

# Equality Bill 2015

## Commentary on Clauses

These notes have been prepared by the Cabinet Office in order to assist readers of the Bill.

They provide information about the content of each of the clauses of the Equality Bill and they are largely based on the Explanatory Notes that accompanied the [Equality Act 2010](#) (of Parliament) ("the UK 2010 Act") with adaptations to take account of differences between the provisions of the UK 2010 Act and those of the Bill.

The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. Some known issues in the Bill are highlighted.

**This is a draft document that may contain errors and omissions.**

### PART 1 - INTRODUCTORY

**Clause 1** states the short title the Act will have if the Bill is passed.

**Clause 2** provides that the Bill comes into operation on such day or days as set out in one or more Appointed Day Orders (ADOs) to be made by the Council of Ministers. An ADO can make different provision for different purposes and may contain such consequential, incidental, supplemental, transitional and transitory provision as necessary or expedient in consequence of, or otherwise in connection with, the partial operation of the Bill.

**Clause 3** provides for the general interpretation of terms and concepts used in the Bill.

**NOTE:** In the definition of "Tribunal" the reference to section 96 should be a reference to section 95.

**Clause 4** is a further interpretation clause which explains what is meant by the different periods of maternity leave which are referred to in the Bill. The rights of female employees to statutory maternity leave are provided for under the [Employment Act 2006](#). Ordinary maternity leave, compulsory maternity leave and additional maternity leave are the three types of maternity leave provided for in clauses 79(1), 80(1) and 81(1) of that Act.

### PART 2: EQUALITY: KEY CONCEPTS

#### Division 1: Protected characteristics

##### **Clause 5: The protected characteristics**

This clause lists the characteristics of a person that are protected by subsequent provisions of the Bill. Subject to certain exceptions set out in the Bill, discrimination against a person because he or she has one (or more) of the protected characteristics will be unlawful. The protected characteristics listed are the same as those set out in section 4 of the UK 2010 Act.

##### **Clause 6: Age**

This clause establishes that where the Bill refers to the protected characteristic of age, it means a person belonging to a particular age group. An age group includes people of the same age and people of a particular range of ages. Where people fall in the same age group they share the protected characteristic of age.

## Examples

- An age group would include “over fifties” or twenty-one year olds.
- A person aged twenty-one does not share the same characteristic of age with “people in their forties”. However, a person aged twenty-one and people in their forties can share the characteristic of being in the “under fifty” age range.

### **Clause 7: Disability**

This clause establishes who is to be considered as having the protected characteristic of disability and so is a disabled person for the purposes of the Bill. With Schedule 1 and regulations<sup>1</sup> to be made under that Schedule, it will also establish what constitutes a disability. Where people have the same disability, they share the protected characteristic of disability.

It provides for a relevant Department (which would normally be the Department of Health and Social Care (“DHSC”)) to issue statutory guidance to help those who need to decide whether a person has a disability for the purposes of the Bill<sup>2</sup>.

## Examples:

- A man works in a warehouse, loading and unloading heavy stock. He develops a long-term heart condition and no longer has the ability to lift or move heavy items of stock at work. Lifting and moving such heavy items is not a normal day-to-day activity. However, he is also unable to lift, carry or move moderately heavy everyday objects such as chairs, at work or around the home. This is an adverse effect on a normal day-to-day activity. He is likely to be considered a disabled person for the purposes of the Act.
- A young woman has developed colitis, an inflammatory bowel disease. The condition is a chronic one which is subject to periods of remissions and flare-ups. During a flare-up she experiences severe abdominal pain and bouts of diarrhoea. This makes it very difficult for her to travel or go to work. This has a substantial adverse effect on her ability to carry out normal day-to-day activities. She is likely to be considered a disabled person for the purposes of the Act.

### **Clause 8: Gender reassignment**

This clause defines the protected characteristic of gender reassignment for the purposes of the Bill as where a person has proposed, started or completed a process to change his or her sex. A transsexual person has the protected characteristic of gender reassignment.

The clause also explains that a reference to people who have or share the common characteristic of gender reassignment is a reference to all transsexual people. A woman making the transition to being a man and a man making the transition to being a woman both share the characteristic of gender reassignment, as does a person who has only just started out on the process of changing his or her sex and a person who has completed the process.

## Examples

- A person who was born physically male decides to spend the rest of his life living as a woman. He declares his intention to his manager at work, who makes appropriate

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<sup>1</sup> The UK’s Equality Act 2010 (Disability) Regulations 2010 can be read at:

<http://www.legislation.gov.uk/ukxi/2010/2128/contents/made>

<sup>2</sup> The UK Government’s guidance can be found at:

<https://www.gov.uk/definition-of-disability-under-equality-act-2010>

arrangements, and she then starts life at work and home as a woman. After discussion with her doctor and a Gender Identity Clinic, she starts hormone treatment and after several years she goes through gender reassignment surgery. She would have the protected characteristic of gender reassignment for the purposes of the Act.

- A person who was born physically female decides to spend the rest of her life as a man. He starts and continues to live as a man. He decides not to seek medical advice as he successfully 'passes' as a man without the need for any medical intervention. He would have the protected characteristic of gender reassignment for the purposes of the Act.

### **Clause 9: Marriage and civil partnership**

This clause defines the protected characteristic of marriage and civil partnership. People who are not married or civil partners do not have this characteristic.

The clause also explains that people who have or share the common characteristics of being married or of being a civil partner can be described as being in a marriage or civil partnership. A married man and a woman in a civil partnership both share the protected characteristic of marriage and civil partnership.

#### Examples

- A person who is engaged to be married is not married and therefore does not have this protected characteristic.
- A divorcee or a person whose civil partnership has been dissolved is not married or in a civil partnership and therefore does not have this protected characteristic.

### **Clause 10: Race**

This clause defines the protected characteristic of race. For the purposes of the Bill, "race" includes colour, nationality, ethnic or national origins and caste.

The clause explains that people who have or share characteristics of colour, nationality, ethnic or national origins, or caste can be described as belonging to a particular racial group. A racial group can be made up of two or more different racial groups.

The term "caste" denotes a hereditary, endogamous (marrying within the group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity. It is generally (but not exclusively) associated with South Asia, particularly India, and its diaspora. It can encompass the four classes (varnas) of Hindu tradition (the Brahmin, Kshatriya, Vaishya and Shudra communities); the thousands of regional Hindu, Sikh, Christian, Muslim or other religious groups known as jatis; and groups amongst South Asian Muslims called biradaris. Some jatis regarded as below the varna hierarchy (once termed "untouchable") are known as Dalit.

#### Examples

- Colour includes being black or white.
- Nationality includes being a British, Australian or Swiss citizen.
- Ethnic or national origins include being from a Roma background or of Chinese heritage.
- A racial group could be "black Britons" which would encompass those people who are both black and who are British citizens.

### **Clause 11: Religion or belief**

This clause defines the protected characteristic of religion or religious or philosophical belief, which is stated to include for this purpose a lack of religion or belief. It is a broad definition in line with the freedom of thought, conscience and religion guaranteed by Article 9 of the [European Convention on Human Rights](#). The main limitation for the purposes of Article 9 is that the religion must have a clear structure and belief system. Denominations or sects within a religion can be considered to be a religion or belief, such as Protestants and Catholics within Christianity.

The criteria for determining what is a “philosophical belief” are that it must be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others. So, for example, any cult involved in illegal activities would not satisfy these criteria. The clause provides that people who are of the same religion or belief share the protected characteristic of religion or belief. Depending on the context, this could mean people who, for example, share the characteristic of being Protestant or people who share the characteristic of being Christian.

#### Examples

- The Baha’i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism are all religions for the purposes of this provision.
- Beliefs such as humanism and atheism would be beliefs for the purposes of this provision but adherence to a particular football team would not be.

### **Clause 12: Sex**

This clause simply explains that references in the Bill to people having the protected characteristic of sex are to mean being a man or a woman, and that men share this characteristic with other men, and women with other women.

### **Clause 13: Sexual orientation**

This clause defines the protected characteristic of sexual orientation as being a person’s sexual orientation towards:

- people of the same sex as him or her (in other words the person is a gay man or a lesbian);
- people of the opposite sex from him or her (the person is heterosexual);
- people of both sexes (the person is bisexual).

It also explains that references to people sharing a sexual orientation mean that they are of the same sexual orientation.

#### Examples

- A man who experiences sexual attraction towards both men and women is “bisexual” in terms of sexual orientation even if he has only had relationships with women.
- A man and a woman who are both attracted only to people of the opposite sex from them share a sexual orientation.

- A man who is attracted only to other men is a gay man. A woman who is attracted only to other women is a lesbian. A gay man and a lesbian share a sexual orientation.

## **Division 2: Prohibited conduct**

### Sub-Division 1 - Discrimination

#### **Clause 14: Direct discrimination**

This clause defines direct discrimination for the purposes of the Act. Direct discrimination occurs where the reason for a person being treated less favourably than another is a protected characteristic listed in clause 5. This definition 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).

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.

The clause also provides that:

- for age, different treatment that is justified as a proportionate means of meeting a legitimate aim is not direct discrimination;
- in relation to disability it is not 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 breastfeeding a baby who is more than six months old amounts to direct sex discrimination; and
- men cannot claim privileges for women connected with pregnancy or childbirth.

#### Examples

- If an employer recruits a man rather than a woman because she assumes that women do not have the strength to do the job, this would be direct sex discrimination.
- If a Muslim shopkeeper refuses to serve a Muslim woman because she is married to a Christian, this would be direct religious or belief-related discrimination on the basis of her association with her husband.
- If an employer rejects a job application form from a white man who he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer's mistaken perception.
- If an employer advertising a vacancy makes it clear in the advert that Roma need not apply, this would amount to direct race discrimination against a Roma who might reasonably have considered applying for the job but was deterred from doing so because of the advertisement.
- If the manager of a nightclub is disciplined for refusing to carry out an instruction to exclude older customers from the club, this would be direct age discrimination against the manager unless the instruction could be justified.

### **Clause 15: Combined discrimination: dual characteristics**

This clause provides for the discrimination prohibited by the Bill to include direct discrimination because of a combination of two protected characteristics ("dual discrimination"). The protected characteristics which may be combined are age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

For a claim to be successful, the claimant must show that the less favourable treatment was because of the combination alleged, as compared with how a person who does not share either of the characteristics in the combination is or would be treated. A dual discrimination claim will not succeed where an exception or justification applies to the treatment in respect of either of the relevant protected characteristics - for example, where an occupational requirement in Schedule 9 (Work: exceptions) renders direct discrimination lawful.

The clause allows those who have experienced less favourable treatment because of a combination of two relevant protected characteristics to bring a direct discrimination claim, such as where the single-strand approach may not succeed.

The claimant does not have to show that a claim of direct discrimination in respect of each protected characteristic would have been successful if brought separately. A claimant is not prevented from bringing direct discrimination claims because of individual protected characteristics and a dual discrimination claim.

The clause enables the Council of Ministers to make orders specifying further what a claimant does or does not need to show to prove dual discrimination or further restricting the circumstances in which dual discrimination is prohibited by the Act.

**NOTE 1:** Currently subsection (5) excludes from the scope of this clause circumstances involving disability discrimination in schools. This is based on the provision in the UK 2010 Act which appropriate there because in the UK claims in respect of disability discrimination in schools are heard by the Special Educational Needs and Disability Tribunals or equivalent specialist tribunals (i.e. rather than the normal route of an employment tribunal for work related cases and the county courts for goods and services cases). However, in the Isle of Man it is proposed that all cases will be heard by the Employment and Equality Tribunal so there is no need for the exclusion and the subsection will be omitted from the final draft of the Bill.

**NOTE 2:** The equivalent provision of the UK 2010 Act is not yet in force.

#### Examples

- A black woman has been passed over for promotion to work on reception because her employer thinks black women do not perform well in customer service roles. Because the employer can point to a white woman of equivalent qualifications and experience who has been appointed to the role in question, as well as a black man of equivalent qualifications and experience in a similar role, the woman may need to be able to compare her treatment because of race and sex combined to demonstrate that she has been subjected to less favourable treatment because of her employer's prejudice against black women.
- A bus driver does not allow a Muslim man onto her bus, claiming that he could be a "terrorist". While it might not be possible for the man to demonstrate less favourable treatment because of either protected characteristic if considered separately, a dual discrimination claim will succeed if the reason for his treatment was the specific combination of sex and religion or belief, which resulted in him being stereotyped as a potential terrorist.

- 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 numerous other female TV presenters. She may also struggle to win an age discrimination claim as her employer could point to plenty of older TV presenters. However, she may be able to establish less favourable treatment by comparing herself to older male TV presenters.

### **Clause 16: Discrimination arising from disability**

This clause provides that it is discrimination to treat a disabled person unfavourably not only because of the person's disability itself but 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. This clause is aimed at establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment.

#### Examples

- An employee with a visual impairment is dismissed because he cannot do as much work as a non-disabled colleague. If the employer sought to justify the dismissal, he would need to show that it was a proportionate means of achieving a legitimate aim.
- The licensee of a pub refuses to serve a person 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 is able to show that she did not know, and could not reasonably have been expected to know, that the customer was disabled, she has not subjected him to discrimination arising from his disability.
- However, in the example above, 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 refusing to serve him was a proportionate means of achieving a legitimate aim.

### **Clause 17: Gender reassignment discrimination: cases of absence from work**

This clause provides that it is discrimination against transsexual people to treat them less favourably for being absent from work because they propose to undergo, are undergoing or have undergone gender reassignment than they would be treated if they were absent because they were ill or injured. Transsexual people are also discriminated against in relation to absences relating to their gender reassignment if they are treated less favourably than they would be treated for absence for reasons other than sickness or injury and it is unreasonable to treat them less favourably.

#### Example

- A female to male transsexual person takes time off work to receive hormone treatment and attend appointments with a specialist consultant off-Island as part of his gender reassignment. His employer cannot discriminate against him because of his absence from work for this purpose.

### **Clause 18: Pregnancy and maternity discrimination: non-work cases**

This clause defines what it means to discriminate because of a woman's pregnancy or maternity, as distinct from her sex, in specified situations outside work. It protects a woman

from discrimination because of her current or a previous pregnancy. It also protects her from maternity discrimination, which includes treating her unfavourably because she is breast-feeding, for 26 weeks after giving birth and provides that pregnancy or maternity discrimination as defined cannot be treated as sex discrimination.

#### Examples

- A café owner must not ask a woman to leave his café because she is breast-feeding her baby. (As a result of this it is considered that the Breastfeeding Act 2011 can be repealed as being redundant.)
- A shopkeeper must not refuse to sell cigarettes to a woman because she is pregnant.
- A school must not prevent a pupil taking an exam because she is pregnant.

### **Clause 19: Pregnancy and maternity discrimination: work cases**

This clause defines what it means to discriminate in the workplace because of a woman's pregnancy or pregnancy-related illness, or because she takes or tries to take maternity leave. The period during which protection from these types of discrimination is provided is the period of the pregnancy and any statutory maternity leave to which she is entitled. During this period, these types of discrimination cannot be treated as sex discrimination.

#### Examples

- An employer must not demote or dismiss an employee, or deny her training or promotion opportunities, because she is pregnant or on maternity leave.
- An employer must not take into account an employee's period of absence due to pregnancy-related illness when making a decision about her employment.

### **Clause 20: Indirect discrimination**

This clause defines indirect discrimination for the purposes of the Act. Indirect discrimination occurs when a policy 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.

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.

#### Examples

- 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 allowances are 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.

## Sub-Division 2 – Adjustments for Disabled Persons

### **Clause 21: Duty to make adjustments**

This clause 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).

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 Bill states otherwise, it would never be reasonable for a person bound by the duty to pass on the costs of complying with it to an individual disabled person.

It contains only one threshold for the reasonable adjustment duty — “substantial disadvantage”.

**NOTE:** In the table in subsection (12) on page 30 of the Bill the reference to the Applicable Schedule for “Part 7 (associations)” should be Schedule 14 rather than Schedule 15 and for “Each of the Parts mentioned above” it should be Schedule 18 rather than Schedule 17.

### Examples

- 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 it 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 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 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 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.

## **Clause 22: Failure to comply with duty**

This clause has the effect that a failure to comply with any one of the reasonable adjustment requirements amounts to discrimination against a disabled person to whom the duty is owed. It also provides that, apart from under this Bill, no other action can be taken for failure to comply with the duty.

### Examples

- 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 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 discrimination.

## **Clause 23: Regulations**

This section provides a power for the Council of Ministers and relevant Departments to make regulations 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. This power also allows amendment of the Applicable Schedules referred to in clause 21.

### Example

- Regulations could be made about what is and what is not included within the meaning of a "provision, criterion or practice" if, for example, research indicated that despite statutory codes of practice there was quite a high level of uncertainty among employers and service providers about the extent of the duty and how it applied.

### Subdivision 3: Discrimination: Supplemental

## **Clause 24: Comparison by reference to circumstances**

This clause provides that like must be compared with like in cases of direct, dual or indirect discrimination. The treatment of the claimant must be compared with that of an actual or a hypothetical person — the comparator — who does not share the same protected characteristic as the claimant (or, in the case of dual discrimination, either of the protected characteristics in the combination) but who is (or is assumed to be) in not materially different circumstances from the claimant. In cases of direct or dual discrimination, those circumstances can include their respective abilities where the claimant is a disabled person.

The clause also enables a civil partner who is treated less favourably than a married person in similar circumstances to bring a claim for sexual orientation discrimination.

**NOTE:** There is a numbering error in this clause. The "(3)" before the "(b)" should be omitted and "(4)" renumbered as "(3)".

## Examples

- A blind woman claims she was not shortlisted for a job involving computers because the employer wrongly assumed that blind people cannot use them. An appropriate comparator is a person who is not blind — it could be a non-disabled person or someone with a different disability — but who has the same ability to do the job as the claimant.
- A Muslim employee is put at a disadvantage by his employer's practice of not allowing requests for time off work on Fridays. The comparison that must be made is in terms of the impact of that practice on non-Muslim employees in similar circumstances to whom it is (or might be) applied.

### **Clause 25: Irrelevance of alleged discriminator's characteristics**

This clause provides that it is no defence to a claim of direct or dual discrimination that the alleged discriminator shares the protected characteristic (or one or both of the protected characteristics in a dual discrimination claim) with the victim. The discriminator will still be liable for any unlawful discrimination. The wording of the clause is broad enough to cover cases of discrimination based on association or perception.

#### Example

- An employer cannot argue that because he is a gay man he is not liable for unlawful discrimination for rejecting a job application from another gay man because of the applicant's sexual orientation.

### **Clause 26: References to particular strands of discrimination**

This clause sets out what is meant by references to the types of discrimination referred to in the Bill, so that references elsewhere in the Bill to age, marriage and civil partnership, race, religious or belief-related, sex or sexual orientation discrimination, include references to both direct and indirect discrimination because of each of those characteristics respectively.

As well as direct and indirect discrimination, references to disability discrimination also include references to discrimination arising from disability and to a failure to comply with a duty to make reasonable adjustments; and references to gender reassignment discrimination also include discrimination within clause 17 (gender reassignment discrimination: cases of absence from work).

Finally, references to pregnancy and maternity discrimination have the meanings derived from clauses 18 and 19.

## Subdivision 4: Other Prohibited Conduct

### **Clause 27: Harassment**

This clause defines what is meant by harassment for the purposes of the Bill. There are three types of harassment. 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.

In determining the effect of the unwanted conduct, courts and tribunals will continue to be required 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.

#### Examples

- 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 topless calendar, may be harassing their employees where this makes the workplace an offensive place to work for any employee, 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.

#### **Clause 28: Victimisation**

This clause defines what conduct amounts to victimisation under the Bill. It 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. 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.

#### Examples

- 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.

### **PART 3 – SERVICES AND PUBLIC FUNCTIONS**

#### **Clause 29: Application of this Part**

This clause provides that this Part of the Bill, which prohibits discrimination, harassment and victimisation by people who supply services (which includes goods and facilities) or perform public functions, does not apply to discrimination or harassment of people in those

circumstances because they are married or in a civil partnership or because of age if they are under 18.

It also states that, if an act of discrimination, harassment or victimisation is made unlawful by other Parts of the Bill covering premises, work or education, then those provisions, rather than the provisions covering services and public functions, apply. Similarly, if the act in question results in a breach of an equality clause in a person's terms of work or a non-discrimination rule in an occupational pension scheme, this Part will not apply.

### **Clause 30: Provision of services, etc.**

This clause makes it unlawful to discriminate against or harass a person because of a protected characteristic, or victimise someone when providing services (which includes goods and facilities). The person is protected both when requesting a service and during the course of being provided with a service.

It also makes it unlawful to discriminate against, harass or victimise a person when exercising a public function which does not involve the provision of a service. Examples of such public functions include law enforcement and revenue raising and collection. Public functions which involve the provision of a service, for example, medical treatment on the NHS, are covered by the provisions dealing with services.

It also imposes the duty to make reasonable adjustments set out in clause 21 in relation to providing services and exercising public functions. A person is considered to have discriminated against a disabled person if he or she fails to comply with the duty to make reasonable adjustments.

Unlike in the UK's 2010 Act the prohibition on harassment when providing services or exercising public functions does cover sexual orientation or religion or belief. Under the UK Act conduct that would otherwise have fallen within the definition of harassment in relation to these protected characteristics may still amount to direct discrimination, but there does not appear to be any reason for their exclusion from the prohibition on harassment (other than that they were not included in earlier legislation which UK 2010 Act replaced).

The prohibitions in this clause apply, in relation to race or religion or belief, to any actions taken in connection with the grant of entry clearance to enter the Isle of Man, even if the act in question takes place outside the Island.

#### Examples

- A man and two female friends plan a night out at a local night club. At the entrance the man is charged £10 entry; the two women are charged £5 each. The owner explains the night club is trying to attract more women and has decided to charge them half the entrance fee. This would be direct sex discrimination.
- A company which organises outdoor activity breaks requires protective headwear to be worn for certain activities, such as white water rafting and rock climbing. This requirement could be indirectly discriminatory against Sikhs unless it can be justified, for example on health and safety grounds.
- A man who suffers from long-standing and serious health problems, including partial paralysis and a severe sight impairment, is imprisoned. On his imprisonment, the man is not allocated an adapted cell, despite being assessed as requiring one within 24 hours of arriving at prison. Instead, he is allocated a standard cell. This would be discrimination resulting from a failure to make reasonable adjustments to take account of a person's disability.

- A black man goes into a bar to watch a football match. He is served a pint of beer and takes a seat at an empty table. Whilst watching the football match the bartender and a number of customers make racist remarks about some of the footballers on the pitch. When the man complains he is then called a number of derogatory names. This would be harassment because of race.

### **Clause 31: Interpretation and exceptions**

This clause explains what is meant by the terms “provision of a service” and “public function” in the Bill. The definition of a “public function” is that which applies for the purposes of the [Human Rights Act 2001](#). The public functions provisions apply only where what is being done does not fall within the definition of a “service”.

This clause also explains that refusing to provide or not providing a service includes providing a person with a service of different quality, or in a different way (for example, in a hostile or less courteous way) or on less favourable terms than the service would normally be provided.

This clause provides that where an employer arranges for another person to provide a service to a closed group of employees, then the members of that closed group are to be treated as a section of the public for the purposes of their relationship with the service-provider. This means that if the service-provider discriminates against members of that group, the prohibitions in this Part apply. However, the employer is not to be treated as a service-provider, despite facilitating access to the service. Instead, his or her conduct in respect of his or her employees is to be governed by the provisions in Part 5 (work).

Further details of how the reasonable adjustments duty applies in relation to providing services and exercising public functions are contained in Schedule 2 and the exceptions which apply to this Part of the Bill are contained in Schedule 3.

#### Examples

- Services include the provision of day care, the running of residential care homes and leisure centre facilities, whether provided by a private body or a local authority.
- Public functions not involving the provision of a service include licensing functions; Government and local authority public consultation exercises; the provision of public highways; planning permission decisions; and core functions of the prison service and the probation service.
- The definition of refusing to provide a service covers, for example, a bank which has a policy not to accept calls from customers through a third party. This could amount to indirect discrimination against a deaf person who uses a registered interpreter to call the bank.
- An employer arranges for an insurer to provide a group health insurance scheme to his employees. The insurer refuses to provide cover on the same terms to one of the employees because she is transsexual. This would be treated as direct discrimination in the provision of services by the insurer against the employee in the same way as if the insurance was available to the general public. However, if it was the employer, rather than the insurer, who decided that the transsexual employee should not be able to access the group health insurance scheme, such discrimination in the employee’s access to benefits in the workplace would be covered by the provisions of Part 5 (work).

## **PART 4 – PREMISES**

### **Clause 32: Application of this Part**

This clause provides that this Part of the Bill, which prohibits discrimination, harassment and victimisation in relation to the disposal, management and occupation of premises, does not make it unlawful to discriminate against or harass people in those circumstances because they are married or in a civil partnership or because of age.

It also states that, if an act of discrimination, harassment or victimisation is made unlawful by other Parts of the Bill covering work or education, then those provisions, rather than the provisions covering premises, apply. Further, where accommodation is provided either as a short-term let or where it is provided as part of a service or public function, Part 3 (services and public functions) applies instead of this Part. If the act in question results in a breach of an equality clause in a person's terms of work or a non-discrimination rule in an occupational pension scheme then these provisions will not apply.

### **Section 33: Disposals, etc.**

This clause makes it unlawful for a person who has the authority to dispose of premises (for example, by selling, letting or sub-letting a property) to discriminate against or victimise someone else in a number of ways including by offering the premises to them on less favourable terms; by not letting or selling the premises to them or by treating them less favourably.

It also makes it unlawful for a person with authority to dispose of premises to harass someone who occupies or applies for them. Unlike in the UK's 2010 Act the prohibition on harassment when providing services or exercising public functions does cover sexual orientation or religion or belief. Under the UK Act conduct that would otherwise have fallen within the definition of harassment in relation to these protected characteristics may still amount to direct discrimination, but there does not appear to be a rational reason for their exclusion from the prohibition on harassment (other than that they were not included in earlier legislation which 2010 Act replaced).

#### Examples

- A landlord refuses to let a property to a prospective tenant because of her race. This is direct discrimination when disposing of premises.
- A vendor offers her property to a prospective buyer who is disabled at a higher sale price than she would to a non-disabled person, because of the person's disability. This is direct discrimination when disposing of premises.

### **Clause 34: Permission for disposal**

This clause makes it unlawful for a person whose permission is needed to dispose of premises (for example, to sell, let or sublet a property) to discriminate against or victimise someone else by withholding that permission. It also makes it unlawful for such a person to harass someone who seeks that permission, or someone to whom the property would be sold or let if the permission were given. Unlike in the UK's 2010 Act the prohibition on harassment when providing services or exercising public functions does cover sexual orientation or religion or belief for the reason set out in clause 33 above.

This clause does not apply where permission to dispose of premises is refused by a court in the context of legal proceedings.

### Example

- A disabled tenant seeks permission from his landlord to sublet a room within his flat to help him pay his rent. The landlord tells him that he cannot because he is disabled. This is direct discrimination in permission for disposing of premises.

### **Clause 35: Management**

This clause makes it unlawful for a person who manages premises to discriminate against or victimise someone who occupies the property in the way he or she allows the person to use a benefit or facility associated with the property, by evicting the person or by otherwise treating the person unfavourably. It also makes it unlawful for a person who manages a property to harass a person who occupies or applies to occupy it. Unlike in the UK's 2010 Act the prohibition on harassment when providing services or exercising public functions does cover sexual orientation or religion or belief for the reason set out in clause 33 above.

### Examples

- A manager of a property restricts a tenant's use of a communal garden by setting fixed times when she can use the garden because she is undergoing gender reassignment, while allowing other tenants unrestricted access to the garden. This would be direct discrimination in the management of premises.
- A manager of a property refuses to allow a lesbian tenant to use facilities which are available to other tenants, or deliberately neglects to inform her about facilities which are available for the use of other tenants, because she had previously made a claim of discrimination against the manager. This would be victimisation.
- A manager of a property responds to requests for maintenance issues to be addressed more slowly or less favourably for one tenant than similar requests from other tenants, because the tenant has a learning disability. This would be direct discrimination in the management of premises.

### **Clause 36: Leasehold and common parts**

This clause imposes the reasonable adjustments duty on those who let premises and those who are responsible for the common parts of let premises. This clause also defines who is responsible for common parts, defines common parts and includes a power to prescribe premises to which the requirements do not apply.

Unlike the UK Act this clause does not deal with commonhold premises as this concept does not exist in Isle of Man law.

### Example

- An agency used by a landlord to let and manage leasehold premises is a controller of premises under this provision and therefore is under the duty to make reasonable adjustments for disabled people, such as making information about the property available in accessible formats.

### **Clause 37: Interpretation and exceptions**

This clause explains what is meant by terms used in this Part. In particular it sets out the kinds of property transactions meant by "disposing of premises" in the case of premises which are subject to a tenancy, and defines what is meant by "tenancy". It also makes it clear that the provisions apply to tenancies made before as well as after the Bill.

The details of how the reasonable adjustments duty applies in relation to "let premises", "premises to let" and "common parts" of let premises are contained in Schedule 4 and the exceptions which apply to this part of the Bill are contained in Schedule 5.



**PART 5 – WORK**  
DIVISION 1 – EMPLOYMENT, ETC.  
Subdivision 1 – Employees

**Clause 38: Employees and applicants**

This clause makes it unlawful for an employer to discriminate against or victimise employees and people seeking work. It applies where the employer is making arrangements to fill a job, and in respect of anything done in the course of a person's employment. In respect of discrimination because of sex or pregnancy and maternity, a term of an offer of employment which relates to pay is treated as discriminatory where, if accepted, it would give rise to an equality clause or if an equality clause does not apply, where the offer of the term constitutes direct or dual discrimination.

It also imposes the reasonable adjustments duty set out in clause 21 on employers in respect of disabled employees and applicants.

Examples

- An employer decides not to shortlist for interview a disabled job applicant because of her epilepsy. This would be direct discrimination.
- An employer offers a woman a job on lower pay than the set rate because she is pregnant when she applies. She cannot bring an equality clause case as there is no comparator. However, she will be able to claim direct discrimination.
- An employer refuses to interview a man applying for promotion, because he previously supported a discrimination case against the employer brought by another employee. This would be victimisation.
- An employer enforces a "no beards" policy by asking staff to shave. This could be indirect discrimination, because it would have a particular impact on Muslims or Orthodox Jews.

**Clause 39: Employees and applicants: harassment**

This clause makes it unlawful for an employer to harass employees and people applying for employment. The UK Act previously also made an employer liable for harassment of its employees by third parties, such as customers or clients, over whom the employer does not have direct control. However, this provision was removed from the UK Act in 2013 and the Bill follows this new approach.

**Clause 40: Contract workers**

This clause makes it unlawful for a person (referred to as a principal) who makes work available to contract workers to discriminate against, harass or victimise them. Contract workers are separately protected from discrimination by their employer (for example, the agency for which they work and which places them with the principal) under clause 38. This clause also imposes a duty on the principal to make reasonable adjustments for disabled contract workers (in addition to the duty on the contract worker's employer).

Examples

- A hotel manager refuses to accept a black African contract worker sent to him by an agency because of fears that guests would be put off by his accent. This would be direct discrimination.

- A bank treats a female contract worker less well than her male counterparts, for example by insisting that as she is a woman she should make coffee for all meetings. This would be direct discrimination.

#### Subdivision 2 – Police officers

##### **Clause 41: Police officers: identity of employer**

This clause provides that police constables and police cadets are treated as employees for the purposes of this Part of the Bill. It identifies the relevant employer as either the chief constable or the Department of Home Affairs depending on who commits the act in question.

##### Example

- The chief constable refuses to allocate protective equipment to female constables. The chief constable would be treated as the employer in a direct discrimination claim.

#### Subdivision 2 – Partners

##### **Clause 42: Partnerships**

This clause makes it unlawful for firms (and those intending to set up a firm) to discriminate against, harass or victimise their partners, or people seeking to be partners in the firm. Activities covered by these provisions could include the offering of partnerships or giving existing partners access to opportunities such as training and/or transfers to other branches of the firm. It imposes on firms and people setting up firms a duty to make reasonable adjustments for disabled partners and prospective partners.

In the case of limited partnerships, these prohibitions only apply in relation to those partners who are involved with the operation of the firm (general partners).

Because partners are mainly governed by their partnership agreements, rather than by employment contracts, separate provisions are needed to provide protection from discrimination, harassment and victimisation for partners in ordinary and limited partnerships. In its application to a limited partnership within the meaning of section 47 of the [Partnership Act 1909](#) "partner" means a general partner within the meaning of that section.

##### Examples

- A firm refuses to accept an application for partnership from a black candidate, who is qualified to join, because he is of African origin. This would be direct discrimination.
- A limited partnership refuses a member access to use of a company car because he has supported a discrimination or harassment claim against the partnership. This would be victimisation.

##### **Clause 43: Personal offices: appointments, etc.**

This clause makes it unlawful to discriminate against, harass or victimise people who are or wish to become personal office-holders. These provisions apply in so far as other work provisions do not — this means that where office-holders are also employees, they will be protected by the provisions dealing with employment in respect of their employment relationship. In respect of sex or pregnancy and maternity discrimination, a term of an offer of an appointment to office which relates to pay is treated as discriminatory where, if accepted, it would give rise to an equality clause or, if that is not the case, where the offer of the term constitutes direct or dual discrimination.

Personal office-holders are people who perform a function personally at a time and place specified by another person and who, in return, are entitled to payment (other than expenses or compensation for lost income). Clause 46(4) provides that, where a personal office is a public office at the same time, it is to be treated as a public office only.

An office-holder can be appointed by one person and then an entirely different person can be responsible for other matters, for example for providing facilities for the office-holder to perform his or her functions. Because of this, the clause prohibits both the person who makes the appointment and any relevant person from discriminating against, victimising or harassing the office-holder.

The relevant person is the person who is responsible for the act complained of in each case.

This clause places a duty to make reasonable adjustments on a person who makes the appointment and any relevant person in relation to the needs of disabled people who seek or hold personal offices.

#### Examples

- A company board refuses to appoint a candidate as director because she is black. This would be direct discrimination.
- A company terminates the appointment of a director because it is discovered that she is pregnant. This would be direct discrimination.

#### **Clause 44: Public offices: appointments, etc.**

This clause makes it unlawful to discriminate against, harass or victimise people who are or wish to become public office-holders. Like the personal officeholder provisions above, these provisions apply in so far as other work provisions do not. This means that where public office-holders are also employees, they will be protected by the provisions dealing with employment in respect of their employment relationship. In respect of sex or pregnancy and maternity discrimination, a term of an offer of an appointment to office which relates to pay is treated as discriminatory where, if accepted, it would give rise to an equality clause or if that is not the case where the offer of the term constitutes direct or dual discrimination.

Public office-holders are people appointed by, on the recommendation of, or with the approval of, the Governor, the Governor in Council, the Council of Ministers, the Chief Minister, the Appointments Commission, Tynwald or a Branch of Tynwald.

A public office-holder can be appointed by one person and then an entirely different person can be responsible for other matters, for example for providing facilities for the office-holder to perform his or her functions. Because of this, the clause prohibits both the person with the power to make the appointment and any relevant person from discriminating against, victimising or harassing the officeholder. The relevant person is the person who is responsible for the act complained of in each case (but does not include Tynwald, the House of Keys or the Legislative Council).

This clause also places on the person who has the power to make an appointment and any relevant person a duty to make reasonable adjustments for disabled people seeking or holding public offices.

#### Example

- The Council of Ministers refuses to appoint a person as a lay member of its International Development Committee because he is gay. This would be direct discrimination.

#### **Clause 45: Public offices: recommendations for appointments, etc.**

This clause makes it unlawful for a person with power to make recommendations about or approve appointments to public offices to discriminate against, harass or victimise people seeking or being considered as public officeholders in respect of the recommendation or approval process. It also imposes a duty on the person with the power to make a recommendation or approve an appointment to make reasonable adjustments for disabled people who seek or are being considered for appointment to public offices.

This clause does not apply in respect of all public offices, only those which are appointed by, on the recommendation of, or with the approval of, the Governor, the Governor in Council, the Council of Ministers, the Chief Minister, and the Appointments Commission.

#### Example

- It would be direct discrimination for the Appointments Commission to refuse to appoint a person as the Chair or member of a tribunal because the person had a hearing impairment.

#### **Clause 46: Sections 43 to 45: Interpretation and exceptions**

This clause explains the meaning of various terms, such as "relevant person", used in clauses 43, 44 and 45. It provides that appointment does not include election, meaning elected offices do not constitute personal or public offices for the purpose of these clauses.

It also stipulates that termination of an appointment includes the expiration of the appointment period or where unreasonable conduct of the relevant person causes the officeholder to terminate the appointment. But it does not count as termination if after expiry of the appointment the person's appointment is immediately renewed on the same terms.

The clause provides that Schedule 6 sets out which offices are excluded from being public offices for the purposes of the Bill.

### Subdivision 5 - Qualifications

#### **Clause 47: Qualifications bodies**

This clause makes it unlawful for a qualifications body (i.e. any authority or body which can confer a relevant qualification) to discriminate against, harass or victimise a person when conferring relevant qualifications (which includes renewing or extending a relevant qualification). It provides that applying a competence standard to a disabled person is not disability discrimination, provided the application of the standard is justified. It also imposes a duty on qualifications bodies to make reasonable adjustments for disabled people.

This clause defines what a relevant qualification is and which bodies are not covered by the term "qualifications body". It also confirms that conferring a relevant qualification includes renewing or extending such a qualification.

#### Examples

- A body which confers diplomas certifying that people are qualified electricians refuses to confer the qualification on a man simply because he is gay. This would be direct discrimination.

- An organisation which maintains a register of professional tradespeople refuses to include a person's details on the register because her name does not sound English. This would be direct discrimination.

#### **Clause 48: Employment service-providers**

This clause makes it unlawful to discriminate against, harass or victimise a person when providing an employment service. It also places a duty on providers of employment services to make reasonable adjustments for disabled people. The duty is an anticipatory duty except for providers of a vocational service, so that in relation to the provision of vocational services, employment service-providers do not need to deal in advance with reasonable adjustments for disabled people. The clause sets out what the provision of an employment service includes (such as the provision of training for employment or careers guidance), and what it does not include (such as education in schools) and vocational services are defined.

##### Examples

- A company which provides courses to train people to be plumbers refuses to enrol women because its directors assume that very few people want to employ female plumbers. This would be direct discrimination.
- An agency which finds employment opportunities for teachers in schools offers placements only to white teachers based on the assumption that this is what parents in a particular area would prefer. This would be direct discrimination.
- An agency advertises job vacancies on its website. It will need to have the website checked for accessibility and make reasonable changes to enable disabled people using a variety of access software to use it.
- Examples of the types of activities covered under this section include providing CV writing classes, English or Maths classes to help adults into work; training in IT/keyboarding skills; or providing work placements.

#### **Clause 49: Trade organisations**

This clause makes it unlawful for a trade organisation to discriminate against, harass or victimise a person who is, or is applying to be, a member. It also requires trade organisations to make reasonable adjustments for disabled people.

A trade organisation is an organisation of workers (such as a trade union) or employers (such as the Isle of Man Employers Federation); or an organisation whose members carry out a particular trade or profession.

##### Examples

- A trade union restricts its membership to men. This would be direct discrimination.
- An organisation of employers varies membership subscriptions or access to conferences because of a person's race. This would be direct discrimination.

#### **Clause 50: Official business of local authority members**

This clause makes it unlawful for local authorities to discriminate against, harass or victimise their members in relation to providing access to facilities such as training which relate to the carrying out of their official business. This does not apply to election or appointment to posts within the local authority. It imposes a duty on local authorities to make reasonable adjustments for disabled members.

## Example

- A local authority does not equip meeting rooms with hearing loops for a member who has a hearing impairment, in order to enable her to take full part in the business for which she has been elected. This would be discrimination if provision of hearing loops were considered to be a reasonable adjustment.

### **Clause 51: Enquiries about disability and health**

Except in the situations specified in this clause, an employer must not ask about a job applicant's health until that person has been either offered a job (on a conditional or unconditional basis) or been included in a pool of successful candidates to be offered a job when a suitable position arises. The specified situations where health-related enquiries can be made are for the purposes of:

- finding out whether a job applicant would be able to participate in an assessment to test his or her suitability for the work;
- making reasonable adjustments to enable the disabled person to participate in the recruitment process;
- finding out whether a job applicant would be able to undertake a function that is intrinsic to the job, with reasonable adjustments in place as required;
- monitoring diversity in applications for jobs;
- supporting positive action in employment for disabled people; and
- enabling an employer to identify suitable candidates for a job where there is an occupational requirement for the person to be disabled.

The clause also allows questions to be asked where they are needed in the context of national security vetting.

Where an employer makes a health or disability-related enquiry which falls outside the specified situations, he or she would be acting unlawfully. Proceedings may be instituted against the employer by the Attorney General who would, for example, be able to conduct an investigation if there was evidence that a large employer was routinely asking prohibited questions when recruiting.

Where the employer asks a question not allowed by this section and rejects the applicant, if the applicant then makes a claim to the employment tribunal for direct disability discrimination, it will be for the employer to show that it had not discriminated against the candidate.

As well as applying to recruitment to employment, the section also applies to the other areas covered by Part 5 of the Act, such as contract work, business partnerships and office-holders.

This provision will limit the making of inappropriate enquiries and therefore help to tackle the disincentive effect that an employer making such enquiries can have on some disabled people making applications for work.

**NOTE:** There are some cross reference and typographical errors in this clause.

- in clause 51(5) the reference to "Subsection (5)" should be to "Subsection (6)";
- in clause 51(6) the reference to "section 119 (burden of proof)" should be to "section 120 (burden of proof)";
- in clause 51(8) and (9) the references to "(6)(b)" and "(6)(e)" should be to "(7)(b)" and "(7)(e)" respectively;
- in clause 51(12)(b) there is a "(" missing in "section 40(1)b)"; and

- the numbering of the paragraphs in clause 51(12) has gone awry. Paragraphs (h), (i), (j) should be renumbered as (e), (f), (g) respectively.

#### Examples

- Applicants are asked on an application form whether they have a disability that requires the employer to make a reasonable adjustment to the recruitment process. This is to allow, for example, people with a speech impairment more time for interview. This enquiry would be permitted.
- An applicant applies for a job in a warehouse, which requires the manual lifting and handling of heavy items. As manual handling is a function which is intrinsic to the job, the employer is permitted to ask the applicant questions about his health to establish whether he is able to do the job (with reasonable adjustments for a disabled applicant, if required). The employer would not be permitted to ask the applicant other health questions until he or she offered the candidate a job.

### DIVISION 2 – OCCUPATIONAL PENSION SCHEMES

#### **Clause 52: Non-discrimination rule**

This clause requires that every occupational pension scheme is to have a non-discrimination rule read into it. The rule prohibits “a responsible person” from discriminating against, harassing or victimising a member or a person who could become a member of the scheme.

A responsible person is a scheme trustee or manager, an employer, and the person responsible for appointing a person to a public office, where the office-holder can be a scheme member.

The rule does not apply to pension rights built up or benefits payable for periods of service before the commencement of this provision.

Where there has been a breach of a non-discrimination rule, proceedings may be brought against the person responsible for the breach under Part 9 of the Act.

It would not be a breach of a non-discrimination rule if an employer or the trustees or managers maintain certain practices or make decisions in relation to age that are specified by order made by the Treasury following consultation with such persons as it considered appropriate.

The non-discrimination rule does not apply where an equality rule operates or would operate, but for the exceptions in Part 2 of Schedule 7.

#### Example

- A disabled person is refused membership of an occupational pension scheme because the trustees believe it is not in her best interest to join. This is because she has a short life expectancy and is unlikely to build up a reasonable pension. Although the trustees believe they are acting reasonably, they may be liable to challenge because they have breached the non-discrimination rule.

#### **Clause 53: Non-discrimination alterations**

This clause gives trustees and managers of an occupational pension scheme the power, by resolution, to alter their scheme’s rules to conform to the non-discrimination rule in clause 52. They may use the power if:

- they lack powers to alter the rules for that purpose, or

- procedures for altering the rules, including obtaining consent, are unduly complex or would take too long.

#### Example

- Changes to the scheme rules of a large scheme require consultation with all the members before they may be made. This is impracticable, particularly as some deferred members cannot be traced. Scheme trustees may make the necessary alteration to scheme rules relying on this power.

#### **Clause 54: Communications**

This clause applies to clauses 52, 105, 109 and paragraph 15 of Schedule 8, in their application to communications, to a disabled person who is:

- entitled to the present payment of dependants' or survivors' benefits under an occupational pension scheme, or
- entitled to a pension derived from a divorce settlement (pension credit member).

### DIVISION 3 – EQUALITY OF TERMS Subdivision 1 – Sex equality

#### **Clause 55: Relevant types of work**

Division 3 of Part 5 of the Bill contains provisions designed to achieve equality between men and women in pay and other terms of employment where the work of an employee and his or her comparator — a person of the opposite sex — is equal. It does so by providing for a sex equality clause to be read into the employee's contract of employment. This is designed to ensure parity of terms between the employee and his or her comparator. A similar provision — referred to as a sex equality rule — is implied into the terms of pension schemes.

This clause explains that the sections mentioned which impose the equality clause and equality rule apply to employees and office-holders where one person's work is equal to the work of another.

This clause should be read together with clause 69 (comparators). Clause 55(2) is intended to ensure that a comparator need not be someone who is employed at the same time as the person making a claim under these provisions, but could be a predecessor in the job<sup>3</sup>.

#### Examples

- A female employee can compare her work with that of a male colleague employed by the same employer.
- A male police officer can compare his work with that of a female police officer in the same force.

#### **Clause 56: Equal work**

This clause sets out when the work of two people, whose work is being compared, is taken to be equal so that an equality clause or equality rule can operate. For work to be equal, a claimant must establish that he or she is doing:

- like work,
- work rated as equivalent; or
- work of equal value to a comparator's work.

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<sup>3</sup> There is UK case law in this area, i.e. *Macarthy's Ltd v Smith* (C 129/79; [1981] 1 All ER 111; [1980] ECR 1275)



The clause also sets out the factors which determine whether a person's work is within one of these categories. The fact that a discriminatory job evaluation study has been carried out which gives different values to the work of men and women is not an obstacle to the operation of an equality clause if an evaluation that set the same values for men and women would have found the jobs to be of equal value.

Existing legislation<sup>4</sup> already covers the situations where a person is doing like work or work rated as equivalent but the situation where work is of equal value to a comparator's work is new.

#### Examples

- Male and female supermarket employees who perform similar tasks which require similar skills will be doing like work even though the men may lift heavier objects from time to time. This is because the differences are not of practical importance in relation to their terms of employment.
- A job evaluation study rated the jobs of women and their better paid male comparators as not equivalent. If the study had not given undue weight to the skills involved in the men's jobs, it would have rated the jobs as equivalent. An equality clause would operate in this situation.

#### **Clause 57: Sex equality clause**

This clause requires that a "sex equality clause" be read into the terms under which people are employed. The effect of this is that any term in the contract which is less favourable than that of the comparator of the opposite sex is modified so as to ensure that both have the same effect. Where the comparator benefits from a term which is not available to the employee, the effect of the sex equality clause is to include such a term in the employee's contract of employment.

A sex equality clause will operate similarly on the terms of a person who is an appointee to an office as it does in relation to an employee.

Subsection (3) is intended to ensure that the provisions relating to equality of terms at work and the provisions governing pension schemes in clauses 59 and 60 operate effectively together so that action can be taken against an employer as it could against a trustee, to ensure, for example that a defence that operates in relation to one, will operate in relation to the other.

Where a job evaluation study has rated the work of an employee and comparator as equivalent, the equality clause will give the employee the benefit of all of the comparator's terms, including those which have not been determined by the rating of the work.

#### Example

- A male employee's contract includes a term that he can use his employer's car for private purposes. His female comparator who does equal work does not benefit from this term. A sex equality clause will have the effect of including in her contract a term corresponding to that of her male comparator.

#### **Clause 58: Sex equality rule — occupational pension schemes**

This clause requires that every occupational pension scheme is to have a sex equality rule read into it.

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<sup>4</sup> [Employment \(Sex Discrimination\) Act 2000](#)

The rule requires that men and women are treated equally to comparable members of the opposite sex in relation both to the terms on which they are permitted to join the scheme, and to the terms on which they are treated once they have become scheme members.

The rule, insofar as it applies to the terms on which a person is treated once he or she has become a member of the scheme, does not apply to pensionable service before 6 April 2006.

Where there has been a breach of a term modified by a sex equality rule, proceedings may be brought against the person responsible for the breach under Part 9 (enforcement) of the Bill.

#### Example

- A scheme rule requires employees to work full time before they may join the scheme. There may be a breach of the equality rule because the scheme rule may have an adverse impact on female employees, who are less able to comply with the requirement to work full-time.

### **Clause 59: Sex equality rule: consequential alteration of schemes**

This clause gives trustees and managers of an occupational pension scheme the power, by resolution, to alter scheme rules to conform to the sex equality rule in clause 59. They may use the power if:

- they lack the power to alter rules; or
- procedures for altering rules, including obtaining consent from another person (for example the employer), are unduly complex or would take too long.

In line with clause 58, where the operation of an equality rule relates to the terms on which a person becomes a member of the scheme, any alteration made relying on this section may only have effect from 6 April 2006.

#### Example

- The scheme rules of a large scheme require consultation with all the members before an amendment to the rules may be made. This is impracticable, particularly as some deferred members cannot be traced. Scheme trustees may make the necessary alterations to scheme rules relying on this power.

### **Clause 60: Defence of material factor**

As a general rule, if the work of a worker and a comparator of the opposite sex is equal but their terms are not, the sex equality clause takes effect. Clause 60 provides that neither a sex equality clause nor a sex equality rule will apply if the employer can show that the difference in terms is due to a material factor which is relevant and significant and does not directly or indirectly discriminate against the worker because of her sex.

If there is evidence that the factor which explains the difference in terms is not directly discriminatory but would have an adverse impact on people of her sex (that is, without more, it would be indirectly discriminatory), the employer must show that it is a proportionate means of meeting a legitimate aim or the sex equality clause will apply. For these purposes, the long-term objective of reducing pay inequality will always count as a legitimate aim.

Subsection (4) deals with the application of the material factor defence to occupational pension schemes.

## Examples

- An employer introduces a bonus payment to encourage staff doing the same work to work a new night shift to maximise production. Only a small number of female staff can work at night and the bonus payments go almost entirely to male employees. Despite the disparate effect on the female employees, the employer's aim is legitimate and the payment of a bonus to night workers is a proportionate way of achieving it.
- A firm of accountants structures employees' pay on the basis of success in building relationships with clients (including at after-hours client functions). Because of domestic responsibilities, fewer women than men can maintain regular client contact and women's pay is much lower. The employer is unable to show the way it rewards client relationship building is proportionate, taking into account the disadvantage to women employees.
- In imposing a new pay structure which seeks to remove pay inequalities between men and women employees, and to accommodate the interests of all the various groups, an employer includes measures which seek to protect the pay of the higher paid group for a short period of time. The intention to remove pay inequalities is a legitimate aim, and the question will be whether the imposition of the particular temporary pay protection arrangements is a proportionate means of achieving it.

### **Clause 61: Exclusion of sex discrimination provisions**

This clause ensures that the sex discrimination provisions of the Bill do not apply where an equality clause or rule operates (or would operate in the absence of a defence of material factor or the exceptions set out in Part 2 of Schedule 7).

The sex discrimination provisions prohibit sex discrimination in relation to non-contractual pay and benefits such as promotion, transfer and training and in relation to offers of employment or appointment.

The equality of terms provisions operate only in relation to the terms of a contract of employment and the terms of appointment to a personal or public office.

#### Example

- A female sales manager is entitled under her contract to a bonus every year in proportion to the number of sales her team achieves. She discovers that a male sales manager for the same firm doing the same job has a contract which includes a larger bonus payment in relation to the same number of sales. Her claim will be dealt with under the equality clause provisions.

### **Clause 62: Sex discrimination in relation to contractual pay**

This clause deals with sex discrimination in relation to contractual pay in circumstances where a sex equality clause would not operate. This could be because there is no comparator doing equal work with whom a claimant can compare his or her pay or other terms. The clause ensures that indirect sex discrimination in respect of contractual pay can be challenged only by means of an equality clause. However, the clause enables a person who is treated less favourably than others by being paid less because of the person's sex or a combination of two protected characteristics including sex to pursue a claim for direct or dual discrimination where an equality clause does not operate.

#### Example

- An employer tells a female employee "I would pay you more if you were a man" or tells a black female employee "I would pay you more if you were a white man". In

the absence of any male comparator the woman cannot bring a claim for breach of an equality clause but she can bring a claim of direct sex discrimination or dual discrimination (combining sex and race) against the employer.

## Subdivision 2 — pregnancy and maternity equality

### **Clause 63: Relevant types of work**

This clause sets out the types of work that are covered by the provisions for pregnancy and maternity equality set out in the sections which follow, i.e. they apply where a woman is employed or holds a personal or public office.

### **Clause 64: Maternity equality clause**

This clause requires that a woman's contract must be read as including a maternity equality clause. Clause 65 sets out how a maternity equality clause modifies a woman's pay. No comparator is required in these cases.

A maternity equality clause is capable of affecting the terms of an occupational pension scheme but only in the way a maternity equality rule (as described in clause 66) would. This ensures that the provisions relating to pregnancy and maternity equality of terms at work and the provision governing pension schemes in clause 66 operate effectively together.

### **Section 65: Maternity equality clause: pay**

This clause sets out how and when a maternity equality clause affects a woman's pay while she is on maternity leave.

Firstly, the maternity equality clause is designed to ensure that any pay increase a woman receives (or would have received if she had not been on maternity leave) is taken into account in the calculation of her maternity-related pay where her terms do not already provide for this.

Secondly, a maternity equality clause will operate to ensure that pay, including any bonus, is paid to the woman at the time she would have received it if she had not been on maternity leave.

Thirdly, a maternity equality clause will provide for a woman's pay on her return to work following maternity leave to take account of any pay increase which she would have received if she had not been on statutory maternity leave.

#### Examples

- Early in her maternity leave, a woman receiving maternity-related pay becomes entitled to an increase of pay. If her terms of employment do not already provide for the increase to be reflected in her maternity-related pay, the employer must recalculate her maternity pay to take account of the increment.
- A woman becomes entitled to a contractual bonus for work she undertook before she went on maternity leave. The employer cannot delay payment of the bonus and must pay it to her when it would have been paid had she not been on maternity leave.

### **Clause 66: Maternity equality rule**

This clause introduces a maternity equality rule into all occupational pension schemes. The effect of the rule is that any period when a woman is on maternity leave should be treated as time when she is not, in particular in relation to any rule of an occupational pension scheme which can be applied in respect of:

- scheme membership,
- accrual of scheme rights, and
- determination of benefits.

The clause makes similar provision in relation to any discretion under scheme rules which can be exercised in a way that treats a period of maternity leave differently from time when a woman is not on maternity leave. The woman's contributions to the scheme during maternity leave need be determined only by reference to the amount she is paid during maternity leave.

The provisions of the clause apply only to women on unpaid ordinary maternity leave where the expected week of confinement began on or after 30 September 2007.

The provisions of the clause apply only to a woman on unpaid additional maternity leave where the expected week of confinement began on or after 5 October 2008 and they do not apply to the accrual of scheme rights.

Where there has been a breach of a term modified by a maternity equality rule, proceedings may be brought against the person responsible for the breach under Part 9 (enforcement) of the Bill.

#### Examples

- A woman who is on maternity leave will be entitled to continuing membership of the scheme throughout the period of maternity leave whether or not she is paid.
- A woman who is paid whilst on maternity leave will be entitled to accrue rights in a scheme as though she were paid her usual salary but she will only be required to make contributions based on her actual pay.

#### **Clause 67: Exclusion of pregnancy and maternity discrimination provisions**

This clause provides that the pregnancy and maternity discrimination provisions of the Bill do not apply where a maternity clause or rule operates.

The maternity discrimination provisions prohibit discrimination in relation to non-contractual pay and benefits such as promotion, transfer and training and in relation to offers of employment or appointment.

The maternity equality clause provisions operate only in relation to terms of a contract of employment and the terms of appointment to a personal or public office and do so by including an equality clause to modify terms governing maternity-related pay.

This provision explains the relationship between the two sets of provisions and is intended to ensure that they provide seamless protection against pregnancy and maternity-related inequality.

#### Example

- A woman who is in line for promotion tells her employer that she is pregnant. The employer tells the woman he will not promote her because she is likely to be absent on maternity leave during a very busy period. This will be direct pregnancy discrimination.

### Subdivision 3 — disclosure of information

#### **Clause 68: Discussions about pay**

This clause is designed to make unenforceable terms of employment or appointment that prevent or restrict people from disclosing or seeking to disclose their pay to others, or terms that seek to prevent people from asking colleagues about their pay, where the purpose of any disclosure is to find out whether there is a connection between any difference in pay and a protected characteristic. Any action taken against an employee by the employer as a result of conduct protected by this clause is treated as victimisation within the meaning of clause 28, as applied in the clauses listed in the table in subsection (5).

Generally, discussions about pay would take place between colleagues, but this clause makes it clear that protection extends more widely so as to include, for example, disclosures made to a trade union official or anyone else, provided that it is made with a view to finding out whether any pay differences may be connected with a protected characteristic.

The clause is intended to ensure that there is greater transparency and dialogue within workplaces about pay.

#### Examples

- A female employee thinks she is underpaid compared with a male colleague. She asks him what he is paid, and he tells her. The employer takes disciplinary action against the man as a result. The man can bring a claim for victimisation against the employer for disciplining him.
- A female employee who discloses her pay to one of her employer's competitors with a view to getting a better offer could be in breach of a confidentiality clause in her contract. The employer could take action against her in relation to that breach.

### Subdivision 4 —supplementary

#### **Clause 69: Comparators**

This clause sets out the circumstances in which employees and others are taken to be comparators for the purposes of Division 3 of the Bill. A person who claims the benefit of a sex equality clause or sex equality rule must be able to show that his or her work is equal to that of the chosen comparator.

If two persons share the same employer and work at the same establishment, each may be a comparator for the other.

If two persons work at different establishments but share the same employer and common terms and conditions of employment apply, each may be a comparator for the other.

A person can also be a comparator for another in either of the above circumstances if one is employed by a company associated with the other's employer. Subsection (8) defines when employers are taken to be associated.

A person holding a personal or public office may be a comparator for another person holding a personal or public office if the same person is responsible for paying both of them.

A person holding the office of constable is treated for the Division 3 of the Bill as holding a personal office for the purpose of determining who can be that person's comparator.

The section also defines when members of Tynwald staff may be taken to be each other's comparators.

#### Example

- A woman is employed by a company at a factory. A man works for the same company at another factory. Common terms of employment apply at both establishments. The woman may treat the man as a comparator, if they are doing equal work (as defined in clause 56).

#### **Clause 70: Interpretation and exceptions**

This clause explains the meaning of terms used in Division 3 of Part 5 of the Bill. It also gives effect to Schedule 7, which sets out exceptions to the equality of terms provisions.

### DIVISION 4: SUPPLEMENTARY

#### **Clause 71: Offshore work**

This clause contains a power for the Council of Ministers to make an Order in relation to work on board offshore installations. The power may be used to apply Part 5 (with or without modification) to those working on such installations.

This clause will enable protection to be extended to workers on offshore installations, such as oil and gas rigs and renewable energy installations (generally wind farms).

#### **Clause 72: Interpretation and exceptions**

This clause explains the meaning of various terms used in Part 5 of the Bill. In particular, it defines what is meant by "employment". It also gives effect to Schedule 8 (reasonable adjustments) and Schedule 9 (exceptions).

## **PART 6: EDUCATION**

### Division 1: Schools

#### **Clause 73: Application of this Division**

This clause provides that this Division of the Bill, which prohibits discrimination, harassment and victimisation in the field of education in schools, does not apply in where the actions relate of age or marriage and civil partnership status of the person.

**NOTE:** the consultation document asks for views on whether the protected characteristic of marriage and civil partnership status needs to be excluded from this Division.

#### Examples

- It is not unlawful discrimination for a school to organise a trip for pupils in one year group, but not for pupils in other years.
- It is not unlawful discrimination for a school to allow older pupils to have privileges for which younger pupils are not eligible, such as more choice of uniform or the right to leave school during the lunch period.

#### **Clause 74: Pupils: admission and treatment, etc.**

This clause makes it unlawful for the responsible body of a school to discriminate against, harass or victimise a pupil or prospective pupil in relation to the terms on which it offers him or her admission, by not admitting him or her, or in the way it treats the pupil once admitted. The responsible body for a maintained school is the DEC or the governing body,

and for an independent educational institution or a non-maintained special school is the proprietor.

The clause also imposes on the responsible body of a school the duty to make reasonable adjustments for disabled pupils and prospective disabled pupils.

#### Examples

- A school refuses to let a gay pupil become a prefect because of his sexual orientation. This would be direct discrimination.
- A selective school imposes a higher standard for admission to applicants from an ethnic minority background, or to girls. This would be direct discrimination.
- A pupil alleges, in good faith, that his school has discriminated against him because of his religion (for example claiming that he is given worse marks than other pupils because he is Jewish), so the school punishes him by making him do a detention. This would be victimisation.
- A teacher ridicules a particular pupil in class because of his disability, or makes comments which have the result of making the girls in the class feel embarrassed and humiliated. This would be harassment.

#### **Clause 75: Victimisation of pupils, etc. for conduct of parents, etc.**

This clause protects children in schools from being victimised as a result of a protected act (such as making or supporting a complaint of discrimination) done by their parent or sibling. The aim is to prevent parents being discouraged from raising an issue of discrimination with a school because of worry that their child may suffer retaliation as a result.

Where a parent or sibling maliciously makes or supports an untrue complaint, the child is still protected from victimisation, as long as the child has acted in good faith. But, in common with the general approach to victimisation, where a child has acted in bad faith, he or she is not protected, even where a parent or sibling makes or supports an untrue complaint in good faith.

#### Examples

- The parent of a pupil complains to the school that her daughter is suffering sex discrimination by not being allowed to participate in a metalwork class. The daughter is protected from being treated less favourably by the school in any way because of this complaint.
- A pupil brings a case against his school claiming that he has suffered discrimination by a member of staff because of his sexual orientation. The pupil's younger brother, at the same school, is protected against any less favourable treatment by the school because of this case, even if it is later found that the older brother was not acting in good faith.

#### **Clause 76: Disabled pupils: accessibility**

This clause introduces Schedule 10 which requires the DEC and schools to prepare and implement accessibility strategies and plans. These will increase disabled pupils' access to the curriculum and improve the physical environment and the provision of information. They are explained in more detail in the notes to that Schedule.

#### **Clause 77: Interpretation and exceptions**

This clause explains what is meant by terms used in this Division, such as "school" and "pupil". It also makes it clear that the prohibitions in the Chapter do not apply to anything



done in relation to the content of the school curriculum. This ensures that the Bill does not inhibit the ability of schools to include a full range of issues, ideas and materials in their syllabus and to expose pupils to thoughts and ideas of all kinds. The way in which the curriculum is taught is, however, covered by the reference to education in clause 74(2)(a), so as to ensure issues are taught in a way which does not subject pupils to discrimination. This clause also gives effect to Schedule 11 which provides some exceptions to the provisions in this Division.

#### Examples

- A school curriculum includes teaching of evolution in science lessons. This would not be religious discrimination against a pupil whose religious beliefs include creationism.
- A school curriculum includes Shakespeare's play *The Taming of the Shrew* on the syllabus. This would not be discrimination against a girl.

### DIVISION 2: FURTHER AND HIGHER EDUCATION

#### **Clause 78: Students: admission and treatment, etc.**

This clause makes it unlawful for universities, colleges and other institutions in the higher and further education sectors to discriminate against, harass or victimise a student or someone who wants to become a student in relation to the arrangements it makes in deciding who to admit, the terms on which a person is admitted and the way a person is treated when admitted.

Subsection (4) of the clause specifically makes it unlawful to discriminate when considering conferring qualifications to disabled people who are not enrolled at the institution.

The clause also imposes on the responsible body of such an institution the duty to make reasonable adjustments for disabled students and prospective students.

#### Examples

- A college refuses admission to a man who applies to be a student, because he is gay. This would be direct discrimination.
- A university refuses to provide residential accommodation to Jewish or Muslim students. This would be direct discrimination.
- A college puts an age limit on access to a particular course. This would be direct discrimination, unless the college could show that the age limit was objectively justified.

#### **Clause 79: Further and higher education courses**

This clause makes it unlawful for responsible body in relation to a course to discriminate against, harass or victimise a person in relation to deciding who to enrol, or in the way it provides any services when the person has been enrolled. It also imposes on them the duty to make reasonable adjustments when offering such facilities and services to disabled people.

#### Example

- The Isle of Man College puts on a 10-week evening educational course for local adults but prevents transsexual applicants from enrolling. This would be direct discrimination.

### **Clause 80: Recreational or training facilities**

This clause makes it unlawful for the responsible body in relation to providing any recreational or training facilities to discriminate against, harass or victimise a person in terms of deciding who should be provided with any facilities and the terms on which the facilities are provided. It also imposes on them the duty to make reasonable adjustments when offering such facilities and services to disabled people.

The clause does not apply to the protected characteristic of age, so far as relating to persons who have not attained the age of 18.

#### Example

- The Department runs a summer camp for children from local schools but it refuses an application from a child simply because that child is disabled or a Muslim. This would be direct discrimination.

### **Clause 81: Interpretation and exceptions**

This clause explains what is meant by terms used in this Division, such as "student" and "university". It also makes it clear that the prohibitions in the Chapter do not apply to anything done in relation to the content of the curriculum. This ensures that the Bill does not inhibit the ability of institutions in the higher and further education sectors to include a full range of issues, ideas and materials in their syllabus and to expose students to thoughts and ideas of all kinds. The way in which the curriculum is taught is, however, covered by the reference to education in section 78(3)(a), so as to ensure issues are taught in a way which does not subject students to discrimination or harassment. It also gives effect to Schedule 12 which provides exceptions to the provisions in this Division.

#### Examples

- A College course includes a module on feminism. This would not be discrimination against a male student.
- A university requires students to use a computer for projects or essays. This would not be indirect discrimination against a member of a religious sect which rejects the use of modern technology.

## DIVISION 3: MISCELLANEOUS

### **Clause 82: Reasonable adjustments**

This clause introduces the provisions of Schedule 13, concerning the making of reasonable adjustments to ensure that disabled pupils are not placed at a substantial disadvantage in comparison with non-disabled pupils. These provisions are explained in more detail in the notes to that Schedule.

### **Clause 83: Educational charities**

This clause provides for trust deeds or other instruments concerning educational charities which restrict available benefits to a single sex to be modified by the Attorney General. This cannot be done within 25 years of the trust being created without the consent of the donor, or the donor's or testator's personal representatives. The Attorney General must publish particulars of the proposal and invite representations before making the order.

This might be used if a single-sex school became co-educational, and so wanted to enable both sexes to benefit from a particular charity connected with the school.

## **PART 7: ASSOCIATIONS**

### **Clause 84: Application of this Part**

This clause provides that this Part of the Bill, which prohibits discrimination, harassment and victimisation by associations, does not make it unlawful for an association to discriminate against or harass people because of marriage or civil partnership.

It also provides that, if an act of discrimination, harassment or victimisation is made unlawful by the Parts of the Bill covering services and public functions, premises, work or education, then those provisions, rather than the provisions in this Part, apply.

### **Clause 85: Members and associates**

This clause makes it unlawful for an association to discriminate against, harass or victimise an existing or potential member, or an associate. This means that an association cannot refuse membership to a potential member or grant it on less favourable terms because of a protected characteristic. It does not, however, prevent associations restricting their membership to people who share a protected characteristic (see Schedule 15). It also means that an association cannot, among other things, refuse an existing member or associate access to a benefit or deprive him or her of membership or rights as an associate respectively because of a protected characteristic covered by this Part.

#### Examples

- A gentlemen's club refuses to accept a man's application for membership or charges him a higher subscription rate because he is Muslim. This would be direct discrimination.
- A private members' golf club, which has members of both sexes, requires its female members to play only on certain days while allowing male members to play at all times. This would be direct discrimination.

### **Clause 86: Guests**

This clause makes it unlawful for an association to discriminate against, harass or victimise existing or potential guests. In particular, an association cannot refuse to invite a person as a guest because of a particular characteristic or invite that person on certain conditions which the association would not apply to other would-be guests. Equally, a guest cannot be refused access to a benefit or subjected to any other detriment simply because of a protected characteristic.

#### Example

- An association refuses to invite the disabled wife of a member to attend an annual dinner, which is open to all members' partners, simply because she is a wheelchair user. This would be direct discrimination.

### **Clause 87: Sections 85 and 86: further provision**

This clause imposes on associations the duty to make reasonable adjustments for disabled members and guests.

### **Clause 88: Interpretation and exceptions**

This clause explains what is meant by terms used in Part 7 of the Bill. It defines an association as a body with 25 or more members where access to membership is controlled by rules and involves a genuine selection process based on personal criteria. It gives the Council of Ministers the power (by Order subject to Tynwald approval) to amend this definition so as to change the number of members required by the definition.

It also provides that people who have any kind of membership of a particular association are protected by this Part, as are associates who are not members of an association but have many of the rights of members as a consequence of being a member of another association.

The clause introduces Schedule 14 (associations: reasonable adjustments) and Schedule 15 (associations: exceptions) which are described separately.

#### Examples

- Associations include: private members' golf clubs and gentlemen's clubs where applicants for membership are required to make a personal application, be sponsored by other members and go through some kind of selection process.
- Membership would cover full membership, associate membership, temporary membership and day membership.
- Casinos, nightclubs and gyms, where payment of the requisite "membership" fee is all that is required to secure admittance are not associations for the purposes of this Part. These are covered instead by the provisions in Part 3 concerning services provided to the public.
- A book club run by a group of friends which has no formal rules governing admittance or whose membership is less than 25 is not an association for the purposes of this Part.

### **PART 8: PROHIBITED CONDUCT: ANCILLARY**

#### **Clause 89: Relationships that have ended**

349. This clause makes it unlawful to discriminate against or harass someone after a relationship covered by the Bill has ended. It covers any former relationship in which the Bill prohibits one person from discriminating against or harassing another, such as in employment, or in the provision of goods, facilities and services. It is designed to ensure that treatment of the kind made unlawful by the Bill which results from, and is closely linked to, the existence of a relationship is still unlawful even though the relationship no longer exists.

This provision applies to conduct which takes place after the Bill is commenced, whether or not the relationship in question ended before that date.

The clause also requires reasonable adjustments to be made for disabled people even after a relationship has ended, if they continue to be at a substantial disadvantage in comparison with people without a disability. A person will be considered to have discriminated against a disabled person if he or she fails to comply with the duty to make reasonable adjustments.

A breach of this clause triggers the same enforcement procedures as if the treatment had occurred during the relationship. However, if the treatment which is being challenged constitutes victimisation, it will be dealt with under the victimisation provisions and not under this clause.

#### Examples

- A school or employer refuses to give a reference to an ex-pupil or ex-employee because of his or her religion or belief. This would be direct discrimination.
- A builder or plumber addresses abusive and hostile remarks to a previous customer because of her sex after their business relationship has ended. This would be

harassment. It would not be harassment, however, where the reason for the treatment was not the customer's sex but, for example, a dispute over payment.

- A disabled former employee's benefits include life-time use of the company's in-house gym facilities. The employer or owner of the premises must make reasonable adjustments to enable the former employee to continue using the facilities even after she has retired.

### **Clause 90: Liability of employers and principals**

This clause makes employers and principals liable for acts of discrimination, harassment and victimisation carried out by their employees in the course of employment or by their agents acting under their authority. It does not matter whether or not the employer or principal knows about or approves of those acts.

However, employers who can show that they took all reasonable steps to prevent their employees from acting unlawfully will not be held liable. Employers and principals cannot be held liable for any criminal offences under the Bill that are committed by their employees or agents, except for those in the provisions on transport services for disabled people in Part 12 of the Bill.

This clause is designed to ensure that employers and principals are made responsible for the acts of those over whom they have control. The clause works together with the provisions on "Liability of employees and agents" (clause 91), "Instructing, causing or inducing contraventions" (clause 92), and "Aiding contraventions" (clause 93) to ensure that both the person carrying out an unlawful act and any person on whose behalf he or she was acting can be held to account where appropriate.

#### Examples

- A landlord (the principal) instructs an agent to collect rent at a property. The agent harasses an Asian couple, who bring a claim in which the agent is held to have acted unlawfully. The principal may be held liable for breaching the harassment provisions even if he or she is unaware of the agent's actions.
- A shop owner becomes aware that her employee is refusing to serve disabled customers. The employer tells the employee to treat disabled customers in the same way as other customers and sends the employee on a diversity training course. However, the employee continues to treat disabled customers less favourably. One such customer brings a claim against both the employee and the employer. The employer may avoid liability by showing that she took all reasonable steps to stop the employee from acting in a discriminatory way.

### **Clause 91: Liability of employees and agents**

This clause makes an employee personally liable for unlawful acts committed in the course of employment where, because of clause 90, the employer is also liable – or would be but for the defence of having taken all reasonable steps to prevent the employee from doing the relevant thing.

An agent would be personally liable under this section for any unlawful acts committed under a principal's authority. However, an employee or agent will not be liable if he or she has been told by the employer or principal that the act is lawful and he or she reasonably believes this to be true.

Subsections (4) and (5) make it an offence, punishable by a fine of up to £5,000, if an employer or principal knowingly or recklessly makes a false statement about the lawfulness of doing something under the Bill.

This clause does not apply to discriminatory acts done by an employee or agent because of disability in relation to schools, because claims for disability discrimination in schools cannot be enforced against individuals.

#### Examples

- A factory worker racially harasses her colleague. The factory owner would be liable for the worker's actions, but is able to show that he took all reasonable steps to stop the harassment. The colleague can still bring a claim against the factory worker in an employment tribunal.
- A principal instructs an agent to sell products on her behalf. The agent discriminates against a disabled customer. Both the principal and the agent are liable, but the courts are able to determine that evidence provided by the principal indicate the authority given to the agent did not extend to carrying out an authorised act in a discriminatory manner. The disabled customer can still bring a claim against the agent.

### **Clause 92: Instructing, causing or inducing contraventions**

This clause makes it unlawful for a person to instruct, cause or induce someone to discriminate against, harass or victimise another person, or to attempt to do so. It provides a remedy for both the recipient of the instruction and the intended victim, whether or not the instruction is carried out, provided the recipient or intended victim suffers a detriment as a result.

However, the clause only applies where the person giving the instruction is in a relationship with the recipient of the instruction in which discrimination, harassment or victimisation is prohibited.

The Attorney General is given statutory powers to enforce this clause. Equally, both the recipient of the instruction and the intended victim can bring individual claims for breach of this section against the person giving the instructions, so long as they have suffered a detriment as a result. A claim brought by the recipient of the instruction will be dealt with by the Employment and Equality Tribunal as a direct claim for discrimination, harassment or victimisation against the person giving the instruction would be. A claim brought by the intended victim against the person giving the instruction will be dealt with in the same forum as a claim for discrimination, harassment or victimisation against the person carrying out the instruction would be.

#### Example

- A GP instructs his receptionist not to register anyone with an Asian name. The receptionist would have a claim against the GP if subjected to a detriment for not doing so. A potential patient would also have a claim against the GP if she discovered the instruction had been given and was put off applying to register.

### **Clause 93: Aiding contraventions**

This clause makes it unlawful for a person to help someone carry out an act which he or she knows is unlawful under the Bill. However, this is not unlawful if the person giving assistance has been told that the act is lawful and he or she reasonably believes this to be true. It makes it an offence, punishable by a fine of up to £5,000, knowingly or recklessly to make a false statement about the lawfulness of doing something under the Bill.

For the purposes of enforcement, breaches of the prohibition on aiding contraventions are dealt with under the same procedures in the Bill as the contraventions themselves.

It ensures that a person who helps another to do something which he or she knows to be prohibited by the Act is liable in his or her own right. Taken together with the provisions on "Liability of employers and principals" (clause 90), "Liability of employees and agents" (clause 91) and "Instructing, causing or inducing contraventions" (clause 92) this clause is designed to ensure that both the person carrying out an unlawful act and any person on whose behalf or with whose help he or she was acting can be held to account where appropriate.

Example

- On finding out that a new tenant is gay a landlord discriminates against him by refusing him access to certain facilities, claiming that they are not part of the tenancy agreement. Another tenant knows this to be false but joins in with the landlord in refusing the new tenant access to the facilities in question. The new tenant can bring a discrimination claim against both the landlord and the tenant who helped him.

## **PART 9: ENFORCEMENT**

**NOTE:** It is known that further work to streamline and clarify the provisions of this Part is required.

### DIVISION 1 – INTRODUCTORY

#### **Clause 94: Proceedings**

This clause introduces Part 9 of the Bill and provides that proceedings for a contravention of the Bill must be brought in accordance with this Part. However, this does not prevent a person submitting a petition of doleance or proceedings under immigration legislation. This clause confirms that a contravention also includes a breach of an equality clause or rule.

### DIVISION 2 – THE TRIBUNAL

#### **Clause 95: Tribunal: constitution, functions and transition**

This clause establishes the proposed Employment and Equality Tribunal ("the Tribunal"), which replaces the existing Employment Tribunal constituted under the [Employment Act 2006](#). In addition to the current jurisdiction of the Employment Tribunal (which includes cases of discrimination under the [Employment \(Sex Discrimination\) Act 2000](#)), the new Tribunal will deal with the full range of claims of unlawful discrimination involving work.

In addition, it is proposed that the Tribunal should also have jurisdiction to hear all cases involving claims of discrimination in the provision of goods and services. This is different to the position in the UK where claims of discrimination in non-work must be taken to the courts. It is believed that in a small jurisdiction such as the Isle of Man avoiding the need for cases to be taken to the courts will provide a more timely and lower cost route for claimants seeking redress. Although some additional training for members of the Tribunal, and some expansion of its membership, may be required, the Tribunal would have naturally taken on all work discrimination cases and many of the same considerations will apply in coming to conclusions about whether a claim of discrimination is well-founded in both work or non-work contexts.

The change from the Employment Tribunal to the Tribunal is made by substituting section 156 of the 2006 Act.

### **Clause 96: Tribunal’s jurisdiction under this Act**

This clause sets out the Tribunal’s broad jurisdiction to deal with cases under the Bill and also under other enactments. In certain cases anything done by the Tribunal has the same effect as if it were done by the Court.

This clause also introduces Schedule 16 to the Bill which includes provisions about the composition and proceedings of the Tribunal. Further information about these matters is set out in the notes on Schedule 16.

### **Clause 97: Remedies for breach of provisions of the Employment Act 2006**

This clause sets out the procedures to be followed remedies available for breaches of listed provisions of the [Employment Act 2006](#).

The clause allows the DED to make an order (subject to Tynwald approval) to extend the listed provisions to include other provisions of the 2006 Act.

The clause also confirms that complaints to the Tribunal must be commenced in accordance with Tribunal rules made under Schedule 16.

### **Clause 98: Conciliation**

This clauses provides for procedures to allow for conciliation with a view to, where possible, avoiding the need to take a claim to the Tribunal. It is envisaged that the “relevant officer” to attempt such conciliation is an industrial relations officer for work related cases; the Office of Fair Trading for most goods and services cases; and the arrangements made by the DEC under Schedule 17 involving the Education Council for schools cases.

The clause make it clear that anything communicated to a relevant officer in connection with the performance of his or her functions under the clause is not admissible in evidence in proceedings before the Tribunal, except with the consent of the person who communicated it to him or her.

**NOTE:** the number “(7)” after subsection (6) should be deleted.

## DIVISION 3 – JURISDICTION IN NON-WORK CASES

### **Clause 99: Jurisdiction**

This clause sets out the jurisdiction of the Tribunal to hear claims related to provision of services, the exercise of public functions, disposal and management of premises, education and associations. Immigration cases under clause 100 are an exemption to the Tribunal’s jurisdiction.

#### Examples

- A woman has joined a golf club but because she is a woman she is allowed to play golf only on Tuesday afternoons and is not allowed access to the club bar. She could bring a discrimination claim in the Tribunal.
- A gay man applies for residential housing in a local authority area, but is told that he can choose from only three housing blocks because all homosexual people are housed together. He could bring a discrimination claim in the Tribunal.

### **Clause 100: Immigration cases**

This clause sets out which claims under the Bill are outside the jurisdiction of the Tribunal because they are being dealt with in immigration proceedings. These are claims in relation to decisions on whether a person may enter or remain in the Island and claims where the



question of whether there has been a breach of Part 3 of the Act (dealing with services and public functions) has either been raised in immigration proceedings and rejected, or could be raised on appeal.

#### **Clause 101: Education cases**

This clause gives effect to Schedule 17 which deals with the procedure where there is a claim on discrimination relating to a school (see Division 1 of Part 6 of the Bill). Although the case can still be taken to the Tribunal, the DEC must make arrangements, which involve the Education Council established under section 4A of the [Education Act 2001](#), to try to resolve the issue without reference to the Tribunal.

#### **Clause 102: National security**

The Court may need to take various steps during proceedings in order to safeguard national security. This clause enables the Deemsters to make rules of court conferring jurisdiction on the Court to hear such cases instead of the Tribunal; to enable the court to exclude a claimant, representative or assessor from part or all of the proceedings; permit a claimant or representative who has been excluded to make a statement before the proceedings begin; and ensure that part or all of the reasons for a decision on the merits of the case are kept confidential. Where the claimant or his or her representative is excluded from proceedings, a special advocate can be appointed to represent the claimant's interests.

#### **Clause 103: Time limits**

A person must bring a claim under the Bill to which clause 99 (non-work cases) to the Tribunal within six months of the alleged unlawful act taking place. If a person wants to make a claim after that period it is at the Tribunal's discretion whether it grants permission to allow this. The test applied by the court is what is "just and equitable" in the circumstances.

The six month period will only begin, in a claim involving a decision of an immigration body, when that body has ruled that there is a breach of Part 3 and that ruling can no longer be appealed.

Where the conduct in respect of which a claim under the Act might arise continues over a period of time, the time limit starts to run at the end of that period. Where it consists of a failure to do something, the time limit starts to run when the person decides not to do the thing in question. In the absence of evidence to the contrary, this is either when the person does something which conflicts with doing the act in question; or at the end of the time when it would have been reasonable for them to do the thing.

#### **Clause 104: Remedies**

This clause gives powers to the Tribunal (see note below) hearing claims relating to non-work cases under the Bill to grant any remedy that the Court grant in proceedings in tort or in a claim for petition of dolence. The main remedies available are damages (including compensation for injuries to feelings), an injunction and a declaration. In cases based on indirect discrimination, if the respondent proves that he or she did not intend to treat the claimant unfavourably then the award of damages cannot be considered until the Tribunal has looked at the other remedies available to it.

The Tribunal cannot grant some remedies, such as an injunction, if doing so would prejudice a criminal investigation or proceedings.

**NOTE:** the references to "the Court" in this clause should be to "the Tribunal".

## DIVISION 4 – JURISDICTION IN WORK CASES

### **Clause 105: Jurisdiction**

This clause sets out what types of claims under the Bill in respect of work cases the Tribunal has jurisdiction to hear. These are cases involving discrimination in a work context (which includes contract workers, partners and office-holders. Its jurisdiction also includes cases about the terms of collective agreements (which can cover any of the terms of employment) and rules of undertakings which are unenforceable under clause 129 because they provide for treatment which is prohibited by the Bill. This is made clear in clause 129 of the Bill.

This clause also gives jurisdiction to the Tribunal to hear complaints relating to breaches of a non-discrimination rule. Jurisdiction for hearing a complaint regarding a breach of an equality clause or an equality rule is set out in clause 110. The Tribunal can also make a ruling on an application made by a responsible person in relation to an occupational pension scheme (as defined in clause 52(4)) for a declaration about his or her rights and those of a worker or member or prospective member of the scheme.

#### Examples

- A worker is racially abused by a co-worker. She could bring a discrimination claim in the Tribunal.
- A gay man has applied to become a partner in a firm of accountants but because he is gay he has not been invited for an interview despite being equally or better qualified than other candidates who were invited for an interview. He could bring a discrimination claim in the Tribunal

### **Clause 106: References by Court to Tribunal, etc**

The Bill does not prevent the civil courts from considering a claim that a pension scheme operates in a discriminatory manner. This clause enables the Court to strike out such a claim if it would be more convenient for the Tribunal to deal with it, or to refer an issue relating to such a claim to the Tribunal.

#### Example

- An employee who is a member of a pension scheme sues his employer in court alleging the employer operates the scheme in a discriminatory manner. The court decides to refer the issue to the Tribunal and postpones the case until the Tribunal's decision.

### **Clause 107: Time limits**

This clause deals with time limits for work cases under the Bill in the Tribunal (however, under clause 112, different times limits apply for equality of terms cases). A person must bring a claim within three months of the alleged conduct taking place. If a person wants to make a claim after that period it is at the Tribunal's discretion whether they grant permission to allow them to do so. The test applied by the tribunals is what is "just and equitable" in the circumstances.

Where the conduct in respect of which a claim under the Bill might arise continues over a period of time, the time limit starts to run at the end of that period. Where it consists of a failure to do something, the time limit starts to run when the person decides not to do the thing in question. In the absence of evidence to the contrary, this is either when the person does something which conflicts with doing the act in question; or at the end of the time when it would have been reasonable for them to do the thing.

### **Clause 108: Remedies: general**

This clause sets out the remedies available to the Tribunal hearing work related cases under the Bill. It does not however apply to a breach of an equality clause or an equality rule, which is dealt with in clauses 114, 115 and 116.

The Tribunal can make a declaration regarding the rights of the complainant and/or the respondent; order compensation to be paid, including damages for injury to feelings; and make an appropriate recommendation.

The maximum compensation which may be awarded is the amount set under section 144(1) of the [Employment Act 2006](#) (currently £50,000).

Where the Tribunal makes a recommendation it does not have to be aimed only at reducing the negative impact on the individual claimant(s) of the respondent's actions which gave rise to the successful claim, but can be aimed at reducing that impact on the wider workforce. The recommendation must state that the respondent should take specific action within a specified period of time. The Tribunal has the power in any case where a recommendation made for the benefit of the individual claimant only is not complied with, to award compensation or increase any award already made.

In a case of indirect discrimination where the respondent proves that there was no intention to treat the claimant unfavourably, a tribunal cannot award damages to a claimant unless it has first considered making either a declaration or recommendation.

#### Example

- The Tribunal could recommend that the respondent:
  - introduces an equal opportunities policy;
  - ensures its harassment policy is more effectively implemented;
  - sets up a review panel to deal with equal opportunities and harassment/grievance procedures;
  - re-trains staff; or
  - makes public the selection criteria used for transfer or promotion of staff.

### **Clause 109: Remedies: occupational pension schemes**

This clause sets out the additional remedies available to the Tribunal in cases involving occupational pension schemes. These are cases in which the respondent is an employer, or the trustee or manager of the pension scheme; and the complaint relates to the terms on which membership is offered to a pension scheme or how members of an existing scheme are treated. In these cases the Tribunal can, in addition to the remedies of declaration, compensation and recommendation, also make a declaration about the terms on which a person should be admitted as a member to that scheme or a declaration about the rights of an existing member of that scheme not to be discriminated against.

However, the Tribunal can award compensation only for injured feelings or for failure to comply with a recommendation; it cannot compensate the claimant for loss caused by the unlawful discrimination.

## DIVISION 5 – EQUALITY OF TERMS

### **Clause 110: Jurisdiction**

This clause sets out the types of cases relating to equality of terms which the Tribunal has jurisdiction to hear. The Tribunal may hear and decide claims (including those referred to it

by the Court) involving equality in the rules of occupational pension schemes and claims relating to an equality clause, including claims relating to pregnancy and maternity equality.

A responsible person (as defined in clause 70), such as an employer, or a pension scheme trustee or manager) can also ask the Tribunal for a declaration of each party's rights in relation to a dispute or claim about an equality clause or rule.

#### Example

- An employment tribunal can hear claims brought by an employee or office-holder in relation to a breach of an equality clause and in relation to breach of an equality rule concerning a pension scheme.

### **Clause 111: References by Court to Tribunal**

This Bill does not prevent the High Court from considering a contractual claim relating to an equality clause or rule. However, this clause gives the Court the power to strike out such a claim if it would be more convenient for a Tribunal to deal with it, or to refer an issue relating to such a claim to Tribunal.

#### Example

- An employer sues an employee in a civil court for breach of her employment contract. In response, the employee counterclaims for breach of an equality clause. The Court decides to refer the counterclaim to Tribunal and postpones the case until the Tribunal's decision.

### **Clause 112: Time limits**

A person who wishes to bring a claim for breach of an equality clause or rule or to apply for a declaration about the effect of such a clause or rule must normally do so within six months of the end of the employment contract. In certain circumstances, this clause gives a claimant more time to make a claim. This applies where the employer conceals certain information from the claimant or where the claimant has an incapacity (as defined in clause 125).

Time limits provide certainty by requiring claims to be brought within specified periods and also take into account factors which may affect a claimant's ability to assert his or her claim.

As different time limits apply to nonstandard cases, this clause defines what is not a standard case.

In a stable work case, a series of fixed- or short-term contracts and breaks between contracts is treated as a continuing single contract. In a standard case, the time limit would start at the end of the contract of employment. In a stable work case, the time limit only begins to run when the stable working relationship ends.

In a concealment case, the employer deliberately conceals relevant information from the employee. The time limit starts to run when the employee discovers, or could reasonably have discovered, the information.

#### Examples

- A woman's employment ends due to mental health problems which result in her temporary loss of capacity to make decisions for herself. She could make a claim for breach of an equality clause to an employment tribunal but is not well enough to do so. The six month time limit will start when she recovers sufficiently to make a claim.

- A woman suspects that her male colleagues who do the same work are better paid. Her employer reassures her that she and her colleagues get the same salary but he deliberately does not tell her that the men also receive performance bonuses under their contracts. Her male colleagues refuse to discuss their pay with her. The woman only discovers the discrepancy between her pay and the men's when one of the men tells her 18 months after she ceases employment. Within six months, she makes an equal pay claim to the Tribunal based on the value of the bonus payments she would have received if her contract had provided for them. Although the woman's claim is made more than six months after her employment ends, she shows that her employer deliberately misled her into believing that her salary was the same as the men's. She had no way of discovering the truth earlier. Her claim can proceed as a concealment case.

### **Clause 113: Assessment of whether work is of equal value**

Where the Tribunal has to decide if the work of a claimant and comparator are of equal value, this clause gives it the power to require an independent expert ("a qualified person") to prepare a report on the matter. A "qualified person" means a person approved by a body with which the Appointments Commission has entered into arrangements for the provision of reports, documents and information under this clause. Such a body might, for example, include the Advisory, Conciliation and Arbitration Service (ACAS) in the UK.

Unless the Tribunal withdraws its request for a report (in which case it can ask the expert to give it any documents or other information the expert has to help it make a decision) it must wait for the expert's report before deciding whether the work is of equal value.

If there has been a job evaluation study in relation to the work involved and the study finds that the claimant's work is not of equal value to the work of the comparator, the tribunal is required to come to the same decision unless it has a good reason to suspect that the study is discriminatory or unreliable.

#### Example

- A woman claims that her job is of equal value to that of a male comparator. The employer produces a job evaluation study to the Tribunal in which the woman's job is rated below her comparator's job. The employer asks the Tribunal to dismiss the woman's claim but the woman is able to show that the study is unreliable because it is out of date and does not take account of changes in the jobs resulting from new technology. The Tribunal can disregard the study's conclusion and can proceed to decide if the work of the claimant and the work of the comparator are of equal value.

### **Clause 114: Remedies in non-pensions cases**

Under this clause, if a claim for breach of an equality clause (other than in relation to a pension scheme) succeeds, the Tribunal can make a declaration clarifying what the rights of the parties to the claim are.

The Tribunal can also order the employer to pay the claimant arrears of pay or damages. The period used for calculating arrears depends on the type of case. The basic period is six years from the date a claim is made. Special provision is made for claims involving concealment and/or incapacity (as set out in clause 117).

#### Example

- A woman successfully establishes that her work is the same as her male comparator's and that in addition to a discrepancy between her pay and that of her

male comparator, she has been denied access to the benefit of a company car. The claimant is entitled to claim the difference in pay going back up to six years from the date of the claim. She is also entitled to monetary compensation for not having had the use of a company car.

#### **Clause 115: Remedies in pensions cases**

This clause allows the Tribunal to declare that in cases where an equality rule or equality clause has been breached in relation to:

- scheme membership, the complainant is entitled to be admitted to the scheme from a date specified by the Tribunal; or
- scheme rights, the complainant is entitled to have any rights which would have accrued under the scheme secured from a date specified by the Tribunal,

but the date cannot be earlier than 6 April 2006.

However, the section prevents a tribunal ordering an award of compensation to the complainant.

#### **Clause 116: Remedies in claims for arrears brought by pensioner members**

This clause allows the Tribunal to require compensation to be paid to a pensioner member for a breach of an equality clause or rule in relation to an occupational pension scheme and sets out the period for which arrears may be awarded for different types of cases. In a standard, the period is six years before the date when a claim is made. Special provision is made for claims involving concealment and/or incapacity (as set out in clause 117).

#### **Clause 117: Remedies: Supplementary**

The amount that the Tribunal can award a successful claimant in cases to which clauses 114, 115 and 116 apply is affected by how far back in time it can go in making its calculation. The type of case which is before the tribunal determines this period. This clause defines the different types of cases and the relevant periods of time.

### DIVISION 6 — APPEALS

#### **Clause 118: Appeals**

This clause provides for an appeal to the High Court on a question of law by any person who is aggrieved by a decision, determination, order or award of the Tribunal. If such an appeal is granted the High Court may exercise any power of the Tribunal or may remit the case back to the Tribunal. A decision, determination, order or award of the High Court on such an appeal has the same effect as if it had been made by the Tribunal and it can be enforced in the same manner as a decision or award of the Tribunal.

##### Examples

- An employer is ordered to pay compensation to an employee who the Tribunal found had been discriminated against on the grounds of her religion. The employer believes that in coming to its decision the Tribunal incorrectly interpreted the provisions of the Bill. If the High Court considers that the employer has an arguable case it may hear his appeal.
- A customer's claim that a shop failed to make a reasonable adjustment to allow him to access its premises is rejected by the Tribunal, finding that the adjustment requested would not be reasonable taking into account the circumstances. The customer profoundly disagrees with the decision of the Tribunal but can point to no specific question of law on which the Tribunal erred. No appeal under this clause is

possible. However, the customer may still pursue the matter with a petition of dolance.

## DIVISION 7 – MISCELLANEOUS

### **Clause 119: Enforcement of awards etc. of Tribunal**

This clause replaces section 159 of the Employment Act 2006 which provides for the enforcement of awards of the current Employment Tribunal. Where the Tribunal determines that a sum must be paid or compensation should be awarded the Tribunal may grant execution for the sum or the amount of the award, as the case may be, which is enforceable in the same manner as a sum or award executed by the High Court (i.e. through the coroners).

### **Clause 120: Burden of proof**

This clause provides that, in any claim where a person alleges discrimination, harassment or victimisation under the Bill, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the Bill. The exception to this rule is if the proceedings relate to a criminal offence under this Bill.

#### Example

- A man of Chinese ethnic origin applies for a promotion at work but is not given an interview for the job. He finds that a number of white colleagues were given interviews despite having less experience and fewer qualifications. He brings a case for race discrimination before the Tribunal and provides sufficient evidence to show that he had been treated less favourably because of his ethnic origin. It would then be up to his employer to prove that she had not discriminated against him in the promotion process.

### **Clause 121: Previous findings**

This clause provides that if a person has brought a case under any of the previous legislation listed in this clause (which this Bill replaces), and a finding by a tribunal or court has been finalised, the issues decided in that case cannot be reopened and litigated again under the provisions in this Bill.

### **Clause 122: Interest**

This clause enables Council of Ministers to make an order (subject to Tynwald approval) enabling the Tribunal to add interest payments to any award of compensation made to a claimant as a result of a discrimination case brought under this Bill. The order can set out how the Tribunal should calculate how much interest should be paid.

The Order may provide that interest is to be calculated in a different way in discrimination proceedings from how it is in other cases before the Tribunal. It can also modify the operation of an order made under paragraph 14 of Schedule 16 of this Bill or under paragraph 11 of Part II of Schedule 3 to the [Employment Act 2006](#) (interest on sums awarded) so far as it relates to an award in proceedings

**NOTE 1:** In the UK an employment tribunal has the power to award interest on arrears of pay awards (which may amount to up to six years' arrears). This can form a significant part of the overall award that an employer is required to pay. At present in the Island, the Employment Tribunal does not have the power to include this type of interest to pay arrears in successful like work or job evaluation cases and it is not envisaged that this will change

under the Bill when equal pay for work of equal value cases are added to the circumstances under which the Tribunal may award pay arrears.

**NOTE 2:** The Island's provisions in respect of interest on awards by the Employment Tribunal which are not settled in time are currently set out in the Employment Tribunal (Interest on Awards) Order 1992 (GC 106/92), which was made under the Employment Act 1991. Although the 1991 Act has been repealed and replaced by the Employment Act 2006 this order is deemed to have been made under the 2006 Act because of the operation of the operation of section 16 (effect of substituting provisions) of the [Interpretation Act 1976](#). Under the 1992 order the current rate of interest is set as the same as the interest rate chargeable under section 9 of the [Administration of Justice Act 1981](#), at 4%. In the UK the current rate of interest is 8%.

#### Example

- A claimant is awarded compensation for being discriminated against by her employer. An order made under this section may provide that if the award is not settled by the respondent within 42 days of the Tribunal's decision then interest is to accrue on this award.

#### **Clause 123: Equal pay audits**

This clause enables the DED to make regulations to require the Tribunal to order employers to carry out equal pay audits where they have been found to have breached equal pay law or to have discriminated because of sex in non-contractual pay such as discretionary bonuses.

Regulations made under this power will be subject to the approval of Tynwald. The clause spells out the circumstances to be set out in regulations in which a pay audit cannot be ordered by the Tribunal and that the regulations may set out the content of pay audits. Regulations made under this section may provide that the Tribunal may order an employer to pay a penalty not exceeding £5000 for failure to comply with an equal pay audit order and that such a penalty may be repeated. The first regulations made under this power must include an exemption for certain types of new or small businesses.

**NOTE:** The equivalent provision in the UK was inserted into the Equality Act 2010 by the Enterprise and Regulatory Reform Act 2013. The UK's Equality Act 2010 (Equal Pay Audits) Regulations 2014 came into force on 1 October 2014 and they can be found at: <http://www.legislation.gov.uk/ukSI/2014/2559/contents/made>.

#### **Clause 124: Conduct giving rise to separate proceedings**

This clause enables the Tribunal to transfer a case to the Court, or the Court to transfer a case to the Tribunal, if it is based on the same conduct as one or more separate cases and one of the claims relates to instructing, causing or inducing a person to discriminate against, harass or victimise another person.

#### **Clause 125: Interpretation, etc.**

This clause provides interpretation on certain concepts and terms for the purposes of Part 9 of the Bill, including what is meant by a person lacking capacity and what constitutes a criminal matter.



**PART 10 — CONTRACTS, ETC**  
DIVISION 1— CONTRACTS AND OTHER AGREEMENTS

**Clause 126: Unenforceable terms**

This clause makes terms of contracts which discriminate against a person or would otherwise lead to conduct prohibited by the Bill unenforceable in that respect. But a person who would have been disadvantaged by any such term will still be able to rely on it so as to obtain any benefit to which it entitles him.

For disability alone, this section also applies to terms of non-contractual agreements relating to the provision of employment services (within clause 48(8)(a) to (e)) or group insurance arrangements for employees. These terms are referred to in the section as “relevant non-contractual terms”.

This clause does not apply to a term of contract modified by an equality clause under Part 5, Division 3 because once the term is modified it is no longer discriminatory. Nor, as a result of clause 131, does it deal with contractual terms which may breach the public sector equality duty (Part 11, Chapter 1) to which a different enforcement mechanism apply.

Example

- A term in a franchise agreement which included a requirement that the franchisee should only employ Asian people (which would be unlawful direct discrimination because of race unless an exception applied) could not be enforced by the franchisor. But the franchisee could still obtain any benefit he is due under the term, for example he could continue operating the franchise. However, if the franchisee complied with the discriminatory term, a person discriminated against under it could make a claim against the franchisee for unlawful discrimination under other provisions in the Bill.

**Clause 127: Removal or modification of unenforceable terms**

This clause allows the Employment and Equality Tribunal to make an order to modify or remove a contractual (or relevant non-contractual) term which is made unenforceable under clause 126, when asked to do so by a person who has an interest in the contract (which includes anyone affected by it). The Tribunal may also decide that the term is to be treated as having been removed or modified during the period prior to the making of the order.

The Tribunal must first ensure that anyone who would be affected has been told of the proceedings and given an opportunity to make his or her views known.

Example

- A person renting an office in a serviced office block could ask for a term in the rental contract to be amended if the term discriminated indirectly, for example by including an unjustified requirement that people entering the premises remove any facial covering (thus discriminating against Muslim women). The term could be adjusted by the Tribunal to allow special arrangements to be made to satisfy both genuine security needs of other users and the religious needs of Muslim women visiting the claimant.

**Clause 128: Contracting out**

Under this clause, contractual and relevant non-contractual terms which try to exclude or limit the operation of any provision in the Bill (which includes those dealing with equality of terms) or a provision of secondary legislation made under the Bill are unenforceable by the person in whose favour the term operates. The clause does apply to:

- a contract which settles a claim within clause 99 (jurisdiction of the Tribunal – non work cases), or
- a contract which settles a complaint within clause 105 (jurisdiction of the Tribunal — work cases) if the contract is made with the assistance of the industrial relations officer.

#### Examples

- A woman who thinks she may have a claim for unlawful discrimination upon being made redundant may give up any right to pursue the claim under the Bill in return for payment. She will not then be able to ask the Tribunal to modify or remove that term so as to pursue the claim at a later date.
- However, if the agreement was not reached with the assistance of a industrial relations officer, it would be unenforceable (and thus would not prevent the claimant pursuing the claim before the Tribunal).

### DIVISION 2 — COLLECTIVE AGREEMENTS AND RULES OF UNDERTAKINGS

#### **Clause 129: Void and unenforceable terms**

This clause deals with collective agreements (which are defined in section 173 of the Employment Act 2006). It also deals with rules of undertakings of employers, qualifications bodies and trade organisations (which are defined in Part 5).

Any term of a collective agreement is rendered void to the extent that it discriminates against a person or would otherwise lead to conduct prohibited by the Bill. Terms of collective agreements are made void rather than unenforceable because making them unenforceable would be of no help to those affected, since they are unenforceable in any case unless incorporated into a contract. The term is therefore made of no effect at all, leaving the interested parties to renegotiate.

A rule of an undertaking which discriminates against a person or would otherwise lead to conduct prohibited by the Bill is made unenforceable. A rule of an undertaking is defined in clause 131 as a rule made by a trade organisation or a qualifications body in relation to membership or conferral of a qualification, or a rule made by an employer for application to employees and prospective employees.

#### Examples

- A collective agreement which required jobs in a particular part of a factory to be given only to men would be void, so a woman who applied could not be refused on those grounds.
- An indirectly discriminatory rule of a qualifications body (providing for example a professional qualification for plumbers) which required that applicants must have two years' previous experience with a British firm would be unenforceable against a person who had the equivalent experience with a foreign firm. It would still be enforceable against a person who did not have the required experience at all (provided it was justified).

#### **Clause 130: Declaration in respect of void term, etc.**

This clause enables the Tribunal to declare a term of a collective agreement void, or a rule of an undertaking unenforceable, as set out in clause 126, when a person thinks that it might in the future have the effect of discriminating against him or her. Because collective agreements apply to many people in many (possibly varying) situations, it is not appropriate for the Tribunal to modify them and so they are made void, rather than subject to

modification or amendment, and the parties are left to renegotiate, bearing all those potentially affected in mind.

The clause sets out who can make a complaint in each instance. Terms of discriminatory collective agreements can be challenged by employees or prospective employees. Rules of undertakings of employers can be challenged by employees or prospective employees; those of trade organisations by members or prospective members; and those of qualifications bodies by persons seeking or holding relevant qualifications (as defined in clause 47).

#### Example

- A person who is studying for an engineering qualification who is told he will only be eligible for it if he passes a test of his ability to write English could ask the Tribunal to declare that the rule requiring the test is indirectly discriminatory and therefore, if unjustified, unenforceable.

### **Clause 131: Interpretation**

This section explains what is meant by various terms used in this Part of the Bill, or applies definitions provided elsewhere. These are referred to in the notes on earlier clauses.

**NOTE:** This clause is based on section 148 of the UK 2010 Act. The equivalent of section 148(2)(b) of the UK 2010 Act has been inadvertently omitted from this clause. The text below should be inserted after subsection (1) as subsection (2) and the following subsections should be renumbered accordingly:

“A reference to treatment of a description prohibited by this Act does not include treatment in so far as it is treatment that would contravene Division 1 of Part 11 (public sector equality duty).”

## **PART 11: ADVANCEMENT OF EQUALITY**

### Chapter 1: Public sector equality duty

#### **Clause 132: Public sector equality duty**

This clause imposes a duty, known as the public sector equality duty, on the public authorities (where “public authority” has the same meaning as in section 6 of the [Human Rights Act 2001](#)) to have due regard to three specified matters when exercising their functions. The three matters are:

- eliminating conduct that is prohibited by the Act, including breaches of non-discrimination rules in occupational pension schemes and equality clauses or rules which are read, respectively into a person’s terms of work and into occupational pension schemes;
- advancing equality of opportunity between people who share a protected characteristic and people who do not share it; and
- fostering good relations between people who share a protected characteristic and people who do not share it.

The second and third matters apply to the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. They do not apply to the protected characteristic of marriage and civil partnership.

As well as public authorities within the meaning of section 6 of the Human Rights Act 2001, the clause also imposes the public sector equality duty on others that exercise public functions, but only in respect of their public functions.

Subsections (3), (4) and (5) expand on what it means to have due regard to the need to advance equality of opportunity and foster good relations. In particular, subsection (4) makes clear that having due regard to the need to advance equality of opportunity between disabled people and non-disabled people includes consideration of the need to take steps to take account of disabled people's disabilities.

Subsection (6) makes clear that complying with the duty might mean treating some people more favourably than others, where doing so is allowed by the Bill. This includes treating disabled people more favourably than non-disabled people and making reasonable adjustments for them, making use of exceptions which permit different treatment, and using the positive action provisions in Division 2 of this Part where they are available.

A public sector equality duty already exists in relation to the provision of goods and services for the protected characteristic of race under the [Race Relations Act 2004](#).

#### Examples

- The duty could lead the Isle of Man Constabulary to review its recruitment procedures to ensure they do not unintentionally deter applicants from ethnic minorities, with the aim of eliminating unlawful discrimination.
- The duty could lead a local authority to target training and mentoring schemes at disabled people to enable them to stand as local councillors, with the aim of advancing equality of opportunity for different groups of people who have the same disability, and in particular encouraging their participation in public life.
- The duty could lead a local authority to provide funding for a black women's refuge for victims of domestic violence, with the aim of advancing equality of opportunity for women, and in particular meeting the different needs of women from different racial groups.
- The duty could lead a Government Department, in its capacity as an employer, to provide staff with education and guidance, with the aim of fostering good relations between its transsexual staff and its non-transsexual staff.
- The duty could lead a local authority to review its use of internet-only access to services; or the Isle of Man College to focus introductory IT adult learning courses on older people, with the aim of advancing equality of opportunity, in particular meeting different needs, for older people.
- The duty could lead a school to review its anti-bullying strategy to ensure that it addresses the issue of homophobic bullying, with the aim of fostering good relations, and in particular tackling prejudice against gay and lesbian people.
- The duty could lead a local authority to introduce measures to facilitate understanding between Christians and Muslims living in a particular area, with the aim of fostering good relations between people of different religious beliefs.

#### **Clause 133: Exceptions from duty to promote equality**

This clause sets out persons and functions to which the equality duty does not apply.

Subsection (1) disapplies the equality duty with respect to age in relation to the education of pupils in schools and the provision of services to pupils in schools and in relation to children's homes.

Subsection (2) disapplies the equality of opportunity limb of the equality duty in relation to immigration functions in respect of race (except as it includes "colour"), religion or belief and age.

Subsection (3) disapples the equality duty in respect of judicial functions or functions exercised on behalf of, or on the instructions of, a person exercising judicial functions. A judicial function includes judicial functions which are carried out by persons other than a court or tribunal.

The Council of Ministers may amend this clause (by Order, subject to the approval of Tynwald) except for subsection (3).

#### Examples

- A school will not be required to consider advancing equality of opportunity between pupils of different ages. Nor will it be required to consider how to foster good relations between pupils on different ages. But it will still need to have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations between pupils in respect of the other protected characteristics.
- The Passports and Immigration Office, when taking immigration-related decisions, will not be required to have due regard to the need to advance equality of opportunity for people of different races, religious beliefs or age when taking those decisions. However, it will still be required to have due regard to the need to advance equality of opportunity for disabled people, for men and women, for people of all sexual orientations and transsexual people when making those decisions.

#### **Clause 134: Enforcement**

This clause is designed to make it clear that the duties imposed by or under Division 1 of Part 11 do not create any private law rights for individuals. These duties are, however, enforceable by way of petition of doleance.

#### Example

- A local authority fails to give due regard to the requirements of the public sector equality duty when deciding to stop funding a local women's refuge. An individual would not be able to sue the local council as a result and claim compensation. She would need to consider whether to pursue proceedings by a petition of doleance.

### DIVISION 2 — POSITIVE ACTION

#### **Clause 135: Positive action: general**

This clause provides that the Bill does not prohibit the use of positive action measures to alleviate disadvantage experienced by people who share a protected characteristic, reduce their under-representation in relation to particular activities, and meet their particular needs. It will, for example, allow measures to be targeted to particular groups, including training to enable them to gain employment, or health services to address their needs. Any such measures must be a proportionate way of achieving the relevant aim.

The extent to which it is proportionate to take positive action measures which may result in people not having the relevant characteristic being treated less favourably will depend, among other things, on the seriousness of the relevant disadvantage, the extremity of need or under-representation and the availability of other means of countering them.

To provide greater legal certainty about what action is proportionate in particular circumstances, the clause contains a power to make regulations setting out action which is not permitted under it.

If positive action measures are taken in recruitment or promotion under section 136(3) those provisions will apply rather than this clause.

This clause does not allow any action to be taken that would be prohibited by other legislation.

#### Examples

- Having identified that its white male pupils are underperforming at maths, a school could run supplementary maths classes exclusively for them.
- The NHS identifies that lesbians are less likely to be aware that they are at risk of cervical cancer and less likely to access health services such as national screening programmes. It is also aware that those who do not have children do not know that they are at an increased risk of breast cancer. Knowing this it could decide to establish awareness campaigns for lesbians on the importance of cancer screening.

#### **Clause 136: Positive action: recruitment and promotion**

This clause permits an employer to take a protected characteristic into consideration when deciding whom to recruit or promote, where people having the protected characteristic are at a disadvantage or are under-represented. This can be done only where the candidates are as qualified as each other. The question of whether one person is as qualified as another is not a matter only of academic qualification, but rather a judgement based on the criteria the employer uses to establish who is best for the job which could include matters such as suitability, competence and professional performance. The clause does not allow employers to have a policy or practice of automatically treating people who share a protected characteristic more favourably than those who do not have it in these circumstances; each case must be considered on its merits. Any action taken must be a proportionate means of addressing such disadvantage or under-representation.

The clause defines recruitment broadly, so that for example offers of partnership or appointment to public offices, are included.

The clause is intended to allow the maximum extent of flexibility to address disadvantage and under-representation where candidates are as good as each other.

#### Examples

- A police service which employs disproportionately low numbers of people from an ethnic minority background identifies a number of candidates who are as qualified as each other for recruitment to a post, including a candidate from an under-represented ethnic minority background. It would not be unlawful to give preferential treatment to that candidate, provided the comparative merits of other candidates were also taken into consideration.
- An employer offers a job to a woman on the basis that women are under-represented in the company's workforce when there was a male candidate who was more qualified. This would be unlawful direct discrimination.

## **PART 12: DISABLED PERSONS: TRANSPORT**

### **DIVISION 1 – PUBLIC TRANSPORT**

#### **Clause 137: PPV accessibility regulations**

This clause enables the Department of Infrastructure (DOI) to make public passenger vehicle (PPV) accessibility regulations specifying the technical standards applying to buses and coaches, to provide greater accessibility to disabled passengers including when seated in a wheelchair. The requirements can relate to the construction, use and maintenance of the vehicle, to the design and carriage of equipment, and to wheelchair restraints and wheelchair position.

Before making PPV accessibility regulations the DOI must consult the Tynwald Equality Consultative Council and such other representative organisations as DOI thinks appropriate. Such regulations also require the approval of Tynwald before they can come into operation.

#### **Example**

- Buses and coaches must meet certain technical standards in respect of equipment and design to ensure accessibility by disabled passengers. If accessibility features, such as handrails or other aids, were present when the vehicle was approved but have subsequently been removed, the bus must not be used on the road.

#### **Clause 138: Offence of contravening PPV accessibility regulations**

This clause makes it an offence to fail to comply with the requirements of the regulations or to use or allow to be used on the road a public passenger vehicle which does not meet the requirements of the regulations. If an offence is found to have been committed by or with the consent of a responsible person, such as a director, manager or company secretary, that individual, as well as the company, is guilty of the offence. The offence is punishable by a fine of up to £2,500.

#### **Example**

- A bus has an accessibility feature removed and is subsequently used on a registered service. By using, or permitting the vehicle to be used in this condition, an offence is committed and may lead to the driver and the operator being convicted of the offence and a fine of up to £2,500 being imposed.

#### **Clause 139: Accessibility certificates**

This clause requires a regulated public passenger vehicle to have an accessibility certificate to demonstrate that it meets the requirements of the public passenger vehicle accessibility regulations (see clause 137), or an approval certificate (see clause 140), before it can be used on a road. It also allows the DOI to make regulations relating to applications and the issue (or copies) of accessibility certificates and providing for vehicle examinations. These regulations are subject to the same requirements as the PPV accessibility regulations before they can be made and come into operation.

#### **Example**

- A bus must have an accessibility certificate showing that it conforms to requirements about accessibility features, for example, ramps, handrails and wheelchair spaces. The certificate shows that the bus meets the minimum acceptable standard to enable disabled passengers to get on and off it and be carried on it in reasonable safety and comfort.

### **Clause 140: Approval certificates**

This clause allows the DOI to approve a public passenger vehicle as a "type vehicle" if the relevant technical requirements are met, and the issue of an approval certificate if a particular vehicle conforms with a "type vehicle". This allows a design of vehicle to be approved as meeting the technical and accessibility requirements. It also contains a power for the DOI to make regulations relating to applications and the issue (or copies) of approval certificates and providing for vehicle examinations. These regulations are subject to the same requirements as the PPV accessibility regulations before they can be made and come into operation.

The DOI can withdraw approval for a "type vehicle" at any time. When this happens, no further approval certificates may be issued. The certificates issued prior to withdrawal remain valid.

**NOTE:** In subsection (1) the reference to "PSV" should be replaced by "PPV".

#### Example

- A particular bus manufacturer's chassis in combination with a body is approved as a "type vehicle", and approval certificates are issued in respect of buses conforming to this design. Modifications are subsequently made to the "type vehicle" which mean that it no longer meets the technical requirements, so its approval as a "type vehicle" is withdrawn and no approval certificates will be issued in respect of buses conforming to the modified design.

### **Clause 141: Special authorisations**

This clause provides that this Division of Part 12 of Bill does not prevent the use of a vehicle in accordance with an order made by the DOI under paragraph 3 of Schedule 2 to the [Road Traffic Act 1985](#) (authorisation of special types of vehicle).

The clause also provides that the DOI may make an order to apply provisions of PPV accessibility regulations to regulated public passenger vehicles of a description specified by the order, subject to any modifications or exceptions specified by the order.

#### Example

- A new design of public passenger vehicle, which does not conform to certain of the provisions of the current accessibility regulations, is to be trialled on the Island. The DOI makes an order modifying the application of the PPV accessibility regulations in respect of the vehicle type, so that its performance can be tested.

## DIVISION 2 – TAXIS, ETC.

### **Clause 142: Interpretation**

This clause defines certain terms that are used in Division 2 of Part 12 of the Bill, including "accessibility requirements", "assistance dog", "private hire vehicle", "taxi" and "taxi accessibility regulations".

### **Clause 143: Taxi accessibility regulations**

This clause contains a power for the DOI to make regulations specifying the technical standards applying to licensed taxis and imposing requirements on taxi drivers, to enable disabled people to access taxis safely, even when seated in a wheelchair, and to be carried in safety and reasonable comfort. It makes it an offence, punishable by a fine of up to £1,000, for a driver of a regulated taxi to fail to comply with the requirements of the regulations.



These conditions do not apply to vehicles which are drawn by horses or other animals.

**NOTE:** The equivalent provision of the UK 2010 Act is not yet in force.

Example

- It is an offence for a taxi driver not to comply with a requirement to have a ramp or other device to enable a disabled person in a wheelchair to access a regulated taxi (wheelchair accessible taxi) in safety.

#### **Clause 144: Taxi licence conditional on compliance with taxi accessibility regulations**

This clause prevents the granting a licence for a taxi to ply for hire unless the vehicle complies with the regulations made under clause 143, so as to ensure that licensed taxis in use are accessible by disabled passengers. The provisions do not apply if a licence has been in force in respect of the taxi in the preceding 28 days, so that existing vehicles can continue to be used even if they do not meet the accessibility requirements.

**NOTE:** The equivalent provision of the UK 2010 Act is not yet in force.

Example

- Someone making an application for a taxi licence will need to ensure the taxi will be accessible by disabled people.

#### **Clause 145: Passengers in wheelchairs**

This clause places duties on drivers of designated taxis and private hire vehicles to carry a disabled passenger while in a wheelchair; to not make an additional charge; if the passenger chooses to sit in a passenger seat, to carry the passenger's wheelchair; to carry the passenger in safety and in reasonable comfort; and to provide reasonable assistance to enable the passenger to use the taxi. A taxi or private hire vehicle is designated if it appears on a list maintained by the RTLC under clause 147.

A driver of a designated taxi or private hire vehicle who refuses to carry a wheelchair user commits an offence punishable by a fine of up to £1,000.

Examples

- A person in a wheelchair hires a wheelchair-accessible taxi or private hire vehicle. The driver must help the passenger into and out of the vehicle by using a ramp or lift and helping the passenger onto the lift or up the ramp. The driver must ensure the wheelchair is correctly positioned in the vehicle and secured so that the passenger travels safely and in reasonable comfort.
- If a passenger in a wheelchair wishes to travel in a passenger seat, the driver must assist the passenger into and out of the vehicle and transport the wheelchair.
- A driver must load a disabled passenger's luggage into and out of the taxi.
- A driver cannot charge a person in a wheelchair more than any other passenger.

**NOTE:** The equivalent provision of the UK 2010 Act is only in force so far as it relates to, and for the purpose of, the issue of exemption certificates under the equivalent of clause 146.

### **Clause 146: Passengers in wheelchairs: exemption certificates**

This clause provides that a licensing authority must issue a certificate to exempt a driver from the duties contained in clause 145 if it is satisfied that the driver cannot provide assistance due to a medical or physical condition. The exemption certificate must be displayed in the vehicle.

#### Example

- A driver is not required to provide physical assistance to help a passenger in a wheelchair into and out of a designated wheelchair accessible vehicle if he or she is medically unfit to do so.

### **Clause 147: Lists of wheelchair-accessible vehicles**

This clause requires the RTLC to maintain a list of wheelchair accessible taxis and private hire vehicles operating in its area.

If it so wishes, the RTLC may decide to include on the list only those vehicles only that are being used, or are to be used, by the holder of a licence for regular service under that licence, where "regular service" means a service (not being an excursion), provided on more than one occasion, for the carriage of passengers at separate fares on either a predetermined route or a variable route which falls within predetermined limits, whether passengers are taken up or set down at predetermined stopping places or on demand (i.e. mainly the Island's buses).

The duties contained in clause 145 will apply to drivers of the vehicles that appear on the list of designated wheelchair-accessible vehicles unless the driver holds an exemption certificate under clause 146.

**NOTE 1:** The RTLC already maintains a list of operators of wheelchair accessible private hire vehicles and taxis.

**NOTE 2:** The equivalent provision of the UK 2010 Act is basically only in force so far as it relates to, and for the purpose of, the issue of exemption certificates under the equivalent of clause 146

#### Examples

- A RTLC maintains a list of the wheelchair-accessible taxis and private hire vehicles. The drivers of the vehicles on that list are required to perform the duties to assist passengers in wheelchairs contained in clause 145 unless the driver holds an exemption certificate under clause 146.
- The driver of a vehicle that is included on the list will provide assistance to passengers in wheelchairs and will not charge them an additional fare.

### **Clause 148: Assistance dogs in taxis**

This clause places duties on drivers of taxis to transport a disabled person's assistance dog, for example, a blind person's guide dog, and allow it to stay with the passenger without making any additional charge.

A driver of a taxi who refuses to carry an assistance dog commits an offence that is punishable by a fine of up to £1,000.

#### Example

- A deaf person with a hearing dog hails a taxi. The driver must not refuse to transport the assistance dog and must let it accompany the passenger in the taxi.

#### **Clause 149: Assistance dogs in taxis: exemption certificates**

This clause provides that the RTLC must exempt a driver of a taxi from the duties contained in clause 148 if it is satisfied that the driver cannot carry an assistance dog on medical grounds; in particular if the vehicle the driver uses or will be using is not suitable for the carriage of assistance dogs because of the driver's medical condition. The exemption certificate must be displayed on the taxi.

#### Example

- A driver who has a medically certified allergy to dogs is not required to carry an assistance dog, as long as he or she displays an exemption certificate in his or her taxi.

#### **Section 150: Assistance dogs in private hire vehicles**

This clause places duties on operators and drivers of private hire vehicles to transport a disabled person's assistance dog and allow it to stay with the passenger without making any additional charge.

An operator or driver of a private hire vehicle who refuses to carry an assistance dog commits an offence that is punishable by a fine of up to £1,000.

#### Examples

- A driver of a private hire vehicle cannot impose an additional charge for carrying an assistance dog.
- An operator of a fleet of private hire vehicles accepts a booking from a passenger with an assistance dog. The driver cannot refuse to carry the assistance dog.

#### **Clause 151: Assistance dogs in private hire vehicles: exemption certificates**

This clause requires the RTLC to exempt a driver of a private hire vehicle from the duties contained in clause 150 if it is satisfied that the driver cannot carry an assistance dog because of a medical condition; in particular if the vehicle the driver uses or will be using is not suitable for the carriage of assistance dogs because of the driver's medical condition. The exemption certificate must be displayed on the private hire vehicle.

#### Example

- A driver is not required to carry an assistance dog if he has a medically certified allergy to dogs and displays his exemption certificate in his vehicle.

### **PART 13: DISABILITY: MISCELLANEOUS**

#### **Clause 152: Reasonable adjustments**

This clause give effect to the supplementary provisions on reasonable adjustments set out in Schedule 18 to the Bill areas of services, premises, work, education and associations where a person providing a service or delivering functions, an employer or an education provider, or an association is required to consider reasonable adjustments to premises which it rents and would require the landlord's consent to proceed. Further information is provided in the notes on Schedule 18.

### **Clause 153: Improvements to let dwelling houses**

This clause provides a procedure for a disabled tenant or occupier of rented residential premises to seek consent to make a disability-related improvement to the premises where the lease allows a tenant to make an improvement only with the consent of the landlord. The landlord may not unreasonably withhold consent, but may place reasonable conditions on the consent. A landlord who refuses consent must set out the reasons for that refusal. In deciding whether a refusal or condition is unreasonable, the onus is on the landlord to show that it is not. This clause applies to all leases of residential property used as the occupier's or tenant's only or main residence.

#### Examples

- A disabled tenant who has mobility problems asks her landlord to consent to the installation of a walk-in shower and a grab rail to help her use the lavatory. Her landlord refuses consent. It would be for the landlord to give reasons for the refusal, and to show that it was not unreasonable.
- The landlord consents to the fitting of the grab rail and shower, on condition that their colour matches the other bathroom fittings, and that they must be removed if the disabled person moves out of the property. These might be reasonable conditions, but it is for the landlord to show that they are.

## **PART 14: GENERAL EXCEPTIONS**

### **Clause 154: Statutory provisions**

This clause gives effect to Schedule 19, which allows differential treatment which would otherwise be made unlawful by specific parts of the Bill where that is required by other laws. It also allows differential treatment of pregnant women for their own protection, and allows people of particular religions or beliefs to be appointed to specified educational posts. It also allows rules about Crown employment to provide for differential treatment on the basis of nationality and provides that a person does not contravene this Bill so far as relating to disability or race in so far as relating to nationality in respect of the operation of the Island's work permit system.

### **Clause 155: National security**

This clause ensures that the Act does not make it unlawful to do anything which is proportionate in order to safeguard national security.

#### Example

- Denying people of a particular nationality access to sensitive information is not unlawful race discrimination under the Act if it is proportionate

### **Clause 156: Charities**

This clause allows charities 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 their colour — and if they do their charitable instrument will be applied as if that limitation did not exist.

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.

The clause 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.

**NOTE:** clause 156(11)(e) currently refers to the [Disabled Persons \(Employment\) Act 1946](#) which it is proposed will be repealed by Schedule 24. This drafting issue will be addressed and if it is necessary to keep any of the provisions of the 1946 Act they will be inserted in modern form into an appropriate Act of Tynwald or this Bill.

#### Examples

- 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 which provides for funding to benefit poor black members of a community actually enables the benefits to be provided to all poor members of that community regardless of their colour.
- 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.

#### **Clause 157: Sport**

This clause 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.

In addition, this clause allows the 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.

#### Examples

- 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 a parish tennis championship to have been born in that parish or to have lived there for a minimum period prior to the event.

#### **Clause 158: General**

This clause gives effect to Schedule 20, which contains a number of general exceptions to the prohibitions against discrimination and harassment, covering acts authorised by statute

or the Government, organisations relating to religion or belief, communal accommodation and training provided to people who are not resident in the European Economic Area.

### **Clause 159: Age**

This clause enables the Council of Ministers to make orders setting out 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 Ministers or a Department to issue guidance, for consultation about the guidance, and for the imposition of requirements that refer to the guidance.

#### Examples

- 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;
- holidays for particular age groups.

## **PART 15 – CLOSING PROVISIONS AND MISCELLANEOUS**

### **Clause 160: Codes of practice**

This clause enables the Council of Ministers to issue codes of practice in connection with any matter addressed by the Bill with a view to ensuring or facilitating compliance with Bill or an enactment made under it, or promoting equality of opportunity. The Council of Ministers may also issue a code of practice giving practical guidance to landlords and tenants about adjustments to their properties for a disabled person.

Before issuing a code under this clause the Council of Ministers must publish the proposals and consult such persons as the Council thinks appropriate.

In determining any question arising in proceedings under the Bill the Court or Tribunal must have regard to the content of any code of practice insofar as it appears to the Court or Tribunal to be relevant to the question.

### **Clause 161: Codes of practice: supplemental**

This clause confirms that the Council of Ministers may revise a code issued under clause 160; and a that reference in that clause to the issue of a code includes a reference to the revision of a code.

The clause provides that although failure to comply with a provision of a code does not of itself make a person liable to criminal or civil proceedings a code is admissible in evidence in criminal or civil proceedings and must be taken into account by the Court or Tribunal in any case in which it appears to the Court or Tribunal to be relevant.

The Council of Ministers may by order (subject to Tynwald approval) amend clause 160 to vary the range of matters on which codes of practice under that clause can be made.

### **Clause 162: Promoting equality**

This clause allows the Council of Ministers to make such arrangements as it considers appropriate for promoting equality of treatment in relation to protected characteristics and facilitating understanding of and compliance with the Bill and any subordinate legislation, codes of practice or guidance made or issued under it.

#### Example

- When the Bill has received Royal Assent the Council of Ministers might wish to appoint a person to prepare briefing materials, carry out training for businesses, the voluntary sector and Government Departments, etc. as part of the preparation for bringing provisions of the Bill into operation.

### **Clause 163: Manx ships and seafarers**

This clause provides that the provisions of the Bill only apply to Manx aircraft and ships and person who are employed on such aircraft and vessels to the extent set out in an Order made by the Department of Economic Development with the approval of Tynwald.

### **Clause 164: Crown application**

This clause sets out how the Bill applies to Ministers, government departments and certain statutory bodies — collectively known as the Crown. The principle is that the machinery of government, both elected and administrative, should be subject to the Act in the same way as everybody else, unless there are good reasons for it not being.

#### Example

- A Government Department as an employer must not discriminate against an employee because of race; just as any other employer is prohibited from doing so under the Bill.

### **Clause 165: Tynwald Equality Consultative Council**

This clause provides that the current Tynwald Advisory Council for Disabilities continues to exist but its name is changed to reflect a remit that is expanded to cover all of the protected characteristics.

### **Clause 166: Information society services**

This clause introduces Schedule 21 which contains provisions which apply the Bill to information society service providers established in the Island. Further information is set out in the notes on Schedule 21.

### **Clause 167: Employment legislation amended**

This clause gives effect to Schedule 22 which contains a number of amendments to the Island's employment legislation that are not directly related to discrimination and equality. 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 these amendments in the Bill. The amendments concern some potential cost saving measures and some issues that have emerged since the [Employment Act 2006](#) came into operation. Further information about the amendments is provided in the notes on Schedule 22.

**NOTE:** The reference in this clause to Schedule 21 should be a reference to Schedule 22.

### **Clause 168: Harmonisation with UK Equality Act 2010**

This clause allows the Council of Ministers to make orders (with the approval of Tynwald) to reflect certain changes that may be made to the UK 2010 Act.

The clause is broadly based on section 203 of the UK 2010 Act which enables a Minister of the Crown by order to amend that Act (and the Equality Act 2006), to ensure consistency across the legislation where changes which are required by EU law would otherwise result in inconsistent provision.

EU law generally has direct effect in the UK and the European Communities Act 1972 allows a Minister by regulations or order to give effect to a right or obligation arising out of an EU law provision.

However, where provisions of the UK 2010 Act (and equality law of the UK more generally) deal with a sector on a single basis some of the matters covered may not be within the reach of EU law and so outside the scope of the powers in UK's 1972 Act. This arises, for example, in the case of nationality and colour which are not dealt with under the EU law provisions on race discrimination but are covered by the UK provisions.

In these cases the European Communities Act 1972 would not allow amendment of all relevant parts of the legislation, because the change required in respect of, say nationality or colour, would not be consequential on or arising out of the EU obligation. In order to retain the unitary approach to its discrimination law it was necessary for the UK have a power so that in appropriate cases amendments could also be made to those areas of the UK 2010 Act unaffected by new EU law obligations.

Although EU law in matters such as equality is not directly applicable to the Isle of Man, the Council of Ministers can, if it is considered to be appropriate, with the approval of Tynwald, apply and implement EU legislation in the Island using the powers in the [European Communities \(Isle of Man\) Act 1973](#). This power is capable of amending existing legislation to take account of the EU law but, as in the UK, it could only amend the Bill to the extent covered by the EU legislation.

In a case where future EU law required changes to the UK's equality legislation and the UK considered that the powers under section 203 of its 2010 Act were also required so as to maintain a consistent approach in the Act, the Council of Ministers could use the power in this clause (subject to Tynwald approval) to mirror the changes made under section 203 of the UK 2010 Act

#### **Clause 169: Subordinate legislation**

This clause provides that, with the exception of Appointed Day Orders made under clause 2, all orders and regulations made under the Bill must not come into operation unless they are approved by Tynwald.

#### **Clause 170: Consequential amendments**

This clause introduces Schedule 23 which contains amendments to other enactments that are consequential on the provisions of the Bill.

#### **Clause 171: Repeals**

This clause gives effect to Schedule 24 which sets out the repeals of other enactments which are no longer required.

#### **Clause 172: Glossary**

This clause introduces Schedule 25 which will specify the places where expressions used in this Act are defined or otherwise explained.

**NOTE: Schedule 25 has not yet been added to Bill. It will be inserted to the final draft of the Bill.**



## **SCHEDULE 1 DISABILITY: SUPPLEMENTARY PROVISION**

Part 1 of this Schedule clarifies the definition of disability in clause 7 and provides a number of regulation-making powers to enable the definition to be amended at a later date if required. Mental health issues as well as physical conditions may constitute a disability for the purposes of the Bill.

Part 2 describes what can be included in guidance about the definition of disability and prescribes adjudicating bodies which are obliged to take account of guidance, and the role of Departments and the Council of Ministers in developing and publishing guidance.

### Example

- A man with depression finds even the simplest of tasks or decisions difficult, for example getting up in the morning and getting washed and dressed. He is also forgetful and can't plan ahead. Together, these amount to a "substantial adverse effect" on his ability to carry out normal day-to-day activities. The man has experienced a number of separate periods of this depression over a period of two years, which have been diagnosed as part of an underlying mental health condition. The impairment is therefore considered to be "long-term" and he is a disabled person for the purposes of the Bill.

## **SCHEDULE 2 SERVICES AND PUBLIC FUNCTIONS: REASONABLE ADJUSTMENTS**

This Schedule explains how the duty to make reasonable adjustments in clause 20 applies to a service provider or person exercising a public function where a disabled person is placed at a substantial disadvantage. It includes definitions of "substantial disadvantage" and "physical features" and stipulates that the duty does not require fundamental changes to the nature of the service. As the duty is owed to disabled persons generally, it is an anticipatory duty which means service providers and people exercising public functions must anticipate the needs of disabled people and make appropriate reasonable adjustments.

This Schedule also explains how the duty to make reasonable adjustments in clause 21 applies to operators of transport vehicles. It specifies that the duty applies in different ways to different types of vehicle. It provides that a transport service provider is not required to make adjustments to the physical features of vehicles or to whether vehicles are provided, except in specified circumstances. It provides a power to make regulations to allow further amendments to be made to this paragraph in the future.

### Examples

- The manager of a large shop in a national chain installs a ramp, automatic entry doors, hearing induction loops and waives the "no dogs policy" in respect of assistance dogs, to comply with the duty to make reasonable adjustments.
- A police officer is carrying out a public function when interviewing a witness who is deaf. Arranging a British Sign Language / English interpreter for the interview might be a reasonable adjustment to make. The constabulary would not, of course, need to employ such an interpreter permanently but it should be willing, and aware of how, to engage the service of an appropriately qualified person if the circumstances did arise.

### **SCHEDULE 3**

#### **SERVICES AND PUBLIC FUNCTIONS: EXCEPTIONS**

This Schedule 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: Constitutional matters: paragraphs 1–3**

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 (including the House of Keys and the Legislative Council as the Branches of Tynwald);
- preparing, making, approving or considering primary legislation or specified types of secondary legislation; or
- exercising judicial functions or deciding not to commence or continue criminal proceedings.

**NOTE:** In paragraph 2(5) of this Schedule the reference to Schedule 18 should be a reference to Schedule 19.

#### Examples

- Activity related to the preparation and making of primary legislation, such as this Bill, would be excepted from the prohibition on discrimination.
- A decision of a Deemster on the merits of a case would be within the exceptions in this Schedule. An administrative decision of court staff, about which contractor to use to carry out maintenance jobs or which supplier to use when ordering stationery would not be.

#### **Part 2: Schools**

Paragraph 4 provides that the prohibitions on discrimination in Part 3 of Bill do not, so far as they relate to age, or religion or belief, or apply the DEC in performing its functions under section 3 the [Education Act 2001](#), which concerns the establishment of schools.

The reason for the provision in paragraph 4 is to prevent the DEC being bound to provide schools for pupils of different faiths, or no faith, or for particular age groups, in every catchment area. It means that the DEC will not be prevented from establishing single-sex schools, but must provide similar numbers of places for boys and girls.

#### Examples

- Catholic parents will not be able to claim that their local authority is discriminating unlawfully if there is no Catholic school in their catchment area, or if there are fewer places in Catholic schools than in Church of England schools.
- Parents of secondary age children will not be able to claim that it is age discrimination if their children have to travel further than younger ones to reach their school.

Paragraph 5 excepts from the prohibition on age discrimination in Part 3 of the Bill (to the extent that it is not excepted elsewhere), the exercise of functions in a number of areas that relate to schools.

## Examples

- School admissions policies can continue to be based on the ages of prospective pupils.
- School transport can be provided for children of a particular age only.

Paragraph 6 provides an exception from the prohibition on religious or belief related discrimination in Part 3 of the Bill (to the extent that it is not excepted elsewhere), in relation to the exercise of functions in a number of areas that relate to faith and non-faith educational institutions. In relation to all schools those areas are the curriculum, collective worship, school transport and the establishment, alteration and closure of schools; and in relation to schools which have a religious character the exception also applies to admission of pupils and the responsible body of such a school. A school has a religious character if, and only if, it has been specified as such by the DEC in an order which has been laid before Tynwald.

Paragraph 7 provides an exception from clause 30, so far as relating to religious or belief-related discrimination, in respect of the functions of DEC or a governing body of a maintained school in respect of the employment of reserved teachers within the meaning of section 7 (Teachers of religious education in maintained schools) of the [Education Act 2001](#).

## Example

- A public body will not be open to claims of religious discrimination as a result of its decision to establish, alter or close a faith school.
- A particular religion or belief can be appointed to be a governor of a school with a religious character.

Paragraph 8 provides an exception for the DEC from the provisions requiring reasonable adjustments in Part 3 of the Bill, in respect of its activities in relation to school education, from the requirement to alter physical features of premises when making reasonable adjustments for disabled people. (However, see the requirement to produce accessibility strategies under Schedule 10.)

Paragraph 9 simply confirms that this Part of Schedule 3 has to be read with Division 1 (Schools) of Part 6 (Education) of the Bill.

## **Part 3: Health and care**

Paragraph 10 provides that it is not unlawful for a person operating a blood service to refuse to accept someone's donation of blood provided they have reliable evidence that accepting it would put the public or the individual donor at risk and that such a refusal would not be unreasonable. "Blood" includes components, for instance plasma or red blood cells.

## Examples

- If there is evidence that people who have been sexually active in a particular country are more likely to be infected with HIV, the operator of the blood service can refuse to accept donations of blood or blood components from people who have been sexually active there, even if that disproportionately affects members of a particular nationality and so might otherwise be unlawful indirect discrimination because of race.
- If there is evidence that women who have recently given birth are likely to suffer detrimental effects from giving blood or blood components, then a blood service can

refuse to accept donations from them. This would not be unlawful direct discrimination because of maternity.

Paragraph 11 provides that it is not unlawful for a person to discriminate against a pregnant woman by refusing to provide her with a service or only providing the service to her on certain conditions if he or she reasonably believes that to do otherwise would create a risk to her health or safety and he or she would take similar measures in respect of persons with other physical conditions.

#### Examples

- A leisure centre could refuse to allow a pregnant woman to use certain gym equipment (for example, a rowing machine) after a certain point in her pregnancy if it reasonably believed that allowing her to use the equipment would create a risk to her health and safety and it would also refuse, for example, to allow a man with a serious heart condition to use the equipment.
- An airline could refuse to allow a pregnant woman to travel beyond her 35th week of pregnancy if it reasonably believed that allowing her to travel would create a risk to her health and safety and it would also refuse people with other physical conditions that affect their health and safety to travel.

Paragraph 12 is designed to ensure that people who provide foster care, or other similar forms of care, in their own home are not subject to the prohibitions on discriminating against, harassing or victimising a person in the provision of services while providing that care. It applies irrespective of whether or not the person is paid for providing the care service.

#### Examples

- A Muslim family could choose to foster only a Muslim child. This would not constitute discrimination against a non-Muslim child.
- A woman who is the main carer for her mother decides to provide care for another person too, and decides to restrict any offer of care to another woman. This would not constitute discrimination against a man who needed similar care.

### **Part 4: Immigration**

Paragraph 13 provides for an exception in respect of age discrimination in relation to things done by a relevant person relating to immigration.

Paragraph 14 provides an exception from the prohibition on discriminating against a person when providing a service or exercising a public function because he or she has a disability, in relation to certain immigration decisions, including making a decision not to allow someone to enter the country or a decision not to allow him or her to remain in the country. However, this exception only applies where the decision is necessary for the public good.

Paragraph 15 provides an exception from the prohibition on discriminating against a person in the provision of services or the exercise of a public function because of his or her ethnic or national origins or nationality, in relation to the exercise of immigration functions.

#### Example

- Different visa requirements for nationals of different countries, which arise for a variety of historical and political reasons, do not constitute unlawful race discrimination.

Paragraph 16 provides an exception from the prohibition on discriminating against a person in the provision of services or the exercise of a public function because of their religion or belief in relation to decisions not to allow someone to enter the country or to remove someone from the country, if that decision is made on the grounds that it is conducive to the public good to exclude that person from the country or it is not desirable to permit the person to remain in United Kingdom. It also provides an exception for decisions relating to an application for entry clearance or leave to enter to cover people entering the country to provide services in connection with religion or belief, such as a Minister or clergyman.

#### Examples

- The passport and immigration office may differentiate between certain religious groups in order to allow a person such as a minister of religion to enter the Island to provide essential pastoral services, without being challenged by groups which could operate against the public interest, but which might also claim to represent a religion.
- A decision to prevent a person who holds extreme religious views from entering or remaining in the country if his or her presence is not conducive to the public good, for example, preachers who use the pulpit to incite violence, would not constitute unlawful discrimination because of religion or belief.

Paragraph 17 provides that certain expressions are to be construed in accordance with the Immigration Act 1971 (of Parliament), as that Act has effect in the Island.

#### **Part 5: Control of Employment**

Paragraph 18 provides an exception to clause 30 (provision of services, etc) of the Bill in relation to race and disability discrimination for the operation of the Island's control of employment (work permit) legislation.

The exception in respect of race is obviously needed because work permits are not required for a person who is an "Isle of Man worker" (as defined in the Control of Employment Act). The exception concerning disability discrimination is necessary because amongst the matters that the DED may take into consideration when deciding whether to grant a work permit are:

- the state of health of the person concerned and any relevant person;
- the likely demand by the person concerned and any relevant person for public services of any description in the Island,

where "relevant person" means any person living with, or likely to live with, the person concerned as a member of his or her family or household.

#### **Part 6: Insurance and other Financial Services**

Paragraph 19 provides an exception to clause 30 (provision of services, etc) for group insurance schemes and group personal pensions ("group schemes"). As group schemes are offered to employees as part of the employment relationship:

- the employer is responsible for ensuring that the provision of benefits under group schemes complies with the requirements of Part 5 (work); and
- the insurer or pension provider is not responsible for ensuring that the provision of benefits complies with the requirements of Part 3 (services and public functions).

Group policies and schemes are arrangements between an employer and an insurer for the benefit of the employees, their partners and their dependants. They are entered into not on the basis of the individual characteristics of each employee but on the basis of the employer's business and the profile of the employees. Employees can sign up to the benefits under such policies on standard terms that are the same for all employees.

## Example

- An employer enters into a contract with an insurer for the provision of health insurance to employees. As the health insurance is part of the package of benefits provided by the employer to the employee, the employer must ensure that the provision complies with Part 5. So, if benefits under the health insurance policy differ between men and women, the employer may have to justify the difference by reference to paragraph 17 of Schedule 9 (insurance contracts, etc.).

Paragraph 20 creates an exception in respect of age discrimination for things done in connection with the provision of a financial service. But this is subject to a proviso that, where the financial service provider conducts an assessment of risk for the purposes of providing the service, that assessment of risk must, so far as it involves a consideration of their customer's age, be done by reference to information which is relevant to the assessment of the risk and from a source on which it is reasonable to rely. Under this paragraph, "financial services" includes a service—

- (a) falling within the Regulated Activities Order 2011<sup>5</sup>; or
- (b) in the nature of insurance or a personal pension.

**NOTE:** The reference to Regulated Activities Order 2013 in this paragraph should be a reference to the Regulated Activities Order 2011.

Paragraph 21 provides an exception from the prohibition on discriminating against disabled people in the provision of services connected with insurance business (as defined in section 54 of the [Insurance Act 2008](#)) where the decision in question is based on relevant and reliable information. It enables insurance providers to offer different premiums and benefits to disabled people where it is reasonable to do so. The reason for this exception is because it is recognised that insurers may need to distinguish between people on the basis of the risks against which they are insuring.

## Examples

- A disabled person with cancer applies for a life insurance policy. The insurance company refuses to provide life insurance cover based on a medical report from the person's doctor which provides a prognosis on the person's condition.
- An insurer charges higher premiums for travel insurance for a person with a particular disability because actuarial evidence suggests that people with this disability are at increased risk of having a heart attack.

Paragraph 22 provides an exception so that insurers will not be discriminating unlawfully if they continue to apply terms of insurance policies entered into before the date on which this paragraph comes into force. Where pre-existing policies are renewed, or have their terms reviewed, on or after the date this paragraph comes into force, the exception no longer applies to them.

## Examples

- An existing life insurance policy which was taken out in 2004, and has not been subsequently renewed or reviewed, continues to be lawful and does not have to be altered to comply with current relevant discrimination law.

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<sup>5</sup> SD 884/11 (<http://www.tynwald.org.im/links/tls/SD/SD2011/2011-SD-0884.pdf>) as amended by SD 0373/2013 (<http://www.tynwald.org.im/links/tls/SD/2013/2013-SD-0373.pdf>)

- A company has a death in service benefit insurance policy for its employees which has been in place for many years and whose terms have not been reviewed. It benefits from the exception unless and until the policy is reviewed or renewed.

### **Part 7: Marriage**

Paragraph 23 contains exceptions from the general prohibition of gender reassignment discrimination in section 29 of the Act for the religious solemnisation of marriages. By virtue of the [Gender Recognition Act 2009 \(of Tynwald\)](#) an Isle of Man resident with a full Gender Recognition Certificate acquired under the [Gender Recognition Act 2004 \(of Parliament\)](#) is able to marry someone of the opposite gender to his or her acquired gender. The Marriage Act 1949 imposes an obligation on a clergyman in the Church of England to marry anyone residing in his or her parish, or who fits other stated connection criteria. However, section 5A of that Act contains an exception where the clergyman reasonably believes one of the parties' gender is acquired under the Gender Recognition Act.

#### Example

- A clergyman in the Church of England advises an engaged couple that he will not solemnise their marriage as he reasonably believes that one of the couple has acquired his or her gender under the Gender Recognition Act 2009. This would not be unlawful discrimination because of gender reassignment.

### **Part 8: Separate, single and concessionary services, etc**

Paragraph 24 contains exceptions to the general prohibition of sex discrimination which allow the provision of separate services for men and women. A provider can deliver separate services for men and women where providing a combined service would not be as effective. A provider can deliver separate services for men and women in different ways or to a different extent where providing a combined service would not be as effective and it would not be reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex. In each case such provision has to be justified. The exceptions cover all services, whether privately or publicly provided.

The exceptions also cover the exercise of public functions in respect of the "back-room" managerial, administrative and finance decisions which allow separate services to be provided.

#### Example

- It would not be unlawful for a charity to set up separate hostels, one for homeless men and one for homeless women, where the hostels provide the same level of service to men and women because the level of need is the same but a unisex hostel would not be as effective.

Paragraph 25 contains exceptions to the general prohibition of sex discrimination to allow the provision of single-sex services. Single sex services are permitted where:

- only people of that sex require it;
- there is joint provision for both sexes but that is not sufficient on its own;
- if the service were provided for men and women jointly, it would not be as effective and it is not reasonably practicable to provide separate services for each sex;
- they are provided in a hospital or other place where users need special attention (or in parts of such an establishment);
- they may be used by more than one person and a woman might object to the presence of a man (or vice versa); or

- they may involve physical contact between a user and someone else and that other person may reasonably object if the user is of the opposite sex.

In each case, the separate provision has to be objectively justified.

These exceptions also cover public functions in respect of the “back-room” managerial, administrative and finance decisions which allow such single-sex services to be provided.

#### Examples

These exceptions would allow:

- a cervical cancer screening service to be provided to women only, as only women need the service;
- a fathers’ support group to be set up by a private nursery as there is insufficient attendance by men at the parents’ group;
- a domestic violence support unit to be set up by a local authority for women only but there is no men-only unit because of insufficient demand;
- separate male and female wards to be provided in a hospital;
- separate male and female changing rooms to be provided in a department store;
- a massage service to be provided to women only by a female massage therapist with her own business operating in her clients’ homes because she would feel uncomfortable massaging men in that environment.

Paragraph 26 contains an exception to the general prohibition of gender reassignment discrimination in relation to the provision of separate- and single-sex services. However, such treatment by a provider has to be objectively justified as a proportionate means of achieving a legitimate aim.

#### Example

- A group counselling session is provided for female victims of sexual assault. The organisers do not normally allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful.

Paragraph 27 contains an exception to the general prohibition of sex discrimination to allow ministers of religion to provide separate and single-sex services. The minister can provide such services so long as this is done for religious purposes, at a place occupied or used for those purposes and it is either necessary to comply with the tenets of the religion or for the purpose of avoiding conflict with the strongly held religious views of a significant number of the religion’s followers. This does not apply to acts of worship (which are not themselves “services” within the meaning of the Act so no exception is required).

#### Example

- A synagogue can have separate seating for men and women at a reception following a religious service.

Paragraph 28 confirms, for the avoidance of doubt, that religious organisations (within the meaning of paragraph 27) have no obligation under the Bill to host civil partnerships if they do not wish to do so.



Paragraph 29 provides that a service provider does not breach the requirement in clause 30 of the Bill not to discriminate in the provision of a service if he or she supplies the service in such a way that it is commonly only used by people with a particular protected characteristic (for example, women or people of Afro-Caribbean descent) and he or she continues to provide that service in that way.

If it is impracticable to provide the service to someone who does not share that particular characteristic, a service provider can refuse to provide the service to that person.

#### Examples

- A hairdresser who provides Afro-Caribbean hairdressing services would not be required to provide European hairdressing services as well. However, if a white English person wanted his hair braided and there was no technical difficulty to prevent that, it would be unlawful for the hairdresser to refuse to provide her services to him.
- A butcher who sells halal meat is not required also to sell non-halal meat or kosher meat. However, if a non-Muslim customer wanted to purchase the meat that was on offer, he could not refuse to sell it to her.

Paragraphs 30, 31 and 32 provide for exceptions in respect of age discrimination from the requirements of clause 30 of the Bill for:

- concessions and preferential treatment (such as discounts) offered by traders and service providers by reference to age;
- the provision of pre-arranged holidays to groups of people limited by reference to age (such as Saga holidays); and
- schemes operated by those selling or providing goods or services that are subject to age limits created by or under legislation, such as alcohol, tobacco or entry to a cinema in respect of particular films; and

### **Part 9: Television, radio and on-line broadcasting and distribution**

Paragraph 33 makes it clear that claims for discrimination, harassment and victimisation cannot be brought in relation to broadcasting and distribution of content, as defined in the [Communications Act 2003 \(of Parliament\)](#)<sup>6</sup>. This would include, for example, editorial decisions on the content of a television programme or the distribution of online content.

This paragraph does not, however, extend to the provision of an electronic communications network, service or associated facility, which are also defined in the Communications Act 2003. This will ensure that the act of sending signals is not excluded by the exception in subparagraph (1), only the content of what is broadcast.

This provision is intended to safeguard the editorial independence of broadcasters when broadcasting or distributing content, whether on television, radio or on-line.

#### Examples

- An aggrieved person is not entitled to bring a claim for discrimination against a broadcaster in relation to an editorial decision about what programmes to

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<sup>6</sup> Provisions of this Act were extended to the Island by The Communications (Isle of Man) Order 2003 (SI 2003/3198) <http://www.legislation.gov.uk/ukxi/2003/3198/contents/made>, to which relevant amendments were made by The Broadcasting and Communications (Isle of Man) Order 2004 (SI 2004/309) <http://www.legislation.gov.uk/ukxi/2004/309/contents/made> and The Broadcasting and Communications (Isle of Man) Order 2004 (SI 2004/1115) <http://www.legislation.gov.uk/ukxi/2004/1115/contents/made>

commission; on what day a specific programme should be shown; or who should appear in a particular programme.

- An aggrieved person is, however, entitled to bring a claim for discrimination against a broadcaster in relation to a decision to refuse to send a signal to his house purely on the basis that he has a particular protected characteristic.

## **Part 10: Transport**

Paragraph 34 applies the exceptions listed in paragraphs 35 and 36 in relation to disability, thereby stipulating the extent to which providers of transport services are bound by the disability provisions of the Act.

Paragraph 35(1) provides an exception to the prohibition of discrimination, so far as it relates to disability, in respect of the provision of services in connection with air transport.

Paragraph 35(2) ensures that there is no duplication where there would otherwise be an overlap between the disability provisions of the Bill and Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (["EC Regulation 1107/2006"](#)).

**NOTE:** Regulation (EC) No.1107/2006 does not currently apply to the Island. It 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. 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...".

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 in the consultation document 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 1973](#) (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.

If EC Regulation 1107/2006 is not applied to the Island it may be necessary to replicate most of its provisions in the Bill.

### Examples

- An airline is required to make reasonable adjustments to its booking services to ensure that they are accessible to disabled people. It is not required to make any structural adjustments to the cabin environment inside an aircraft by reason of the derogation in Article 4(1)(a) of EC Regulation 1107/2006.

- An airport owner charges a disabled person for wheelchair assistance to board an aircraft. This would be a breach of EC Regulation 1107/2006, so section 29 of the Act would not apply. However, if the same airport owner fails to make adjustments to allow disabled people to access car parks at the airport, this would fall within the scope of the Act.

Paragraph 36 provides an exception from clause 30 for all services of transporting people by road, except those listed. The definitions of the vehicles listed are contained in paragraph 4 of Schedule 2.

### **Part 11: Supplementary**

Paragraph 37 contains a power for the Council of Ministers to make orders to add, vary, or remove exceptions in this Schedule. Such an order can only come into operation if it is approved by Tynwald.

## **SCHEDULE 4 PREMISES: REASONABLE ADJUSTMENTS**

Schedule 4 explains how the duty to make reasonable adjustments in clause 21 applies to a controller of "let" premises or of premises "to let" where a disabled tenant (or prospective tenant) or the disabled person legally occupying the property is placed at a substantial disadvantage, so that the disabled person can enjoy the premises or make use of them. It stipulates that the duty does not require the removal or alteration of a physical feature, and makes clear what are not "physical features" for these purposes. The duty only applies if a request for an adjustment is made by or on behalf of a disabled person.

This Schedule also explains how the duty to make reasonable adjustments in clause 21 applies in relation to "common parts", for example an entrance hall in a block of flats. These provisions relate specifically to physical features and set out the process that must be followed by the person responsible for the common parts (for example, the landlord) if a disabled tenant or someone on his or her behalf requests an adjustment. This includes a consultation process with others affected which must be carried out within a reasonable period of the request being made. If the responsible person decides to make an adjustment to avoid the disadvantage to the disabled person, a written agreement must be entered into between them setting out their rights and responsibilities.

The Schedule also makes it unlawful for a landlord or other responsible person to victimise a disabled tenant because costs have been incurred in making a reasonable adjustment.

Regulations made under paragraph 8 of this Schedule can make further provision for a number of matters such as the circumstances in which premises are to be treated as let, or as not let, to a person; who is to be treated as being, or as not being, a person by whom premises are let; and who is to be treated as being, or as not being, a manager of premises.

**NOTE:** In paragraph 8(2)(c) the words "or unit-holder" should be deleted as a unit-holder only applies in relation to the concept of commonhold, which does not exist in the law of the Island.

### Examples

- A landlord has a normal practice of notifying all tenants of any rent arrears in writing with a follow-up visit if the arrears are not reduced. A learning disabled person explains to the landlord that he cannot read standard English so would not be aware that he was in arrears. He asks to be notified of any arrears in person or

by telephone. The landlord arranges to visit or telephone the learning-disabled person to explain when he has any arrears of rent. This personal contact may be a reasonable adjustment for the landlord to make.

- A landlord is asked by a disabled tenant to install a ramp to give her easier access to the communal entrance door. The landlord must consult all people he thinks would be affected by the ramp and, if he believes that it is reasonable to provide it, he must enter into a written agreement with the disabled person setting out matters such as responsibility for payment for the ramp. The landlord can insist the tenant pays for the cost of making the alteration.

## **SCHEDULE 5 PREMISES: EXCEPTIONS**

Schedule 5 sets out limited exceptions to the prohibitions on discrimination and harassment contained in the premises provisions in Part 4 of the Bill.

The first exception applies where a person who owns and lives in a property disposes of all or part of it privately (for example by selling, letting or subletting) without using the services of an estate agent, or publishing an advertisement.

This exception does not apply to race discrimination in disposing of premises. It only applies to discrimination in relation to permission to dispose of premises where it is based on religion or belief or sexual orientation. This exception also exempts a controller of leasehold premises (as defined in clause 37) from the duty to make reasonable adjustments provided that:

- where the premises have been let, the premises are (or have been) the controller's main or only home and he or she has not used the services of a manager since letting the premises (paragraph 2(1));
- where the premises are to let, they are the controller's main or only home and he or she has not used the service of an estate agent for letting purposes (paragraph 2(3)).

The second exception applies to disposal, management or occupation of part of small premises. It applies where a person engaging in the conduct in question, or a relative of that person, lives in another part of the premises and the premises include facilities shared with other people who are not part of their household. This exception does not apply to race discrimination when disposing of or giving permission for the disposal of premises, or in the management of premises.

The small premises exception also exempts a controller of premises or a person responsible in relation to common parts (as defined in clause 36) from the duty to make reasonable adjustments where the premises are small, where that person or a relative of that person lives in one part of the premises and residents who are not members of that person's household live in another part of the premises. The definitions of "small premises" and "relative" in paragraph 3 apply.

Paragraph 5 contains a power for DEFA to amend this Schedule by order (subject to the approval of Tynwald).

### Examples

- A homeowner makes it known that she is preparing to sell her flat privately. A work colleague expresses an interest in buying it but she refuses to sell it to him because

he is black. That refusal would not be covered by this exception and so would be unlawful.

- A homeowner makes it known socially that he wants to sell his house privately. Various prospective buyers come forward and the homeowner opts to sell it to a fellow Christian. The other prospective buyers cannot claim that they were discriminated against because the homeowner's actions were covered by this exception.
- A single woman owns a large house in London and lives on the top floor, although the bathroom and toilet facilities are on the first floor. The ground floor is unoccupied and she decides to take in a lodger, sharing the bathroom and toilet facilities. Various prospective tenants apply but she chooses only to let the ground floor to another woman. This would be permissible under this exception.
- A Jewish family own a large house but only live in part of it. They decide to let out an unoccupied floor but any new tenant will have to share kitchen and cooking facilities. The family choose only to let the unoccupied floor to practising Jews as they are concerned that otherwise their facilities for keeping their food kosher may be compromised. This would be permissible under this exception.

## **SCHEDULE 6 OFFICE-HOLDERS: EXCLUDED OFFICES**

This Schedule provides that an office or post is not treated as a personal or public office in the Bill in circumstances where the office-holder is protected by one of the other forms of protection given in Part 5 of the Act — employment, contract work and employment services (as they relate to work experience).

It also provides that political offices, any other dignity or honour conferred by the Crown, and the office of the Bishop are not personal or public offices for the purposes of the Bill.

The conferral of honours and dignities is treated as a public function for the purposes of the Bill. Public bodies' activities in relation to honours and dignities will also be subject to the public sector equality duty.

Example

- A person appointed to a public body may be both an employee and an office-holder. Such a person will be protected under the employment provisions in clause 43 as against his or her employer, and under the office-holder provisions in clauses 44 and 45 as against the person who appointed him or her and/or any relevant person.

## **SCHEDULE 7 EQUALITY OF TERMS: EXCEPTIONS**

### **Part 1: Terms of work**

Part 1 of this Schedule sets out exceptions to the operation of a sex equality clause or a maternity equality clause. It provides that such clauses will not have effect on any terms of employment, appointment or service that are governed by laws regulating employment of women. A few of these remain, mainly for health and safety purposes.

A sex equality clause will also have no effect on terms giving special treatment to women in connection with pregnancy or childbirth.

## **Part 2 — Occupational Pension Schemes**

Part 2 of this Schedule sets out certain circumstances where a sex equality rule does not have effect in relation to occupational pension schemes. It allows payments of different amounts for comparable men and women, in prescribed circumstances, if the difference is only because of differences in retirement benefits to which men and women are entitled. It permits payment of different amounts where those differences result from the application of prescribed actuarial factors to the calculation of the employer's contributions to an occupational pension scheme. It also permits payment of different amounts where actuarial factors are applied to the determination of certain prescribed benefits.

It also contains a regulation-making power for the Treasury (with the approval of Tynwald) to vary or add to these circumstances. The regulations may make provision for past periods, but not for pensionable service before 6 April 2006.

## **SCHEDULE 8 WORK: REASONABLE ADJUSTMENTS**

This Schedule explains how the duty to make reasonable adjustments in clause 21 applies to an employer or other persons under Part 5 of the Bill. It sets out the three requirements of the duty which apply where an "interested" disabled employee or job applicant is placed at a substantial disadvantage compared with nondisabled employees or applicants. As the duty is owed to an "interested" disabled employee or job applicant, it is not an anticipatory duty which means that an employer is not required to anticipate the needs of potential disabled employees or job applicants and make reasonable adjustments in advance of their having an actual disabled employee or job applicant.

The tables in this Schedule set out who is an interested disabled person in relation to different categories of "relevant matters" and the circumstances in which the duty applies in each case. These tables capture how the duty applies in a number of areas related to work, for example to qualifications bodies and to trade organisations and there is a regulation-making power to enable further detail to be set out about how the duty applies to local authorities in respect of disabled members.

The Schedule also sets out the circumstances in which lack of knowledge of the person's disability or that a disabled person may be an applicant for a job means that the duty does not apply.

### Examples

- An employer provides specially adapted furniture for a new employee with restricted movement in his upper limbs. This is likely to be a reasonable adjustment for the employer to make.
- A large employer is recruiting for posts which routinely attract a high number of applications. He arranges for large-print application forms to be available on request for any visually impaired people applying for a job. This is likely to be a reasonable adjustment for the employer to make.

## **SCHEDULE 9 WORK: EXCEPTIONS**

### **Part 1: Occupational requirements**

Part 1 of this Schedule concerns requirements for particular kinds of work.

Paragraph 1 provides a general exception to what would otherwise be unlawful direct discrimination in relation to work. The exception applies where being of a particular sex, race, disability, religion or belief, sexual orientation or age — or not being a transsexual person, married or a civil partner — is a requirement for the work, and the person whom it is applied to does not meet it (or, except in the case of sex, does not meet it to the reasonable satisfaction of the person who applied it). The requirement must be crucial to the post, and not merely one of several important factors. It also must not be a sham or pretext. In addition, applying the requirement must be proportionate so as to achieve a legitimate aim.

The exception can be used by employers, principals (as defined in clause 40) in relation to contract work, partners, members of limited liability partnerships and those with the power to appoint or remove office-holders, or to recommend an appointment to a public office.

The burden of showing that the exception applies rests on those seeking to rely on it.

#### Examples

- The need for authenticity or realism might require someone of a particular race, sex or age for acting roles (for example, a black man to play the part of Othello) or modelling jobs.
- Considerations of privacy or decency might require a public changing room or lavatory attendant to be of the same sex as those using the facilities.
- An organisation for deaf people might legitimately employ a deaf person who uses British Sign Language to work as a counsellor to other deaf people whose first or preferred language is BSL.
- Unemployed Muslim women might not take advantage of the services of an outreach worker to help them find employment if they were provided by a man.
- A counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress.

Paragraph 2 provides a specific exception which applies to employment for the purposes of an organised religion, which is intended to cover a very narrow range of employment: ministers of religion and a small number of lay posts, including those that exist to promote and represent religion. Where employment is for the purposes of an organised religion, this paragraph allows the employer to apply a requirement to be of a particular sex or not to be a transsexual person, or to make a requirement related to the employee's marriage or civil partnership status or sexual orientation, but only if —

- appointing a person who meets the requirement in question is a proportionate way of complying with the doctrines of the religion; or,
- because of the nature or context of the employment, employing a person who meets the requirement is a proportionate way of avoiding conflict with a significant number of the religion's followers' strongly held religious convictions.

The requirement must be crucial to the post, and not merely one of several important factors. It also must not be a sham or pretext. Applying the requirement must be a proportionate way of meeting either of the two criteria described in the bullet points above.

The requirement can also be applied by a qualifications body in relation to a relevant qualification (within the meaning of clause 47), if the qualification is for employment for the purposes of an organised religion and either of the criteria described above is met.

#### Examples

- This exception would apply to a requirement that a Catholic priest be a man and unmarried.
- This exception is unlikely to permit a requirement that a church youth worker who primarily organises sporting activities is celibate if he is gay, but it may apply if the youth worker mainly teaches Bible classes.
- This exception would not apply to a requirement that a church accountant be celibate if he is gay.

Paragraph 3 allows an employer with an ethos based on religion or belief to discriminate in relation to work by applying a requirement to be of a particular religion or belief, but only if, having regard to that ethos:

- being of that religion or belief is a requirement for the work (this requirement must not be a sham or pretext); and
- applying the requirement is proportionate so as to achieve a legitimate aim.

It is for an employer to show that it has an ethos based on religion or belief by reference to such evidence as the organisation's founding constitution.

#### Example

- A religious organisation may wish to restrict applicants for the post of head of its organisation to those people that adhere to that faith. This is because to represent the views of that organisation accurately it is felt that the person in charge of that organisation must have an in-depth understanding of the religion's doctrines. This type of discrimination could be lawful. However, other posts that do not require this kind of in-depth understanding, such as administrative posts, should be open to all people regardless of their religion or belief.

Paragraph 4 makes it lawful for an employment service-provider to restrict a service to people with a particular protected characteristic if the treatment relates either to work for which having that characteristic is an occupational requirement, or to training for such work. The service-provider can rely on the exception by showing that he or she reasonably relied on a statement from a person who could offer the work in question that having the particular characteristic was an occupational requirement. It is, however, a criminal offence for such a person to make a statement of that kind which they know to be false or misleading.

#### Example

- The provider of a Catholic theological training course required exclusively for those training to be Catholic priests may limit access to the course to Catholics because the training relates to work the offer of which can be limited to Catholics by virtue of an occupational requirement.



Paragraph 5 defines “work” for the purposes of Part 1 of this Schedule and provides that the exceptions in this Part are available in respect of direct discrimination in recruitment, access to promotion, transfer or training, or (except in the case of sex discrimination) dismissal only. None of these exceptions can be used to justify indirect discrimination or harassment.

## **Part 2: Exceptions relating to age**

Paragraph 6 simply defines the term “age contravention” for the purposes of this Part of Schedule 9.

Paragraph 7 ensures that an employer does not have to justify paying or providing fewer benefits to a worker with less service than a comparator, should such a practice constitute indirect discrimination because of age. The employer can rely on the exception as an absolute defence where the benefit in question was awarded in relation to service of five years or less.

If the length of service exceeds five years, the exception applies only if it reasonably appears to an employer that the way in which he uses length of service to award benefits will fulfil a business need of his undertaking. For example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers.

Sub-paragraph (6) contains provisions which ensure that in calculating an employee’s length of service previous service is taken into account where that is the result of the operation of Schedule 5 to the [Employment Act 2006](#) if, that does not apply, under an enactment pursuant to which the person’s employment was transferred the employer.

Sub-paragraph (7) defines what a benefit is and expressly rules out benefits provided only by virtue of a person’s ceasing to work.

This paragraph enables employers to continue to effect employment planning, in the sense of being able to attract, retain and reward experienced staff through service-related benefits. This exception cannot be used to justify the level of payments when a worker leaves as service-related termination payments are not a reward for experience from which the employer can benefit. Therefore, redundancy payment is dealt with separately.

### Examples

- An employer’s pay system includes an annual move up a pay spine, or a requirement that a certain amount of time must elapse before an employee is entitled to be a member of an employee benefits scheme. Provided that the pay spine or time it takes to get the benefit is no longer than five years or can be justified the exception will apply.
- An employer’s terms and conditions relating to annual leave entitlement provide that employees are entitled to an additional five days’ leave after ten years of service. Such an entitlement needs to be justified as reasonably fulfilling a business need.

Paragraph 8 allows employers to base their pay structures on the [Minimum Wage Act 2001](#) and regulations made under that Act. This will allow employers to continue to use the young workers rates of the national minimum wage without the threat of legal challenge on the grounds of age discrimination.

### Example

- It is lawful for an employer to pay 16 to 21 year olds a lower rate of minimum wage than that given to adults over the age of 21. For example, based on the rates from 1 October 2014<sup>7</sup>, the hourly minimum wage is:
  - £4.67 for a worker who has not attained the age of 17;
  - £5.24 for a worker who has attained the age of 17 but not the age of 18;
  - £6.40 for a worker who has attained the age of 18 but not the age of 21,whereas the single hourly rate of the minimum wage for those 22 and over is £6.65.

Paragraph 9 deals with apprentices. It enables an employer to pay an apprentice who is not entitled to the single hourly rate minimum wage less than an apprentice who is entitled to the to that rate of the of the minimum wage.

A worker who—

- (a) has not attained the age of 25,
- (b) is employed under a contract of apprenticeship (or is to be treated as employed under a contract of apprenticeship), and
- (c) is within the first 12 months after the commencement of that employment or has not attained the age of 19,

does not qualify for the minimum wage in respect of work done for his employer under that contract.

### Examples

- It is lawful for an employer to pay an apprentice who is under the age of 19 or in the first year of his apprenticeship at a lower rate than an apprentice who is 19 or over and not in the first year of his apprenticeship. For example, based on the new rates:
  - an 18 year old apprentice is not entitled to the minimum wage;
  - a 19 year old apprentice in the first year of his apprenticeship is not entitled to the minimum wage;
  - a 19 year old apprentice in the second year of his or her apprenticeship is entitled to £6.40 per hour based on the rate for 18 – 21 year olds.
- It is lawful to pay both a 17 year old apprentice and a 19 year old apprentice in the first year of her apprenticeship £5.24 per hour and to pay a 19 year old in the second year of her apprenticeship £6.40 per hour.

Paragraph 10 permits an employer to provide a qualifying employee a redundancy payment of an amount less than that of a redundancy payment which the employer gives to another qualifying employee, if each amount is calculated on the same basis.

Also, under subparagraph (2), it is not an age contravention for a person to give a qualifying employee (E) a redundancy payment of an amount less than the amount of such a payment given to another employee (F) if the amounts are calculated on the same basis but the payment to E is reduced in accordance with paragraph 2 of Schedule 2 (Redundancy Rebates) to the [Redundancy Payments Act 1990](#).

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<sup>7</sup> Minimum Wage (Young Workers) Regulations 2014 (SD 2014/0232) and Minimum Wage (Single Hourly Rate) Regulations 2014 (SD 2014/0233)

**NOTE:** It is proposed that Schedule 2 to the Redundancy Payments Act 1990 should be repealed (see paragraph 1(h)(iv) of Schedule 24 to the Bill). If this proposal is approved paragraph 10(2) of Schedule 9 to the Bill is defunct and should be deleted.

Paragraph 11 provides an exception for employers who provide insurance or related financial services to employees only for the period ending with whichever is the greater of the person reaching the age of 65 and the state pensionable age. Employers may also offer or insurance or related financial services only to employee who have not yet attained the greater of the person reaching the age of 65 and the state pension age.

The "state pensionable age" is defined as meaning the pensionable age determined in accordance with the rules in paragraph 1 of Schedule 4 to the Pensions Act 1995 (of Parliament), as that Act has effect in the Island.

Life assurance cover, for example, is usually provided in respect of people below the state pension age. Such cover may not be provided in respect of older people because, as the probability of death increases, it becomes more and more expensive to provide. If employers were no longer able to impose — or had to objectively justify — a "cut off" for the provision of such cover to those who have retired early, there is a risk they would "level down": in other words, they would cease to offer it to anyone. This exception is intended to avoid that happening.

#### Example

- An employer who has no normal retirement age provides life assurance cover for an employee who has retired early due to ill health. If the employer then ceases to provide such cover when the employee reaches the state pension age, this is lawful.

Paragraph 12 creates an exception from the prohibition of age discrimination in employment and certain other work relationships for benefits which relate to the provision of child care, and to which access is restricted to children of a particular age group. The exception applies not only to natural parents, but also to others with parental responsibility for a child. The exception covers benefits which relate to the provision of care for children aged up to and including 17 years old.

The European Court of Justice in ruling *Coleman v Attridge Law and another* (Case C-303/06) [2008] ECR I-5603) found that it could potentially be direct discrimination for an employer to treat an employee less favourably because of the age of an employee's child. There is, therefore, a potential impact on the provision of facilities, such as child care, where access is limited by reference to the child's age. Although EU case law in this area does not have effect in the Island such a ruling could be persuasive if the Island's courts were required to consider the issue.

The exception allows employers to continue to offer employees child care facilities based on the age of a child without being open to a challenge of direct discrimination from other employees.

#### Examples

- An employer may provide a crèche for employees' children aged two and under; or a holiday club open only to employees' children aged between 5 and 9. In each of these cases, the exception allows an employer to discriminate against employees because of their association with a child who does not fall within the specified age groups.

- The exception does not apply to employee benefits which do not have a close relationship with the provision of child care. For example, if an employer offers luncheon vouchers, gym membership or a company car only to those employees with children of a particular age group, the exception does not apply as none of these benefits involves child care.
- Neither does the exception apply to benefits conferred as a result of the employee's employment, but applying directly to the child, where child care is not involved. For example, an employer may offer private healthcare to employees' children up to a certain age, or use of the employer's services (e.g. free train tickets if the employer is a train company) by such children.

Paragraph 13 gives Treasury the power by order to specify practices, actions or decisions relating to age in respect of employer contributions to personal pension schemes that an employer can use without breaching a non-discrimination rule. Before making such an order the Treasury would have to consult the Insurance and Pensions Authority and other such persons as it considered appropriate. The order would also be subject to Tynwald approval.

### **Part 3: Other exceptions**

Paragraph 14 sets out an exception to the prohibitions on pregnancy and maternity discrimination by employers which allows an employer not to offer an applicant or provide an employee who is on maternity leave the benefits of the non-contractual terms and conditions of her employment. It also explains what is and is not covered by this exception.

#### Examples

- An employer would not have to pay a woman on maternity leave a discretionary bonus if the only condition of eligibility for the bonus was that the employee must be in active employment at the time of payment.
- If a discretionary bonus amounted to retrospective payment for time worked over a specific period (such as the past year) during which a woman took maternity leave, the employer must include any part of that period the woman spent on compulsory maternity leave in calculating the bonus.

Paragraph 15 concerns a specific exception to the prohibition of discrimination because of sexual orientation in the field of work. The exception concerns the provision of benefits by reference to marital status in respect of periods of service before 6 April 2011 (the day on which section 1 of the [Civil Partnership Act 2011](#) came into operation for the purpose of civil partnership ceremonies). It also concerns benefits restricted to married persons and civil partners.

#### Examples

- An example of an employment benefit provided by reference to marital status is an occupational pension scheme which pays benefits to an employee's spouse on the death of the employee, but does not similarly compensate an unmarried employee's partner.
- A scheme which pays out only to surviving married and civil partners could be indirectly discriminatory because it might disadvantage gay couples, but it is permitted by the exception.
- A scheme which pays out to surviving married partners must also pay out to surviving civil partners in respect of any employee service since 6 April 2011 (when the Civil Partnership Act 2011 came into operation). Provided the scheme does that,

the exception allows it, even though it may (directly or indirectly) discriminate by paying out only to married partners for service before that date.

Paragraph 16 provides that an employer who provides services to the public at large is not liable for claims of discrimination or victimisation by an employee under Part 5 of the Bill in relation to those services. Rather, where individuals are discriminated against or victimised in relation to those services, they can make a claim to the Tribunal under Part 3 of the Bill. If on the other hand the service differs from that provided to other employees, is provided under the terms and conditions of employment, or the service is to do with training, the individual can bring a claim in Tribunal for breach of the provisions in Part 5. These provisions are also applicable to services provided by principals, firms and relevant persons (in respect of personal or public office-holders).

#### Examples

- If an employee of a car hire company is denied the hire of one of its cars (on the same terms available to the general public) because he is black, the employee should claim under the "services" section of the Bill in the Tribunal.
- If the same employee's employment contract provides that he is allowed to hire the company's cars at a discount (which members of the public would not get), but the employee is refused the discount when he goes to hire one of the firm's cars because he is a Muslim, then the employee would be able to make a discrimination claim under clause 38 (employees and applicants).

Paragraph 17 applies where annuities, life assurance policies, accident insurance policies or similar matters which involve the assessment of risk are provided in the field of employment. It allows for employers to provide for payment of premiums or benefits that differ for men and women, persons who are or are not married or in a civil partnership, pregnancy or maternity or gender reassignment if this is by reference to reliable actuarial or other data and it is reasonable in all the circumstances.

#### Example

- An employer makes access to a group insurance policy available as a result of being employed by it. The employer, not the insurer, is responsible for ensuring that the provision of benefits under the policy complies with this Bill — see paragraph 19 (services arranged by employer) of Part 6 of Schedule 3. In providing access to these group policies the employer may take advantage of this exception.

## **SCHEDULE 10 ACCESSIBILITY FOR DISABLED PUPILS**

This Schedule provides for accessibility arrangements for pupils in schools as set out in clause 76.

The DEC must prepare in relation to provided and maintained schools written accessibility strategies which will increase disabled pupils' access to the school curriculum, improve the physical environment for such pupils and improve the provision of information to them. Strategies must be implemented by the DEC after taking account of pupils' disabilities and preferences expressed by them and their parents. They should be reviewed regularly, and revised if needed.

Schools must develop written accessibility plans which will increase the access of disabled pupils to the school curriculum, improve the physical environment for such pupils and

improve the provision of information to them. Plans must be implemented by schools after taking account of disabled pupils' disabilities and preferences expressed by them and their parents. They should be reviewed regularly, and revised if needed.

#### Example

- A school discusses with its disabled pupils their needs and requirements in order to help it develop a written accessibility plan. The plan includes a strategy to improve the physical environment of the school by putting in ramps in appropriate places and putting in hearing loops.

## **SCHEDULE 11 SCHOOLS: EXCEPTIONS**

### **Part 1: Sex discrimination**

Part 1 of this Schedule makes exceptions from the prohibition on sex discrimination by schools in clause 74 to allow for the existence of single-sex schools and for single-sex boarding at schools, and to make transitional provisions for single-sex schools which are turning co-educational.

Paragraph 1 of Part allows a single-sex school to refuse to admit pupils of the opposite sex. A school is defined as single-sex if it admits pupils of one sex only. This is so even if it admits a small number of pupils of the opposite sex on an exceptional basis or in relation to particular courses or classes only. Limiting those pupils to particular courses or classes is not discrimination. However, other forms of sex discrimination by the school against its opposite-sex pupils would still be unlawful.

#### Examples

- A school which admits only boys is not discriminating unlawfully against girls.
- If the daughters of certain members of staff at a boys' school are allowed to attend, it is still regarded as a single-sex school.
- A boys' school which admits some girls to the Sixth Form, or which lets girls attend for a particular GCSE course not offered at their own school is still regarded as a single-sex school.
- A boys' school which admits girls to A-level science classes is not discriminating unlawfully if it refuses to admit them to A-level media studies or maths classes.

Paragraph 2 provides that a mixed-sex school some of whose pupils are boarders may lawfully admit only pupils of one sex to be boarders. The exception applies even if some members of the other sex are admitted as boarders, so long as their numbers are comparatively small. It allows a school to refuse to admit a pupil to a boarding place at the time he or she initially joins the school, or to provide him or her with boarding facilities at a later stage.

#### Example

- A mixed-sex school has facilities for female boarders and can lawfully state in its prospectus that males cannot be accepted as boarders.

Paragraph 3 enables a school which is going through the process of changing from a single-sex to a co-educational institution to apply for a transitional exemption order to enable it to

continue to restrict admittance to a single sex until the transition from single-sex is complete.

**NOTE:** Subparagraph 3(4) refers to paragraph 4 making provision in relation to the making of transitional exemption orders. However, the current paragraph 4 in this Schedule to the Bill is unrelated to this matter. Provision in relation to making such orders will need to be inserted in or after paragraph 3.

#### Examples

If a transitional exemption order is made:

- A boys' school which decides to become co-educational by starting to admit girls to Year 7 while keeping upper classes as they are, will not be discriminating unlawfully by refusing to admit girls to other years, until coeducational classes have been phased in throughout the school.
- A girls' school which decides to become co-educational by initially admitting a certain number of boys to each year group will not be discriminating unlawfully by reserving a number of places in each year group for boys.
- A school in the process of becoming co-educational must treat its male and female pupils equally once they have been admitted, since the transitional exemption order only relates to admissions.

### **Part 2: Religious or belief-related discrimination**

Part 2 of this Schedule makes some exceptions to the prohibition on discrimination because of religion or belief in relation to schools with a religious character, and to acts of worship or other religious observance in any school.

Paragraph 4 allows schools which have been specified in an order made by the DEC under paragraph 6 of Schedule 3 as having a religious character to discriminate because of religion or belief in relation to access to any benefit, facility or service. It means that these schools may conduct themselves in a way which is compatible with their religious character. It does not allow faith schools to discriminate because of any other of the protected characteristics, such as sex, race or sexual orientation. Nor does it allow them to discriminate because of religion in other respects, such as by excluding a pupil or subjecting him to any other detriment.

#### Examples

- A Roman Catholic school which organises visits for pupils to sites of particular interest to its own faith, such as a cathedral, is not discriminating unlawfully by not arranging trips to sites of significance to the faiths of other pupils.
- A school with a religious character would be acting unlawfully if it sought to penalise or exclude a pupil because he or she had renounced the faith of the school or joined a different religion or denomination.

Paragraph 5 disapplies the prohibition on religious discrimination from anything done in relation to acts of worship or other religious observance organised by or on behalf of a school, whether or not it is part of the curriculum. This exception applies to any school, not just schools with a religious character, and reflects the need to avoid any conflict with the existing legislative framework in respect of religious education and worship in schools, which is generally required to be of a broadly Christian nature. While parents can remove their children from religious education and worship, schools are under no obligation to provide

opportunities for separate worship for the different religions and beliefs represented among their pupils.

#### Examples

- Under the [Education Act 2001](#), a provided school or maintained school must allow Jewish, Hindu or Muslim parents to withdraw their children from daily assemblies which include an element of worship of a mainly Christian character, but it will not be discriminating unlawfully against those children by not providing alternative assemblies including Jewish, Hindu or Islamic worship.
- Schools are free to organise or to participate in ceremonies celebrating any faith, such as Christmas, Diwali, Chanukah or Eid, without being subject to claims of religious discrimination against children of other religions or of none.

Paragraph 6 provides a power for the Council of Ministers to add to, amend or repeal these religious discrimination exceptions. This is to allow the Council of Ministers, if it considers it appropriate to do so, to review the working of these provisions once they have been in effect for a sufficient period and make any changes which appear to be necessary in the light of that experience, using secondary legislation (subject to the approval of Tynwald).

### **Part 3: Disability discrimination**

Paragraph 7 provides that schools will not be discriminating against disabled children when applying a permitted form of selection that they are using. Permitted forms of selection are the selective admission arrangements operated by the DEC, for example in respect of children with special educational need and selection by independent schools by ability and aptitude.

#### Example

- The parents of a disabled pupil cannot claim disability discrimination against a particular school if that pupil fails to meet any educational entry requirements set by the school.

## **SCHEDULE 12 FURTHER AND HIGHER EDUCATION EXCEPTIONS**

**NOTE:** The exceptions for single sex further and higher education institutions that are in Part 1 of Schedule 12 to the UK's 2010 Act have not been included in the Bill. There are no institutions providing education at these levels in the Island at present and there does not appear to be any strong argument for allowing them to be established in the future.

Paragraph 1 enables a higher or further education institution to treat a person differently based on a protected characteristic in relation to providing training which would only fit them for work which, under exceptions in Schedule 9, can lawfully be restricted to people of a particular race, sex, religion, sexual orientation or age, or who are not transgendered or who are not married or in a civil partnership and for which they would therefore be ineligible.

#### Example

- A Catholic theological college could refuse to admit a woman to a training course which was designed only to prepare candidates for the Catholic priesthood. However, a Church of England college could not confine training for the priesthood to men since women may also become Anglican priests.



Paragraph 2 confers on the DEC a power to designate an institution if the Department was satisfied that the institution has a religious ethos. If an institution is designated it may admit students who share the relevant religion or belief in preference to those who do not, but only in relation to admissions to courses which do not constitute vocational training.

Example

- A sixth form college that had a religious ethos could be designated by the DEC.

Under paragraph 3 a higher or further education institution which confines any benefit, facility or service – such as access to residential accommodation – to married people and civil partners will not be discriminating because of sexual orientation against people who are unmarried or not in a civil partnership.

Paragraph 4 provides that a higher or further education institution is permitted to provide, or make arrangements for, or facilitate, care for the children of students which is confined to children of a particular age group. This includes all kinds of assistance with child care including paying for or subsidising it, or enabling parents to spend more time caring for the child.

The exception makes it clear that where child care for students' children who are aged 16 or under is concerned, it is not unlawful for this to be based on the age of the child.

Example

- If a college provides a crèche for the pre-school children of students, this will not be unlawful age association discrimination against a student who is the parent of an older child. The college will not have to demonstrate that the provision and the age limits are objectively justified.

Paragraph 5 requires that, when making any reasonable adjustment for a particular person, the educational institution needs to consider any request made by that person to keep the nature and existence of that person's disability confidential.

**NOTE:** Paragraph 5 has inadvertently been placed in the wrong Schedule. It should appear in Schedule 13.

### **SCHEDULE 13**

#### **EDUCATION: REASONABLE ADJUSTMENTS**

This Schedule provides for reasonable adjustments to be made by educational bodies in relation to disabled people.

Paragraph 1 is introductory.

Paragraph 2, which relates to admissions, the provision of education and access to benefits, facilities and services, requires schools to comply with requirements to:

- ensure that any provisions, criteria or practices do not place disabled pupils at a substantial disadvantage in comparison with non-disabled pupils; and
- provide any reasonable auxiliary aids which might help remove any such disadvantage.

Paragraph 3 requires higher or further education institutions in relation to admissions, education, access to benefits, facilities and services, and the conferring of qualifications to comply with requirements to take reasonable steps to:

- ensure that any provisions, criteria or practices do not place disabled students at a substantial disadvantage in comparison with non-disabled students;
- take reasonable steps to change physical features which place disabled students at a disadvantage;
- provide any reasonable auxiliary aids which might help remove any substantial disadvantage.

Paragraph 4 defines who is an “interested disabled person”, in relation to conferment of qualifications. It also sets out that a provision, criterion or practice does not include an application of a competence standard, which is also defined.

Paragraph 5 responsible bodies which are providing higher education or further education to take reasonable steps to ensure that any provisions, criteria or practices do not place disabled people at a substantial disadvantage, and provide any reasonable auxiliary aids to help remove any disadvantage in relation to enrolling people on courses of further or higher education, and to services provided once enrolled. DEC providing such services does not need to take reasonable steps to change physical features which place disabled students at a disadvantage.

## **SCHEDULE 14**

### **ASSOCIATIONS: REASONABLE ADJUSTMENTS**

This Schedule explains how the duty to make reasonable adjustments in clause 21 applies to associations. Paragraph 1 is introductory. Paragraph 2 explains that the duty applies in respect of disabled members and guests including prospective members and guests and that the association must comply with all three reasonable adjustment requirements. It describes the types of adjustments an association must make, stipulates what the duty does not require and provides further information on the meaning of “physical features”. It is an anticipatory duty which means associations must anticipate the needs of disabled members and guests including prospective members and guests and make appropriate reasonable adjustments.

Under Part 7 of the Bill an “association” is an association of persons which has at least 25 members, and admission to membership of which is regulated by the association’s rules and involves a process of selection.

#### Examples

- A private club with 30 members usually holds its annual dinner upstairs in a local restaurant. However, as there is no lift, the room is not accessible to two new disabled members who have severe difficulty in climbing stairs. Under the duty the club would need to think about changing the venue to a downstairs room to accommodate the new members. This is likely to be a reasonable adjustment for the club to make.
- A club has members who cannot read standard print. Under the duty it would need to think about providing information in large print or in audio format for them. These are likely to be reasonable adjustments for the club to make.

## **SCHEDULE 15 ASSOCIATIONS: EXCEPTIONS**

Schedule 16 contains exceptions from the association provisions in Part 7 of the Act.

Paragraph 1 allows an association whose main purpose is to bring together people who share a particular characteristic (such as a particular nationality, sexual orientation or a particular disability) to continue to restrict membership to such people, and impose similar restrictions on those who can exercise the rights of an associate, or who can be invited as guests.

It is however unlawful for an association to restrict its membership to people of a particular colour.

Example

- A club for deaf people can restrict membership to people who are deaf and would not need to admit people with other disabilities, such as a blind person.

Paragraph 2 provides for exceptions from age discrimination in respect of concessions and in relation to various forms of special treatment by associations by reference to age.

Example

- A society which offers a reduced annual membership fee to members who are over the age of 65 is not unlawfully discriminating on the grounds of age.

Paragraph 3 is designed to ensure that it is not unlawful for an association to treat a pregnant woman differently in the terms on which she is admitted as a member or is given access to benefits as a member if the association reasonably believes that to do otherwise would create a risk to her health or safety and the association would take similar measures in respect of persons with other physical conditions. Equivalent provision is made in respect of associates and guests.

Example

- A private members' gym may wish to restrict access to squash courts after a certain point in the pregnancy (for example, after 36 weeks).

## **SCHEDULE 16 THE TRIBUNAL**

### **Part 1 — Constitution of the Tribunal**

Paragraph 1 deals with the appointment of the chairperson, a panel of deputy chairpersons and panels of members of the Tribunal by the Appointments Commission. As at present, there will be an "employee panel" and an "employer panel" (for work related cases) and, in addition, there will be a "general panel" (for non-work cases).

Paragraph 2 concerns the composition of the Tribunal for appeals. For work related cases the Tribunal consists of the chairperson and one person chosen by him or her from each of the employee and employer panels. For non-work cases the Tribunal consists of the chairperson and two other persons chosen by him or her from any of the employee, employer or general panels.

If the chairperson is absent or unable to act his or her place may be taken by a deputy chairperson. If a panel member is absent or unable to act, he or she may be replaced by the chairperson or deputy chairperson by another person chosen from the same panel. However, generally if the Tribunal has begun to hear a complaint or other matter, it may not, without the consent of the parties, continue to do so unless it comprises at least two of the members who started to hear the matter, one of whom must be the chairperson or deputy chairperson.

## **Part 2 – Proceedings of the Tribunal**

Paragraph 3 just defines “the 2006 Act” as meaning the Employment Act 2006 for the purposes of this Part of Schedule 16.

Paragraph 4 sets of the procedures for making detailed rules of procedure for the Tribunal. In line with the general procedure for tribunal rules under section 8 of the [Tribunals Act 2006](#), such rules may be made by the Council of Ministers after consulting the Deemsters.

The paragraph outlines a number of areas on which the Tribunal rules may make particular provision. These area include: fees for making a complaint; whether the DED or Treasury can be treated as parties to a complaint; requirements for giving evidence and producing documents; procedure for complaints and persons entitled to appear before the Tribunal; awards of costs; and provision for the chairperson to consider complaints on his or her own in some simple cases. If a person fails to comply with the requirements of the Tribunal rules that person is guilty of an offence and liable on summary conviction to a fine of up to £5,000.

Paragraph 5 allows rules for the Tribunal to make provision for pre-hearing reviews to be carried out by such person as may be determined in the rules or by the Tribunal itself. These rules may in particular make provision for a person to pay a deposit to participate in proceedings, the amount of deposit to be paid, the consequences of non-payment of the deposit, and the circumstances in which the deposit will be returned.

### Example

- A pre-hearing review finds that a claim has no realistic prospect of success if it progressed to the Tribunal and it would almost certainly be a waste of the Tribunal’s time. However, the Tribunal rules may provide that the claim must be still be heard in full by the Tribunal if the claimant is willing to pay a deposit of a prescribed amount. If the claim is then successful (despite the findings of the pre-hearing review) the deposit may be returned to the claimant, in addition to any award that the Tribunal may determine.

Paragraph 6 provides that if it is shown that actions that would be contrary to the requirement of this Bill or certain provisions of the [Employment Act 2006](#) were necessary for the purpose of safeguarding national security the Tribunal must dismiss any complaint to it in respect of those actions. Tribunal rules may, in accordance with this paragraph, may make provision in relation to national security for Crown employment proceedings. Crown employment proceedings are where the employment to which the complaint relates is connected with the performance of functions on behalf of the Crown.

Paragraph 7 concerns confidential information and it provides that the Tribunal rules can allow the Tribunal to sit in private to hear evidence from any person which in the opinion of the Tribunal is likely to consist of: information which he or she could not disclose without contravening other legislation; information which has been obtained in confidence; or information the disclosure of which would, for reasons other than its effect on negotiations with respect to any of the matters mentioned in the definition of “trade dispute” in section

173 of the 2006 Act, cause substantial injury to any undertaking of that person or in which that person works.

Under paragraph 8 where the Tribunal has either been directed, or it has determined itself, because of national security reasons under paragraph 6 to take steps to conceal the identity of a particular witness, or to take steps to keep secret all or part of the reasons for its decision it is an offence to publish relevant information. A person is liable on summary conviction to a fine of up to £5,000. However, it is a defence for a person to prove that at the time of the alleged offence he or she was not aware, and neither suspected nor had reason to suspect, that the publication in question was of, or included, the restricted information.

**NOTE:** the references to paragraph 5(4) and 5(5) in subparagraph (1) should be references to paragraph 6(4) and 6(5) respectively.

Paragraph 9 provides that where the Chief Minister considers that the disclosure of any information would be contrary to the interests of national security nothing in the provisions of the Employment Act 2006 listed in this paragraph requires any person to disclose the information, and persons must not disclose the information in any court or tribunal relating to any of those provisions.

Paragraph 10 establishes that the provisions of the [Arbitration Act 1976](#) do not apply to proceedings of the Tribunal (as the provisions of the Bill and tribunal rules made under it apply instead).

Paragraph 11 concerns conciliation in relation to proceedings before the Tribunal and claims that may be brought to the Tribunal but have not yet been done so.

If a relevant officer certifies to the Tribunal that he or she has (before or after the start of the proceedings) brought about a settlement of the question to which the proceedings or claim relate, any proceedings must be stayed, and may not be continued or commenced (as the case may be), without the permission of the Tribunal. In this paragraph "relevant officer" means an industrial relations officer for work related cases; the Office of Fair Trading for most goods and services cases; and the secretary to the Education Council for schools cases (see Schedule 17).

Paragraph 12 provides that in any proceedings before the Tribunal a person may appear on their own behalf or the person can be represented by an advocate or by any other person (such a trade union official) whom he or she desires to represent him or her.

Paragraph 13 provides that the Council of Ministers may, with the approval of the Treasury, make arrangements for the payment of sums in respect of loss of earnings and travelling expenses to certain persons who are parties to or witnesses in proceedings before the Tribunal. (Expenses and travel allowances for members of tribunals are dealt with separately under the Payment of Members' Expenses (Specified Bodies) Order 2003, as amended, which is made by the Treasury by sections 4(1)(a) and 5(1)(c)(iii) of the Payment of Members' Expenses Act 1989.)

**NOTE:** the reference to "the Department" in subparagraph (2) should be a reference to the Council of Ministers.

Paragraph 14 enables the Council of Ministers to make an order (subject to Tynwald approval) enabling the Tribunal to add interest payments to any award of compensation

made to a claimant as a result of a discrimination case brought under this Bill. The order can set out how the Tribunal should calculate how much interest should be paid.

The rate of interest to be charged can be (although it does not have to be) linked to interest rate chargeable under section 9 of the [Administration of Justice Act 1981](#) from time to time.

**NOTE 1:** In the UK an employment tribunal has the power to award interest on arrears of pay awards (which may amount to up to six years' arrears). This can form a significant part of the overall award that an employer is required to pay. At present in the Island, the Employment Tribunal does not have the power to include this type of interest to pay arrears in successful like work or job evaluation cases and it not envisaged that this will change under the Bill when equal pay for work of equal value cases are added to the circumstances under which the Tribunal may award pay arrears.

**NOTE 2:** The Island's provisions in respect of interest on awards by the Employment Tribunal which are not settled in time are currently set out in the Employment Tribunal (Interest on Awards) Order 1992 (GC 106/92), which was made under the Employment Act 1991. Although the 1991 Act has been repealed and replaced by the Employment Act 2006 this order is deemed to have been made under the 2006 Act because of the operation of the operation of section 16 (effect of substituting provisions) of the [Interpretation Act 1976](#). Under the 1992 order the current rate of interest is set as the same as the interest rate chargeable under section 9 of the [Administration of Justice Act 1981](#), at 4%. In the UK the current rate of interest in 8%.

## **SCHEDULE 17**

### **EDUCATION CASES: ENFORCEMENT**

This Schedule sets out special provision for dealing with complaints of discrimination under Division 1 of Part 6 of the Bill (education cases in schools). That Division applies to the admission and treatment of pupils, victimisation due to the conduct of the child's parents, and also accessibility for disabled pupils.

Paragraph 3 of the Schedule sets the time limit for bringing proceedings. This is normally 6 months unless the dispute has been referred to resolution under paragraph 5 in which case the period is extended by 3 months. However, if the Tribunal considers it is appropriate to do so cases may be heard by it out of time.

Under paragraph 4 if the Tribunal decides that a contravention of the requirements of Division 1 of Part 6 of the Bill occurred it order as it thinks fit. This power may be exercised with a view to eliminating or reducing the adverse effect on the person of any matter to which the claim relates but it does not include power to order the payment of compensation.

Paragraph 5 requires the DEC to make such arrangements as it considers appropriate with a view to avoiding or resolving disagreements between responsible bodies and children attending (or wishing to attend) a school. These arrangements must provide for the appointment of independent persons with the function of facilitating the avoidance or resolution of such disagreements, and this may involve requiring the Education Council established under section 4A of the [Education Act 2001](#) to provide such assistance as it can to resolve disputes. The arrangements for dispute resolution must be made known to all relevant persons, including pupils and their parents.

## Examples

- A school pupil is not allowed to join other children in the playground at break-times because of his wheelchair and his parents believe he is being discriminated against because of his disability. The parents and the school seek to resolve the dispute with the assistance of the Education Council and as a result of these discussions the school agrees to make arrangements for the pupil to join his peers at break time. However, if a mutually acceptable resolution could not be reached the parents could still make a claim to the Tribunal.
- A pupil is refused admission to a school and her parents believe that it is because of her disability. They are able to bring a claim against the school to the Tribunal. The Tribunal rules that the school did unlawfully discriminate on the grounds of disability and it makes an order for the school to admit the pupil.

## **SCHEDULE 18 REASONABLE ADJUSTMENTS: SUPPLEMENTARY**

The provisions in this Schedule apply to earlier Schedules in the Bill dealing with reasonable adjustments where a person providing services or carrying out public functions, an employer, an education provider or an association is required to consider reasonable adjustments to premises which it rents and would require landlord consent to do so. It sets out what steps it is reasonable for a person to take in discharging a duty to make reasonable adjustments in a case where a binding agreement requires that consent must be obtained from a third party before that person may proceed to make the adjustment to let premises or the common parts of let premises.

Where a person wishes to make an adjustment in order to fulfil a duty to make reasonable adjustments but is unable to do so, the Schedule enables the adjustment to be made by deeming the tenancy to include certain provisions. For example, the tenancy may have effect as if a tenant is able to make alterations with the consent of the landlord.

Where a landlord has refused consent to an alteration or gives consent subject to a condition, the person requesting the consent (or a disabled person who has an interest in the alteration being made) can refer the refusal (or the conditional consent) to the Tribunal or the Isle of Man Rent and Rating Appeal Commissioners.

The Schedule also provides for a landlord to be joined as a party to proceedings where a disabled person is bringing an action under the reasonable adjustment duty.

The Schedule provides a power to make regulations about matters such as when a landlord is taken to have refused consent, when such refusal is unreasonable and when it is reasonable. Words and phrases used in the Schedule are interpreted consistently with the parts of the Bill to which it cross-refers.

**NOTE:** Further consideration is to be given to whether there is a good reason to involve the Isle of Man Rent and Rating Appeal Commissioners here.

## Examples

- An insurance company works from a rented two storey building and has plans to install a stair lift to make the building more accessible to employees with mobility impairments. The terms of the lease preclude alterations to the staircase. The company writes to the landlord for permission to make the alteration. The landlord consults the superior landlord who agrees to waive this condition of the lease thereby

allowing the installation of the chair lift to proceed. However, as a condition of consent, the landlord requires that the chair lift is removed on surrender of the lease.

- A disabled tenant asks to have automated doors put in at the entrance of her block of flats. Her landlord would like to agree but is unable to do so as he is a tenant of a superior landlord who does not agree to the alteration. The tenant's remedy is to bring an action against her landlord in the Tribunal where she can ask that the superior landlord is brought in as an additional party to the case. The Tribunal can order the alteration to be made and order the superior landlord to pay compensation if it finds he has acted unreasonably in refusing his consent.

## **SCHEDULE 19 STATUTORY PROVISIONS**

Paragraph 1 of this Schedule provides exceptions from several Parts of the Bill, in relation to the protected characteristics of age, disability, religion or belief, sex and sexual orientation, for things done in accordance with what is, or may in future be, required because of some other law.

### Examples

- An employer can lawfully dismiss a disabled employee if health and safety regulations leave him with no other choice.
- An employer can lawfully refuse to employ someone to drive a large goods vehicle who is not old enough to hold a LGV licence.

Paragraph 2 allows differential treatment based on sex or pregnancy and maternity at work which is required to comply with laws protecting women who are pregnant, who have recently given birth or against risks specific to women.

### Examples

- A care home cannot lawfully dismiss, but can lawfully suspend, a night-shift worker because she is pregnant and her GP has certified that she must not work nights.
- It may be lawful for a road haulier to refuse to allow a woman lorry driver to transport chemicals that could harm women of child-bearing age.

Paragraph 3 provides an exception from the provisions on religious discrimination for certain posts in schools or institutions of further or higher education where their governing instrument requires the head teacher or principal to be of a particular religious order. There is an order-making power conferred on the DEC to withdraw the exception either in relation to a particular institution or a class of institutions.

Paragraph 4 allows restrictions on the employment of foreign nationals in employment in the service of the Crown; employment as a civil servant; employment by any other prescribed public body; and holding a public office (within the meaning of clause 46).

Paragraph 5 allows exception from requirements in relation to disability and race in so far as relating to nationality for the operation of the Isle of Man's control of employment (work permit legislation). The exception in respect of race is needed because work permits are not required for a person who is an "Isle of Man worker" (as defined in the Control of



Employment Act<sup>8</sup>). The exception concerning disability discrimination is necessary because amongst the matters that the DED may take into consideration when deciding whether to grant a work permit are:

- the state of health of the person concerned and any relevant person;
- the likely demand by the person concerned and any relevant person for public services of any description in the Island,

where “relevant person” means any person living with, or likely to live with, the person concerned as a member of his or her family or household.

## **SCHEDULE 20 GENERAL EXCEPTIONS**

This paragraph allows direct nationality discrimination and indirect race discrimination on the basis of residency requirements where the discrimination is required by law or requirements of the Isle of Man Government (the executive).

### Examples

- The points-based system can discriminate on the basis of nationality in determining whether migrants from outside the European Economic Area and Switzerland should be given entry clearance for the Isle of Man.
- The DHSC can charge some people who are not ordinarily resident in the Island for hospital treatment they receive here.

Paragraph 2 provides an exception for religious or belief organisations with regard to the provisions in the Bill relating to services and public functions, premises and associations. The types of organisation that can use this exception are those that exist to:

- practice, advance or teach a religion or belief;
- allow people of a religion or belief to participate in any activity or receive any benefit related to that religion or belief;
- promote good relations between people of different religions or beliefs.

Organisations whose main purpose is commercial cannot use this exception.

The exception allows an organisation (or a person acting on its behalf) to impose restrictions on membership of the organisation; participation in its activities; the use of any goods, facilities or services that it provides; and the use of its premises. However, any restriction can only be imposed by reference to a person’s religion or belief or sexual orientation.

In relation to religion or belief, the exception can only apply where a restriction is necessary to comply with the purpose of the organisation or to avoid causing offence to members of the religion or belief whom the organisation represents.

In relation to sexual orientation, the exception can only apply where it is necessary to comply with the doctrine of the organisation or in order to avoid conflict with the strongly held convictions of members of the religion or belief that the organisation represents. However, if an organisation contracts with a public body to carry out an activity on that

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<sup>8</sup> The current legislation is the [Control of Employment 1975](#) but this is due to be replaced in the near future by a new Control of Employment Act that is currently waiting for Royal Assent.

body's behalf then it cannot discriminate because of sexual orientation in relation to that activity.

The exception also enables ministers of religion to restrict participation in the activities that they carry out in the performance of their functions as a minister and access to any goods, facilities or services they provide in the course of performing those functions.

#### Examples

- A Church refuses to let out its hall for a Gay Pride celebration as it considers that it would conflict with the strongly held religious convictions of a significant number of its followers. This would not be unlawful sexual orientation discrimination.
- A religious organisation which has a contract with the DHSC to provide meals to elderly and other vulnerable people within the community on behalf of the Department cannot discriminate because of sexual orientation.

Paragraph 3 provides an exception to the general prohibition of sex and gender reassignment discrimination. It allows communal accommodation to be restricted to one sex only, as long as the accommodation is managed as fairly as possible for both men and women. It sets out factors which must be considered when restricting communal accommodation to one sex only, and provides that discriminatory treatment of transsexual people must be objectively justified.

Communal accommodation is defined as residential accommodation which includes shared sleeping accommodation which should only be used by members of one sex for privacy reasons. Where such accommodation is refused in the field of work, or a benefit linked to such accommodation is refused, alternative arrangements must be made where reasonable so as to compensate the person concerned.

#### Examples

- A hostel only accepts male guests. It is not unlawful for it to refuse to accept female guests because the majority of the bedrooms are shared and there is only one communal bathroom.
- At a worksite the only available sleeping accommodation is communal accommodation occupied by men. A woman employee who wishes to attend a training course at the worksite is refused permission because of the men-only accommodation. Her employer must make alternative arrangements to compensate her where reasonable, for example by arranging alternative accommodation or an alternative course.

Paragraph 4 allows less favourable treatment because of a person's nationality in relation to training and associated benefits that are intended for people who do not live in an EEA state, as long as the training provider believes that the person will not subsequently use the skills obtained in Great Britain. This means that an EEA resident cannot claim to have been discriminated against in relation to this type of activity.

Employment or contract work can be covered by this exception where its sole or main purpose is the provision of training in skills.

The main purpose of this provision is to enable people from developing countries to acquire vital skills which may not be available in their country of residence.

## Example

- It would be not unlawful for a company specialising in sustainable irrigation that offers a training scheme in the Isle of Man for people who live in Mozambique, who then return home to put the skills learned into practice, to refuse to offer the same training to someone who lives in the Island.

## **SCHEDULE 21 INFORMATION SOCIETY SERVICES**

This Schedule mirrors Schedule 25 to the UK's 2010 Act which ensures that the provisions of that Act do not conflict with the requirements of European Directive 2000/31/EC of 8 June 2000, known as the [E-Commerce Directive](#). The Directive concerns information society services, which are services provided from a distance by means of electronic equipment to businesses and consumers such as on-line shopping, direct marketing and advertising. It provides that where an information society service provider is established in the Isle of Man, the provisions of the Bill apply to anything done by it in providing the information society service in another EEA state other than the United Kingdom. By contrast, where the provider is established in an EEA state other than the United Kingdom, then the Act does not apply to anything done by the provider in providing the information society service. Various exceptions to the provisions of the Act are provided in respect of intermediary internet service providers who carry out activities essential for the operation of the internet.

**NOTE:** the E-Commerce Directive does not apply directly as part of the law of the Island and, to date, it has not been applied to the Island using the powers in the European Communities (Isle of Man) Act 1973 or other means. The Directive does not apply to services supplied by service providers established in a third country (such as the Isle of Man) to nationals in an EEA State Although further consideration is to be given to this Schedule most of its provisions appear to be relevant to the Island even though the E-Commerce Directive does not apply.

## Examples

- An online holiday company established in the Island refuses to take bookings for shared accommodation from same-sex couples. In this instance a case of direct sexual orientation discrimination could be brought in the Island regardless of whether the complainant was in the Island, the UK or another EEA member state.
- An online retailer, which provides tickets to major sporting events, provides discounts to large groups of men but not women when booking hospitality packages for a forthcoming football tournament. The online retailer is established in Germany, so in this instance a case of direct sex discrimination would have to be brought in the German courts if the retailer was contravening German law.

## **SCHEDULE 22 EMPLOYMENT LEGISLATION – MISCELLANEOUS AMENDMENTS**

**NOTE:** it is known that further work on this Schedule is required.

Schedule 22 contains a number of amendments to the Island's employment legislation that are generally not related directly to equality in the Bill. These amendments were proposed by the Department of Economic Development (DED) and they concern some potential cost saving measures and some issues that have emerged since the Employment Act 2006, which was the last major piece of employment law in the Island, came into operation.

Since the Bill deals in large part with rights and obligations relating to employment, it was considered that it was both opportune and appropriate to include these amendments in a Schedule to the Bill.

Part 1 of this Schedule deals with a number of amendments to the [Employment Act 2006](#).

Paragraphs 2 and 3 amend sections 17 and 18 of the 2006 Act respectively in relation to the Tribunal's powers in cases involving written statements of terms and conditions and employees' pay statements.

Employees have the right to receive a written statement of their terms and conditions within 4 weeks of commencing employment. 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.

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, under section 17 of the 2006 Act the Tribunal must make an award of 2 to 4 weeks' pay.

The Tribunal must also make an award to an employee bringing certain other types of complaint (set out in Schedule 1 to the 2006 Act), 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, under section 18 of the 2006 Act the Tribunal must make an award of 2 to 4 weeks' pay.

Under section 14 of the 2006 Act employees have a right to be given itemised pay statements. 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.

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.

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.

Paragraph 4 amends the Tribunal's powers under section 25 of the 2006 Act in cases involving cases of unlawful deductions from an employee's pay.

At present there is no cut off point for claiming an unlawful deduction from wages. The provisions of the [Limitation Act 1984](#) 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 claim was made to the Tribunal). So, if a 'series' of deductions/non-payments exists, it is possible for a claim to extend backwards for an unlimited number of years prior to the 6 year period that would be allowed if the Limitation Act did apply to these cases. The 2006 Act is amended to make any claim subject to a 6 year cut off point.

Paragraph 5 amends section 105 of the 2006 Act to clarify the meaning of "worker" and "employer" for the purposes of the Part VIII (disciplinary and grievance hearings) of that Act.

Paragraph 6 amends section 107 of the 2006 Act. That section, with Schedule 2 to the Act, gives an employee certain rights during the period of notice to terminate his or her contract. The rights under section 107 are inapplicable if the employee works normally during his or her notice period and he simply gets his contractual pay; the section covers the case where the employee does not work normally, for example because he or she is off sick, or is on piece-work and the employer gives the employee no work to do. Section 107(3) excludes the right to payment under Schedule 2 to the 2006 Act where, under the contract of employment, the notice to be given by the party in question is at least 2 weeks longer than the minimum period of notice under section 107(1) or (2). The amendment disapplies section 107(3) to the extent that the employee is entitled, under any other legislation, to the benefit of the terms and conditions of employment despite his or her absence

Paragraph 7 inserts new sections 124A and 124B into the 2006 Act. These new sections provide, respectively, that if an employee is dismissed for a reason that would constitute unlawful discrimination under the Equality Act 2015 or for having a spent conviction (within the meaning of the Rehabilitation of Offenders Act 2001) (or, if more than one, the principal reason) it is to be regarded as unfair dismissal.

**NOTE:** the provision in respect of spent convictions is new but dismissal on the grounds of race, religion and sexual orientation is already unfair dismissal under sections 125, 126 and 127 of the 2006 Act. These sections are repealed by Schedule 24 to the Bill as they will be redundant when the Bill comes into operation.

Paragraph 8 amends section 128 of the 2006 Act which concerns dismissal on the grounds of redundancy so that an employer cannot simply make an employee who has a protected characteristic or a spent conviction redundant as a way of circumventing the provisions on unfair dismissal in new sections 124A and 124B. As with a number of other circumstances set out in section 128, an employer will still be able to make an employee who has a protected characteristic or a spent conviction redundant provided that the employer's reason (or if more than one, the principal reason) for which the employee was selected for dismissal was not simply because the employee has a protected characteristic or a spent conviction.

Paragraph 9 consequentially amends section 130 of the 2006 Act to take account of the insertion of new sections 124A and 124B and the repeal of sections 125 to 127.

Paragraph 10 amends section 132 of the 2006 Act. Subsection 132(1) is substituted to take account of the age discrimination strand of Bill by removing the upper age limit for an employee to the claim unfair dismissal. Subsection 132(2) is amended so that the normal requirement for an employee to have been employed for one year to be able to claim unfair dismissal does not apply if it is shown that the reason (or, if more than one, the principal reason) for the dismissal was because the person had a protected characteristic or spent conviction. The qualification period already does not apply to dismissal on the grounds of race, religion or sexual orientation and paragraphs which refer to these protected characteristics separately are repealed. Finally, section 132 is amended so that the qualification period for making a claim of unfair dismissal does not apply if a person is dismissed on the grounds that he or she is a member of the Reserve Forces (which is in line with changes made in the UK by the [Defence Reform Act 2014](#)) or is connected with the employee's political affiliations or opinions.

Paragraph 11 amends section 140(1)(a) of the 2006 Act to correct a typographical error.

Paragraph 12 amends section 145(1)(b) of the 2006 Act to take account of the repeal of the [Employment \(Sex Discrimination\) Act 2000](#) and the enactment of this Bill.

Paragraphs 13, 14 and 15 amend sections 147(1), 148(1) and 149(1) respectively in relation to insolvency of an employer, cessation of business of an employer and payment of unpaid contributions to occupational pension scheme etc. where an employer has become insolvent.

At present, 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. Comparable payments in the UK are capped at £464 a week.

In addition, compensation can only be paid to an employee under Part XI of the 2006 Act 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.

The amendments will provide 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.

Paragraph 16 amends section 153 of the 2006 Act to take account of the transfer of social security functions from the former Department of Social Care (DSC) to the Treasury by the Transfer of Functions (Health and Social Care) Order 2014, as that Order inadvertently omitted to make certain amendments to the references to the DSC in that section.

Paragraph 17 amends section 156 of the 2006 Act, which concerns the Employment Tribunal, to add two additional subsections. New subsection (8) enables the DED, if it is satisfied that an employee or worker is entitled to exercise a remedy by way of complaint or reference to the Tribunal in respect of an infringement of a right conferred on the employee or worker or for the contravention of an obligation referred to in section 156, to, with the consent of the employee or worker, exercise the remedy on behalf of the employee or worker. New subsection (9) confirms that if any act or omission by an employer is an infringement of more than one of the rights conferred on an employee or worker by the 2006 Act or a contravention of more than one of the obligation imposed by that Act, the Tribunal has no power to make more than one award in respect of the action.

**NOTE:** Section 156 of the 2006 Act is substituted by the Bill because of the change from the Employment Tribunal to the Employment and Equality Tribunal and Division 2 of Part 9 of the Bill deals with the powers in respect of the new Tribunal. The provisions in this paragraph should therefore be moved to a clause in that Division – perhaps the end of clause 97.

Paragraph 18 amends section 171(1) (codes of practice) of the 2006 Act to take account of the repeal of the Employment (Sex Discrimination) Act 2000 and the enactment of this Bill.

Paragraph 19 amends section 173 (general interpretation) of the 2006 Act to correct the definition of "Crown employment"; to amend the definition of the "the Employment Acts" to take account of the repeal of the Employment (Sex Discrimination) Act 2000 and the enactment of this Bill; and to amend the definition of "the Tribunal" as a result of the establishment of the Employment and Equality Tribunal.

Paragraph 20 amends section 174(3) (subordinate legislation: general provisions) to the 2006 Act to substitute "to the maker of the subordinate legislation" for "to the Department" because it is not only the DED (which is defined as the Department in the 2006 Act) which has powers to make subordinate legislation under that Act.

Paragraph 21 amends Schedule 1 to the 2006 Act. That Schedule lists provisions of the 2006 Act and other enactment to which section 18 of that Act (tribunal's duties in cases other than section 17 applies). The Bill omits entries in this Schedule that relate to the Employment (Sex Discrimination) Act 2000 and inserts entries for provisions of this Bill. In addition, the paragraph inserts into Schedule 1 references to section 104 (discipline and grievance hearings) and 110 (written reasons for dismissal) of the 2006 Act, and to regulation 10 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2007 and regulation 11 of the Annual Leave Regulations 2007 as the Tribunal has duties under these provisions but they are not currently listed in the Schedule.

Paragraph 22 amends Schedule 5 to the 2006 Act which deals with how the length of a period of employment is calculated for the purposes of that Act.

Paragraph 8(2) of Schedule 5 to the 2006 Act provides that if a trade or business or an undertaking is transferred from one person to another, the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and the transfer does not break the continuity of the period of employment. Paragraph 8(2) is substituted to clarify that the continuity of period of employment is not broken if the trade or business or undertaking is transferred from one person to another in whole or just in part.

A new subparagraph is added to paragraph 8 of Schedule 5 to the 2006 Act to confirm that an employee of a Department, Statutory Board or an office of the Government, who is not a public sector employee, is transferred to another such body the period of employment of the employee with the original body at the time of the transfer counts as a period of employment with the transferee, and the transfer does not break the continuity of the employee's period of employment.

**NOTE:** If the Public Services Commission Bill has been passed and brought into operation prior to the introduction of this Bill the provision referred to in the paragraph above may be redundant.

Paragraph 22 of this Schedule also correct a typographical error in Schedule 5 to the 2006 Act and it omits a subparagraph that refers to the Employment (Sex Discrimination) Act 2000.

Paragraph 23 amends Schedule 6 to the 2006 Act which concerns the calculation of normal working hours and a week's pay.

Paragraph 8(3) of Schedule 6, which concerns the calculation date for the purposes of section 77 (suspension on maternity grounds) of the 2006 Act is substituted to clarify the provision.

Paragraph 10 of Schedule 6 provides for the purposes of calculating certain awards and payments the maximum amount of a week's pay that can be taken into account cannot exceed £480.00 (or such sum as may be prescribed by order made by the DED). This paragraph is amended so payments made by the Treasury under section 147 (insolvency of employer), section 148 (cessation of employer's business), or under section 149 (unpaid contributions to pension scheme) of the 2006 Act are subject to the maximum amount limit.

Paragraph 24 amends Schedule 7 to the 2006 Act to repeal certain transitional provisions that are now redundant.

### **SCHEDULE 23 CONSEQUENTIAL AND MINOR AMENDMENTS**

This Schedule sets out a number of amendments to Acts of Tynwald which are either consequentially required as a result of the main provisions of the Bill or which are fairly minor in nature. The Acts are the Douglas Municipal Corporation Act 1895, Marriage Act 1984, Road Transport Act 2001, Tribunals Act 2006, Civil Partnership Act 2011, Social Services Act 2011 and Regulation of Care Act 2013.

These amendments are mostly necessary to ensure that these Acts refer accurately to the new provisions contained in the Bill and work properly with those new provisions.

The amendment to the [Douglas Municipal Corporation Act 1895](#) substitutes a gender neutral term for the word "He".

Section 31 of the [Marriage Act 1984](#) (which concerns the solemnization in a registered building of a marriage according to the usages of the church, denomination or religious body of which the building is a place of public religious worship) is amended so that the marriage cannot be solemnised in the building without the consent of the minister or one of the trustees, owners, deacons or managers of the building; or in the case of a building of the Roman Catholic Church, without the consent of the minister of the registered building.



It is proposed that section 37 of the [Road Transport Act 2001](#) be amended to provide additional powers in respect of the obligation to carry passengers in relation to disabled persons, as a potential alternative to some of the provisions in Part 12 of the Bill.

The [Tribunals Act 2006](#) is amended to reflect the proposed new name (and expanded remit) of the current Employment Tribunal.

Section 7 (place of registration) of the [Civil Partnership Act 2011](#) is amended to make a minor correction; make further provision in respect of the guidance to be taken into account as to which a place may be registered; and to confirm, for the avoidance of doubt, that a religious organisation is not obliged to permit the use of its premises for the purposes of civil partnership ceremonies if it does not wish to do so.

The [Social Services Act 2011](#) is amended to insert into that Act certain provisions which replicate (in a more modern form) some provisions of the Chronically Sick and Disabled Persons Act 1981, which is to be repealed.

A typographical error in the [Regulation of Care Act 2013](#) is corrected.

#### **SCHEDULE 24 REPEALS AND REVOCATIONS**

This Schedule lists the legislative provisions which will cease to have effect when the relevant provisions in the Bill come into force.

#### **SCHEDULE 25 GLOSSARY**

This Schedule will list the terms and expressions which are defined in the Bill.