particular religious belief).

⁶ The Disability Discrimination Act 2006 would have dealt with discrimination against disabled persons in the provision of goods and services (but not employment) but pending the enactment of the Equality Bill that Act will not now be brought into operation.

3.10 However, a different approach applies where the reason for the treatment is marriage or civil partnership, in which case only less favourable treatment because of the victim's status amounts to discrimination. It must be the victim, rather than anybody else, who is married or a civil partner.

3.11 The clause concerning direct discrimination also provides that:

- for age, there is a defence of justification if the conduct in question is a proportionate means of achieving a legitimate aim;
- in relation to disability it is not unlawful discrimination to treat a disabled person more favourably than a person who is not disabled;
- racial segregation is always discriminatory;
- in non-work cases, treating a woman less favourably because she is breast-feeding a baby amounts to direct sex discrimination; and
- men cannot claim privileges for women connected with pregnancy or childbirth.

Q5. Do you have any comments about direct discrimination?

3.12 The Bill includes a clause which deals specifically with **discrimination arising from disability** so that it is discrimination to treat a disabled person less favourably not just because of the person's disability itself but also because of something arising from, or in consequence of, his or her disability, such as the need to take a period of disability-related absence. It is, however, possible to justify such treatment if it can be shown to be a proportionate means of achieving a legitimate aim. For this type of discrimination to occur, the employer or other person must know, or reasonably be expected to know, that the disabled person has a disability.

3.13 The provision was included in the UK 2010 Act, and mirrored in the Bill, because in 2008 a House of Lords judgement⁷ limited the degree of protection from disability-related direct discrimination that had been intended for disabled people. The purpose of the provision in the UK 2010 Act is to re-establish an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arose because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment.

3.14 An example relating to discrimination arising from disability is as follows:

- The licensee of a pub refuses to serve a man who has cerebral palsy because she believes that he is drunk as he has slurred speech. However, the slurred speech is a consequence of his impairment. If the licensee did not know, and could not reasonably have been expected to know, that the customer was disabled, she has not subjected him to unlawful discrimination arising from his disability.
- However, if a reasonable person would have known that the behaviour was due to a disability, the licensee would have subjected the customer to discrimination arising from his disability, unless she could show that ejecting him was a proportionate means of achieving a legitimate aim.

Q6. Do you have any comments about discrimination arising from a disability?

⁷ London Borough of Lewisham v Malcolm [2008] UKHL 43

3.15 **Indirect discrimination** occurs when a 'provision, criterion or practice' which applies in the same way for everybody has an effect which particularly disadvantages people with a protected characteristic. Where a particular group is disadvantaged in this way, a person in that group is indirectly discriminated against if he or she is put at that disadvantage, unless the person applying the policy can justify it as a proportionate means of achieving a legitimate aim. Indirect discrimination can also occur when a policy would put a person at a disadvantage if it were applied. This means, for example, that where a person is deterred from doing something, such as applying for a job or taking up an offer of service, because a policy which would be applied would result in his or her disadvantage, this may also be indirect discrimination. Indirect discrimination applies to all the protected characteristics, apart from pregnancy and maternity although it does apply to the protected characteristic of sex which would cover most pregnancy and maternity issues in any case.

3.16 Indirect discrimination against women in respect of employment is already prohibited in the Island under the Employment (Sex Discrimination) Act 2000 and on the grounds of race in relation to the provision of goods and services under the Race Relations Act 2004.

3.17 Examples of indirect discrimination are as follows:

- A woman is forced to leave her job because her employer operates a practice that staff must work in a shift pattern which she is unable to comply with because she needs to look after her children at particular times of day, and no allowance is made because of those needs. This would put women (who are shown to be more likely to be responsible for childcare) at a disadvantage, and the employer will have indirectly discriminated against the woman unless the practice can be justified.
- An observant Jewish engineer who is seeking an advanced diploma decides (even though he is sufficiently qualified to do so) not to apply to a specialist training company because it invariably undertakes the selection exercises for the relevant course on Saturdays. The company will have indirectly discriminated against the engineer unless the practice can be justified.

Q7. Do you have any comments about indirect discrimination?

3.18 There are three types of **harassment** under the Bill:

- The first type, which applies to all the protected characteristics apart from pregnancy and maternity, and marriage and civil partnership, involves unwanted conduct which is related to a relevant characteristic and has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant or of violating the complainant's dignity.
- The second type is sexual harassment which is unwanted conduct of a sexual nature where this has the same purpose or effect as the first type of harassment.
- The third type is treating someone less favourably because he or she has either submitted to or rejected sexual harassment, or harassment related to sex or gender reassignment.

3.19 In determining the effect of the unwanted conduct the Tribunal ([see page 24](#)) may need to balance competing rights on the facts of a particular case. For example, this could include balancing the rights of freedom of expression (as set out in Article 10 of the European Convention on Human Rights) and of academic freedom against the right not to be offended in deciding whether a person has been harassed.

3.20 Examples of harassment are as follows:

- A white worker who sees a black colleague being subjected to racially abusive language could have a case of harassment if the language also causes an offensive environment for her.
- An employer who displays any material of a sexual nature, such as a calendar with topless women, may be harassing employees where this makes the workplace an offensive place to work for any employee, be they female or male.
- A shopkeeper propositions one of his shop assistants. She rejects his advances and then is turned down for promotion which she believes she would have got if she had accepted her boss's advances. The shop assistant would have a claim of harassment.

Q8. Do you have any comments about harassment?

3.21 The Bill provides that **victimisation** takes place where one person treats another badly because the other person has, in good faith, brought legal proceedings concerning a protected characteristic, given evidence in connection with such proceedings or made an allegation that someone has broken the law on equality. A person is not protected from victimisation where he or she maliciously makes or supports an untrue complaint. Only an individual can bring a claim for victimisation.

3.22 Examples relating to victimisation are as follows:

- A woman makes a complaint of sex discrimination against her employer. As a result, she is denied promotion. The denial of promotion would amount to victimisation.
- A gay man sues a publican for persistently treating him less well than heterosexual customers. Because of this, the publican bars him from the pub altogether. This would be victimisation.
- An employer threatens to dismiss a staff member because he thinks she intends to support a colleague's sexual harassment claim. This threat could amount to victimisation.
- A man with a grudge against his employer knowingly gives false evidence in a colleague's discrimination claim against the employer. He is subsequently dismissed for supporting the claim. His dismissal would not amount to victimisation because of his untrue and malicious evidence.

Q9. Do you have any comments about victimisation?

Disability and reasonable adjustments

General

3.23 Under clause 7 of the Bill a person has a disability for the purposes of the Bill if the person has a physical or mental impairment and the impairment has a substantial and long term adverse effect on the person's ability to carry out normal day-to-day activities. Schedule 1 to the Bill includes additional provision concerning the determination of whether a particular condition would constitute an impairment for the

purposes of the Bill and, as in the UK⁸, it is envisaged that this would be expanded on by both secondary legislation and guidance after Royal Assent.

- 3.24 Disability is treated slightly differently in the Bill than the other protected characteristics because to allow persons with a disability to participate as fully as possible in the work environment and to access as wide a range of goods and services it may be necessary for their employers (and prospective employers) or service providers to make "reasonable adjustments" to accommodate the disabled person.
- 3.25 Clause 21 of the Bill defines what is meant by the duty to make reasonable adjustments for the purposes of the Bill and lists the Parts of the Bill which impose the duty and the related Schedules which stipulate how the duty will apply in relation to each Part. The duty comprises three requirements which apply where a disabled person is placed at a substantial disadvantage in comparison with non-disabled people:
- the first requirement covers changing the way things are done (such as changing a practice),
 - the second covers making changes to the built environment (such as providing access to a building), and
 - the third covers providing auxiliary aids and services (such as providing special computer software or providing a different service).
- 3.26 The clause makes it clear that where the first or third requirements involves the way in which information is provided, a reasonable step includes providing that information in an accessible format. It sets out that under the second requirement, taking steps to avoid the disadvantage will include removing, altering or providing a reasonable means of avoiding the physical feature, where it would be reasonable to do so. It also makes clear that, except where the Act states otherwise, it would not be reasonable for a person bound by the duty to pass on the costs of complying with it to an individual disabled person.
- 3.27 Failure to comply with the duty to make reasonable adjustments will constitute unlawful discrimination on the grounds of disability for the purposes of the Bill.
- 3.28 There are powers to make Regulations (i.e. secondary legislation) under the Bill about a range of issues relating to the reasonable adjustment duty, such as the circumstances in which a particular step will be regarded as reasonable.
- 3.29 A number of examples in relation to the duty, and the failure to comply with it, are as follows:
- A utility company knows that significant numbers of its customers have a sight impairment and will have difficulty reading invoices and other customer communications in standard print, so must consider how to make its communications more accessible. As a result, it might provide communications in large print to customers who require this.
 - A bank is obliged to consider reasonable adjustments for a newly recruited financial adviser who is a wheelchair user and who would have difficulty negotiating her way around the customer area. In consultation with the new

⁸ See the Equality Act 2010 (Disability) Regulations 2010 (SI 2010/2128) - <http://www.legislation.gov.uk/uksi/2010/2128/contents/made>
Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85038/disability-definition.pdf

adviser, the bank rearranges the layout of furniture in the customer area and installs a new desk. These changes result in the new adviser being able to work alongside her colleagues.

- The organiser of a large public sector conference knows that hearing-impaired delegates are likely to attend. She must therefore consider how to make the conference accessible to them. Having asked delegates what adjustments they need, she decides to engage British Sign Language (BSL)/English interpreters, have a speech-to-text typist and an induction loop to make sure that the hearing-impaired delegates are not substantially disadvantaged.
- An employee develops carpal tunnel syndrome which makes it difficult for him to use a standard keyboard. The employer refuses to provide a modified keyboard or voice-activated software which would overcome the disadvantage. This could be an unlawful failure to make a reasonable adjustment which would constitute unlawful discrimination.
- A private club has a policy of refusing entry to male members not wearing a collar and tie for evening events. A member with psoriasis (a severe skin condition which can make the wearing of a collar and tie extremely painful) could bring a discrimination claim if the club refused to consider waiving this policy for him.
- A visually-impaired prospective tenant asks a letting agent to provide a copy of a tenancy agreement in large print. The agent refuses even though the document is held on computer and could easily be printed in a larger font. This is likely to be an unlawful failure to make a reasonable adjustment which would constitute unlawful discrimination.

3.30 Legislation in this area has been anticipated since before the passing of the Disability Discrimination Act 2006 although that Act does not deal with discrimination in the workplace (or in education) against disabled persons. Whilst it is now not intended that the 2006 Act will be brought into operation work on access for disabled persons to premises has been continuing, ahead of any legislative requirements, through the Multi-Agency Forum on the Disability Discrimination Act 2006 with the piloting of the tiered award scheme and Crossroads Care's access service.

3.31 In the UK it is now thought that the average cost of reasonable adjustments for a person with a disability at work is about £75⁹. In many cases these adjustments are simple and inexpensive or free, although there will be some cases where greater expense is involved. The important point is that adjustments only have to be made if those adjustments are objectively reasonable. Factors such as the cost and practicality of any adjustments and the size and nature of the organisation involved are included in this consideration. Reasonableness is one of the issues being considered by the Multi-Agency Forum.

3.32 If the employer (or service provider) and employee (or service user) cannot agree whether changes to accommodate a disabled person would be reasonable the issue will be determined by the proposed Employment and Equality Tribunal.

3.33 It may be noted that the Employment (Persons with Disabilities etc.) Scheme 1999¹⁰ is a longstanding Scheme under which the Department of Economic Development may already make grants to provide assistance in respect of a qualifying person for the following purposes:

⁹ <http://www.peoplebusiness.co.uk/news.asp?ArticleID=59> - February 2014

¹⁰ [https://www.gov.im/categories/working-in-the-isle-of-man/employment-\(persons-with-a-disability\)-scheme/](https://www.gov.im/categories/working-in-the-isle-of-man/employment-(persons-with-a-disability)-scheme/)

- (a) help in seeking employment;
- (b) the provision of aids or equipment in relation to employment, such as a person not suffering from disability, ill-health or illness would not need for that employment;
- (c) alterations to any premises, place of work or equipment to enable the person to engage in employment;
- (d) help in transport to and from work;
- (e) help while at work.

Grants of up to £10,000 over any 3 year period may be made to the person or their employer/prospective employer, whichever is more appropriate.

Q10. Do you have any comments about what constitutes a disability or about making reasonable adjustments for persons with a disability?

Transport

- 3.34 Part 12 of the Bill contains provisions concerning the use of certain forms of transport by disabled persons. In particular it deals with public passenger vehicles, private hire vehicles and taxis.
- 3.35 The ultimate aim is of course to improve the access of persons who have a relevant disability to these types of transport. However, it is recognised that this will need to be progressed in a carefully considered manner and a phased approach to the implementation of the provisions in Part 12 of the Bill will almost certainly be required.
- 3.36 The Department of Infrastructure (DOI) is given powers to make two sets of "accessibility regulations" – one for public passenger vehicles (PPV) and the other for taxis.
- 3.37 The purpose of the **PPV accessibility regulations** is to ensure that it is possible for disabled persons—
- (a) to get on to and off regulated public passenger vehicles in safety and without unreasonable difficulty (and, in the case of disabled persons in wheelchairs, to do so while remaining in their wheelchairs), and
 - (b) to travel in such vehicles in safety and reasonable comfort.
- 3.38 The regulations may, in particular, make provision as to the construction, use and maintenance of regulated public passenger vehicles, including provision as to—
- (a) the fitting of equipment to vehicles;
 - (b) equipment to be carried by vehicles;
 - (c) the design of equipment to be fitted to, or carried by, vehicles;
 - (d) the fitting and use of restraining devices designed to ensure the stability of wheelchairs while vehicles are moving;
 - (e) the position in which wheelchairs are to be secured while vehicles are moving.
- 3.39 The purpose of the **taxi accessibility regulations** is to ensure that it is possible for disabled persons—
- (a) to get into and out of taxis in safety;
 - (b) to do so while in wheelchairs;
 - (c) to travel in taxis in safety and reasonable comfort;

- (d) to do so while in wheelchairs.
- 3.40 The regulations may, in particular, require a regulated taxi to conform with provision as to—
- (a) the size of a door opening for the use of passengers;
 - (b) the floor area of the passenger compartment;
 - (c) the amount of headroom in the passenger compartment;
 - (d) the fitting of restraining devices designed to ensure the stability of a wheelchair while the taxi is moving.
- 3.41 These regulations may also—
- (a) require the driver of a regulated taxi which is plying for hire, or which has been hired to comply with provisions as to the carrying of ramps or other devices designed to facilitate the loading and unloading of wheelchairs;
 - (b) require the driver of a regulated taxi in which a disabled person is being carried while in a wheelchair to comply with provisions as to the position in which the wheelchair is to be secured.
- 3.42 In each case the DOI will be required to consult the Tynwald Equality Consultative Council ([see page 23](#)) and such representative organisations as the DOI thinks appropriate before making accessibility regulations. Failure to comply with accessibility regulations will be an offence.
- 3.43 In addition, Part 12 of the Bill includes a requirement for the drivers of designated taxis and private hire vehicles to provide assistance to wheelchair users, where “designated” means that the vehicle is included on a list of wheelchair accessible vehicles to be maintained by the Road Transport Licensing Committee (RTLTC). However, a driver could be exempted from the requirement on medical grounds or because the person’s physical condition would make it impossible or unreasonably difficult for the person to comply with the requirement.
- 3.44 Drivers of taxis and private hire vehicles would also be required to carry a disabled person’s assistance dog (seeing dog, hearing dog, etc) unless the driver has been provided with an exemption certification by the RTLTC on medical grounds.
- 3.45 It may be noted that the power in the UK 2010 Act to make taxi accessibility regulations is not yet in force and the requirement to assist wheelchair users is also mostly not in force.

Q11. Do you have any comments about PPV accessibility regulations?

Q12. Do you have any comments about taxi accessibility regulations?

Q13. Do you have any comments about a requirement for drivers of taxis and private hire vehicles to assist wheelchair users unless exempted?

Q14. Do you have any comments about the requirement for drivers of taxis and private hire vehicles to carry assistance dogs unless exempted?

Q15. Do you have any comments other about the accessibility of the Island’s transport for disabled persons?

Equal pay for work of equal value

3.46 Under the Island's Employment (Sex Discrimination) Act 2000 ("the 2000 Act") an employer must not discriminate between men and women in terms of their pay where a woman is employed in *like* work to that of a male colleague or the woman is employed on **work rated equivalent** to that of a man in the same employment¹¹.

3.47 For the purposes of the 2000 Act:

- A woman is to be regarded as employed on like work with a man if, but only if, her work and his work is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things he does are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with his, regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences.
- A woman is to be regarded as employed on work rated as equivalent with that of any man if, but only if, her job and his job have been given an equal value by a job evaluation study, in terms of the demand made on a worker under various headings (for instance: effort, skill, decision-making).

3.48 However, under the Equality Act 2010 the provisions for ensuring equality between men and women in the workplace are more comprehensive. The UK 2010 Act enables workers to claim equal pay for work that may be different but of equal value in terms of the demands of the job (such as the **effort, skill, responsibility** and **decision making** demands) where there has been no job evaluation study. This has been the position in the UK since 1 January 1984 when an amendment to the Equal Pay Act 1970 came into force. Although the jobs being compared may, at first sight, appear to be quite different it is not about "comparing apples with oranges" because, on closer examination, the overall demands of the different jobs may be very similar.

3.49 Examples of where tribunals in the UK have found jobs to be of equal value are:

- In one case the work of a cook was found to be of equal value to the work done by a joiner, a painter and a thermal insulation engineer;
- In another, women employed as packers were found to be doing work of equal value to that done by a labourer;
- Several female sewing machinists in the furniture manufacturing industry have successfully compared their work to that done by male upholsterers; and
- Female speech therapists have won equal value claims comparing their work with that of male pharmacists and occupational psychologists.

3.50 Each case is determined on its own particular facts and a decision in one case, whether favourable or unfavourable, does not automatically determine the outcome in other cases where similar jobs are being compared. In the UK, cases have often been brought by large groups of workers. It is undoubtedly true that some equal value cases in the UK have been complex, lengthy and costly. However, it may be said that if jobs that have traditionally been seen as "women's work" remain undervalued when compared to "men's work" that places similar demands on a person there can be no true equality in the workplace. It may also be said that some of the most expensive cases in the UK have arisen because certain large employers have avoided addressing

¹¹ It may be noted that if women in a particular area were generally paid more than men in that area the provisions would apply in the same way to male workers.

structural inequities in the pay of their male and female workers for substantial periods of time.

- 3.51 In the UK, as a general rule, a claim for equal pay for work of equal value can be lodged with an employment tribunal at any time during the person's employment or, if the claimant has left the employment in question, within six months of the date of the end of the claimant's employment. If the woman's claim succeeds she is entitled to:
- An order from the employment tribunal declaring her rights;
 - Her pay, including any occupational pension rights, must be raised to that of her male comparator;
 - Any beneficial term in the man's contract but not in hers must be inserted into her contract;
 - Any term in her contract that is less favourable than the same term in the man's contract must be made as good as it is in his;
 - Equalisation of contractual terms for the future (if she is still in employment);
 - Compensation consisting of arrears of pay (if the claim is about pay) and/or damages (if the complaint is about some other contractual term).
- 3.52 The Bill provides that if a claim in respect of equal pay for work of equal value is taken to the Tribunal in the Island, the Tribunal may, before determining the question, require "a qualified person" to prepare a report on the question. A qualified person means a person approved by a body (e.g. the Advisory, Conciliation and Arbitration Service (ACAS) in the UK) with which the Appointments Commission has entered into arrangements for the provision of reports, documents and information on such matters.
- 3.53 In standard cases in the UK back pay can be awarded up to a maximum of six years¹² from the date that proceedings were filed with an employment tribunal. In addition, the tribunal may award interest on the award of compensation. With up to six years' worth of back pay being awarded, this interest element of the award may be considerable.
- 3.54 To reduce the potential cost of awards and to preclude historic claims, under the Equality Bill it is envisaged that in the Isle of Man the period for which back pay could be awarded if a claim was successful would exclude any period prior to the provisions of the Bill relating to equal pay for work of equal value coming into operation, i.e. there could be no retrospective claims. In addition, it is expected that a lead-in period (of perhaps two years) following Royal Assent prior to bringing the provisions into operation would also be applied to allow employers time to consider and, if necessary, adjust their pay policies in respect of work of equal value carried out by men and women. So far as possible, it is obviously better for employers to consider their pay systems in respect of equal pay at the outset than for the issue to have to be examined by the Tribunal at a later date in response to a claim. There is a significant amount of UK guidance and assistance for employers in this area; for example, the UK's Equality and Human Rights Commission has equal pay toolkits available on its website¹³.
- 3.55 Under the Island's 2000 Act the maximum period for which pay arrears can be awarded for successful equal pay cases is currently two years. The draft Bill follows the

¹² Except in Scotland where it is five years.

¹³ <http://live.ehrc.precedenthost.co.uk/advice-and-guidance/tools-equal-pay/>

position in England and Wales under the 2010 Act where an employment tribunal can award a maximum of six years' pay arrears. However, since it is proposed that it should not be possible in the Island to award pay arrears in an equal pay for work of equal value work case for the period before these provisions come into operation it would be six years after their commencement before the maximum amount could be awarded (or, with a lead-in period, perhaps 8 years or more after Royal Assent before the maximum amount of pay arrears could be awarded).

- 3.56 For the avoidance of doubt, in like work and job evaluation cases ([see paragraph 3.47 above](#)) it is also proposed that the maximum amount of pay arrears should increase from two to six years subject to a transitional period. So, for example, in a successful case one year after the provisions in the 2000 Act had been repealed and replaced by the Bill it might be that the Tribunal could only award up to three years pay arrears, and it would be four years after 2000 Act had been replaced before the maximum award of pay arrears could be made.
- 3.57 It is intended that in all types of equal pay cases the standard time limit for bringing a claim to the Tribunal will be within 6 months beginning with the last day of the employment or appointment¹⁴.
- 3.58. In addition, it should be noted that unlike in the UK the Island's Employment Tribunal is not able to add accrued interest to a pay arrears award¹⁵. It is envisaged that this would continue to be the position for all equal pay cases under the Equality Bill.
- 3.59 It is important to take into account that providing equal pay for work of equal value is an obligation under a number of international conventions that are relevant to the Isle of Man, including:
- UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁶;
 - UN International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁷;
 - and
 - Equal Remuneration Convention – International Labour Organisation (ILO) Convention 100¹⁸.
- 3.60 These conventions, amongst others, reflect what are now seen by the international community as the normal standards to be expected in developed countries such as the Isle of Man.
- 3.61 Of the three conventions listed above:
- the UK's ratification of CEDAW was extended to the Island some years ago (at the request of the Isle of Man Government) and therefore the Island already has an explicit international obligation under article 11(1) of that convention to ensure equal remuneration for work of equal value;
 - the UK's ratification of ICESCR extends to the Isle of Man but the provision concerning equal pay for work of equal value is presently subject to a reservation

¹⁴ The time limit will be extended if the employer deliberately concealed relevant facts from the person wishing to bring a claim or if the person was suffering from an incapacity during the qualifying period which meant that they could not reasonably be expected to progress their claim in that time.

¹⁵ There is provision for interest to be paid where the Employment Tribunal makes an award in a case under the Employment Act 2006 and the respondent fails to pay the awarded amount within the required time, but the Tribunal has no power to add interest to awards of pay arrears.

¹⁶ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

¹⁷ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>

¹⁸ http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312245:NO

postponing its effect for the Island. However, the UN Committee on Economic, Social and Cultural Rights has asked for the reservation to be withdrawn; and

- the UK's ratification of the Equal Remuneration Convention has not been extended to the Isle of Man. However, this convention is one of the ILO's 8 "Core" conventions and the ILO is pressing for every country to ratify all 8 of these conventions; the UK has done so and it has raised the issue with the Island in the past.

3.62 It may be noted that earlier this year Jersey consulted on adding sex discrimination to its framework under the Discrimination (Jersey) Law 2013 and it is not currently considering implementing equal pay for work of equal value. However, Jersey is in a different position to the Isle of Man both in terms of the current limited extent of its employment law protections and in terms of its international obligations because the UK's ratification of CEDAW has not been extended to that island.

3.63 Research has shown that reducing the gender pay gap can increase productivity and reduce dependency on the state. A levelling up of women's earnings has the potential to bring gains to the Treasury not only in increased revenue from tax and national insurance, but also through a reduction in the payment of benefits¹⁹.

3.64 Figures from the Isle of Man Earnings Survey 2013²⁰ illustrate the discrepancy that still exists between the average hourly earnings of men and women in the Island²¹:

	Males			Females		
	Manual	Non-manual	All	Manual	Non-manual	All
Average gross hourly earnings in pence (excluding overtime pay and overtime hours)	1154	1934	1585	1049	1605	1505

Q16. Do you have any comments about the introduction of equal pay for work of equal value?

Q17. Do you have any comments about the proposal to bring (over a number of years) the maximum amount of pay arrears that can be awarded by the Tribunal in successful equal work cases into line with the amount under the UK Act?

¹⁹ See, for example, the House of Commons Business, Innovation and Skills Committee - First Report of Session 2013-14 – Women in the Workplace:

Volume I – <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/342/342.pdf>

Volume II (Oral and written evidence) – <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/342/342ii.pdf>

Volume III (Additional written evidence) –

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/342/342iii.pdf>

Government response - <https://www.gov.uk/government/publications/government-response-to-the-house-of-commons-business-innovation-and-skills-committee-women-in-the-workplace>

²⁰ <http://www.gov.im/categories/working-in-the-isle-of-man/earnings-survey/>

²¹ The Isle of Man is not unique in this regard of course and a similar situation exists in all of the Island's neighbours and to a greater or lesser degree across Europe and further afield.

Retirement

- 3.65 Following the provisions of the UK Act, under the draft Bill it is proposed that the compulsory retirement of any employee on reaching a given age will amount to direct age discrimination, unless it is objectively justified as a proportionate means of achieving a legitimate aim. This will generally mean that a person will have a right to continue to work until either they retire voluntarily or they are no longer capable of carrying out their employment to an appropriate standard, which would need to be managed through capability procedures.
- 3.66 Currently in the Island employers can set their own normal retirement (which must be the same for men and women). Under Section 132 of the Employment Act 2006²² employees who have reached their employer's normal retiring age or, if there is no such age, the age of 65, cease to be protected against dismissal except in those cases where the dismissal is for an automatically unfair reason (e.g. "whistleblowing" or for a health and safety related reason).
- 3.67 It might be argued that the need to use capability procedures for some older members of staff who are no longer able to do their jobs properly has the potential to be difficult and distressing for both the manager and the member of staff. But a counter argument is that any competent manager should be able to carry out capability procedures in an appropriate, fair and sensitive manner whatever the underlying reason for the lack of capability, at any point in the employee's working life.
- 3.68 An argument that is sometimes voiced against initiatives to assist older people in working longer is that older persons in the labour market may displace young people. However, it has been suggested that this argument is based on what is commonly referred to as the 'lump of labour fallacy': this suggests that there are a fixed number of jobs and that workers are perfectly substitutable for each other whereas in practice younger workers cannot always be easily substituted for older workers. In fact, most economists agree that the job market doesn't work on a one-in, one-out basis. When more people are in work, people have more money to spend, and this creates more jobs.
- 3.69 It may also be argued that having a fixed default retirement age (even where it may not be possible to objectively justify it) in statute gives certainty to both employers and employees allowing them to plan for staff succession and retirement. However, there are also opposing arguments: a "one size fits all" approach is no longer suitable and managers should always have an ongoing dialogue with their staff about their expectations and aspirations allowing both the employer and employees to plan for the future. And, of course, allowing an employer to dismiss an employee on the ground of age when that person remains capable of carrying out a job to the required standard, means that any protection against discrimination on the ground of age would be partial and not comprehensive.
- 3.70 With increasing life expectancy and the state pension age going up, it is likely that some people will want or need to keep working into older age (perhaps on a part time or flexible basis) in order to be financially secure. Any gap between a default retirement age and the state pension age could be problematic (although this may be mitigated if the employee can access a pension from their employer on retirement). Indeed, this issue has already been raised in the Island. Whilst this problem might be resolved if any default retirement age was harmonised with the state pension age or

²² http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2006/2006-0021/EmploymentAct2006_3.pdf

was higher than that age, such an approach is unlikely to eliminate the need for employers to use capability procedures for some older members of staff, particularly if the state retirement age, upon which the default retirement age would be based, continues to rise.

- 3.71 Age UK, which is the UK's largest charity dedicated to helping everyone make the most of later life, strongly supported the abolition of a default retirement age and its research found that 9 out of 10 people aged 60-70 were against forced retirement²³.
- 3.72 Readers may wish to note that although the Bill follows the UK Act as it now stands, when it was enacted in 2010 the UK Act included provision for a default retirement age in line with the previous legislation that it replaced. The UK Government removed the default retirement age in 2011 and removed compulsory retirement as a potentially fair reason for dismissal. However, replication of the former UK position would not necessarily be easy: the UK's legislation which provided for a default retirement age was actually far more complex than the current position which is reflected in the Bill.
- 3.73 It appears that the removal of the default retirement age in the UK has had no significant impact on businesses and there has been no discernible rush of claims or discussions in the UK about forcible retirement or performance management of older employees.
- 3.74 Although the default retirement age has been abolished, developing case law in the UK has determined that employers may still be able to have a normal retirement age if this is a 'proportionate means of achieving a legitimate aim' provided that the aim is both of a public interest/social policy nature and is relevant to the particular employer's circumstances. However, aims that are only relevant to the employer and/or based solely on cost may not be sufficient to justify an enforced retirement age. It is also likely that a normal retirement age that was lower than the state pension age would be difficult to justify as being proportionate in most cases (but may still be justifiable as in the case of the fire service, etc).
- 3.75 It appears that people working longer whilst paying tax and NI may be of overall benefit to Government revenue, potentially allowing additional resources to be targeted at vulnerable members of the Island's community. In addition, the potentially greater spending power of older persons who continue in employment could be beneficial to the economy of the Island as a whole.

Q18. Do you have any comments about the proposals in the Bill relating to retirement?

Advice, assistance, conciliation, enforcement, etc.

Advice and assistance

- 3.76 In the UK the Equality Act 2006²⁴ (not the 2010 Act of the same name) established the Equality and Human Rights Commission ("the EHRC")²⁵. This independent body has a statutory remit to promote and monitor human rights and to protect, enforce and promote equality as it relates to the protected characteristics. One of the key roles of the Commission is to provide advice and guidance on rights, responsibilities and good practice, based on equality law and human rights.

²³ <http://www.ageuk.org.uk/work-and-learning/discrimination-and-rights/default-retirement-age---frequently-asked-questions/>

²⁴ <http://www.legislation.gov.uk/ukpga/2006/3/contents>

²⁵ <http://www.equalityhumanrights.com/>

- 3.77 In addition, under the 2006 Act the EHRC has enforcement powers in respect of contraventions of either equality or human rights legislation and it may bring proceedings against a person or body that has contravened the legislation.
- 3.78 It is not intended that the Isle of Man should establish a comparable body to the EHRC as it is almost certain that such a move would be seen as both overly bureaucratic and, particularly in the current financial climate, overly expensive.
- 3.79 However, at least initially, it will almost certainly be essential for provision to be made to assist businesses and other bodies with their understanding of equality issues and their compliance with the legislation.
- 3.80 Similar provision was made for the introduction of Employment (Sex Discrimination) Act 2000 through the appointment of a Discrimination Officer, and it was found that when the 2000 Act had “bedded in” and employers had become more familiar with the legislation the need for an active discrimination officer diminished.
- 3.81 The Bill contains a broad enabling power for Council to make this, or any such arrangements as it considers appropriate:
- (a) to promote equality of treatment in relation to protected characteristics and related matters;
 - (b) to facilitate understanding of, and compliance with, this Act, and any subordinate legislation, codes of practice or guidance made or issued under it.
- 3.82 This power could be used, for example, to appoint a person on a limited term basis to prepare and provide training, briefings, presentations, advice and guidance to Government, business, voluntary organisations and the public. Such a person might perhaps be appointed for a 2 year period commencing as soon as the Bill had completed its passage through the Branches and prior to Royal Assent, or as soon as possible after that.
- 3.83 When the initial familiarisation phase has come to an end, it is envisaged that advice and guidance provided by relevant Departments, Boards, Offices and other bodies (such as the Department of Health and Social Care (DHSC) and the Manx Industrial Relations Service (MIRS)) in respect of matters that fall within their remits should generally be sufficient.
- 3.84 It is likely that much of the material produced by the EHRC in the UK (and other bodies such as ACAS, etc.) will be useful for the Island, either directly or with some adaptations. It is intended that the Council of Ministers or a relevant Department should be able to issue statutory guidance and/or codes of practice in relation to matters covered by the Bill (this provision is adapted from a power in the Equality Act 2006 that rests with the EHRC).

Tynwald Advisory Council for Disabilities

- 3.85 It appears that there is support for the continued existence of the Tynwald Advisory Council for Disabilities (TACD)²⁶ and it is envisaged that this body would be retained in some form under the Equality Bill. The body was established (as the “Chronically Sick and Disabled Persons Committee”) by the Chronically Sick and Disabled Persons Act

²⁶ <https://sites.google.com/site/advisorycouncilfordisabilities/home>

1981, which was based on UK legislation, and in the UK such bodies have been superseded by the equality and human rights commissions of England & Wales, Scotland and Northern Ireland.

3.86 The TACD currently consists of 5 members, as follows²⁷–

- a) 2 members of Tynwald appointed by the Council of Ministers, subject to the approval of Tynwald, one of whom shall be appointed by the Advisory Council as chairman;
- b) 3 persons, not being members of Tynwald, appointed by the Council of Ministers, subject to the approval of Tynwald, as representatives of interested statutory or voluntary welfare organisations with experience of work among, and the special needs of, chronically sick or disabled persons and including, if practicable, a disabled person or persons with that experience.”

3.87 If the Island is to have a comprehensive framework for equality it would seem anomalous to continue to have a (Government funded) body that is concerned with just one protected characteristic but not the others. It is therefore proposed that the TACD should be renamed as the **Tynwald Equality Consultative Council** and its consultative/advisory remit extended to cover all the protected characteristics.

Q19. Do you have any comments about the proposals to promote and explain the legislation when it is introduced?

Q20. Do you have any comments about the proposal to rename the Tynwald Advisory Council for Disabilities as the Tynwald Equality Consultative Council and expand its remit to cover all of the protected characteristics? If the remit is expanded do you have any comments about the composition of the Council?

Enforcement and the Employment and Equality Tribunal

3.88 All legislation must be enforceable and if it is not it is useless. Enforcement of legislation can take various forms, such as provisions which create criminal offences with various levels of penalty which may include fines or custodial sentences. Enforcement may also enable individuals to take civil action in the courts or for a tribunal to be able to hear, decide and enforce its decisions by various means.

3.89 As in the UK, it is proposed that, with a few limited exceptions, it should not in the first instance be a criminal offence to discriminate against a person on the grounds of one of the “protected characteristics” set out in the Bill.

3.90 Under the UK 2010 Act the main mechanism for enforcement is for an individual who believes that they been discriminated against to take a case to the court or (for any employment issue) to an employment tribunal.

3.91 However, under the Equality Bill it is proposed that a person who alleges discrimination in a non-employment context (i.e. provision of “goods and services”) cases should not generally have to go to court in the first instance to seek redress. Instead, it is proposed that the remit of the Employment Tribunal should be expanded to deal with

²⁷ A provision of the Social Services Act 2011 will, if it is brought into operation prior to the Equality Bill, amend the appointment procedure for the Tynwald Members of the TACD so that they will consist of a chairman and deputy chairman, appointed by the Appointments Commission, subject to the approval of Tynwald. However, it is considered that the drafting of the provision is flawed and that it would be preferable for Tynwald itself to simply nominate and vote on Members to be the chairman and deputy chairman.

these cases and it should be renamed as the **Employment and Equality Tribunal**²⁸. It might be desirable to broaden the Tribunal's expertise and experience but it may be that cases relating to discrimination in the provision of goods and services will be few in number.

3.92 In addition, it is proposed that the Attorney General should have certain of the powers of intervention that rest with the EHRC in the UK. The Employment (Sex Discrimination) Act 2000 already provides the Attorney General with powers to deal with certain types of discrimination which would be onerous for an individual to challenge. Under the Equality Bill where a person is unable to take a case to the Tribunal that is in the public interest or where the alleged discrimination is particularly serious then the Attorney General will be empowered to take the matter forward.

Q21. Do you have any comments about civil action through the proposed Tribunal being the main way for the Bill to be enforced?

Q22. Do you have any comments about expanding the remit of the Employment Tribunal and renaming it as the Employment and Equality Tribunal? Do you have any views on the constitution of the Tribunal?

Conciliation

3.93 It is envisaged that the Manx Industrial Relations Service (MIRS)²⁹ should be responsible for conciliation/mediation in cases of discrimination relating to employment. The Island's industrial relations officers already have the power to deal with cases arising under the Employment (Sex Discrimination) Act 2000.

3.94 For conciliation/mediation in respect of discrimination in the provision of goods and services it is suggested that the Office of Fair Trading could generally take on this role but in cases involving pupils in schools it is proposed that the Education Council established under section 4A of the Education Act 2001³⁰ should be responsible for trying to resolve disputes.

Q23. Do you have any comments about the Manx Industrial Relations Services dealing with conciliation/mediation for employment related equality cases?

Q24. Do you have any comments about the Office of Fair Trading dealing with conciliation/mediation for goods and services related equality cases?

Q25. Do you have any comments about the Education Council having a role in trying to resolve disputes involving pupils in schools?

Public sector equality duty

3.95 Under the Bill all public authorities in the Island (within the meaning of section 6 of the Human Rights Act 2001³¹) will be subject to a "public sector equality duty". A person who is not a public authority but who exercises public functions will also be subject to

²⁸ In developing its anti-discrimination legislative framework Jersey has taken a similar approach.
<http://www.jerseylaw.ie/Law/Display.aspx?url=%2Flaw%2Flawsinforce%2Fhtm%2FRFiles%2FR%26OYear2014%2FR%26O-027-2014.pdf>

²⁹ <http://www.gov.im/mirs/>

³⁰ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2001/2001-0033/EducationAct2001_3.pdf

³¹ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2001/2001-0001/HumanRightsAct2001_1.pdf

this duty. This means that in the exercise of their functions they must have due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

3.96 Having due regard to the need to advance equality of opportunity between persons who share a characteristic and those who do not share it involves having due regard in particular to the need to —

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (c) encourage persons who share a relevant protected characteristic to participate in public life, or in any other activity in which participation by such persons is disproportionately low.

3.97 The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

3.98 Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to —

- (a) tackle prejudice; and
- (b) promote understanding.

3.99 A similar public sector equality duty already applies to public authorities in the Island in respect of the protected characteristic of race under the Race Relations Act 2004³².

3.100 Certain specific exceptions apply to the public sector equality duty (for example in respect of the protected characteristic of age so far as it relates to the education of pupils in schools) and these are set out in Bill. The duty is also subject to other general statutory exemptions set out in the Bill, such as those relating to the operation of the work permit system.

3.101 Extensive guidance on the public sector equality duty as it has effect in the UK is available³³ and it is intended that guidance on the public sector equality duty in the Island would be made under the Bill.

Q26. Do you have any comments about the proposed public sector equality duty?

³² http://www.legislation.gov.uk/cms/images/LEGISLATION/PRINCIPAL/2004/2004-0006/RaceRelationsAct2004_2.pdf

³³ See for example: http://www.equalityhumanrights.com/sites/default/files/documents/PSD/technical_guidance_on_the_public_sector_equality_duty_england.pdf

Positive action

3.102 The Bill also includes a power to allow positive action to support persons who are disadvantaged because they have a particular protected characteristic. Positive action might be seen as something of a blunt instrument. However, positive action is never compulsory and can only be voluntarily undertaken in certain defined circumstances, i.e. if all three of the following conditions apply:

- i. A person must reasonably think that a group of people who share a protected characteristic:
 - suffer a disadvantage linked to that characteristic;
 - have a disproportionately low level of participation in a service or activity; or
 - need different things from other groups.

("Reasonably think" means that the disadvantage, low level of participation or different needs can be seen but there is no requirement to show any detailed statistical or other evidence.)

- ii. The action is intended to:
 - meet the group's different needs;
 - enable or encourage the group to overcome or minimise that disadvantage; or
 - enable or encourage the group to participate in that activity.
- iii. The action is a proportionate way to increase participation, meet different needs or overcome disadvantage. This means that the action is appropriate to that aim and that other action would be less effective in achieving this aim or likely to cause greater disadvantage to other groups.

3.103 It would not be lawful to treat members of a disadvantaged or under-represented group more favourably than other groups if the three conditions above did not apply or were not met. If these conditions were not met, positive action would be likely to constitute unlawful direct discrimination.

Q27. Do you have any comments about positive action?

Exceptions

3.104 Of necessity the Bill includes a significant number of exceptions and exemptions from the general prohibition against discrimination on the grounds of the protected characteristics.

3.105 The exceptions, which generally mirror those in the UK 2010 Act, are mostly set out in Part 14 of the Bill and a number of the Schedules to the Bill.

3.106 In addition to introducing two Schedules to the Bill, Part 14 contains substantive provisions relating to national security, charities, sport and age.

3.107 The national security provision ensures that the Act does not make it unlawful to do anything which is proportionate in order to safeguard national security. For example, denying people of a particular nationality access to sensitive information would not be unlawful race discrimination under the Act if it was proportionate in order to guard against terrorist attacks.

- 3.108 The provision concerning charities allow them to provide benefits only to people who share the same protected characteristic (for example, sex, sexual orientation or disability), if this is in line with their charitable instrument and if it is objectively justified or to prevent or compensate for disadvantage. It remains unlawful for them to limit their beneficiaries by reference to a person's colour – and if they do their charitable instrument will be applied as if that limitation did not exist.
- 3.109 Charities must not restrict benefits consisting of employment, contract work or vocational training to people who share a protected characteristic, except that the section does allow people to provide, and a Department to agree, arrangements for supported employment only for people with the same disability, or disabilities of a description to be set out in regulations.
- 3.110 The provision also allows certain charities to make acceptance of a religion or belief a condition of membership, and to refuse members access to benefits if they do not accept a religion or belief where membership itself is not subject to such a condition, but only if the requirement existed prior to the Bill being introduced into the House of Keys. It also allows single-sex activities for the purpose of promoting or supporting a charity (such as women-only fun-runs), and allows the court or the Attorney General to exercise their functions in a charity's interests, taking account of what is said in its charitable instrument, without contravening the Bill.
- 3.111 Some examples of where the charity provision is relevant are as follows:
- It is lawful for the Women's Institute to provide educational opportunities only to women.
 - It is lawful for the RNIB to employ, or provide special facilities for, visually impaired people in preference to other disabled people.
 - A charitable instrument limiting the provision of benefits to white members of a community actually enables the benefits to be provided to all members of that community.
 - It is lawful for the Scout Association to require children joining the Scouts to promise to do their best to do their duty to God.
 - Race for Life, a women-only event which raises money for Cancer Research UK, is lawful.
- 3.112 The provision concerning sport allows separate sporting competitions to continue to be organised for men and women where physical strength, stamina or physique are major factors in determining success or failure, and in which one sex is generally at a disadvantage in comparison with the other. It also makes it lawful to restrict participation of transsexual people in such competitions if this is necessary to uphold fair or safe competition, but not otherwise.
- 3.113 In addition, this section allows the existing selection arrangements of national sports teams, regional or local clubs or related associations to continue. It also protects "closed" competitions where participation is limited to people who meet a requirement relating to nationality, place of birth or residence.
- 3.114 The following are examples of exceptions relating to sport:
- It would be lawful to have men and women, but not necessarily younger boys and girls, compete in separate 100 metre races.

- It would be lawful to require participants in an Isle of Man sports team to have been born in the Island or to have lived here for a minimum period prior to the event.
- 3.115 The provision in Part 14 of the Bill relating to age enables the Council of Ministers to make orders setting out additional exceptions to the prohibition on discriminating against people because of age, except in relation to work and further and higher education. These exceptions can relate to particular conduct or practices, or things done for particular purposes, or things done under particular arrangements, as set out in any order made under this power. Orders can provide for the Council of Minister or a relevant Department to issue guidance, for consultation about the guidance, and for the imposition of requirements that refer to the guidance. Any guidance will come into force at a date specified in a further order so that Tynwald has the opportunity to consider the particular use of the guidance power.
- 3.116 Examples of appropriate age-based treatment may include the following:
- concessionary travel for older and young people;
 - disease prevention programmes such as cancer screening targeted at people in particular age groups on the basis of clinical evidence;
 - age differences in the calculation of annuities and insurance programmes which are reasonable and based on adequate evidence of the underlying difference in risk; and
 - holidays for particular age groups.
- 3.117 Schedule 3 sets out exceptions from the prohibitions on discriminating against, harassing or victimising a person when providing services or exercising a public function set out in clause 30 of the Bill. Part 1 of this Schedule provides that the prohibitions do not apply to:
- the exercise of Tynwald functions and functions linked to the undertaking of Tynwald business;
 - preparing, making, approving or considering primary legislation or particular forms of secondary legislation;
 - exercising judicial functions or deciding not to commence or continue criminal proceedings.
- 3.118 Part 2 provides that the prohibitions on discrimination in clause 30 do not apply in certain circumstances in relation to schools. Part 3 concerns exceptions in respect of health and care. Parts 4 and 5 contain exceptions that apply to the operation of the Island's immigration and control of employment (work permit) legislation respectively.
- 3.119 Part 6 relates to marriage; Part 7 to separate, single and concessionary services etc; Part 8 concerns exceptions in respect of television, radio and online broadcasting and distribution; Part 9 applies to transport; and Part 10 contains a power for the Council of Ministers to amend this Schedule if necessary in future with the approval of Tynwald.
- 3.120 Schedule 5 contains exceptions for the private disposal of premises by an owner occupier; in respect of the duty to make reasonable adjustments to leasehold premises and the common parts of premises; and also in respect of the disposal, occupation and management of small premises. This Schedule may be amended by the Department of the Environment, Forestry and Agriculture with the approval of Tynwald.

- 3.121 Schedule 7 provides for certain exceptions in respect of the equality of terms relating to terms of work and occupational pension schemes. Treasury may amend this Schedule with the approval Tynwald.
- 3.122 Schedule 9 contains a number of exceptions relating to work in respect of occupational requirements; matters relating to age; and other matters.
- 3.123 Schedules 11 and 12 set out certain exceptions that apply in relation to schools and the provision of further and higher education respectively. Schedule 15 contains some exceptions relating to associations.
- 3.124 Schedule 18 confirms that a person does not contravene the provisions of the Bill if the person is acting in accordance with certain other statutory provisions and Schedule 19 sets out some general exceptions. Schedule 20 provides for certain exceptions for information society services.

Q28. Do you have any comments about the exceptions that are included in the Bill? Do you think any of the exceptions should be removed or that any additional exceptions should be included?

Repeal of existing legislation

- 3.125 During the preparation of the Bill in addition to the Acts that are obviously related to equality a number of other relevant Acts and provisions were identified as being either spent, outdated or no longer necessary because of the Bill and which it was therefore considered could be repealed by the Bill. The Bill will repeal and, where appropriate, replace the following Acts and provisions:
- (a) Factories and Workshops Act 1909³⁴;
 - (b) Sex Disqualification (Removal) Act 1921³⁵;
 - (c) Factories and Workshops (Amendment) Act 1931³⁶;
 - (d) Factories and Workshops Amendment Act 1936³⁷;
 - (e) Factories and Workshops Amendment Act 1939³⁸;
 - (f) Disabled Persons (Employment) Act 1946³⁹;
 - (g) Chronically Sick and Disabled Persons Act 1981⁴⁰;
 - (h) Chronically Sick and Disabled Persons (Amendment) Act 1992⁴¹;
 - (i) Employment (Sex Discrimination) Act 2000⁴²;
 - (j) Race Relations Act 2004⁴³;

³⁴ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/1909/1909-0001/FactoriesandWorkshopsAct1909_1.pdf

³⁵ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/1921/1921-0005/SexDisqualificationRemovalAct1921_1.pdf (with saving - see paragraph 2 of Schedule 24 to the Bill)

³⁶ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/1931/1931-0003/FactoriesandWorkshopsAmendmentAct1931_1.pdf

³⁷ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/1936/1936-0003/FactoriesandWorkshopsAmendmentAct1936_1.pdf

³⁸ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/1939/1939-0003/FactoriesandWorkshopsAmendmentAct1939_1.pdf

³⁹ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/1946/1946-0002/DisabledPersonsEmploymentAct1946_2.pdf

⁴⁰ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/1981/1981-0036/ChronicallySickandDisabledPersonsAct1981_2.pdf

⁴¹ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/1992/1992-0008/ChronicallySickandDisabledPersonsAmendmentAct1992_1.pdf

⁴² http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2000/2000-0016/EmploymentSexDiscriminationAct2000_1.pdf

⁴³ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2004/2004-0006/RaceRelationsAct2004_2.pdf

- (k) Disability Discrimination Act 2006⁴⁴;
- (l) in the Employment Act 2006⁴⁵ —
 - (i) sections 125 to 127;
 - (ii) section 128(12) to (14);
 - (iii) section 132(2) paragraphs (l) to (n);
 - (iv) Schedule 3; and
 - (iv) in Schedule 5, paragraphs 1(3) and 14(2)(b);
- (m) the Breastfeeding Act 2011⁴⁶;
- (n) in the Regulation of Care Act 2013⁴⁷, section 165(3).

Q29. Do you think that any other legislation could be repealed by the Bill? Do think anything in the legislation that is to be repealed needs to be, or should be, retained?

4. Some differences between the Bill and the UK’s Equality Act 2010

4.1 In addition to differences between the Bill and the UK 2010 Act that may be referred to in the previous section of this document, there are some other obvious differences. Some of these differences are simply due to reasons such as: differences in drafting style; the omission of provisions which only relate to Scotland; differences between referenced or supporting UK legislation and that of the Isle of Man; and changes to take account of the fact that certain legal arrangements (e.g. commonhold, Limited Liability Partnerships, barristers’ and Scottish advocates’ employment arrangements) do not exist in the Island. However, attention is drawn to a number of other differences between the Bill and the UK 2010 Act in the following paragraphs.

Armed Forces

4.2 The Bill does not deal with any matters relating to the Armed Forces as the Island does not have any armed forces of its own and although people from the Isle of Man have a long tradition of serving in the British Armed Forces it would neither appropriate nor possible for the Bill to legislate for matters within these Forces. In effect, members of HM Armed Forces are subject to service law wherever in the world they may be, and if they are discriminated against in the course of their duties in the services the provisions of the UK’s Armed Forces legislation will apply.

4.3 It should be emphasised, however, that a person who is serving in the Armed Forces who has one of the protected characteristics would have the same protection against discrimination in the Island as any other person in the areas that are covered by the Bill.

Caste Discrimination

4.4 Unlike in the UK Act “caste” is included as an integral part of the definition of race in the Bill.

⁴⁴ http://www.legislation.gov.uk/cms/images/LEGISLATION/PRINCIPAL/2006/2006-0017/DisabilityDiscriminationAct2006_2.pdf

⁴⁵ http://www.legislation.gov.uk/cms/images/LEGISLATION/PRINCIPAL/2006/2006-0021/EmploymentAct2006_3.pdf

⁴⁶ http://www.legislation.gov.uk/cms/images/LEGISLATION/PRINCIPAL/2011/2011-0020/BreastfeedingAct2011_1.pdf

⁴⁷ http://www.legislation.gov.uk/cms/images/LEGISLATION/PRINCIPAL/2013/2013-0010/RegulationofCareAct2013_2.pdf

- 4.5 Discrimination against a person because of their place in a hereditary caste system (such as that which has traditionally existed in the Indian sub-continent) is not presently covered by the UK Act because caste is not included as an aspect of "race" in the Act. Race includes colour, nationality and ethnic or national origins.
- 4.6 The UK 2010 Act included a provision at section 9(5) so that the definition of race could be amended by order so as to add "caste", and to make any consequential amendments and to prescribe any exceptions.
- 4.7 Certain groups in the United Kingdom lobbied the UK Government to include caste within the definition of race and so prohibit discrimination based on a person's caste but the UK Government did not initially do so.
- 4.8 However, in response to the lobbying, the Enterprise and Regulatory Reform Act 2013 (ERRA) amended section 9(5) of the Equality Act 2010 so as to place a duty on a Minister of the Crown to make an order which includes "caste" within the definition of "race" in section 9 of that Act. That duty has not yet been fulfilled.
- 4.9 ERRA also provided a power to enable a Minister to review section 9(5) of the Equality Act 2010 and any orders made under it, with a requirement to publish any report but this power cannot be exercised until 2018. After that time if it is considered appropriate, the Minister may repeal or otherwise amend section 9(5) of the Equality Act 2010 by order.
- 4.10 As far as the Island's Bill is concerned the view has been taken that the UK's complicated provision in respect of caste discrimination is unnecessary and it is proposed that caste should simply be included as an aspect of race so as to prohibit discrimination on the grounds of a person's caste in a straightforward way.

Codes of Practice

- 4.11 The Bill includes a provision for the Council of Ministers to issue Codes of Practice in connection with any matter addressed by it with a view to ensuring or facilitating compliance with the Bill or an enactment made under it, to promote equality of opportunity. This provision is based on a power in the UK's Equality Act 2006 which rests with the Equality and Human Rights Commission.

Gender pay gap information

- 4.12 The Bill does not include a power for Regulations to be made to require employers to publish information about the pay of their employees for the purpose of showing whether there are differences in the pay of their male and female employees. The relevant provision (section 78) in the UK 2010 Act has not been brought into force and if it that were to happen⁴⁸ it would only apply to employers with 250 employees or more.

Harassment

- 4.13 In the UK 2010 Act, the prohibition against harassment does not cover the protected characteristics of religion or belief or sexual orientation in a number of circumstances, as follows:
- when providing services or exercising public functions;
 - the disposal or management of premises;

⁴⁸ In July 2014 UK Deputy Prime Minister Nick Clegg said that the Liberal Democrats' election manifesto will include a pledge to bring section 78 of the 2010 Act into force.

- the treatment of a pupil or a person who has applied for admission as a pupil by the responsible body of a school;
- the treatment by an association of a member; a person seeking to become a member; an associate; a guest or a person seeking to be a guest).

4.14 Harassment is defined in the Bill (and the UK 2010 Act) as follows:

- “(1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B’s dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
- (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B’s rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.”.

4.15 The Explanatory Notes for the UK 2010 Act indicate that there is no express protection for harassment related to religion or belief or sexual orientation in the above circumstances simply because the Act follows previous legislation which did not cover harassment. However, the Notes state that conduct that would otherwise have fallen within the definition of harassment may still amount to direct discrimination.

4.16 Since there appears to be no objective rationale for permitting the harassment as defined above of persons in the Isle of Man on the grounds of their religion or belief or their sexual orientation in the circumstances referred to above the UK’s exceptions from the prohibition against harassment have not been included in the Bill.

Limit of compensation

4.17 Under the Bill the maximum amount that may be awarded as compensation in cases of discrimination will be limited to the amount set by the Department of Economic Development under section 144 of the Employment Act 2006. This amount is currently £50,000. In the UK awards of compensation are not subject to a statutory maximum because of the requirement to follow European Union case law which decided that capping compensation meant that victims of discrimination did not have an “effective remedy”⁴⁹.

Political Parties

4.18 The Bill does not include any special provisions for political parties to be treated any differently to other types of association or in relation to positive discrimination by political parties. Although there is now some political party membership in Island politics, the majority of Members still stand as independents and it is considered that in

⁴⁹ Marshall v Southampton and South West Hampshire Area Health Authority. European Court of Justice, 2 August 1993

the context of a small jurisdiction such as the Isle of Man the UK's political party provisions are unnecessary and possibly unworkable⁵⁰.

Public authorities

- 4.19 In the UK 2010 Act the "public authorities" to which the public sector equality duty applies are explicitly listed in a Schedule which may be amended by Order but in the Bill "public authority" has the same meaning as in section 6 of the Human Rights Act 2001 as this is considered to be more straightforward and convenient. In addition, the powers in the UK 2010 Act for a Minister of Crown to impose specific public sector equality duties (as opposed to the general duty) on a public authority is omitted from the Bill as being unnecessary in the Isle of Man context.

Socio-economic inequalities duty

- 4.20 The Bill does not include Part 1 (sections 1 to 3) of the UK 2010 Act concerning the public sector duty regarding socio-economic inequalities. The current UK Government has stated that it does not intend to bring this Part into force and it is considered that it is not necessary or proportionate to include the provisions of this Part of the Act in the Island's Bill.

Q30. Do you have any comments about any of the differences between the Bill and the UK Equality Act 2010?

5. Further issues/questions

Schools and the protected characteristic of marriage and civil partnership

- 5.1 Currently the Bill follows the UK 2010 Act so that the prohibition against unlawful discrimination in relation to schools (see Part 6, Division 1 of the Bill) does not apply to the protected characteristics of age or marriage and civil partnership. This is necessary in respect of age. However, young people can get married or enter into a civil partnership from the age of 16 and could potentially still be school after doing so. Although it may be unlikely that any school in the Island would actually discriminate against a young person because they were married or in a civil partnership it is not clear whether there is any good reason why schools should not be prohibited from doing so under the law. It appears that the reason the provision is in the UK 2010 Act is because it simply replicated earlier legislation in this area.

Q31. Do you have any comments about whether or not the prohibition against unlawful discrimination in respect of marriage and civil partnership should apply to schools in the Island?

⁵⁰ The provision in the UK Act allows registered political parties to make arrangements in relation to the selection of election candidates to address the under-representation of people with particular protected characteristics in elected bodies. These arrangements can include single-sex shortlists for election candidates, but not shortlists restricted to people with other protected characteristics. With the exception of single-sex shortlists, the arrangements must be a proportionate means of reducing under-representation. Examples of how the provisions works in the UK are:

- A political party can have a women-only shortlist of potential candidates to represent a particular constituency in Parliament, provided women remain under-represented in the party's Members of Parliament;
- A political party cannot shortlist only black or Asian candidates for a local government by-election. However, if Asians are under-represented amongst a party's elected councillors on a particular Council, the party could choose to reserve a specific number of seats for Asian candidates on a by-election shortlist.

Rights of disabled persons and persons with reduced mobility when travelling by air

- 5.2 Paragraph 35(2) of the Schedule 3 to the Bill is identical to a provision in the UK 2010 Act which states:

“Section 30 does not apply to anything governed by Regulation (EC) No.1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air⁵¹.”

- 5.3 Regulation (EC) No.1107/2006 applies directly to the United Kingdom but under the Island’s Protocol 3 relationship with the European Union it does not apply directly as part of the law of the Island.

- 5.4 Article 1 of the EU Regulation sets out its scope and purpose:

“1. This Regulation establishes rules for the protection of and provision of assistance to disabled persons and persons with reduced mobility travelling by air, both to protect them against discrimination and to ensure that they receive assistance.

2. The provisions of this Regulation shall apply to disabled persons and persons with reduced mobility, using or intending to use commercial passenger air services on departure from, on transit through, or on arrival at an airport, when the airport is situated in the territory of a Member State to which the Treaty applies.

3. Articles 3 (*Prevention of refusal of carriage*), 4 (*Derogations, special conditions and information*) and 10 (*Assistance by air carriers*) shall also apply to passengers departing from an airport situated in a third country to an airport situated in the territory of a Member State to which the Treaty applies, if the operating carrier is a Community air carrier...”

- 5.5 It can be seen that this EU Regulation applies to all disabled persons travelling to the Island from an airport in an EU Member State. Certain provisions also apply to disabled persons departing from the Island’s airport if they are travelling with a carrier that is based in an EU Member State. However, views are sought on whether the provisions of this EU Regulation should be applied to the Island, with any appropriate modifications, using the powers in the European Communities (Isle of Man) Act 1973⁵² (or in some other way) so that rights of disabled persons and persons with reduced mobility when travelling by air are fully equivalent in the Island to the UK and other EU countries.

Q32. Do you have any comments about implementing Regulation (EC) No.1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air in the Island?

Dual discrimination

- 5.6 Section 14 of the UK 2010 Act deals with the situation where a person is subject to discrimination arising out of a combination of two protected characteristics⁵³ – for example, a black woman or an older disabled person.

⁵¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R1107&rid=1>

⁵² http://www.legislation.gov.uk/cms/images/LEGISLATION/PRINCIPAL/1973/1973-0014/EuropeanCommunitiesIsleofManAct1973_1.pdf

⁵³ Although it is possible to envisage discrimination arising out of a combination of more than two protected characteristics (e.g. black, female and disabled), the UK Government considered it was too complicated and burdensome to allow claims on three or more different discrimination grounds.

- 5.7 A claim of dual discrimination can be brought only in relation to direct discrimination. A person cannot claim dual discrimination in relation to indirect discrimination, harassment or victimisation. Two protected characteristics are excluded from the dual discrimination provisions of the UK 2010 Act: marriage and civil partnership, and pregnancy and maternity.
- 5.8 A person bringing a dual discrimination claim can still bring separate claims for less favourable treatment because of one protected characteristic. For example, a woman who thinks she has been treated less favourably both because of her gender and because she is black could potentially make three separate claims: dual discrimination for race/sex; race discrimination; and sex discrimination.
- 5.9 An advantage of a dual discrimination claim is that a claimant does not need to show that, taken separately, claims of direct discrimination in respect of each of the protected characteristics in the combination (e.g. older and female) would be successful. For example, if an older female television presenter believes she is getting less work because she is an older woman, she may struggle to win a sex discrimination claim because her employer could point to a plethora of female TV presenters. She may also struggle to win an age discrimination claim as her employer could point to plenty of older TV presenters. Section 14 would make it easier for her to establish less favourable treatment by comparing herself to older male TV presenters.
- 5.10 This provision of the UK 2010 Act has not yet been brought into force. In 2011 it appeared that the UK Government did not intend to bring this provision into force at all but in May 2012 a Ministerial Statement indicated that its commencement was only delayed. However, it remains unclear when or if this provision will be brought into operation in the UK⁵⁴.
- 5.11 Clause 15 of the Bill is based on section 14 of the UK 2010 Act. It is currently envisaged that the clause will not be brought into operation initially but could be brought into operation in the future, if considered desirable.

Q33. Do you have any comments about dual discrimination?

Insurance

- 5.12 Following the ruling by the Court of Justice of the European Union in the *Test-Achats* case⁵⁵, it is no longer lawful for Member States of the EU to maintain differentiations between men and women in individuals' insurance premiums and benefits. The UK implemented this ruling by amending the Equality Act 2010 and the current draft of the Equality Bill reflects this position.

⁵⁴ In March 2014 the deputy leader of the Labour Party, Harriet Harman, said that if that party was returned to power it would bring this provision into operation.

⁵⁵ The *Test-Achats* case which concerned gender discrimination in insurance pricing was referred to the Court of Justice of the EU by the Belgian Constitutional Court. On 1 March 2011, the Court declared invalid as from 21 December 2012 an exemption in EU equal treatment legislation which allowed Member States to maintain differentiations between men and women in individuals' premiums and benefits.

Council Directive 2004/113/EC on equal treatment between men and women in access to and supply of goods and services prohibits direct and indirect gender discrimination outside of the labour market. Before the ruling, Article 5(2) of the Directive gave Member States a right to derogate from the unisex rule with regard to insurance contracts. All Member States made use of this derogation for some or all insurance contracts.

The Court found the exemption to the unisex rule in Article 5(2) was incompatible with the purpose of the Directive and, therefore, with the EU's Charter of Fundamental Rights. The Court ruled that the derogation was invalid, with effect from 21 December 2012.

However, the *Test-Achats* ruling does not mean that women will always pay the same car insurance premiums as men.

- 5.13 However, the Isle of Man is not bound by EU law in this area; it may voluntarily choose to adopt the same position as the UK and the other EU Member States, or not. At present the Bill follows the position in the UK in this area.
- 5.14 It is not clear whether there is any competitive commercial advantage for insurance businesses based in the Island to be able to offer differences in their insurance products for men and women. There may also be differences of opinion over whether discrimination in this area should be prohibited as a matter of principle.

Q34. Do you have any comments about discrimination between men and women in respect of individuals' insurance premiums and benefits?

Commencement

- 5.15 Under clause 2 of the Bill the Council of Ministers can bring different parts of the Bill into operation on different dates. It is not envisaged that the whole Bill will be brought into operation immediately after Royal Assent because in some cases it will be important to ensure that there is sufficient time for businesses and others to adapt to the new requirements.
- 5.16 For example, as referred to in section 3 of this document, it is proposed that there should be a lead-in period before the provisions concerning equal pay for work of equal value come into operation. There may be other cases where either a lead-in or transitional period is necessary or desirable. In some cases it may be necessary to prepare and consult on secondary legislation and/or guidance before provisions of the Bill can be brought into operation. Further consideration will also be required before bringing into operation the provisions of the Bill where the equivalent provisions in the UK 2010 Act are not yet in operation.

Q35. Do you have any comments about bringing the Bill into operation?

General

- 5.17 Comments on any other issues related to the Bill will be welcomed.

Q36. Do you have any comments about anything in the draft Bill that is not referred to in this document or about equality and discrimination in general?

6. Additional proposed employment law amendments (Schedule 22)

- 6.1 Since the Bill deals in large part with rights and obligations relating to employment, it is considered that it is both opportune and appropriate to include a number of additional amendments to the Island's employment law that are not directly related to equality in the Bill. These amendments, which have been included in the Bill by the Department of Economic Development (DED) at Schedule 22 concern some potential cost saving measures and some issues that have emerged since the Employment Act 2006 came into operation. If these amendments had not been included in this Bill the DED would have had to bring forward a separate Employment (Amendment) Bill which would have required more time to progress.
- 6.2 The proposed miscellaneous amendments to employment law, together with a series of questions to consultees, are to be found at Appendix 1A.
- 6.3 In addition, the DED is seeking views on three additional areas of employment law policy to determine whether it is desirable to include some additional regulation making powers in the Bill. These areas, together with a series of questions to consultees, are set out at Appendix 1B.
-

Schedule 22 to the Equality Bill: Employment Law – Miscellaneous Amendments

1. The Department of Economic Development (DED) plans to use the Equality Bill to make some amendments to existing employment law which are concerned with matters other than equality. The amendments are set out at Schedule 22 to the Bill.
2. Appendix 1A summarises the most important amendments. It should be noted that the following are not included in the summary:
 - (i) amendments which are consequent to the Equality Bill itself (for example updating of references to legislation which the Bill will repeal),
 - (ii) corrections,
 - (iii) amendments of a technical nature or which have a very limited application.
3. Separately, the Department is seeking views in respect of three further areas of employment law policy to determine whether it is desirable to include additional regulation making powers in the Bill. The policy areas are set out at Appendix 1B.

Appendix 1A: Summary of amendments included in the Equality Bill

1. Written statements of terms and conditions

- 1.1 Employees have the right to receive a written statement of their terms and conditions within 4 weeks of commencing employment (Employment Act 2006 (EA) s. 8). The primary purpose of the written statement is to provide information, thereby avoiding misunderstandings and mismatched expectations and reducing the scope for disputes between employers and employees. Where a statement is not issued in compliance with the EA and a complaint is made to the Employment Tribunal, the Tribunal must make an award of between 2 to 4 weeks' pay to the employee.
- 1.2 The Bill refines the awards that may be paid, introduced in 2007, in certain respects in the case where an employer fails to issue or update a written statement.⁵⁶

⁵⁶ At present where an employee has made a written request to the employer and the employer has not provided particulars or has issued incomplete particulars to the employee within 14 days of receiving the request, the Tribunal must make an award of 2 to 4 weeks' pay. (Employment Act (EA) s. 17)

The Tribunal must also make an award to an employee bringing certain other types of complaint (set out in Employment Act 2006 Schedule 1), such as unfair dismissal, where the employer was in breach of his or her duty to issue written particulars at the time the proceedings were begun. In such cases, where the Tribunal finds in favour of the employee, the Tribunal must make an award of 2 to 4 weeks' pay. (Employment Act s. 18)

The changes made in the revised provision are as follows:

- In the case of a complaint under EA s. 17 it is no longer necessary for an employee to make a written request to the employer that s/he be given a written statement as a pre-condition of receiving an award.
- Distinction is made between the case where particulars have been issued but are incomplete and the case where they have not been issued at all. In the former case an award will be limited to a maximum of 2 weeks' pay and in the latter case to a maximum of 4 weeks' pay.
- At present the Tribunal must order an employer who has not issued particulars or who has issued incomplete particulars to pay an award of at least 2 weeks' pay to the employee. Under the revised provision the Tribunal has discretion as to whether or not to make an award in the case where particulars have been issued but are incomplete (and could thus, for example, choose to make no award where the employer has not complied with the statutory duty in some minor respect).
- In a case falling under EA s. 18 at present the Tribunal is only to make an award in the case where it finds in favour of the employee. Under the revised provision whether or not the employee succeeds in his or her original complaint ceases to be a criterion for an award if the employer was in breach of the statutory duty to issue particulars.
- The list of complaints at Schedule 1 of the Employment Act 2006 is updated.

2. Pay statements

- 2.1 Employees have a right to be given itemised pay statements (Employment Act 2006 s. 14). Where the employer does not issue a statement and the Tribunal finds that there has been an 'unnotified deduction' from pay it can order the employer to pay the employee a sum not exceeding the aggregate of the unnotified deductions during the 13 week period preceding the date of the application to the Tribunal.
- 2.2 The Bill makes the remedy for breach of the statutory duty to issue a pay statement(s) consistent with the remedy for breach of the duty to issue written particulars. So where an incomplete statement has been issued the Tribunal may make an award of up to 2 weeks' pay; where no statement has been issued the Tribunal must make an award of 2 weeks' pay and may make an award of up to 4 weeks' pay if just and equitable.

3. Unlawful deductions – 6 year cut off point

- 3.1 At present there is no cut off point for claiming an unlawful deduction from wages. The provisions of the Limitation Act 1984⁵⁷ do not apply to claims concerning unlawful deductions from wages. The existing provision is subject to the complication of the 3 months' time limit to make a claim running from the last of a series of deductions (the entirety of which can then be admissible, even though all but the last deduction occurred more than 3 months before the Tribunal claim was presented). So, if the 'series' of deductions/non-payments exists, it is possible for a claim to extend back even further than 6 years.
- 3.2 The Bill makes any claim subject to a 6 year cut off point.

Q37. Do you have any comments regarding the Department's proposals to update the law which applies to written statements, pay statements and unlawful deductions?

4. Unfair dismissal on ground of spent conviction etc.

- 4.1 The purposes of the Rehabilitation of Offenders Act 2001⁵⁸ (ROA) are to rehabilitate offenders who have not been reconvicted of any serious offence for periods of years and to penalise the publication, etc. of their previous convictions.
- 4.2 An employee is able to bring a claim of unfair dismissal if dismissed for a reason which is unlawful under ROA (e.g. penalising an employee with a "spent" conviction) but only if he or she has 1 year's continuous employment with the employer and is under the employer's retirement age.
- 4.3 The Bill removes the gap in protection so that the dismissal of an employee on the ground that he or she has a spent conviction under ROA is automatically unfair irrespective of the employee's length of service or age.

5. Reserve Forces – protection against unfair dismissal

- 5.1 The UK Defence Reform Act 2014 has amended UK employment law to disapply the statutory qualifying period for the purposes of claiming unfair dismissal from a

⁵⁷ http://www.legislation.gov.uk/cms/images/LEGISLATION/PRINCIPAL/1984/1984-0018/LimitationAct1984_3.pdf

⁵⁸ http://www.legislation.gov.uk/cms/images/LEGISLATION/PRINCIPAL/2001/2001-0006/RehabilitationofOffendersAct2001_1.pdf

reservist's civilian employment where the reason (or principal reason) for dismissal is connected with the employee's membership of the Reserve Forces.

- 5.2 The Ministry of Defence contacted the Isle of Man Government in order to request the Island provides a similar level of protection in IOM employment law and the Council of Ministers agreed to the proposal.
- 5.3 The Bill will disapply the qualifying period so that an employee dismissed in connection with his or her membership of the Reserve Forces would be able to challenge the dismissal. As in the UK, the dismissal would not be automatically unfair; this would depend upon the circumstances of the individual case.

6. Dismissal in connection with an employee's political opinions etc.

- 6.1 The Bill will disapply the qualifying period so that an employee dismissed in connection with his or her political affiliations or opinions would be able to challenge the dismissal. As in the UK, the dismissal would not be automatically unfair but would depend upon the circumstances of the individual case. It is to be noted that the UK has recently amended its employment law in the same respect.

Q38. Do you have any comments regarding the Department's proposals to update the law on unfair dismissal as regards these three special cases?

7. Enabling powers to abolish redundancy rebates

- 7.1 An employer with fewer than 40 employees who makes a statutory redundancy payment is entitled to a rebate from the Manx National Insurance Fund of a certain proportion of the payment. The amount of the rebate depends on the size of the workforce of the employer, as shown in the table below. The table also shows the redundancy rebates that have been paid in recent years:

Number of employees	% of rebate which is allowable	Number of claims 2009-2014	Total rebates paid 2009- 2014
up to 5	60%	102	£195,072
6 – 10	50%	62	£169,608
11 – 20	40%	68	£125,085
21 – 30	35%	36	£55,227
31 – 40	30%	21	£40,566
Total:		289	£585,558

- 7.2 The UK rebate, upon which system the IOM rebate was modelled, has been phased out and was finally abolished in 1990.
- 7.3 The Bill inserts enabling powers in the Redundancy Payments Act 1990⁵⁹ (RPA) which could be used to abolish rebates by secondary legislation (the RPA already contains powers to modify the existing system of rebates). Any secondary legislation would require the separate approval of Tynwald.

Q39. Do you have any view as to whether redundancy rebates should be modified or abolished?

Q40. Do you have any alternative proposals which would reduce Treasury expenditure on rebates?

⁵⁹ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/1990/1990-0018/RedundancyPaymentsAct1990_2.pdf

8. Employment Tribunal – powers to charge fees, costs etc.

- 8.1 The Bill provides new powers:
- (i) to charge Employment (and Equality) Tribunal claimants a fee; and
 - (ii) to require a respondent to a complaint to pay the fee or a part of it in specified circumstances.
- 8.2 In the UK the Government has recently introduced fees of up to £1,200 to access an employment tribunal; this has resulted in a very sharp drop in claims. In the Isle of Man the General Registry is presently reviewing fees across its tribunals.
- 8.3 While the Department considers it very important to maintain access to social justice and does not propose to follow the UK model of fees it is nevertheless considered that there is a case to charge some level of fee to claimants both to defray some of the costs of running the Tribunal and to deter claimants from bringing very weak cases or who may feel they have nothing to lose in bringing claims.
- 8.4 On a connected matter, the Employment Tribunal Rules 2008⁶⁰ set out a general principle at Rule 32(2) that a costs order will not normally be made in any proceedings. Further, where such an order is made the costs that may be awarded by the Tribunal may not exceed £500 (inclusive of VAT and disbursements) (Rule 32(11)). In the UK the corresponding limit was increased from £10,000 to £20,000 in 2012.
- 8.5 There are already extant enabling powers, presently contained in Schedule 3 Part II para 1(2)(f) of the Employment Act 2006⁶¹, to make Rules regarding costs (in contrast to the position which applies as regards charging claimants a fee and requiring a respondent to a complaint to pay the fee or a part of it in specified circumstances) so that no change to the Act itself would be required to increase the present costs limit. New Employment Tribunal (Amendment) Rules would, however, be required.

Q41. Do you have any view as to whether Tribunal claimants should be required to pay a fee and whether respondents to complaints should be required to pay part of the fee in specified circumstances (for example where they are found to have breached the claimant's employment rights)?

Q42. If you consider that claimants should be required to pay a fee what charge or system of charges would you consider to be appropriate?

Q43. Do you consider that the £500 limit of costs that may be awarded by the Employment Tribunal should be increased and if so, what do you consider the new limit should be?

9. Employment Tribunal – Chairperson sitting alone

- 9.1 Paragraph 1 (6) of Schedule 3 Part 1 to the Employment Act 2006 sets out a number of cases where the Chair of the Employment Tribunal may sit alone without the side members. This both saves costs and allows cases to be dealt with more quickly. At present the range of cases where the Chair can sit alone is restricted to a pre-hearing review, unlawful deductions, insolvency, a complaint with the consent of the parties or

⁶⁰ <http://www.tynwald.org.im/links/tis/SD/2008/2008-SD-0887.pdf>

⁶¹ Schedule 3 is being repealed and re-enacted as Schedule 16 to the Equality Act consistent with the renaming of the Tribunal and the transfer of the rule-making power from the DED to the Council of Ministers.

cases where one party does not contest the complaint. The range of cases is narrower than in the UK.

- 9.2 The Bill provides powers for Rules to be made⁶² which would allow the Chair to sit alone in respect of some additional types of case such as a claim for unpaid holiday pay under the Annual Leave Regulations 2007⁶³ and to provide enabling powers to prescribe other types of case by order. Side members would still, however, be required in unfair dismissal and discrimination cases.

10. Insolvency and cessation of business of employer

10.1 If an employer becomes insolvent or otherwise ceases to carry on business in the Island, former employees can claim from the Manx National Insurance Fund certain types of payments owed to them by their former employer (arrears of pay, payment in lieu of notice, accrued holiday pay, compensation for unfair dismissal and unpaid pension contributions) subject to certain limits. Such payments are not subject to the usual cap of a maximum of a week's pay (presently £480 per week) which applies to statutory redundancy payments and certain other Tribunal awards and could result in heavy liabilities on the Manx National Insurance Fund should a large employer cease to trade in the Island. Had such a limit been in operation in 2009/10 and 2010/11 total savings would have been just under £20,000. (Note that comparable payments in the UK are capped at £464 a week.)

10.2 Secondly, compensation can only be paid to an employee under Part XI of the Employment Act 2006 if Class 1 NI contributions were payable for the employee. This provision has the unintended effect of excluding part-time workers whose earnings fall below the point at which they are liable to pay NI contributions ("the primary threshold") from entitlement to compensation. No similar provision exists in equivalent UK legislation.

10.3 The Bill proposes that:

- (i) insolvency etc. payments which are based on a week's pay, be subject to the maximum amount of a week's pay;
- (ii) entitlement to such payments should be extended to all employees regardless of the level of their earnings except for those directors and owners of companies who are specifically excluded from eligibility for compensation.

11. Enforcement of employment rights

11.1 In the circumstance where the Department is satisfied that a worker is entitled to exercise a remedy by way of complaint or reference to the Employment Tribunal the Bill gives the Department a power to exercise the remedy on his or her behalf (with the consent of the worker).

12. Powers to arrange a conciliated settlement under the Redundancy Payments Act 1990

12.1 The Bill broadens the powers of the Manx Industrial Relations Service (MIRS) to conciliate and removes a conflict between the Employment Act 2006 and the

⁶² See previous footnote. Again the new power for Rules to be made will pass from the DED to the Council of Ministers.

⁶³ <http://www.tynwald.org.im/links/tis/SD/2007/2007-SD-0102.pdf>

Redundancy Payments Act 1990⁶⁴ in respect of MIRS' power to arrange a conciliated settlement in respect of the latter Act.

13. Enforcement of awards

13.1 Whilst the Employment Tribunal has powers to grant an execution for the sum or the amount of the award, there are no powers enabling the Tribunal to progress the matter further. The Bill will deal with this gap in the Tribunal's powers.

Q44. Do you have any comments regarding the proposals 9 – 13 above?

14. Other issues

Q45. Are there any other minor amendments to Isle of Man employment law comments which you consider should be included in Schedule 22 of the Equality Bill? Please give as full a case as possible.

Appendix 1B: Additional items on which the DED is consulting

1. Regulation making powers for zero-hours contracts

- 1.1 A zero-hours contract is taken to be a contract under which a worker works for an employer on a regular basis without any minimum amount of work being guaranteed but with some obligation to work when required. There can be perfectly legitimate reasons for such contracts but equally they can be very one sided and used in inappropriate circumstances. The UK Government's Small Business, Enterprise and Employment Bill⁶⁵ includes provisions to regulate some aspects of zero-hours contracts.
- 1.2 The DED would like to find out more about the extent of usage of these contracts on the Isle of Man and whether or not there are any allegations of abuse. If necessary a power to make Regulations on zero-hours contracts could be included in the Equality Bill.

Q46. Do you have any knowledge as to how widespread the use of zero-hours contracts is in the Island?

Q47. Do you have any knowledge of any inappropriate use of zero-hours contracts in the Island?

Q48. Do you consider that the DED should regulate the use of zero-hours contracts and if so what specific measures do you consider the Department should take?

2. Regulation making powers to extend the right to request flexible working

2.1 In the UK the Flexible Working Regulations 2014⁶⁶ came into force on 30th June. The Regulations extend the right to make a request for flexible working to any employee who has been employed for 26 weeks (not just parents of children under 17, or 18 if disabled, and certain carers - as was previously the case and remains the case on the Isle of Man).

⁶⁴ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/1990/1990-0018/RedundancyPaymentsAct1990_2.pdf

⁶⁵ <http://services.parliament.uk/bills/2014-15/smallbusinessenterpriseandemployment.html>

⁶⁶ <http://www.legislation.gov.uk/ukxi/2014/1398/contents/made>

- 2.2 The basic right to request is unchanged. Employees can make up to one written request every year, the employer needs to deal with it within three months, and can refuse on any of eight (very wide) business grounds. A tribunal cannot normally investigate the rights and wrongs of the refusal, only whether the procedure has been properly followed. Maximum compensation for a failure to comply is eight weeks' pay.

Q49. Do you consider the DED should broaden the existing powers in the Employment Act 2006 to make regulations on flexible working so as to permit regulations similar to the UK's Flexible Working Regulations 2014 to be made in the Island?

3. Interns

- 3.1 The Department is aware of a greater use of unpaid interns in recent years and would like to find out more as to how widely interns are used, whether there is any abuse or exploitation of interns and whether or not there is any need to strengthen existing employment protection, particularly by way of any amendments to the Minimum Wage Act 2001⁶⁷.

Q50. Do you have any knowledge as to how widespread the use unpaid interns is in the Island?

Q51. Do you have any knowledge of any inappropriate use or exploitation of interns in the Island?

Q52. Do you consider that the DED should take any additional measures to safeguard employment protection of interns and if so what steps, do you consider the Department should take?

4. Other issues

Q53. Are there any other employment law issues that you think the DED should consider as priorities? Please give as full a case as possible.

⁶⁷ http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2001/2001-0025/MinimumWageAct2001_1.pdf

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Q53

Are there any other employment law issues that you think the DED should consider as priorities? Please give as full a case as possible.

45

List of direct consultees

Tynwald Members

Clerk of Tynwald

Acting Attorney General

Isle of Man Courts of Justice

Local Authorities

Chief Officers of Government Departments, Boards and Offices

Manx Industrial Relations Service

Appointments Commission

Isle of Man Chamber of Commerce

Isle of Man Trade Union Council

Isle of Man Employers Federation

Isle of Man Law Society

Positive Action Group

Liberal Vannin Party

Tynwald Advisory Council for Disabilities

Multi-agency Forum for the Disability Discrimination Act

Isle of Man Council of Voluntary Organisations

Code of Practice Consultation Criteria

1. Consult widely throughout the process, allowing a minimum of 6 weeks for a minimum of one written consultation at least once during the development of the legislation or policy.
 2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
 3. Ensure your consultation is clear, concise and widely accessible.
 4. Give feedback regarding the responses received and how the consultation process influenced the policy.
 5. Monitor your Department's effectiveness at consultation.
 6. Ensure your consultation follows best practice, including carrying out an Impact Assessment if appropriate.
-

DEPARTMENT: Cabinet Office		
IMPACT ASSESSMENT OF: (draft) Equality Bill		
Stage: Pre-Public Consultation	Version: 1.0	Date: 14/7/14
Related Publications:		
Responsible Officer: Anne Shimmin		
Email Address: anne.shimmin@gov.im		Telephone: 685202

SUMMARY: INTERVENTION AND OPTIONS

Briefly summarise the proposal’s purpose and the intended effects

The purpose of the Bill is to introduce a comprehensive and consistent legislative framework to protect the people in the Isle of Man against any discrimination.

The Bill will, subject to certain objectively justifiable exceptions, prohibit discrimination against persons on the grounds that they have a number of “protected characteristics” which are:

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief (note: this includes a lack of religion or faith);
- sex;
- sexual orientation.

The Bill will cover discrimination in relation to all aspects of employment and also the provision of “goods and services” in their broadest sense, including Education, Benefits, Health care and social care, Housing, Retail services, Insurance, Transport, and Pensions.

The Bill will replace, consolidate and repeal the Island’s current fragmented and quite limited legislation relating to equality and discrimination.

The Bill will enable the Island to comply with certain existing international obligations that have been accepted by the Isle of Man Government and allow a number of other important international conventions to be extended to the Island.

What are the options that have been considered

1. Do nothing. The Island’s legislation would continue to be fragmented and limited; vulnerable persons would not be protected from discrimination; and the Island would not be able to comply with a number of international obligations.

2. Progress a Bill based on the UK’s Equality Act 2010 (Preferred option). Advantages of following the 2010 Act include: adoption of an established framework; people will be able to find all equality provisions in a single place (subject to any necessary subordinate legislation); many businesses that operate both in the UK and in the Island should already have a general awareness of the 2010 Act; and the ability to draw on and adapt existing UK guidance and case-law concerning the operation of the legislation.

3. Develop new equality/anti-discrimination specific to the Isle of Man. This would be a

much more complex, resource intensive and time consuming task than basing the Bill on existing UK legislation that has been in force for a number of years and which has been adapted over time. It would be difficult to use the UK guidance and case law that has developed. The legislation would still need to comply with human rights and other international obligations.

Link to Government Strategic Plan

Protect the Vulnerable

Link to Department/Statutory Board/Office Aims and Objectives

Responsible Departmental Member

Chief Minister

Ministerial sign off

I have read the Impact Assessment and I am satisfied that the balance between the benefit and any costs is the right one in the circumstances.

Signed by the Responsible Minister

Date:

SUMMARY: ANALYSIS AND EVIDENCE

IMPACT OF PROPOSAL

Resource Issues - Financial (including manpower)

Statement

It is undeniable that there will be some costs as well as benefits arising from the Equality Bill but these costs and benefits are very difficult to quantify. The UK Government has a great deal more expertise, resource and experience in producing impact assessments but even there it is not usually possible to accurately assess all costs and benefits of legislation. When introducing the Equality Act 2010 in the UK a comprehensive cost and benefit analysis was undertaken and an impact assessment was produced which stated the following:

"In the first year, the Equality Act is estimated to cost between £240.9m and £282.6m. This represents the cost of people making themselves familiar with the new law and one-off implementation costs of the Act. In the same year it is estimated the Act could produce benefits in the range of £101.6m to £133.6m. Overall in the first year the Act could have a net cost of between £107.3m and £181.0m."

"Estimates show that from the second year onwards the Act could create an average net benefit of between £24.5m and £86.8m annually."

"In each case a range of figures is quoted because it is difficult to accurately estimate what changes in legislation might cost. In summary, over 10 years, the Equality Act could produce a net benefit between £39.4m, and up to £674.1m."

In other words, in the UK it is believed that equality legislation results in an overall ongoing financial benefit rather than a cost.

It is, however, difficult to equate the UK estimates to the situation in the Isle of Man. This is not only due to the great difference in size and social situation in the Island but also due to the fact that whilst the UK's 2010 Act was in large part a consolidation and simplification exercise a significant amount of the Bill will represent new legislation for the Island. This might mean, for example, that initial overall costs may be higher but ongoing benefits greater.

Likely Financial Costs

One Off

"Familiarisation" costs associated with new legislation, limited term appointment to assist Government and private and third sectors with the implementation of the legislation.

If the principle of a limited term appointment is accepted (along the lines of the person who was appointed to assist with the implementation of the Employment (Sex Discrimination) Act 2000 or the Human Rights Act 2001), this post might be graded at HEO level so that the person could be expected to largely work on their own initiative in preparing and presenting guidance materials, advice, briefings, etc for Government, business and the public.

Currently the starting point of the HEO scale is £35,333 so that over a 2-year LTA total salary costs would be £72,063 (allowing for one increment progression). To this would need to be added pension scheme costs, employer NI, etc.

Average Annual (excluding one off)

Certain reasonable adjustments for persons with a disability – average cost in UK about £75 for each person who has a disability⁶⁸

Unknown number of additional equality related cases for the proposed Employment and Equality Tribunal to consider. It might be that there will be an initial increase in cases which then tails off. However, the experience of the Employment (Sex Discrimination) Act 2000 is that there was no initial flux of cases and there have been very few subsequent cases.

Indicative costs of recruitment of Tribunal members and each additional Tribunal case might be of the following order:

Recruitment (every three ⁶⁹ years)	£500 per year
Cost per Tribunal	£1000

Depending on the additional number of equality related employment and good and services cases that the Manx Industrial Relations Service (MIRS) and the Office of Fair Trading (OFT) respectively have to deal with for mediation/conciliation, it might be necessary to look at additional resources for these bodies, though there are no present plans to increase the establishment of either body at this time.

Likely Financial Benefits

One Off -

Average Annual (excluding one off)

Assisting disabled persons to be able to contribute more fully in employment and be less reliant on public benefits is likely to be of an overall benefit to public finances. It has been estimated that

⁶⁸ <http://www.peoplebusiness.co.uk/news.asp?ArticleID=59> – February 2014

⁶⁹ This is to be changed to 5 years by amendments in the Legislation Bill

10% of the Island's population has some form of disability, and this population ranges across all social and economic groups. To ignore the potential spending power of this part of the Island's community in being able to access goods and services, together with that of their families and friends, would fail to recognise the potential positive economic impact which implementation could bring to a range of organisations and businesses – not least in terms of retail, tourism and leisure, and in relation to employment and the consequential impact on the demand for benefits.

Similarly, enabling older workers to continue working longer is likely to be of benefit to both Government in relation to tax and NI payments and to the Island's economy as a whole by boosting the spending power of older persons.

Research has shown that reducing the gender pay gap will increase productivity and reduce dependency on the state. A levelling up of women's earnings has the potential to bring gains to the Treasury not only in increased revenue from tax and national insurance, but also through a reduction in the payment of benefits.

The amendments set out in Schedule 21 to the Bill have the potential to generate some savings for Government.

If the proposal introduces provisions that will require another Department, Board, Office or Body to take on additional work or responsibility please ensure that they have been consulted with early on in your considerations. Please provide a brief statement as to who they are and the consultation that has taken place.

All parts of Government will need to be familiar with this legislation. All parts of Government were included in the initial internal consultation which took place earlier this year.

The legislation may result in some additional mediation/conciliation cases for the Manx Industrial Relations Service in respect of equality related employment cases.

The Office of Fair Trading may have some increase in workload in providing mediation/conciliation for goods and services cases.

There could be some slight increase in work for the Appointments Commission in appointing additional members for the Employment and Equality Tribunal (an expanded Employment Tribunal) and for experts in equal pay for work of equal value cases. Potentially there may be some additional cases for the Tribunal itself.

Are there any costs or benefits that are not financial i.e. social?

The Bill will help to create a fairer society in the Isle of Man by setting out in law that discrimination against people because of their age, disability, race, religion, sex etc. is not acceptable and by providing victims with a way of redress if discrimination does take place.

The confirmation that the Island is a modern jurisdiction where the rights of all persons are respected in relation to employment and other areas of life will safeguard the Island's reputation and may contribute to attracting high quality workers and investors.

The Bill will allow the Island to comply with existing and future international obligations related to rights.

Which Business sectors/organisations will be impacted, if any, and has any direct consultation taken place?

The Bill is likely to have an impact on all business and organisations in the Island. Bodies such as the Chamber of Commerce, the IOM Law Society, the Employers' Federation, the IOMTUC and the Council of Voluntary Organisations will be included amongst the direct consultees for the public consultation exercise.

Does the proposal comply with privacy law? Please provide a brief statement as to any issue of

<p>privacy or security of personal information.</p> <p>The Bill should not have issues concerning the privacy or security of personal information.</p>
<p>Has Treasury Concurrence been given for the preferred option?</p> <p>Date of Treasury Concurrence <i>(full Treasury Concurrence is to be sought after public consultation)</i></p>
<p>Key Assumptions / Sensitivities / Risks</p> <p>Although discrimination, harassment and victimisation against people undoubtedly takes place in the Island, the extent of any discrimination is sometimes disputed - "We don't have a problem with that here, so we don't need any legislation".</p> <p>Some people may argue that legislation for equality/against discrimination that may take place is unnecessary and people should just deal with it through "common sense".</p> <p>The length and comprehensive nature of the Bill may be off-putting to some people. Careful explanation of the Bill will be needed, including presentations to Members, etc.</p> <p>It is assumed that the Island should implement international conventions that it has accepted and work towards adopting accepted international standards that do not currently apply.</p> <p>There is now a public and political expectation that the Equality Bill will be progressed, particularly its disability provisions, and there is risk of a backlash if that does not happen.</p> <p>The Bill may be seen by some as promoting the rights of certain groups above those of others. Although this is neither the purpose nor effect of the Bill in reality, UK and European Court of Human Rights case law has sometimes been portrayed in this way by sections of the UK media.</p>
<p>Approximate date for legislation to be implemented if known</p> <p>The intended target for Bill to receive Royal Assent is by July 2016 with subsequent phased implementation.</p>

SUMMARY: CONSULTATION	
<p>Consultation in line with Government standard consultation process Yes/No (Public Consultation has yet to take place).</p>	
<p>Date 1st Consultation 14/2/14 – 4/4/14 (Government internal only)</p>	<p>2nd Consultation (subject to Council approval – August 2014 for 3 months)</p>
<p>Summary of Responses:</p> <p>See summary of responses to Government internal consultation at Appendix 2 to the paper. <i>(Note: it is not intended that this will form part of the Impact Assessment included with the public consultation document)</i></p>	

EVIDENCE BASE

Use this space to set out any further evidence, analysis and detailed narrative from which you have generated your policy options or proposal.

Some relevant background can be found at:

Equality Act 2010 (of Parliament) - <http://www.legislation.gov.uk/ukpga/2010/15/contents>

Equality Act 2010 Explanatory Notes -
<http://www.legislation.gov.uk/ukpga/2010/15/notes/contents>

Equality Act 2010 – Final Impact Assessment - <http://www.equality-law.co.uk/uploads/downloads/Equality%20Act%20Impact.pdf>

UK Government Equality Act 2010 Guidance - <https://www.gov.uk/equality-act-2010-guidance>

UK Government evaluation of the implementation of the Equality Act -
<https://www.gov.uk/government/publications/evaluation-of-the-implementation-of-the-equality-act-2010>

Equality and Human Rights Commission website - <http://www.equalityhumanrights.com/>

ACAS guidance - <http://www.acas.org.uk/index.aspx?articleid=3017>

UN Convention on the Elimination of all forms of Discrimination Against Women -
<http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

UN International Convention on the Elimination of All Forms of Racial Discrimination -
<http://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx>

UNITE equalities webpages - <http://www.unitetheunion.org/unite-at-work/equalities/>



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