



Isle of Man
Government

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Council of Ministers

Response to the consultation on the draft Equality Bill

Cabinet Office
Oik Coonceil ny Shirveishee

August 2015

Consultation on the draft Equality Bill

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Introduction

The consultation document on the draft Equality Bill, along with the draft Bill itself which was based on the UK's Equality Act 2010 ("the UK Act"), was published on 11 August 2014. The purpose of the consultation was to seek views on the creation in the Isle of Man of a legal framework to prohibit discrimination and promote equality that is broadly similar to that in the United Kingdom. This framework would replace the Island's current limited and patchwork legislation relating to discrimination and equality.

In addition, Schedule 22 to the Bill contained a number of proposed amendments to various aspects of the Island's employment law, the majority of which were separate to the main equality provisions of the Bill, on which views were invited. Consultees were also asked to comment on some further employment law matters.

The consultation document included 36 questions about the main equality provisions of the Bill and a further 17 questions about the additional employment law amendments.

The consultation document and the draft Bill were sent directly to a range of consultees (see Appendix 1), there was a press release which was widely reported in the media and the documents were available on the Isle of Man Government website and in hard copy upon request.

An addendum to the consultation document, which provided some additional information on certain technical matters, was published in the middle of August and a second addendum relating to the potential effect of the Bill on redundancy payments and the basic award for unfair dismissal, was published in October. A Commentary on Clauses document was also published in October 2014. All of these documents were sent directly to consultees and were available on the website.

The draft Equality Bill which was published for consultation and supporting documentation is still on available for reference on the Isle of Man Government website at:
<http://www.gov.im/ConsultationDetail.gov?id=454>

Following an extension to the consultation period, the consultation formally closed at the end of November 2014, although a small number of additional responses were accepted after that date.

The Council of Ministers is grateful to everyone who responded to the consultation.

Cabinet Office
August 2015

Consultation responses

A total of 70 responses were received. A number of these responses were lengthy and detailed. All have been given careful consideration. Some of the responses, such as those from the Isle of Man Chamber of Commerce and the Island's trade union bodies, were submitted as being representative of the views of their members.

Responses were received from the following persons and organisations:

Business organisations

Association of Corporate Service Providers
Chartered Institute of Personnel and Development
Isle of Man Chamber of Commerce
Manx Insurance Association
Manx Taxi Federation

Trade Union bodies

Association of Teachers and Lecturers
Isle of Man Trade Union Council
Prospect
UNITE – the Union

Individual businesses

AXA Isle of Man Services Limited (Lyndon Casey, Head of Business Transformation)
Boal & Co
Cains Advocates (Benedict Hughes, Department Director, Insurance and Pensions)
Canada Life International
H & B Isle of Man (Heron & Brearley)

Third sector organisations

Ballamona Association for Mental Health
British Red Cross
Crossroads Care
Leonard Cheshire Disability
Graith (Michael Manning)
Manx Blind Welfare Trustees
Manx Deaf Society
Muscular Dystrophy Campaign
United Response (Isobel Millar)

Local Authorities

Douglas Borough Council
Marown Parish Commissioners
Patrick Parish Commissioners
Ramsey Town Commissioners

Government bodies/officers

Chief Financial Officer (Dr Couch)
Department of Education and Children
Department of Health and Social Care
Department of Infrastructure
Office of Fair Trading
Office of Human Resources (part of the Cabinet Office)

Public Sector Pensions Authority
Road Transport Licensing Committee (RTLCL)

Other bodies

Appointments Commission
Broadway Baptist Church
Isle of Man Law Society
Multi-Agency Forum for the Disability Discrimination Act
Royal College of Nursing
TravelWatch

Individuals

Ms Karen Angela
Mr & Mrs Brown
Mr David Carter
Ms Vicky Christian
Mr Colin Coole (HR Manager, Capital International IOM)
Ms Debs Cripps
Mr Karl Cubbon
Mr Peter Denton
Mr Andrew Dixon
Mr & Mrs Dorricott
Mr Jeffrey Ellis
Mr Keith Fitton
Mr Charles Garside
Mr Andrew Gerrard (Managing Director, Harding Lewis)
Mr Jonathan Kermod
Mr Alistair Kneale
Mrs M. I. Kerruish
Mr Ian Maule (Taxi.im)
Mr Peter Murcott
Mr Mike Nettleton
Ms Pam Self
Ms Jacqueline Yates
Mr Sean Young
Mr & Mrs (*name supplied*)

Members of Tynwald

Hon Juan Watterson MHK

In addition, four responses were marked to be treated as confidential.

With the exception of the confidential responses and the collated response from the IOMTUC the full text of the responses to each of the questions¹ is published as Appendix 2. The response submitted by the IOMTUC consisted of pop up notes added to the pdf copy of the consultation document with comments apparently from more than one contributor. Those notes have been converted into marginal comments to aid readability and that document is published as Appendix 3.

¹ Responses (and parts of responses) which did not refer to a particular question have been included under questions 36 which invited general comments, views on matters not covered in the consultation document or the draft Bill, etc. Although the full substantive text of all of the responses has been retained, in some cases part of the text has been moved if it was considered that it was more relevant to an individual questions.
In addition, most short requests for clarification of particular points have been omitted and in most cases a response will have been sent separately.

Summary of the outcome of the consultation

- i) As may be expected, responses to the consultation represented a very wide range of views. At one end of the range it was stated that the Bill was unnecessary, disproportionate and/or its costs to business and Government would be excessive. At the other end the Bill was considered to be essential, long overdue and/or did not go far enough in some areas. A summary of the comments received in respect of each of the questions in the consultation document is set out in this document.
- ii) The majority of responses were generally supportive of both the principle of the Isle of Man having legislation to comprehensively deal with discrimination and of the Island’s Equality Bill being closely based on the UK’s Equality Act 2010. A minority of responses were either not supportive of the Bill in its entirety or expressed concerns about certain parts of it. A list of the consultation questions with brief comments on the responses is set out below.

Questions about the main part of the Equality Bill		Page
Q1	<u>Do you have any comments about comprehensively dealing with discrimination in the Island?</u>	21
Q2	<u>Do you have any comments about the Island’s Equality Bill being based on the UK’s Equality Act 2010?</u>	21
	The majority of responses were supportive of the Bill and the fact that it is closely based on the UK Act. It is intended that the Bill will be progressed largely in the form it was issued for consultation. However, certain amendments which are set out in this document (other those which relate to typographical and draft corrections) will be made to the Bill.	
Q3	<u>Do you have any comments on the list of “protected characteristics”?</u>	25
Q4	<u>Do you have any comments about the coverage of the Bill?</u>	25
	The majority of responses agreed with the list of protected characteristics and the coverage of the Bill. As a result it is proposed that these should not be changed.	
Q5	<u>Do you have any comments about direct discrimination?</u>	26
	There were no objections to the prohibition of direct discrimination	
Q6	<u>Do you have any comments about discrimination arising from a disability?</u>	28
	There were no objections to discrimination arising from a disability. The provision will remain unchanged but one response received on this question helpfully drew attention to a potential loophole in relation to licenced premises. It is proposed that a consequential amendment to the Licensing Act 1995 should be included in the Bill to provide legal certainty that licenced premises do not have an unintended exemption from the requirement not to discriminate against people on grounds of the protected characteristics.	
Q7	<u>Do you have any comments about indirect discrimination?</u>	29
	There were few responses to this question. The majority were supportive but some considered indirect discrimination to be unduly complicated. Indirect discrimination can be objectively justified as a proportionate means of achieving a legitimate aim. The provision will be retained and guidance will be issued before the Bill is brought into operation.	

Questions about the main part of the Equality Bill		Page
Q8	<u>Do you have any comments about harassment?</u>	29
	The majority of responses were supportive of the harassment provisions and they will be retained.	
Q9	<u>Do you have any comments about victimisation?</u>	30
	There were no objections to the victimisation provisions and they will be retained	
Q10	<u>Do you have any comments about what constitutes a disability or about making reasonable adjustments for persons with a disability?</u>	31
	There were a significant number of responses to this question. Although a majority were generally supportive some concerns about burdens and costs to businesses and employers were expressed. The principle of making reasonable adjustments for persons with a disability is very important and the provisions will be retained. It is accepted, however, that guidance and supporting secondary legislation will be required.	
Q11	<u>Do you have any comments about PPV accessibility regulations?</u>	36
Q12	<u>Do you have any comments about taxi accessibility regulations?</u>	36
Q13	<u>Do you have any comments about a requirement for drivers of taxis and private hire vehicles to assist wheelchair users unless exempted?</u>	36
Q14	<u>Do you have any comments about the requirement for drivers of taxis and private hire vehicles to carry assistance dogs unless exempted?</u>	36
Q15	<u>Do you have any comments other about the accessibility of the Island's transport for disabled persons?</u>	36
	There were a number of responses to these questions and the overwhelming majority supported making transport as accessible as possible for disabled persons. With the delay to the Equality Bill, however, it is now envisaged that enabling powers will be inserted into the Road Transport Act 2001 by the Road Traffic Legislation (Amendment) Bill.	
Q16	<u>Do you have any comments about the introduction of equal pay for work of equal value?</u>	38
Q17	<u>Do you have any comments about the proposal to bring (over a number of years) the maximum amount of pay arrears that can be awarded by the Tribunal in successful equal work cases into line with the amount under the UK Act?</u>	38
	There were a number of responses to these questions and opinions were divided. It is accepted that some cases in the UK have been complex, lengthy and costly, particular in the public sector. However, the Island is under an international obligation to implement this provision. It is proposed that the provision is retained but that there should be a lead-in period of two years after the Bill is passed before it comes into operation to allow time for employers to consider their pay systems. In addition, it is proposed that the maximum amount of pay arrears that the Tribunal will be able to award in a successful case will be limited to two years (in line with the Employment (Sex Discrimination) Act 2000 rather than the six years in the UK as it is considered that this is the balanced and proportionate approach to take.	

Questions about the main part of the Equality Bill

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- Q18** **Do you have any comments about the proposals in the Bill relating to retirement?** 42

Again there were a significant number of responses to these questions and opinions were divided. Concerns were expressed having to deal with the capability issues of older workers. A number of responses wished to see the Island introduce a default retirement age (DRA), perhaps in line with the State Pension Age. The UK used to have a DRA prior to the current provisions under the Equality Act 2010. Having carefully weighed the comments it is considered that the Bill should continue to follow the UK position although there is likely to be a lead-in period after the Bill is passed before the provisions are brought into operation.

- Q19** **Do you have any comments about the proposals to promote and explain the legislation when it is introduced?** 45

- Q20** **Do you have any comments about the proposal to rename the Tynwald Advisory Council for Disabilities as the Tynwald Equality Consultative Council and expand its remit to cover all of the protected characteristics? If the remit is expanded do you have any comments about the composition of the Council?** 45

There were a range of responses to these questions. Whilst consultees were generally supportive of the proposed Tynwald Equality Consultative Council (TECC), concerns were expressed about whether the limited term appointment of an Equality Officer would be adequate for the promotion and implementation of the Bill. The Equality Officer will be just one of the sources of advice and assistance that will be available when the Bill is passed. Although it is proposed that the lay membership of the TECC should be increased from three to five, the provisions of the Bill in this area will be retained.

- Q21** **Do you have any comments about civil action through the proposed Tribunal being the main way for the Bill to be enforced?** 47

- Q22** **Do you have any comments about expanding the remit of the Employment Tribunal and renaming it as the Employment and Equality Tribunal? Do you have any views on the constitution of the Tribunal?** 47

A large majority of the responses were supportive of civil action to enforce rights under the Bill and the establishment of the Employment and Equality Tribunal. Concerns were expressed, however, whether the Tribunal would have the expertise and training to deal with equality cases. Many "equality" cases will of course be related to alleged discrimination in employment situation and the Employment Tribunal already has responsibility for claims of sex discrimination in the workplace. Although training for the Tribunal Chairs and members will certainly be required, it is considered that most are "generalists" rather than employment law "experts" and the same principles will apply in considering a case concerning discrimination in employment and discrimination in the provision of goods and services. The proposals will therefore be retained.

Questions about the main part of the Equality Bill		Page
Q23	<u>Do you have any comments about the Manx Industrial Relations Service dealing with conciliation/mediation for employment related equality cases?</u>	50
Q24	<u>Do you have any comments about the Office of Fair Trading dealing with conciliation/mediation for goods and services related equality cases?</u>	50
Q25	<u>Do you have any comments about the Education Council having a role in trying to resolve disputes involving pupils in schools?</u>	50
	Support for the work of the Manx Industrial Relations Services was overwhelming subject to it having the resources to deal with a potential increase in its workload. There was also general support for the proposal concerning OFT conciliation in goods and services cases. As a result of a greater understanding of how the Education Council operates in practice it is no longer proposed that it should have a role in school equality cases. Instead it is proposed that initially such cases should also rest with the OFT. The Bill will be amended accordingly.	
Q26	<u>Do you have any comments about the proposed public sector equality duty?</u>	52
	Although a range of views were expressed about public sector equality duty (PSED) it was considered that on balance it is a useful requirement, provided that it is dealt with appropriately and it does not become a "box ticking" exercise or generate useless bureaucratic practices. The PSED will be retained.	
Q27	<u>Do you have any comments about positive action?</u>	54
	Although it was suggested that positive action amounted to tokenism, the majority of consultees were supportive Positive action is only ever voluntary and where used it must be a proportionate means of addressing a disadvantage or imbalance experienced by a particular group. The provision will be retained.	
Q28	<u>Do you have any comments about the exceptions that are included in the Bill? Do you think any of the exceptions should be removed or that any additional exceptions should be included?</u>	56
	There were few responses to this question and the majority of those were supportive of the proposals. Some additional exceptions were suggested, however, and these will be incorporated into the Bill.	
Q29	<u>Do you think that any other legislation could be repealed by the Bill? Do think anything in the legislation that is to be repealed needs to be, or should be, retained?</u>	58
	Although some concerns about the repeal of early factories legislation the rationale for the repeals is set out. Except for the repeal of paragraph 1(3) of Schedule 5 to the Employment Act 2006 was an error, the repeals set out in the Bill will be retained. It should be noted, however, that the final Bill will contain some additional repeals that had not been identified at the time the draft Bill was published for consultation.	

Questions about the main part of the Equality Bill		Page
Q30	<u>Do you have any comments about any of the differences between the Bill and the UK Equality Act 2010?</u>	62
	<p>There were a range of comments on the various exceptions, where were mostly uncontroversial and were supported.</p> <p>There were some objections that, unlike under the UK Act were awards may be unlimited, awards of compensation (e.g. for loss of earnings) under the Bill are subject to a statutory maximum, this being the amount set by the DED under section 144 of the Employment Act 2006. There was also some objections to the omission of the public sector duty regarding socio-economic inequalities (which is not in force in the UK) from the UK. However, after careful consideration it was decided that these exceptions are appropriate and balanced for the Island.</p> <p>An interpretative provision from the UK Act in to relation to harassment which was inadvertently omitted will be inserted into the Bill.</p>	
Q31	<u>Do you have any comments about whether or not the prohibition against unlawful discrimination in respect of marriage and civil partnership should apply to schools in the Island?</u>	66
	<p>There were few comments on this point and the majority were supportive. As a result, schools in the Island will be prohibited from discriminating against pupils aged 16 and older on the grounds of marriage and civil partnership.</p>	
Q32	<u>Do you have any comments about implementing Regulation (EC) No.1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air in the Island?</u>	67
	<p>All of the responses to this question supported the full implementation of this EU Regulation in the Island. This could most conveniently be achieved in a timely manner by using the powers to apply and implement EU legislation in the European Communities (Isle of Man) Act 1973. Further consideration about the possible implementation of Regulation 1177/2010 (which includes the rights of disabled persons and those with reduced mobility when travelling by sea) in the Island will be carried out in parallel with consideration of Regulation 1107/2006.</p>	
Q33	<u>Do you have any comments about dual discrimination?</u>	68
	<p>There were a number of responses to this question, all of which supported the inclusion of the dual discrimination clause in the Bill, with the majority wanting it to be brought into operation without undue delay. The clause will be kept in the Bill and further consideration will be given to the timing of its implementation in due course.</p>	
Q34	<u>Do you have any comments about discrimination between men and women in respect of individuals' insurance premiums and benefits?</u>	69
	<p>There were few comments on this issue and opinions were divided. Although the Island is not bound by the EU law that underpins the position under the UK Act, on balance it is considered that the Island should follow the UK Act on this issue and prohibit discrimination between men and women in this area.</p>	

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Q35 **Do you have any comments about bringing the Bill into operation?** 71

There were a significant number of responses to this question and a wide range of views were expressed. A majority, however, wished to see the Bill brought into operation without undue delay.

The point made by the Isle of Man Chamber of Commerce about the need for a clear timetable for the commencement of the Bill's provisions is accepted. This will be developed when the timetable for the passage of the Bill is clearer.

It is proposed that there should be a phased approach to the implementation of the legislation and that there should be some lead-in and transitional periods but with these being kept to the minimum that is practical.

Q36 **Do you have any comments about anything in the draft Bill that is not referred to in this document; or about the implementation of this legislation if it is passed; or about equality and discrimination in general?** 73

A significant number of responses did not refer to the questions in the consultation document. In a number of cases where it was clear that a response, or part of a response, related to an issue that was covered by one or more of the specific questions it was considered along with those questions. In other cases such responses have been considered as a whole under this question.

Although many of the "any other comments" responses consisted of standalone points, it was also possible to identify a numbers of themes. Some of the main themes were as follows:

- Business and cost related issues;
- Same sex marriage;
- Balance of rights (in respect of religion/belief and sexual orientation).

Following consideration:

- it is believed the benefits (social, reputational and also financial) outweigh potential costs and the Bill should be progressed;
- same sex marriage should not be included in the Bill but there should be separate consultation on this issue;
- no "conscience clause" is required in the Bill.

Questions about Schedule 22 and additional employment law issues

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Q37 **Do you have any comments regarding the Department's proposals to update the law which applies to written statements, pay statements and unlawful deductions?** 87

Few comments were received from consultees regarding the Department of Economic Development's (DED) proposals and the Department stands by the proposals in the consultation document.

Q38 **Do you have any comments regarding the Department's proposals to update the law on unfair dismissal as regards these three special cases?** 88

The proposals would increase protection in cases where an employee was dismissed on the ground of a spent conviction etc., membership of the Reserve Forces, or for his or her political opinions. Few comments were received from consultees and the Department stands by the proposals.

Questions about Schedule 22 and additional employment law issues		Page
Q39	<u>Do you have any view as to whether redundancy rebates should be modified or abolished?</u>	88
Q40	<u>Do you have any alternative proposals which would reduce Treasury expenditure on rebates?</u>	88
	<p>This proposal divided consultees. The Chamber of Commerce stated that its members were opposed to abolition. The DED maintains that there is a good case for removing or phasing out redundancy rebates, long unavailable in the UK, but proposes to include enabling powers in the Bill to abolish and / or modify rebates by secondary legislation so as to allow for a range of possible options.</p>	
Q41	<u>Do you have any view as to whether Tribunal claimants should be required to pay a fee and whether respondents to complaints should be required to pay part of the fee in specified circumstances (for example where they are found to have breached the claimant’s employment rights)?</u>	89
Q42	<u>If you consider that claimants should be required to pay a fee what charge or system of charges would you consider to be appropriate?</u>	89
	<p>The question as to whether Tribunal claimants should be required to pay a fee to bring a complaint proved to be divisive. The Chamber of Commerce and some employers would like to see a system of charges based closely on the UK system, while trade unions and others were equally passionate in their opposition to fees. The DED considers that it is important that any new system is balanced, fair and should not deter persons with legitimate claims. Ultimately, the Department is not in favour of following the new UK fees regime which has led to a huge drop in claims, but would support a system of moderate “threshold” fees designed to deter any weak or vexatious claimants. The Bill would only include an enabling power to charge fees and would not in itself lead to the introduction of any particular system.</p>	
Q43	<u>Do you consider that the £500 limit of costs that may be awarded by the Employment Tribunal should be increased and if so, what do you consider the new limit should be?</u>	93
	<p>The proposal divided consultees. The DED is content to substantially increase the existing costs limit (maximum costs that can be imposed are only one fortieth of maximum costs in the UK) so as to seek to deter anybody from wasting the Tribunal’s time and public funds but, in order not to deter persons with legitimate claims, considers that costs should only be payable in exceptional circumstances.</p>	

Questions about Schedule 22 and additional employment law issues		Page
Q44	<p><u>Do you have any comments regarding proposals 9 – 13 above?</u></p> <p>[Those proposals concerned the following:</p> <p>(a) Employment Tribunal – power for Chairperson to sit alone without a full Tribunal;</p> <p>(b) Making payments from the Manx National Insurance Fund to employees of insolvent etc. employers subject to the maximum amount of a week’s pay;</p> <p>(c) Power for DED to take a case on a worker’s behalf in certain cases;</p> <p>(d) Power to arrange a conciliated settlement under the Redundancy Payments Act 1990;</p> <p>(e) Strengthening the provisions enforcing Tribunal awards.]</p> <p>The proposals were mostly uncontroversial though (b) was opposed by the Chamber of Commerce which (wrongly) considered it to be indicative of a cost shift on to the private sector. (It is the Manx NI Fund which meets the insolvent employer’s liabilities; there is no burden placed on other employers whatsoever). Such payments are subject to maxima in the UK and the Department stands by both this and the other proposals.</p>	94
Q45	<p><u>Are there any other minor amendments to Isle of Man employment law comments which you consider should be included in Schedule 22 of the Equality Bill? Please give as full a case as possible.</u></p> <p>The response has been combined with the response to question 53.</p>	97
Q46	<p><u>Do you have any knowledge as to how widespread the use of zero-hours contracts is in the Island?</u></p>	97
Q47	<p><u>Do you have any knowledge of any inappropriate use of zero-hours contracts in the Island?</u></p>	97
Q48	<p><u>Do you consider that the DED should regulate the use of zero-hours contracts and if so what specific measures do you consider the Department should take?</u></p> <p>The DED received a range of views as to the extent of zero-hours contracts and whether there was a need for additional regulation. The Department considers the best approach is to insert a new section into the Employment Act 2006 in order to provide appropriate enabling powers for the making of Regulations. The Department would consult on draft Regulations in due course.</p>	97
Q49	<p><u>Do you consider the DED should broaden the existing powers in the Employment Act 2006 to make regulations on flexible working so as to permit regulations similar to the UK’s Flexible Working Regulations 2014 to be made in the Island?</u></p> <p>A majority of consultees supported the DED’s proposal to broaden the existing powers in the Employment Act 2006 in order to make new regulations.</p>	99

Questions about Schedule 22 and additional employment law issues		Page
Q50	<u>Do you have any knowledge as to how widespread the use of unpaid interns is in the Island?</u>	100
Q51	<u>Do you have any knowledge of any inappropriate use or exploitation of interns in the Island?</u>	100
Q52	<u>Do you consider that the DED should take any additional measures to safeguard employment protection of interns and if so what steps, do you consider the Department should take?</u>	100

Only limited information was received from consultees. The Department intends to take the opportunity presented by the Bill to include a simple enabling power in the Minimum Wage Act 2001 to make regulations applying or disapplying the minimum wage to people on work experience of a particular description and to make rules limiting the length of time persons can work without being paid at least the minimum wage.

Q53	<u>Are there any other employment law issues that you think the DED should consider as priorities? Please give as full a case as possible.</u>	100
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Suggestions were received from both workers and employers' organisations as to potentially major changes to employment law. For example trade unions would like statutory recognition of trade unions and greater protection for workers where there is a transfer of an undertaking while some employers wanted a 2 year qualifying period to claim unfair dismissal. Some of these changes are beyond the scope of the present Bill while others would require additional consultation. Some more modest suggestions, such as making awards to workers in detriment claims subject to a cap (as is already the case for employees in unfair dismissal claims), clarifying that where there are overlapping rights compensation is only payable once, and provision of powers for Employment Tribunal Rules to allow for the striking out of feeble Tribunal claims without the Respondent being involved, are, however, all capable of being progressed.

Additional proposals

The DED suggested inclusion of 3 minor provisions:

- (a) Inclusion of a power for the Attorney General to issue a restriction of proceedings order against any serial vexatious litigant, to prevent him or her making further claims.
- (b) Inclusion of a power to amend, by secondary legislation, schedule 5 of the Employment Act 2006, which is concerned with the calculation of continuous employment. The schedule is technical in nature.
- (c) Inclusion of a power to amend, by secondary legislation, schedule 6 of the Employment Act 2006 which is concerned with calculating normal hours worked and the value of a week's pay. This would be useful, for example to set out how the pay of certain atypical workers who may be earning variable amounts of pay, should be calculated for holiday pay purposes.

Questions regarding redundancy and the basic award for unfair dismissal
(from the second addendum to the consultation document)

A1 **Do you have any comments on the proposal to remove the age limit on older employees being entitled to claim a redundancy payment? (NOTE: this will be the effect of the draft Bill)** 107

A2 **If the age limit for claiming a redundancy payment is removed which system should be used for calculating redundancy payments and the Basic Award for Unfair Dismissal?** 107

(please choose an option from paragraph 28 above or suggest an alternative system)

The Chamber of Commerce would prefer a default retirement age (see response to question 18) and had concerns about costs of removing the exclusion of older employees being able to claim redundancy. Modification of rules which exclude older workers from claiming redundancy is a necessary component of protection against age discrimination. However, the following factors will limit any additional costs:

- The proposed cap as to the number of weeks' pay that can be awarded to employees who are made redundant;
- The fact that most employees will continue to seek retirement at some point;
- Employees are made redundant because the need for them to do the job ceases – there can be no other reason. Older employees are more likely to be dismissed on capability than redundancy, in which case an employer's costs will be limited to notice pay and pay in lieu of any untaken annual leave.

As to the system which should be used for calculating redundancy entitlement, the DED's preference is to retain the existing system in the Isle of Man (1 week's pay for each year of continuous employment) but to impose a cap of 26 weeks' pay.

Key concerns

- iii) While concerns expressed during the consultation are discussed and addressed in this document, leaving aside the social justice, fairness and reputational reasons for implementing the Bill, it is perhaps useful to refer to the issues relating to the perceived burden and costs for businesses (and, in some cases, Government) in this summary.
- iv) The concerns may be understandable given that it is not possible to advise individual businesses about the exact financial costs and benefits that this legislation will have for them, and because at this stage no firm timetable for the introduction of the Bill's various provisions has been agreed. The main areas of concern that were raised by the Chamber of Commerce, its members and other employers were:
 - a) the duty to make reasonable adjustments for disabled persons to whom they are providing goods and services;
 - b) the duty to make reasonable adjustments for disabled workers or prospective disabled workers;
 - c) the requirement not to discriminate against older workers and changes to the law regarding retirement; and
 - d) the introduction of equal pay for work of equal value².

Reasonable adjustments

- v) The difficulty for businesses and employers in respect of points a) and b) above is perhaps that there can be no hard and fast definition of "reasonable" in relation to what is a reasonable adjustment (which the Chamber of Commerce acknowledged). Each case must be considered on its merits, although there is a great deal of both guidance and case law from the UK that can be drawn upon and adapted for use in the Island. However, in the absence of certainty it is perhaps natural to imagine the worst case scenario. Nevertheless, the experience from the UK is that "reasonable" has been interpreted as meaning what a reasonable person would consider to be reasonable taking account all of the circumstances.
- vi) As the guidance issued by the UK Equality and Human Rights Commission makes clear, it is entirely legitimate for a provider of goods and services or an employer to take into account issues such as cost, practicality and effectiveness of an adjustment when considering whether an adjustment for persons with a disability would be reasonable. An adjustment the effect of which would be to force a business to change the basic nature of the service it provides or which would put it out of business because of the cost would not be reasonable. Therefore, for example, not every hotel and guesthouse in the Island will be required to have step-free access and not every shop in Strand Street will have to fit automatic doors, have hearing loops for deaf people, etc. Experience of city centres in the UK, even 20 years after the Disability Discrimination Act 1995 was enacted, bears this out³.

² In the UK, this has traditionally been more of a difficulty for public sector bodies that have not properly addressed the issue of equal pay than the private sector, although there is now an ongoing case involving Asda workers, the outcome of which is unlikely to be known until sometime during 2016.

³ Although many people may immediately think about wheelchair users in relation to the need to make reasonable adjustments for a disabled person the majority of impairments are not visible. In the UK it has been estimated that there are around 1.2 million wheelchair users, roughly 2% of UK population. A wide range of adjustments that do not, for example, involve altering the physical features of a building and which may be low cost (or no cost) can make a real difference to the lives of persons with a disability.

- vii) In relation to point a) above, the Resolution of Tynwald in July 2015 concerning the commencement of the Disability Discrimination Act 2006 (DDA) (which is based on parts of the UK's 1995 Act⁴) during 2016 should prepare providers of goods and services for the majority of the requirements of the Equality Bill in this area^{5,6}. However, the DDA only applies to discrimination against persons with a disability in the provision of goods, services and functions. It does not provide any protection in relation to the employment of persons with a disability. As such, the implementation should only be seen as an interim measure pending the enactment and commencement of the Equality Bill, and when the provisions of the Bill relating to disability discrimination are brought into operation the DDA should still be revoked as proposed.
- viii) Although extremely difficult to quantify, it must be remembered that there can be financial benefits to businesses, employers and Government by improving the access of persons with a disability both to goods and services and to employment.

Retirement

- ix) In relation to retirement, it may be noted that at present in the Isle of Man there is no default retirement age. An employer can set whatever compulsory normal retirement age it wishes for its employees provided that it is the same for men and women. The employer does not have to provide any justification for the age it has set. When an employee has reached the normal retirement age which has been set by the employer (or if the employer has not set a normal retirement age, the age of 65) with some exceptions that person general loses the right to claim unfair dismissal or to claim a redundancy payment. The compulsory retirement of a person on the grounds of their age when they are still capable of carrying out the duties of their employment to a satisfactory level is obviously contrary to the principle of eliminating age discrimination. This unsatisfactory situation is compounded where workers with little or no occupational pension are compulsorily retired before the State Pension Age. Where workers are unable to obtain alternative employment they can face real hardship.
- x) Allowing capable skilled persons to continue in employment for longer, where they wish to work to do so, should be beneficial both to the individual and to the organisation by which they are employed. It is accepted, however, that employers may well have to invest more time and effort into capability procedures for their employees and training of managers as it will be more difficult to avoid addressing any capability issues by simply waiting for a person to retire. Of course, capability issues can occur at any point during a person's working life and failure to deal appropriately with those issues is likely to have negative consequences for any employer.
- xi) Under the Bill, as under the UK Act, it will be possible for employers to set a retirement age for their employees and workers if this can be justified as a proportionate means of achieving a legitimate aim. There is UK case law on this issue which will be of assistance to employers in the Isle of Man. Proposed changes to the provisions concerning redundancy payments will help to ensure that the potential exposure of

⁴ The 1995 Act was subject to significant amendment (which are not reflected in the DDA) even before it was superseded by the Equality Act 2010.

⁵ The work of the Multi-Agency Forum on the DDA with Crossroads Care on the voluntary "tiered award" scheme has also been useful in raising awareness in this area.

⁶ The provisions of the DDA and the Equality Bill are not identical so the guidance and secondary legislation for the DDA and the Bill will differ. There will therefore inevitably be some duplication of effort as a result of bringing the DDA into operation ahead of the Bill.

employers for these payments does not become excessively burdensome (see paragraphs 2.108 to 2.114).

- xii) It is considered that the proposals in relation to age discrimination and changes to retirement law are complementary to the Motion on Social Security and National Insurance Reform which was approved by Tynwald in July 2015.

Equal pay for work of equal value

- xiii) With regard to equal pay for work of equal value, the Isle of Man has accepted an international obligation under the United Nations' Convention on the Elimination of all Forms of Discrimination Against Women to implement the right to equal pay for work of equal value. Failure to comply with international law that applies to the Isle of Man is damaging to the Island's reputation, while asking the UK to contact the UN to withdraw its extension of this Convention to the Island would very likely be even more damaging to the Island's reputation.
- xiv) Implementing equal pay for work of equal value is one of the main ways of addressing the historic undervaluing of types of employment that have traditionally been seen as "women's work" and of trying to close the gender pay gap.
- xv) Although some people may consider that equal pay for work of equal value is "like comparing apples with oranges" that is an overly simplistic and unhelpful way of looking at this issue. Two roles within a business or public sector body may be very different in terms of the purpose of those roles but still have very similar levels of responsibility, staff management, decision making, skill, physical demands, etc. This is not a new concept, particularly within the public service where very different roles have long been assigned to the same pay grade on the basis of various requirements of the role.
- xvi) There is significant UK case law concerning equal pay for work of equal value and it is accepted that in the UK a number of cases have been complex, costly and lengthy. However, the Island can benefit from the experience of the UK, its case law and the considerable amount of guidance and advice that has been developed on this issue. To allow the businesses and bodies in the Island further time to consider equal pay issues it is envisaged that there will be a lead-in period of two years after the Bill has been passed before the equal pay for work of equal value provisions are brought into operation. No claim for equal pay for work of equal value will be permitted in respect of any period prior to the relevant provisions coming into operation. In addition, it is now proposed that the maximum amount of pay arrears that the Tribunal will be able to award in a successful case will be limited to two years⁷ rather than the six years in the UK as it is considered that this is the balanced and proportionate approach to take.
- xvii) Differences in pay can be justified in certain circumstances where it can be shown that it is "a proportionate means of achieving a legitimate aim" and where the underlying reason for the difference is not because of a person's sex. It is proposed that the Bill should include a new enabling power to make Regulations to provide greater clarity on the meaning of "a proportionate means of achieving a legitimate aim".

⁷ In line with the provision under the Employment (Sex Discrimination) Act 2000

Mitigation, etc

- xviii) In addition to potential direct costs, there will obviously be certain costs relating to businesses and other bodies familiarising themselves with the requirements in respect of each of the points referred to above, but these should be mitigated to a degree by the following:
- the relatively long lead-in period between the publication of the response to the Equality Bill consultation and the legislation being brought into operation, allowing businesses (and Government) time to prepare;
 - as the Bill is based closely on the UK's Equality Act 2010 there is a wide range of relevant guidance and other information (such as UK case law) on the general requirements that is already freely available;
 - as referred to above following the Resolution adopted by Tynwald at its July 2015 sitting that the Disability Discrimination Act 2006 should be brought into operation during 2016 businesses and service providers should be familiar with the main requirements in relation to disability discrimination in the provision of goods and services⁸ (and this has perhaps been the area of greatest concern for smaller businesses) by the time the Bill has been enacted; and
 - the intention that an Equality Officer should be appointed when (or shortly before) the Bill has been passed to lead on the preparation of Isle of Man specific documentation, provide briefings and training to businesses and other bodies, etc.
- xix) It should be emphasised that even the UK was unable to produce an accurate calculation of the overall costs and benefits of equality legislation in its impact assessment on the Equality Act 2010. The main message from the UK though was that even allowing for some initial costs the legislation would be of overall financial benefit to the economy in the ten year period following its introduction; while additional social and reputational benefits on top of that should also be taken into consideration.
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⁸ Although not in relation to disability discrimination in employment as the DDA 2006 does not deal with this issue.

Next Steps

Subject to work on other priority legislation, the Equality Bill will be finalised in accordance with the proposals set out in this document with a view to seeking the formal approvals required for it to be introduced into the Legislative Council in due course. It is believed that the proposals for finalising the Bill are balanced and appropriate.

In addition to the correction of drafting issues, typographical errors and other minor issues with the Bill, it is proposed that in finalising the Bill the following points in particular should be taken into account:

- a) the majority of the Bill should be retained as published for consultation, including the provisions in respect of disability discrimination, retirement law, and the introduction of equal pay for work of equal value;
- b) Part 9 of the Bill (enforcement) should be redrafted to make it clearer and more consistent⁹, with both employment discrimination and goods and services discrimination cases still to be considered by the proposed Employment and Equality Tribunal (which will supersede the Employment Tribunal);
- c) consequent to the changes to retirement law the Bill should include provision to extend eligibility for a redundancy payment to older employees but to cap redundancy payments and Basic Award payments at a maximum of 26 weeks' pay; *(see paragraphs 2.108 – 2.114)*
- d) the maximum amount pay arrears that can be awarded by the Tribunal in a successful equal pay case should be reduced from 6 years as originally proposed in the Bill (in line with the UK Act) to 2 years in line with current provision under the Employment (Sex Discrimination) Act 2000; *(see paragraphs 1.115 to 1.119)*
- e) the Bill should include a consequential amendment to the Licensing Act 1995 to provide legal certainty that licenced premises do not have an unintended exemption from the requirement not to discriminate against people on the grounds of the protected characteristics; *(see paragraph 1.47)*
- f) Part 12 of the Bill (Disabled persons: public transport and taxis) and also the enabling amendment to the Road Transport Act 2001 in Schedule 23 to the Bill should be removed, because of the delay to the Equality Bill it is proposed that the relevant enabling powers should be inserted into the 2001 Act by the Road Traffic Legislation (Amendment) Bill; *(see paragraphs 1.95 to 1.101)*
- g) references to the Education Council being able to attempt mediation in school discrimination cases should be removed from the Bill, with such cases to initially fall under the OFT's goods and services discrimination conciliation remit; *(see paragraphs 1.168 to 1.172)*
- h) the Bill should include additional age related exemptions for student awards and age restricted housing (such as Saddle Mews where residents must be aged 50+ years) and ensure that the Bill does not require residents who participate in the Homestay scheme to make reasonable adjustments to their homes; *(see paragraphs 1.200 to 1.203)*
- i) the Bill should prohibit secondary schools from discriminating against pupils aged 16+ on the grounds of marriage and civil partnership; *(see paragraphs 1.225 and 1.226)*

⁹ It has been known since the consultation draft of the Bill was published that this would be necessary.

- j) provision for same sex marriage should not be included in the Bill;
(see paragraphs 1.274 to 1.277)
 - k) a “conscience clause” should not be included in the Bill; and
(see paragraphs 1.278 to 1.288)
 - l) the following additional provisions should be included in Schedule 22 (miscellaneous employment law amendments) to the Bill:
 - i) insert enabling powers into the Employment Act 2006 (EA 2006) to allow for the possible future phasing out of redundancy rebates by secondary legislation;
(see paragraphs 2.7 to 2.11)
 - ii) provide an enabling power to charge claimants to the proposed Employment and Equality Tribunal a fee, though such a fee should be modest and not deter any legitimate claims;
(see paragraphs 2.12 to 2.26)
 - iii) make payments from the Manx National Insurance Fund to employees of insolvent etc. employers subject to the maximum amount of a week’s pay;
(see paragraphs 2.38 to 2.42)
 - iv) insert enabling powers into the EA 2006 to allow for zero hours contracts to be regulated by secondary legislation;
(see paragraphs 2.48 to 2.57)
 - v) insert enabling powers into the EA 2006 to extend the existing right to request flexible working by secondary legislation;
(see paragraphs 2.58 to 2.62)
 - vi) insert enabling powers into the EA 2006 in relation to vexatious claims, computation of period of employment and value of a week’s pay; and
(see paragraphs 2.115 to 2.124)
 - vii) amend the Employment Act 2006 to provide for a cap on detriment awards based on the existing cap for unfair dismissal awards.
(see paragraphs 2.87 to 2.93)
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Review of responses to the consultation document questions

Part 1 – the main equality/discrimination provisions

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

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

- 1.1. The consultation document provided a short overview of the Bill and it explained why it was based on the UK's Equality Act 2010.
- 1.2. The large majority of responses supported the principles of equality and dealing with discrimination. However, one response stated that the need to legislate had not been proven and another suggested that the Bill was unnecessary, that it would add a further level of bureaucracy and costs to business and it would give more work to advocates.
- 1.3. Whilst a majority of the responses also supported the fact that the draft Equality Bill was based on the UK's Equality Act 2010 some concerns were expressed, particularly by the Chamber of Commerce and its members. These concerns mainly related to the potential costs that would be required for the implementation of the Bill; the length, complexity and proportionality of the Bill for the Isle of Man; and the timing of the Bill and its implementation. These were recurring themes in a number of responses to various questions in the consultation document and they will be addressed in the following section of this document.
- 1.4. Third sector organisations and trade unions were overwhelming supportive of the Bill, and some responses suggested that such legislation was overdue or wanted it to go further than the UK Act.
- 1.5. One response stated that the UK Act should not be used as a template for the Bill. Another response supported the intention of the Bill to promote fairness in society and to encourage all people to be treated equally but suggested that the Bill would not achieve this aim. A further response suggested that the UK Act did not take into account the potential for colleagues of a person with a disability becoming resentful of the disabled person's potentially lower productivity, particularly in the area of manual work; that the UK Act was based on EU law, the UK might leave the EU and might change its Act and the Island might then be forced to change its legislation; and stated that the UK had different competitors to the IOM and questioned whether they had been looked at.
- 1.6. A further response said that bigots should be subject to the Court of Public Opinion rather than a Court of Law. Another, along the same lines, suggested that legislating against discrimination was a quite reactionary and lazy approach; that legislating to prevent people expressing the views on certain issues was discriminatory in itself; and that people should be able to challenge views that they found distasteful through discussion and argument.
- 1.7. Whilst it is legitimate to hold such views, it is highly unlikely that most people would feel empowered to successfully argue their case against, or change the behaviour of, a person or body that is discriminating against them unless they have the weight of the law behind them. Although some may reject the concept, there appears to a

consensus in most modern countries that society should be subject to laws that have broad effect and which protect minorities and the vulnerable.

- 1.8. It should be emphasised that this legislation will not prevent people from expressing their views, even if those views are such that many would consider them to be unpleasant, extreme or discriminatory as freedom of expression will continue to be protected under Article 10 of the European Convention on Human Rights as given effect in the Island by the Human Rights Act 2001. The Bill is about equal treatment in the course of employment and in the provision of goods and services. Nonetheless, it should be noted that the right to freedom of expression is a qualified right rather an absolute right as set out in Article 10(2) of the European Convention:

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

- 1.9. If the UK Act was not used as a template for the Island's legislation, this would mean starting afresh and would require far more resources. As the Government has many other legislative priorities it is highly unlikely that work on such a Bill could even start before the General Election in 2016.
- 1.10. As stated in the consultation document, there are a number of practical and pragmatic reasons for very largely basing the Island's Equality Bill on the UK Act:
- the UK Act brought together and replaced a number of separate pieces of legislation which in some cases had been in operation for a significant number of years (and which had therefore been tried, tested and amended¹⁰); so people will be able to find almost all equality provisions in a single place (subject to any necessary subordinate legislation);
 - trying to develop bespoke legislation against discrimination in the Island would be a considerably more complex, resource intensive and time consuming task;
 - it will be possible to draw on and adapt for use in the Island the considerable amount of existing UK guidance and case-law concerning the operation of the UK Act¹¹;
 - businesses that operate both in the UK and in the Island should already have a good general awareness of the UK 2010 Act and because of the extensive UK case law and guidance which exists, businesses will be able to have a large degree of certainty about how the Manx legislation will operate and be interpreted in practice – entirely new and different Manx equality legislation would not have been tested and could present more uncertainty for businesses.
- 1.11. It should be noted that entirely new and different Manx equality legislation would still have to properly implement the Island's international obligations (for example, in relation to pay equality between men and women). Any Isle of Man equality

¹⁰ The UK Government has recently published a memorandum concerning post legislative scrutiny on the Equality Act 2010. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441838/Memo_to_Women_Equalities.pdf This document has been submitted to the House of Lords Equality Act 2010 and Disability Select Committee which, at the time of writing, is taking evidence on the impact on people with disabilities of the Equality Act 2010.

¹¹ The Island's legal system is based on that of England and Wales. UK case law may not be binding in the Isle of Man but where similar provisions exist in Manx law UK case law is highly persuasive in the Island's courts and tribunals.

legislation should also allow other relevant international instruments which are recognised as establishing appropriate standards and best practice for a modern caring society to be extended to the Island¹².

- 1.12. The comment about the UK Act not taking into account other workers working with people with a disability is dealt with under question 10.
- 1.13. Although some provisions of the UK Act are derived from the requirements of EU law this is by no means the case for the entire Act; for example, some of the Act relates to the implementation of United Nations and other international obligations. Also, if the effect of the legislation is fair and just, it may be argued that the ultimate origin of the legislation is irrelevant. Even in the eventuality that the UK did leave the EU it does not follow that the UK would choose to amend or repeal the Equality Act 2010; and if it were to do so this would not necessitate the Island changing its legislation.
- 1.14. The reference to looking at the Island's competitors is presumed to be a reference to the position in Jersey and Guernsey.
- 1.15. In Guernsey, at present, only discrimination on the grounds of sex, gender reassignment or marital status in employment is prohibited¹³. The States of Guernsey has decided to prioritise a Law on prevention of the discrimination on the grounds of disability; although the need for other anti-discrimination laws (such as on the grounds of race) is accepted these are not likely to become law for a number of years due to legislative resources issues¹⁴.
- 1.16. Currently, in Jersey only discrimination on the grounds of race is prohibited, and this has only been in operation since 1 September 2014¹⁵. Legislation¹⁶ to prohibit discrimination in Jersey on the grounds of sex and related characteristics (sexual orientation, gender reassignment and pregnancy and maternity)¹⁷ will come into operation on 1 September 2015.
- 1.17. Both Jersey and Guernsey have taken a different approach to the Isle of Man as their Laws (i.e. the primary legislation, the equivalent of Acts of Tynwald) are predominantly enabling powers for making secondary legislation, particular in the case of the Guernsey Law.
- 1.18. The Prevention of Discrimination (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004 only includes five Articles and is 12 pages long. However, the secondary legislation – the Employment and Discrimination Tribunal (Guernsey) Ordinance,

¹² For example, the UN Convention on the Rights of Persons with Disabilities and the "Core Conventions" of the International Labour Organisation's that all countries are strongly encourage to sign up to; in particular ILO Conventions 100 and 111 (respectively the Equal Remuneration Convention and Discrimination (Employment and Occupation) Convention.

¹³ <http://www.guernseylegalresources.gg/article/96739/Prevention-of-Discrimination-Enabling-Provisions-Bailiwick-of-Guernsey-Law-2004-Consolidated-text> and

<http://www.guernseylegalresources.gg/article/97230/Sex-Discrimination-Employment-Guernsey-Ordinance-2005-Consolidated-text>

¹⁴ <http://www.bbc.co.uk/news/world-europe-guernsey-29027883>

¹⁵ <http://www.jerseylaw.je/Law/Display.aspx?url=%2fLaw%2fLawsinforce%2fhtm%2fLawFiles%2f2013%2fL-10-2013.pdf>

¹⁶ Discrimination (Sex and Related Characteristics) (Jersey) Regulations 2015

<http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%5chtm%5cROFiles%5cR%26OYear2015%2fR%26O-061-2015.htm>

¹⁷ Under the Jersey Law an employer must not discriminate in respect of the terms or conditions on which employment is offered or the terms or conditions of employment afforded to an employee. It is not clear that in relation to sex discrimination this would cover equal pay for work of equal value but, because the UN Convention on the Elimination of all forms of Discrimination against Women does not currently apply to it, Jersey is under no international obligation to implement this measure. As the maximum compensation the Tribunal in Jersey can award as compensation for financial loss is £10,000, the rights in Jersey in respect of equal pay claims from 1 September 2015 will still not match those that have existed in the Isle of Man under the Employment (Sex Discrimination) Act 2000 for a number of years.

2005 and the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 – runs to a further 120 pages in total.

- 1.19. The Jersey primary legislation – the Discrimination (Jersey) Law 2013¹⁸ – is somewhat more substantial than that in Guernsey, running to 49 Articles and three Schedules and it is 38 pages long. However, it should be remembered that at present this Law only covers discrimination on the grounds of race, which is arguably the most straightforward of the protected characteristics¹⁹ to deal with. There is provision in the Jersey Law for it to be expanded to cover other protected characteristics using secondary legislation, as is now being done in respect of sex and related characteristics.
- 1.20. It is therefore highly likely that by the time the legislation in Jersey and Guernsey encompasses protection against discrimination on a number of grounds it will be at least as long and complex as the proposed Equality Bill for the Isle of Man.
- 1.21. The political and legislative systems and sensitivities in Jersey and Guernsey are different to those in the Isle of Man. It is not considered to be appropriate for secondary legislation to be used in the Island in the way that it has been and will be used in Jersey and Guernsey; instead it is considered that in most cases the main substantive provisions should be included in a Bill and subject to detailed scrutiny and debate in the Branches of Tynwald.
- 1.22. Although it might be argued that the incremental approach being taken in the Jersey and Guernsey has certain advantages, it should be noted that there is nothing to prevent a comprehensive piece of legislation including a power to allow it to be brought into operation on different dates for different purposes. The Equality Bill includes such a power and it was never the intention that the whole of the Bill would be brought into operation immediately following Royal Assent.
- 1.23. One final point is perhaps worth making. It appears that there is sometimes a perception that legislation which is lengthy and/or complex is necessarily flawed. This view is not accepted. The purpose of legislation is to set out the law of the land in a way that is as legally watertight as possible and with the least scope for subjective interpretation and argument. Whilst plain English is now rightly the norm in legislative drafting this does not mean that legislation which deals with a complex subject where safeguards and exceptions may be required is necessarily going to be easy for a person who is not familiar with legislation to follow. Legislation which is short and easy to read but which is open to personal interpretation and which does not achieve its purpose has failed.
- 1.24. Taking an extreme example, a Bill which just contained a provision along the lines of “Discrimination against any person for any reason is prohibited” would obviously be short and apparently easy to understand – and also completely unworkable. The term “discrimination” is not defined at all so it would be open to subjective views and legal argument; and the prohibition on discrimination is completely unlimited – it could, for example, be as read as meaning that children would have to be treated the same as adults.
- 1.25. Where legislation is long and complex it is accepted, however, that the need for detailed clear and accessible guidance for the public and others who may be affected by the legislation is the all more important. The intention with the Equality Bill is that

¹⁸ <http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%5chtm%5cLawFiles%5c2013%2fL-10-2013.htm>

¹⁹ Like the UK Act and Island’s Equality Bill the Jersey Law uses the concept of protected characteristics.

such guidance will be made available before it comes into operation and in large part this will be adapted from the extensive guidance materials available on the UK Act.

ACTION: It is intended that the Bill as based on the UK's Equality Act 2010 will be progressed largely in the form it was issued for consultation. However, certain amendments which are set out in this document (other those which relate to typographical and draft corrections) will be made to the Bill.

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

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

- 1.26. The consultation document advised that the list of protected characteristics in the Bill was the same as in the UK Act (i.e. age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation) and that, subject to certain exceptions, discrimination against a person because of, for example, his or her race or sex would be prohibited. The consultation document also clarified the coverage of the Bill, i.e. it covers discrimination in employment, in the provision of goods and services, education, etc. and it highlighted the areas where there is already some protection in the Island.
- 1.27. The majority of consultees were content with the coverage of the Bill and that the list of protected characteristics in the Bill should be the same as in the UK Act.
- 1.28. There were some suggestions that the list of protected characteristics should be expanded to explicitly include mental health and to include paternity, trans identity²⁰ and trade union membership.
- 1.29. One response stated that race was a special category on its own, that there was adequate legislation on discrimination and there was no demonstrable reason to expand upon it. Another response stated that the Bill was choosing sections of society to protect and it did not protect everyone equally, and that it did not, for example, seek to protect people (e.g. in recruitment) by virtue of their occupation (e.g. armed forces), by virtue of their appearance or circumstances such as being an ex-offender. It was suggested the intention is to truly provide for equality for all, these should be included.
- 1.30. It is not considered to be appropriate to expand the list of protected characteristics beyond that in the UK Act as this would entail legislating for potential wide ranging matters where there is no UK case law or guidance to draw upon and the consequences of such changes on other Manx legislation would have to be examined very carefully. This would undoubtedly increase the complexity, uncertainty and burden of the Bill. This was an important consideration in using UK Act as a model for the Bill.
- 1.31. In addition, whilst it is accepted that the Bill does not cover discrimination on all the grounds that could be imagined (such as having ginger hair, being bald, being short, not being attractive, being a member of the Armed Forces) it is considered that it does cover all of the main grounds on which people have, and continue to be, subject to significant discrimination in their lives both in the Island and further afield.

²⁰ A person who identifies as being the opposite gender to their physical birth gender but who is not living as the other gender or not seeking to undergo a process for gender reassignment.

- 1.32. In the case of the suggestions that were made in response to the consultation about additional reasons for protection for discrimination it is considered that amendments are either not necessary or not appropriate.
- 1.33. It is clear from UK case law and guidance that under the UK Act the disability protected characteristic does cover mental health issues if those issues have a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities.
- 1.34. Although an increasing number of men are now the primary care providers for babies and children it is still women who mainly fill this role and who are much more likely to be subject to discrimination. However, the Department of Economic Development ("the DED") is monitoring changes in the UK in relation to shared parental leave when a child is born (or adopted) and it may bring forward separate legislation in this area in due course.
- 1.35. It is considered the gender reassignment protected characteristic is sufficiently broad to encompass the circumstances of most persons with gender identity issues.
- 1.36. It is also considered that protection from discrimination in employment against persons because of their membership of a trade union is adequately covered in the Employment Act 2006; the DED monitors relevant developments in the Island's neighbouring jurisdictions.
- 1.37. In terms of discrimination on the grounds of a person's appearance, depending on the circumstances it is possible that it may be covered under one or more of the protected characteristics (for example, race or disability). Persons who have a criminal record are protected from discrimination to the degree that is considered to be appropriate by the Rehabilitation of Offenders Act 2001. Prohibiting discrimination on the grounds of a person's occupation would be likely to be highly complex in practice and if extended to a single occupation, such as membership of the British armed forces, it might be difficult to argue against the extension of this special protection to, for example, police officers, prison officers and others. In the UK in 2014 a backbench Member of Parliament submitted two different Private Members' Bills to extend the UK Act to members of the armed forces but neither was given the time or support for them to be progressed.

ACTION: The list of protected characteristics and the coverage of the Bill will be maintained.

Q5. Do you have any comments about direct discrimination?

- 1.38. Direct discrimination is the most straightforward type of discrimination; it occurs where the reason for one person being treated less favourably than another person is because of a protected characteristic – for example, refusing to serve a person because he or she is black or refusing to employ a person because he or she is a Muslim. There were no objections to the principle of prohibiting direct discrimination. There were, however, some questions about the scope and operation of the provision and it is intended that these will be addressed in guidance.
- 1.39. An example of the type of questions received is:
"Are clients open to discrimination claims for asking staff to work on weekends (i.e. religious reasons), how do we turn down candidates that cannot do those hours due to religious reasons?"

"Disability and age [are] difficult subjects in some work places and it's not [about] discrimination but ability – [in] manual labour [with] people who are older, often meaning less able, and people with certain disabilities may effect this sort of work, and not hiring them for this reason is not discrimination but rather is choosing a suitable candidate for this role".

(Hamlin, in the response from the Isle of Man Chamber of Commerce)

- 1.40. The first part of the question above actually concerns indirect discrimination (see Q7 below) rather than direct discrimination, i.e. it does not directly target a person because they have one of the protected characteristics but it may have a greater effect on people who hold certain religious beliefs – for example, the effect on devout Jewish people of being required to work on a Saturday and the effect on devout Christians of being required to work on a Sunday.
- 1.41. There is highly relevant UK case law about this issue which clarifies the position²¹. The England and Wales Court of Appeal [EWCA] found that in determining a Christian care worker's claim alleging indirect religious discrimination arising from her obligation to work on Sundays, an employment tribunal had erred in placing weight on its finding that her belief that Sunday should be a day of rest and worship was not a core component of the Christian faith. However, the EWCA found that the tribunal's conclusion that the imposition of Sunday working was a proportionate means of achieving the legitimate aim of running a care home effectively was manifestly correct.
- 1.42. In other words, providing that an employer can demonstrate that the requirement to work weekends is justified taking into account any possible accommodation for the religious person then the requirement is legitimate.
- 1.43. It should be remembered of course that shop workers in the Island have the specific ability under the Shops Act 2000 to "opt out" of working on Sundays.
- 1.44. In terms of the second part of the question above, it must be emphasised that the purpose of the Bill is not to force employers to either recruit or retain persons who are not capable of carrying out a role to an appropriate level. However, what employers will have to do is to consider applicants or existing employees on their individual merits rather than simply discounting them because they have a disability or are older. An employer will need to properly consider whether, with reasonable adjustments being made if necessary, a disabled applicant or employee could fulfil a role successfully; and employers who wish to reject an older applicant or retire an older employee will have to be careful to ensure that this is either on the grounds of capability or a proportional means of achieving a legitimate aim²².

ACTION: The provision will be retained unchanged.

²¹ MBA v London Borough of Merton [2013] EWCA Civ 1562 (05 December 2013)
<http://www.bailii.org/ew/cases/EWCA/Civ/2013/1562.html>

²² There is also UK case law in this area. The long running case of *Seldon v Clarkson Wright & Jakes* is of particular interest in respect of age discrimination. Although this case started before the abolition of the default retirement age it does demonstrate the type of balancing exercise that needs to be carried out when considering whether compulsory retirement at a particular age is a proportional means of achieving a legitimate aim. Information on this case can be found at:
http://www.bailii.org/uk/cases/UKCAT/2014/0434_13_1305.html

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

- 1.45. Discrimination arising from a disability is not exactly the same as direct discrimination on the grounds of disability; it is where discrimination occurs as a consequence of the disability rather than the disability itself²³ – such as the need to take periods of disability-related absence or where a person is working slower than colleagues because of their disability. It is, however, possible to justify treatment that might amount to discrimination arising from a disability if it can be shown to be a proportionate means of achieving a legitimate aim.
- 1.46. There were no objections to this provision. However, UNITE – the Union suggested that employers and service providers should not be able to use business needs as a justification to discriminate. The Department of Education and Children (DEC) suggested that there could be cost implications in relation to special educational needs provision.
- 1.47. In addition, as a result of the example given in the consultation document (which was based on an example in the Explanatory Notes for the UK Act), one response drew attention to a difference between licensing law in the Island and in the UK. This difference could have meant that licensed premises in the Island would have had an absolute exemption from the equality requirements that will apply to other businesses and service providers in relation to persons wishing to enter the premises or who are asked to leave the premises²⁴. For example, a licensee in the Island could refuse entry to a person simply because the person is black or expel a person from the premises simply because the person is gay without having to justify the decision.
- 1.48. In relation to special educational needs, this is a largely separate issue and the DEC will continue to be bound by the requirements of sections 18 to 20 of, and Schedule 4 to, the Education Act 2001. Nevertheless, the DEC will have to prepare an overarching strategy for improving the access and participation of disabled pupils in the schools for which it is responsible and schools will need to have accessibility plans on the basis of their particular circumstances. A child who has been assessed as having special educational needs for the purposes of the Education Act 2001 will almost inevitably also qualify as being “disabled” for the purposes of the Equality Bill. However, it should be noted that, as under the UK Act, the duty to make reasonable adjustments for disabled persons is limited in its application to schools, as the requirement to make adjustments to the physical features of a building does not apply to schools.

²³ The provision is the same as in the UK Act and it is necessary because UK case law (which although not binding in the Island would be highly persuasive) narrowed the scope of the protection against discrimination available to a disabled person on the grounds of direct disability discrimination.

²⁴ Section 35(1) & (2) of the Licensing Act 1995 state:

“(1) The responsible person, and any employee or agent of the responsible person, may, without giving any reason —
(a) refuse to admit any member of the public to licensed premises; or
(b) refuse to supply liquor to any person,
if he considers it inadvisable to do so.

(2) The responsible person, and any employee or agent of the responsible person, may, without giving any reason, order any person to leave licensed premises.”

Failure to comply with the above provisions is a criminal offence for which a person may be fined up to £500 on summary convictions. These provisions are in addition to the necessary provision in section 35(4) which allows a responsible person to refuse to admit to, or expel from, the licensed premises any person—

“(a) who is drunk, violent, quarrelsome or disorderly, or
(b) whose presence on the premises would subject the holder of the licence to a penalty under this Act.”

Like the UK, neither Jersey nor Guernsey have such broad provisions allowing any person to be refused entry to, or expelled from, licenced premises for any reason or none.

It is therefore proposed that at the very least this power should be made subject to the non-discrimination requirements of the Equality Bill and if a person believes that the reason (or if more than one reason, the main reason) they have been refused entry to, or expelled from, licenced premises is because of a protected characteristic they will be able to bring a case to the Tribunal in the same way as if they had been discriminated against by a different type of business.

ACTION: The provision will remain unchanged but as a result of comments received on this question it is proposed that a consequential amendment to the Licensing Act 1995 should be included in the Bill to provide legal certainty that licenced premises do not have an unintended exemption from the requirement not to discriminate against people on grounds of the protected characteristics.

Q7 Do you have any comments about indirect discrimination?

- 1.49. The consultation document explained that indirect discrimination occurs when a 'provision, criterion or practice' which applies in the same way for everybody has an effect which particularly disadvantages people with one of the protected characteristics. For example, an employer requires its employees to be 6 feet or more in height; as people from certain racial backgrounds may be much less likely meet this criterion the requirement is indirect discrimination.
- 1.50. However, indirect discrimination may not be unlawful if it can be shown that there is an 'objective justification' for it. This involves demonstrating the provision, criterion or practice is a 'proportionate means of achieving a legitimate aim'.
- 1.51. There were few responses to this question and the majority were supportive of indirect discrimination being made unlawful in the Island in the same way as under the UK Act although a number of the responses raised the need for adequate guidance.
- 1.52. One response suggested that indirect discrimination provisions have unduly complicated the law and have led to some very expensive cases, and that this was another reason for resisting the widening of the categories of people for protection.
- 1.53. It is intended that guidance based on the extensive guidance and case law from the UK will be drawn up in advance of the Bill coming into operation.
- 1.54. It is undoubtedly true that indirect discrimination is a more complex concept than direct discrimination but it is important to ensure that provisions, criteria or practices that may particularly disadvantage people with one of the protected characteristics (often inadvertently) have to be considered and changed unless they can be objectively justified.

ACTION: The provision will be retained unchanged.

Q8 Do you have any comments about harassment?

- 1.55. Under the Bill "harassment" has a specific meaning, which is the same as in the UK Act. There are three types of harassment under the Bill:
- unwanted conduct which is related to a relevant protected characteristic²⁵ and which has the purpose or effect of creating an intimidating, hostile, degrading,

²⁵ The relevant protected characteristics are all the protected characteristics apart from pregnancy and maternity, and marriage and civil partnership. However, section 212(5) of the UK Act makes it clear that harassment on certain omitted grounds would constitute direct discrimination. It states that:

humiliating or offensive environment for the complainant or of violating the complainant's dignity;

- unwanted conduct of a sexual nature which 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 ("sexual harassment");
- treating a person less favourably because he or she has either submitted to or rejected sexual harassment or harassment related to sex or gender reassignment.

- 1.56. The majority of consultees supported this provision although the issue of guidance was again mentioned.
- 1.57. One response suggested that there might be a flood of claims against employers. Another response suggested that introduction of 'harassment' in other areas of the law had led to some very wide-ranging, loosely-worded provisions, especially in the Public Order Act 1998. In respect of the clause in the Equality Bill, the respondent noted there was a reference to Article 10 of the Human Rights Convention in the consultation document but there was no reference to its basic provisions in the proposal.
- 1.58. It is intended that guidance based on the extensive guidance and case law from the UK will be drawn up in advance of the Bill coming into operation.
- 1.59. It may be noted that, although it was not the original intention of the Protection of Harassment Act 2000 Act, it is already possible to use the broad provisions of that Act in an employment context but there have not been a significant number of cases relating to such circumstances since its enactment. The provisions in the Equality Bill are designed to be more specific than those in the 2000 Act in respect of harassment related to the protected characteristics.
- 1.60. Although the harassment provision in the Bill does not explicitly refer to the European Convention on Human Rights, if passed the Bill will be subject to the Island's Human Rights Act 2001 in the same way as all other Manx legislation.
- 1.61. As far as can be judged from the information available, there does not appear to have been any substantial increase in harassment related cases to employment tribunals in the UK following the enactment of the UK Act²⁶.

ACTION: The provision will be retained unchanged.

Q9 Do you have any comments about victimisation?

- 1.62. As with "harassment", "victimisation" has a specific meaning under the Bill which is in line with its meaning under the UK Act. Victimisation is where an individual is

"Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 [Direct discrimination] because of that characteristic."

An equivalent provision was inadvertently omitted from clause 3 of the Bill but it will be inserted into the next draft.

²⁶ From published figures, it is known that for the period October 2012 to March 2015 enquiries to the Equality Advisory Support Service (EASS) concerning harassment constituted just 8% of the total. The EASS is a helpline which provides information and advice on equality and human rights issues which was set up by the UK Government in October 2012 to replace the previous helpline run by the Equality and Human Rights Commission.

subjected to a detriment by a person because the individual has (or the person believes that the individual has or will):

- (a) brought proceedings under the Bill;
- (b) given evidence or information in connection with proceedings under the Bill;
- (c) done any other thing for the purposes of or in connection with the Bill;
- (d) made an allegation in good faith (whether or not express) that a person has contravened the Bill.

- 1.63. There were no objections to this provision although the issue of guidance was again mentioned.
- 1.64. One response suggested that an employee should not suffer detriment as a result of his or his membership of a trade union.
- 1.65. It is intended that guidance based on the extensive guidance and case law from the UK will be drawn up in advance of the Bill coming into operation.
- 1.66. Protection for employees on the basis of their membership of a trade union is already provided for under the Employment Act 2006.

ACTION: The provision will be retained unchanged.

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

- 1.67. The consultation document described what would constitute a disability for the purposes of the Bill and explained the duty to make reasonable adjustments for persons with a disability.
- 1.68. Although many people may immediately think about wheelchair users in relation to the need to make reasonable adjustments for a disabled person the majority of impairments are not visible. In the UK it is has been estimated that there are approximately 1.2 million wheelchair users, roughly 2% of UK population²⁷. A wide range of adjustments that do not, for example, involve altering the physical features of a building and which may be low cost (or no cost) can make a real difference to the lives of persons with a disability.
- 1.69. There were a significant number of responses to this question and a number of the responses were fairly lengthy.
- 1.70. Although a majority of the responses related to the duty to make reasonable adjustments for persons with a disability there were also some comments concerning the definition of disability under the Bill, including:

"In our view the definitions of what constitute a disability as laid out in the bill are satisfactory and we offer no improvement on them."
(Trustees of the Manx Blind Welfare Society)

"The RCN agrees with the comments made about what constitutes a disability";
(Royal College of Nursing)

²⁷ <http://www.papworthtrust.org.uk/sites/default/files/UK%20Disability%20facts%20and%20figures%20report%202014.pdf>

"Perceptions of what constitutes a disability are many and varied.";
(Road Transport Licensing Committee)

"the Society believes that careful consideration needs to be given to using the term 'disability or long term health condition' as many people with impairments do not self-identify with the term 'disability'";
(Manx Deaf Society)

"MENTAL HEALTH MUST BE INCLUDED SPECIFICALLY FOR SUPPORT TO BE MADE AVAILABLE FOR RETURNEES.";
(Ballamona Association for Mental Health)

- 1.71. The consultation document stated that in addition to the provisions in the Bill about what constitutes a disability (in clause 7 and Schedule 1), as in the UK²⁸, it was envisaged that this would be expanded on by both secondary legislation and guidance after Royal Assent. The UK guidance makes it very clear that mental health conditions which have a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities do fall within the definition of disability.
- 1.72. In relation to the secondary legislation and guidance referred to above, one comment in the IOMTUC's collated response stated:
- "Ought to be put to public consultation or at least intentions with regard to this paragraph expanded upon."
- 1.73. Whilst it was perhaps not clear from the consultation document, the intention is that the Island's secondary legislation and guidance in this area should (as with the Bill itself) be closely based on that in the UK.
- 1.74. Generally the responses were supportive of the principle of making reasonable adjustments for disabled persons, although one person suggested that this could have an unfair effect on work colleagues and management.
- 1.75. The purpose of the Bill is to ensure that persons who have a disability are treated as fairly as possible by making reasonable adjustments for them. In some cases this may mean that they are treated somewhat more favourably in certain areas to ensure that they can participate in and contribute to society to the maximum possible degree. Nevertheless, persons who do not have a disability will in many areas of their lives still enjoy significant advantages over those persons who do have a disability.
- 1.76. The responses from businesses to this question understandably raised the issues of costs of implementation and what guidance would be available to assist them. The first point to emphasise is that adjustments only have to be made for disabled persons if it is reasonable to make those adjustments. However, as the Isle of Man Chamber of Commerce accepted, there can be no hard and fast definition of what is meant by the term "reasonable":
- "It is acknowledged that it may be difficult, if not impossible to define reasonable adjustment in the primary legislation. In the UK, the Statutory Code of Practice does provide some useful guidance, which runs to about 20 pages or so, specifically on the kind of reasonable adjustments that an employer would be expected to consider in certain situations. No such regulations or guidance have been supplied yet and the*

²⁸ See the Equality Act 2010 (Disability) Regulations 2010 (SI 2010/2128) - <http://www.legislation.gov.uk/uksi/2010/2128/contents/made>
Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85038/disability-definition.pdf

Consultation Document does not mention what it is intended will be produced, adopted or followed.

Chamber members have submitted that, without sight of the Regulations or any draft Code of Practice or official guidance (or at the very least an indication of what is intended will be adopted), it is difficult for many businesses to understand the full practical implications of the legislation in respect of reasonable adjustments. It should not be for businesses to have to second guess what the Government's plan is in this regard.

The Consultation Document states that there will be powers to make Regulations (secondary legislation) 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. Until such regulations are provided, feedback on this area can only go so far. Are these Regulations going to take the form of the UK Statutory Code of Practice? If so, this information should have been provided.”.
(Isle of Man Chamber of Commerce)

- 1.77. It is accepted that the consultation document may not have been clear on this point, but it can be confirmed that the intention is that any secondary legislation, codes of practice and guidance adopted in the Island in respect of reasonable adjustments should be very closely based on that which has been produced in the UK.
- 1.78. It will still ultimately be down to each individual employer or service provider to consider the question of what is reasonable based on their particular circumstances, but the guidance (and years of UK case law) should assist with this process. The website of the UK's Equality and Human Rights Commission (in relation to service providers) includes the following:

"What is meant by 'reasonable'

You only have to do what is reasonable.

When deciding whether an adjustment is reasonable you can consider:

- *how effective the change will be in assisting disabled people in general or a particular customer, client, service user or member*
- *whether it can actually be done*
- *the cost, and*
- *your organisation's resources and size.*

Your overall aim should be, as far as possible, to remove any disadvantage faced by disabled people.

You can consider whether an adjustment is practicable. The easier an adjustment is, the more likely it is to be reasonable. However, just because something is difficult doesn't mean it can't also be reasonable. You need to balance this against other factors.

If an adjustment costs little or nothing and is not disruptive, it would be reasonable unless some other factor (such as impracticality or lack of effectiveness) made it unreasonable.

Your size and resources are another factor. If an adjustment costs a significant amount, it is more likely to be reasonable for you to make it if you have substantial financial resources. Your organisation's resources must be looked at across your whole organisation, not just for the branch or section that provides the particular service. This is an issue which you have to balance against the other factors.

In changing policies, criteria or practices, you do not have to change the basic nature of the service you offer.”.

- 1.79. The duty to make reasonable adjustments applies in different ways for employers and for services providers (e.g. shops, hotels, etc.).
- 1.80. **Employers** will only need to consider making reasonable adjustments if they have one or more employees, or potential employees²⁹, who have a disability as defined in the Bill. Examples could include an employee who as the result of an accident becomes disabled or an employee who is diagnosed with clinical depression which affects their ability to carry out normal day to day tasks. In each case the employer will need to consider whether it is possible to make reasonable adjustments that would enable the employee to continue to be employed³⁰. If the employer decides that it is not possible to make reasonable adjustments to accommodate the disabled person that decision might need to be justified at some point before the Employment and Equality Tribunal. There is a large body of UK case law on this issue.
- 1.81. In line with the UK Act, **service providers** will in due course be under an anticipatory duty to consider the needs of clients or service users who may have a disability and whether they can make reasonable adjustments that would improve the access of disabled persons using their services (i.e. they will need to consider accessibility without having to be asked to do so). However, following the Resolution adopted by Tynwald at its July 2015 sitting that the Disability Discrimination Act 2006 should be brought into operation during 2016 (for further information see paragraph 1.92) businesses and service providers should be familiar with the main requirements in this area by the time that the Bill has been enacted. .
- 1.82. As it is not possible to say exactly what adjustments might be required as being reasonable for an employer who has one or more employees, or potential employees, who have a disability as defined in the Bill, or what adjustments it might be reasonable for a particular service provider to make, it is obviously not possible to accurately force what costs might be involved in a particular case. However, the cost of reasonable adjustments need not be large. The consultation document quoted information from 2014 that the average cost of a work place reasonable adjustment in the UK was £75³¹.
- 1.83. The IOM Chamber of Commerce response stated:
- "It is unrealistic and, even if it is correct, the UK's position now some 4 years after the Equality Act was introduced and decades after the underlying discrimination legislation was enacted (e.g. disability discrimination legislation 1995) is completely unhelpful and incomparable. It is respectfully submitted that this is misleading."*
- 1.84. It should be stressed that the figure quoted in the article was the average cost of reasonable adjustments by an employer for each worker with a disability³²; it did not cover the costs to service provider businesses under the anticipatory duty to make reasonable adjustments for clients, service users, etc. In addition, the length of time that the legislation has been in place may be largely irrelevant to the cost to an

²⁹ Further information about work related reasonable adjustments, and where adjustments may not be reasonable in relation to recruitment can be found, for example, at:

<http://www.personneltoday.com/hr/disability-discrimination-12-common-reasonable-adjustments-in-recruitment/>

³⁰ UK case law has established that the duty to determine reasonable adjustments lies with the employer. An employer cannot assume that their duty has been discharged just because a disabled employee (or the employee's advisers) cannot suggest any suitable adjustments. Employees may, however, make suggestions as to adjustments that could overcome any substantial disadvantage they face due to their disability. The employer should consider any such suggestions along with any other ideas of their own.

³¹ <http://www.peoplebusiness.co.uk/news.asp?ArticleID=59>

³² Employers have to make reasonable adjustments even if they don't employ the person directly - this includes contract workers, trainees, apprentices and business partners.

employer of reasonable adjustments for a new disabled worker or a newly disabled existing employee. It is unlikely that the employer would already have the particular necessary reasonable adjustments in place regardless of the fact that the UK legislation has been in place for a number of years.

- 1.85. It is accepted that the costs for service providers to make reasonable adjustments may be quite different to those required by employers of disabled persons, and that such businesses in the UK may have made necessary adjustments some time ago. However, it is worth noting that the Island's building regulations have closely followed those in the UK in respect of matters such as access for disabled persons for a number of years³³ and businesses will only have to make additional adjustments if they are reasonable. It is difficult to imagine any circumstances under which an adjustment that was either physically impractical or so expensive that it would jeopardise the viability of a business would be judged to be reasonable.
- 1.86. In addition, the Department of Health and Social Care, with the Multi-Agency Forum on the Disability Discrimination Act, has been working with the business and third sectors to pilot and establish the "tiered award scheme" on accessibility for persons with a disability. The access service run by Crossroads Care has been supporting the roll-out of these pilots and will be responsible for the administration of the scheme. The service also provides advice and assistance to individuals, business and organisations on disability issues. The tiered award scheme is an important step in raising awareness of disability issues and engaging with business and organisations about accessibility.
- 1.87. Further information about the position in the UK can be found at:
<https://www.gov.uk/government/publications/employing-disabled-people-and-people-with-health-conditions/employing-disabled-people-and-people-with-health-conditions>
<http://www.equalityhumanrights.com/your-rights/equal-rights/disability/disability-employment/work-making-reasonable-adjustments>
<http://www.equalityhumanrights.com/your-rights/service-users/adjustments-disabled-people>
- 1.88. The Island's equivalent of the UK's Access to Work scheme that is referred to on the first website linked above is the DED's Employment (Persons with Disabilities etc) Scheme 1999³⁴, under which financial assistance for the costs of reasonable adjustments in respect of disabled workers may be available.
- 1.89. If agreement cannot be reached on what constitutes a reasonable adjustment, it will ultimately be for the Employment and Equality Tribunal to decide, but it is envisaged that it will be possible for many cases to be resolved amicably without recourse to the Tribunal with the assistance of Manx Industrial Relations Service (for work related cases) or the Office of Fair Trading (for service provider cases).

³³ It should be noted, however, it should be noted that Approved Document M, which provides guidance on compliance with Part M (access and use of buildings) of Schedule 1 to the UK's Building Regulations states:

"Although the guidance in this Approved Document, if followed, tends to demonstrate compliance with Part M of the Building Regulations, this does not necessarily equate to compliance with the obligations and duties set out in the EA [Equality Act]. This is because service providers and employers are required by the EA to make reasonable adjustment to any physical feature which might put a disabled person at a substantial disadvantage compared to a non-disabled person. In some instances this will include designing features or making reasonable adjustments to features which are outside the scope of Approved Document M. It remains for the persons undertaking the building works to consider if further provision, beyond that described in Approved Document M, is appropriate."

³⁴ [https://www.gov.im/categories/working-in-the-isle-of-man/employment-\(persons-with-a-disability\)-scheme/](https://www.gov.im/categories/working-in-the-isle-of-man/employment-(persons-with-a-disability)-scheme/)

- 1.90. It must be emphasised that the purpose of the Bill is not to require employers to recruit or retain disabled persons who are not capable under any circumstances of carrying a job at the required level. If, however, with reasonable adjustments a disabled person would be able to carry out the job to an appropriate standard then he or she must be properly considered for recruitment or retention.
- 1.91. Although extremely difficult to quantify, it must be remembered that there can be financial benefits to businesses, employers and Government by improving the access of persons with a disability both to goods and services and to employment.
- 1.92. At the July 2015 sitting of Tynwald, the following Resolution was adopted:
"That Tynwald is of the opinion that the Department of Health and Social Care should as soon as possible consult other Departments affected by the implementation of the Disability Discrimination Act 2006 with a view to commence the laying of the necessary regulations and guidance for approval by Tynwald in December 2015 with a view to the Act's coming into operation in 2016."
- 1.93. It must be emphasised that the Disability Discrimination Act 2006 (DDA), which is generally based on certain parts of the UK's Disability Discrimination Act 1995, only applies to discrimination against persons with a disability in the provision of goods, services and functions. It does not provide any protection for persons with a disability in relation to employment or education. As such, the implementation should only be seen as an interim measure pending the enactment and commencement of the Equality Bill, and when the provisions of the Bill relating to disability discrimination are brought into operation the DDA should still be revoked as proposed.
- 1.94. The provisions of the DDA and the Equality Bill are not identical so the guidance and secondary legislation for the DDA and the Bill will differ. However, although there will inevitably be some duplication of effort required, bringing the DDA into operation ahead of the Equality Bill will introduce businesses and service providers to many of the concepts concerning discrimination against persons with a disability in relation to the provision of goods and services. As a result, it is likely that by the time the Bill is brought into operation many of the initial issues in this area with respect to businesses making reasonable adjustments will have been addressed.

ACTION: The provisions will be retained unchanged. Secondary legislation and guidance in respect of what does and does not constitute a disability for the purposes of the legislation will be provided. Guidance and examples of UK case law will be provided in relation to reasonable adjustments.

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- Q11 Do you have any comments about PPV accessibility regulations?**
Q12 Do you have any comments about taxi accessibility regulations?
Q13 Do you have any comments about a requirement for drivers of taxis and private hire vehicles to assist wheelchair users unless exempted?
Q14 Do you have any comments about the requirement for drivers of taxis and private hire vehicles to carry assistance dogs unless exempted?
Q15 Do you have any comments other about the accessibility of the Island's transport for disabled persons?

- 1.95. The consultation document explained the proposals concerning access to the Island's transport systems by disabled persons (in particular those with mobility issues and those who rely on guide dogs and other types of assistance dog).

- 1.96. There were a number of responses to these questions and the overwhelming majority of which supported the principle of ensuring such access so far as practically possible.
- 1.97. Although there will be no specific exemption for heritage transport systems (i.e. horse trams, MER, steam railway, vintage buses, etc.) it is considered that physical adjustments to these forms of transport would in most cases be unlikely to be reasonable. However, more modern PPV (public passenger vehicles), taxis and private hire vehicles which are obtained from off-Island, in most cases from countries that are ahead of the Island in respect of disability access standards, should generally be accessible to both disabled persons with mobility issues and those who use assistance dogs.
- 1.98. This does not mean, for example, that every taxi in the Island must be wheelchair accessible; this would be neither practicable nor desirable. Indeed, some people with mobility issues find it difficult to use the often high step into such vehicles and find saloon type vehicles easier to use. Instead, a range of vehicles should be available to ensure the best possible access for disabled persons.
- 1.99. The Bill set out two ways of legislating in this area. The first, and most obvious way, was set out in Part 12 of the draft Bill which closely followed the provisions set out in the UK Act. However, Schedule 23 (consequential and minor amendments) to the draft Bill contained an alternative approach – the insertion of an enabling power into the Road Transport Act 2001 – to allow the same result to be achieved using secondary legislation. This second approach was preferred by the Department of Infrastructure (DOI) as giving more flexibility.
- 1.100. It should be stressed that the Regulations would replicate the substantive provisions of the UK Act including the requirement to carry assistance dogs (unless an exemption has been obtained on medical grounds), assistance for wheelchair users, etc.
- 1.101. Although it had originally been intended that the necessary enabling powers would be inserted into the Road Transport Act 2001 by the Equality Bill, given the delay to this Bill it is now envisaged that this will be achieved by the Road Traffic Legislation (Amendment) Bill instead.

ACTION: Following consideration of this matter and the provision of draft regulations to be made by the DOI, it has been decided to remove Part 12 of the Bill and the enabling powers from the Bill. Instead enabling powers will to be inserted into the Road Transport Act 2001 by the Road Traffic Legislation (Amendment) Bill. The draft Regulations will be issued for consultation by the DOI in due course.

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

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

1.102. The consultation document stated that under the Island's Employment (Sex Discrimination) Act 2000 it is already unlawful for an employer to discriminate between men and women in terms of their pay where a woman is employed in **like work** to that of a male colleague or where a woman is employed in **work rated equivalent** to that of a man in the same employment (or vice versa). It also explained that in a successful equal pay case the Employment Tribunal can award up to a maximum of 2 years' pay arrears, based on the difference between the pay of the claimant and the comparator worker. To date, however, no equal pay claims under the 2000 Act have been made at the Employment Tribunal.

1.103. However, the Bill introduced the additional concept of **work of equal value** that exists under the UK Act, where an equal pay case can be brought where a woman is engaged in a job which is different to that of a male comparator colleague but is of equal value in terms of the demands of the job such as the effort, skill, responsibility, decision making demands, etc. It was also proposed that the maximum pay arrears that could be awarded in a successful equal pay case should be increased to six years in line with the UK.

1.104. There was a range of responses to this question, although in terms of numbers a large majority (including the Prospect and UNITE unions) were in favour of introducing equal pay for work of equal value. Indeed, a number of the responses wished the provisions to go further than proposed:

- It was suggested that interest should be payable on awards of pay arrears as in the UK³⁵;
- that there should not be a lead-in period before the provision was brought into operation (it was proposed that there should be a two year lead-in period); and
- that the full six years pay arrears that can be awarded in England and Wales should be reached more quickly than proposed in the consultation document (under the Bill no equal value claims could be made relation to any period prior to the provision coming into operation so it would be at least six years after that time before the full amount of arrears could be awarded in a successful equal value case).

1.105. However, some concerns were expressed about the introduction of equal pay for work of equal value:

"Some members have expressed concern that the concept of equal value is so wide and open to interpretation which will make it difficult for any business to have certainty.

...

There is not enough detail offered in the Consultation Document about the proper effect of equal value. This is a complex area and it will need a lot of explaining, guidance and support and there appears to be no plan for this."

(Isle of Man Chamber of Commerce)

³⁵ Interest is not currently payable on arrears awarded in like work or work rated as equivalent cases in the Island and the consultation document proposed that interest should also not be applied to equal value awards

"Another area of concern here is the clause 56 relating to Equal Work. Whilst we would agree that employees doing the same job/role should be paid equally regardless of sex, the work of 'equal value' is a major trip wire from an employer view point as the definition is open to interpretation depending on your view point and would certainly be exploited in cases of a small population of employees. I'd sooner see this removed."

(Triumph Actuation Systems (through the Chamber of Commerce))

"• Concern about the introduction of new terms and conditions for new starters and differences. What happens if someone has protected pay – eg., if you had protected pay for 10 years would this be an issue due to impact on others? What allowance for grandfather rights?

• Is there a timeframe on how long employers would have to put their 'own house in order' as the issues would take time to sort through?

• How do we reward employees for 'experience' if they do the same job? Concerns about the reward system and implication for existing practise and what would be deemed as acceptable as this may conflict with legislation. Guidance would be required for employers at the earliest opportunity.

• How would bonus amounts paid on length of service be dealt with under the Equality Bill?"

(Chartered Institute of Personnel and Development)

"We support this in principle, as we recognise the Island has committed to it internationally. But has big consequences that have not so far been highlighted... In respect of 3.52, is there any reason why the Manx Industrial Relations Service could not fulfil the role of appointing a "qualified person"? They do this already for arbitration cases."

(Office of Human Resources - Cabinet Office)

1.106. Following discussion with the Manx Industrial Relations Service (MIRS), the suggestion that MIRS rather than the Appointments Commission could be responsible for appointing an independent qualified person to assist the Tribunal in considering equal pay for work of equal value cases has been accepted.

1.107. It is accepted that work of equal value can be a complex area and that in the UK there have been some quite long running and expensive cases (mostly concerning public authorities, although there is currently a large ongoing case involving ASDA which is likely to run into 2016). It is, though, an area in which there is a great deal of UK guidance and case law that can be drawn on and adapted for use in the Island, and it is intended that this information would be provided in time for the start of the lead-in period. In addition, it is envisaged that an Equality Officer will be appointed on fixed term basis when the Bill has been passed and the main role of this officer will be to provide guidance and support to employers, third sector bodies, Government and other public sector bodies on all aspects of the Bill. MIRS will also be able to provide advice and assistance on the employment related provisions of the Bill.

1.108. As set out in the consultation document, it is envisaged that there will be a (minimum) two year lead-in period after the Bill has received Royal Assent during which time all employers would be well advised to consider whether their pay systems could be challenged as being discriminatory between men and women. As a purely illustrative example of the time that will be available to employers to make any necessary changes (and it may well be that in many cases no changes are required), if the Bill were to receive Royal Assent in July 2017 and the first provisions of the Act were brought into operation in early 2018 no claims in respect of equal pay for work of equal value could be made until perhaps 1 January or 1 April 2020.

- 1.109. It is not intended that employers should be required to carry out a full equal pay audit, although undertaking a review of pay systems and making any changes that are deemed to be necessary is good practice which should reduce the likelihood of being subject to future equal pay claims. However, like the UK Act it is proposed that the Bill will include an enabling power to make Regulations so that the Tribunal can order the respondent to carry out an equal pay audit in any case where the tribunal finds that there has been an equal pay breach.
- 1.110. A "Toolkit" to assist with carrying out an equal pay audit has been developed by the Equality and Human Rights Commission (EHRC) in the UK and it can be found on their website³⁶. The EHRC has also produced a statutory Code of Practice on Equal Pay³⁷ much of which can be used as guidance by employers in the Island, although it is intended that an Isle of Man version will be prepared in due course by adapting the UK document. There are also numerous examples of advice and guidance about equal pay that are freely available on the internet.
- 1.111. It should be noted that clause 60 of the consultation draft of the Bill provides a defence for employers where there are differences in pay between a female employee and a male comparator³⁸ if the employer can show that the underlying reason for the difference is because of a material factor reliance on which:
- does not involve treating a person less favourably because of that person's sex than a person of the opposite sex is treated, and
 - is a proportionate means of achieving a legitimate aim.
- 1.112. In terms of issues such as pay protection and "grandfather" rights there is relevant UK case law³⁹ which indicates that (depending on the facts of each case of course) such factor can be justified as a proportionate means of achieving a legitimate aim. However, it has been decided that an enabling power will be included in the Bill so that secondary legislation can be made to give more clarity to what may constitute "a proportionate means of achieving a legitimate aim" in secondary legislation.
- 1.113. Provided that the same terms apply to male and female employees, bonus payments for experience and length of services can also be justified from a sex equality point of view. However, it should be noted that benefits based on length of service may bring age discrimination issues into consideration. Although there is an absolute exemption for length of service benefits up to five years⁴⁰, if a worker's period of service exceeds five years, the employer may only rely on the exemption if it reasonably believes that doing so fulfils a business need. Examples of a business need could include rewarding higher levels of experience, encouraging loyalty, or increasing or maintaining the motivation of long-serving staff. UK case law⁴¹ has also confirmed that retention payments can also be justified.
- 1.114. The Employment Statutory Code of Practice issued by the Equality and Human Rights Commission in the UK states:

³⁶ <http://www.equalityhumanrights.com/private-and-public-sector-guidance/employing-people/managing-workers/equal-pay/equal-pay-audit-toolkit>

³⁷ <http://www.equalityhumanrights.com/equality-act-codes-practice>

³⁸ It could also be a male employee taking a case on the grounds that a female comparator was receiving more favourable terms.

³⁹ [Haq & Ors v The Audit Commission \[2012\] EWCA Civ 1621](#)

⁴⁰ See paragraph 7 of Schedule 9 to the consultation draft of the Bill.

⁴¹ [Bradley v Royal Holloway & Bedford New College, University of London UKEAT/0459/13/SM - http://www.employmentappeals.gov.uk/Public/Upload/13_0459fhATSM.doc](#)

"This test of 'fulfilling a business need' is less onerous than the general test for objective justification for indirect discrimination ... However, an employer would still need evidence to support a reasonable belief that the length of service rule did fulfil a business need. This could include information the employer might have gathered through monitoring, staff attitude surveys or focus groups. An employer would be expected to take into account the interests of their workers and not be motivated simply by financial self-interest."

- 1.115. In relation to the pay arrears that can be awarded in a successful equal pay claim, a range of views were expressed – some consultees considered that 6 years' pay arrears, with interest added should, in line with England & Wales, be introduced immediately, while other were of the view that arrears should not be payable any further back than the date of the actual claim.
- 1.116. Limiting pay arrears to the date of the claim would of course preclude workers who had recently left the employer, for whatever reason, from making any claims. It should also be noted that two years' pay arrears can already be awarded in "like work" and "work rated as equivalent" equal pay cases under the Employment (Sex Discrimination) Act 2000. Removing or curtailing this existing right would undoubtedly be seen as a significant retrograde step in equal pay rights.
- 1.117. Because it is one of the few ways to begin addressing the undeniable gender pay gap that exists, but also because the Island is under an international obligation to introduce provisions concerning work of equal value by virtue of its acceptance of the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women, it is considered that the Bill should continue to include the clauses concerning work of equal value.
- 1.118. However, it is accepted that there might be legitimate concerns over increasing the arrears period from two to six years at the present time. It is therefore proposed that initially the maximum arrears that can be awarded in a successful equal pay case should be limited to two years. Since an equal pay for work of equal value claim will not be able to be made in respect of any time before the work of equal provisions come into operation it will be a further two years after the commencement of the provision before the maximum arrears could be awarded (i.e. if the equal pay for work of equal value provisions of the Bill came into operation on 1 January 2020, it would not be until after 1 January 2022 that the Tribunal could award the full two years' pay arrears in a successful claim).
- 1.119. An enabling power to allow the arrears period to be reviewed and consulted upon and, if considered to be appropriate, increased will be included in the next draft of the Bill. Unlike in the UK, it is not intended that interest will be added to equal pay awards.

ACTION: As the Island is under an international obligation to implement equal pay for work of value, the provision for equal pay for work of equal value will be retained in the Bill but subject to the amendments referred to above.

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

- 1.120. Although when the UK Act was first enacted it provided for a default retirement age (DRA), quite soon afterwards the Act was amended so that there is no longer a DRA in the UK. The draft Bill followed the current position under the UK Act.
- 1.121. This is one the areas of the Bill which resulted in the most comments, with a wide range of views being expressed.
- 1.122. There was a fairly even division between those who wished to see a default retirement age, albeit perhaps at a higher age than some employers currently set, and those such as UNITE – the Union which was in favour of following the position in the UK.
- "Chamber recommends that Government should instead consider raising the retirement age if appropriate (e.g. in line with any new date for receiving state pension)."*
(Isle of Man Chamber of Commerce)
- "Unite believes that workers should be able to decide themselves when they wish to retire and supports the legislation which has restricted the ability of employers to force retirement on grounds of age. Compulsory pension ages force retirement regardless of whether people can afford or wish to retire and reduces the need for employers to provide decent pensions if they want to manage their older workforce."*
(UNITE – the Union)
- 1.123. At present in the Isle of Man an employer can set whatever retirement age it wishes for its employees, with the only requirement being that it must be the same age for men and women. Currently, under the Employment Act 2006 and the Redundancy Payments Act 1990 respectively employees lose the right to claim unfair dismissal and to receive a redundancy payment when they have reached the normal retirement age set by the employer or the age of 65 if no normal retirement age has been set by the employer.
- 1.124. There have been cases of people in the Island being compulsory retired before reaching the State Pension Age, with little or no occupational pension, who have then encountered financial difficulty because they have been unable to obtain further employment. With plans for the State Pension Age to rise to at least the age of 68 due to increased life expectancy, this is likely to become more of an issue without legislation to prohibit unnecessary and unfair age discrimination.
- 1.125. Those who support a DRA generally have two main arguments:
- it provides certainty to employers and employees and avoids the need to retire employees on the grounds of capability; and
 - older employees staying in the workforce for longer will lead to higher youth unemployment.
- 1.126. Taking the second point first, a number of reviews⁴² have concluded that there is no empirical evidence for a correlation between earlier retirement and increased youth employment or a higher retirement age and increased youth unemployment. In fact,

⁴² For example:

<http://wol.iza.org/articles/effect-of-early-retirement-schemes-on-youth-employment.pdf>
<http://www.ifs.org.uk/wps/wp1002.pdf>

the contrary appears to be true, i.e. increasing the employment of older workers also leads to more opportunities for younger workers.

1.127. It may be the case for a particular business that having some of its existing employees work for longer may have the temporary effect of delaying the employment of new, potentially younger, employees but there is no reason to suppose that the academic findings in relation to other places should not apply to the Isle of Man. It should also be borne in mind that the Isle of Man is not a closed employment system. Many younger people wish to leave the Island for education, experience or employment and, to fill vacancies, other people (both younger and older) come to the Island. It must also be noted that the Island has had, and continues to have, very low levels of unemployment.

1.128. Turning to the first bullet above, the consultation document suggested that:

"...any competent manager should be able to carry out capability procedures in an appropriate, fair and sensitive manner whatever the underlying reason for the lack of capability, at any point in the employee's working life".

One of the responses to the consultation questioned where this statement had come from. This would simply appear to be a self-evident truth – if a manager is not able to deal properly with any capability issues of their employees, it would seem that they are failing in an important part of their role, as well as failing both the business and the employee. However, it is accepted that in reality many managers probably deal with capability issues either poorly or not at all. The following may be a recognisable scenario: "he is fairly incompetent these days, but it will be difficult to deal with it so I will just wait until he has to retire in a couple of years". If a default retirement age were to be introduced which is in line with the increasing State Pension Age capability issues would still be likely to become more of an issue that would have to be addressed, and putting off dealing with employee capability issues until a person was forced to retire will become less and less acceptable. A change of mind-set may well be required and consideration of performance/ capability issues should become an integral part of the manager-employee relationship, and dealt with fairly and sensitively whatever the age of the employee.

1.129. It should be stressed that under the UK Act there are a number of exemptions in relation to age discrimination and also different treatment can be justified if it can be shown to be a proportionate means of achieving a legitimate aim. UK case law (e.g. *Seldon v Clarkson Wright & Jakes*⁴³) in this area has confirmed that a business can still apply a set retirement age if it can show that it meets this test. Although this case was initiated on the basis of the UK legislation that preceded the Equality Act 2010 (i.e. at a time when there was still a default retirement age in the UK) it gives useful pointers on the types of issues that may qualify as being a proportionate means of achieving a legitimate aim, although each case will need to be considered on its own facts.

1.130. The response by Boal & Co to this question raised two important issues:

- the misunderstanding that the Bill will prevent age related pension contributions
("We are aware of a widespread myth emerging from local consultation meetings, and comments from government advisers, that the equality legislation will mean an end to the situation found in some defined contribution occupational pension

⁴³ The long running case of *Seldon v Clarkson Wright & Jakes* which was considered by the UK Supreme Court and finally concluded in 2014:

<http://www.bailii.org/uk/cases/UKSC/2012/16.html>

http://www.bailii.org/uk/cases/UKSC/2014/0434_13_1305.html

schemes where contribution rates are designed to be age-specific (and increasing with age). It is being said that such scheme designs will no longer be possible after the equality legislation comes into force.”); and

- the position of international pension schemes

(We are somewhat concerned that the Bill will introduce new anti-discrimination provisions (most notably on the grounds of age) in relation to occupational and personal pension schemes, without distinction between domestic pension schemes and international pension schemes (for non-residents). The Isle of Man is now the leading centre for international pension schemes...

There will be occasions in which we believe it would be inappropriate, and unhelpful, to apply the 'local' equality provisions to international pension schemes. Doing so could prove harmful to the prospects for new business, where we compete with other jurisdictions.

... we respectfully request that similar consideration and exemptions are provided for in respect of "international pension schemes" (being s50B & 50C ITA1970 tax-approved schemes along with ITA1989 schemes for non-resident members).”).

- 1.131. In respect of the first point it is considered that the Bill, in following the UK Act, should in no way lead to difficulty with age-related pension contributions where these are a natural result of actuarial factors or are capable of being objectively justified.
- 1.132. After consideration of the second point above, it has been agreed that international pension schemes should be excluded from the scope of the Bill.
- 1.133. Experience in the UK is that the abolition of the DRA has not been particularly problematic, whilst, in addition, it should be borne in mind that the preceding regime which had supported the DRA had been complex and had contained a number of potential pitfalls for employers. Further, there is a good deal of guidance available in the UK concerning the existing (post-DRA) position (including the guidance and code of practice issued by the EHRC) which can and will be adapted for use in the Island.
- 1.134. To offset the potential increase in redundancy payments as a result of the age discrimination and retirement provisions of the Bill it is intended that changes will be made to the way that redundancy payments are calculated (see response to questions A1 and A2 later in this document).
- 1.135. The provisions of the Bill relating to age discrimination and retirement will not come into operation immediately after Royal Assent. If the Bill received Royal Assent in July 2017 it is tentatively envisaged that these provisions will be brought into operation in first half of 2019.

ACTION: The Bill will continue to follow the UK Act in respect of age discrimination and retirement.

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

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

- 1.136. As explained in the consultation document, it is not intended that the equivalent of the UK's Equality and Human Rights Commission (EHRC) will be created in the Island. However, the EHRC has a number of important roles that will need to be fulfilled, at least to a degree, in the Island.
- 1.137. Coming out of the consultation exercise was the clear message, particularly from the Isle of Man Chamber of Commerce on behalf of its members, that there is a need for adequate information and guidance and support both ahead of the legislation coming into operation and when it has come into operation.
- 1.138. The consultation document noted that the Bill contains a broad enabling power for the Council of Ministers to make such arrangements as it considers appropriate to promote equality of treatment in relation to persons with protected characteristics and to facilitate understanding of, and compliance with, the Bill and any subordinate legislation, codes of practice or guidance made or issued under it. The consultation document suggested that this power could be used, amongst other things, to appoint a person on 2 year fixed term basis to prepare and provide training, briefings, presentations, advice and guidance to Government, business, voluntary organisations and the public.
- 1.139. The Chamber of Commerce questioned whether such an appointment would be sufficient and it suggested that the role would ultimately fall to the Manx Industrial Relations Service (MIRS). It is undoubtedly the case that MIRS will have a significant ongoing role in respect of the employment aspects of the Bill, in the same way as it has a role in other employment issues, and MIRS has not objected to having this responsibility subject to it having sufficient resources⁴⁴. The purpose of an "Equality Officer"⁴⁵ initially, as with the similar "Discrimination Officer" who was appointed under the Employment (Sex Discrimination) Act 2000 ("the 2000 Act"), will be to lay the groundwork for the implementation and understanding of the Bill – to lead (probably with the assistance of a cross-Government working group) on the preparation of appropriate guidance, codes of practice and secondary legislation using the UK documentation as a starting point; and to prepare and provide initial briefings, presentations and training for all interested parties.
- 1.140. How long it will be necessary for there to be such a role will be the subject of further consideration in due course. Certainly with the 2000 Act the need for the Discrimination Officer diminished within a couple of years when the legislation bedded in and now in practice MIRS deals with any questions relating to that Act. However, it is accepted that the Bill is much broader than the 2000 Act and if it is found that there is a need for an Equality Officer to continue in post for longer than currently envisaged it will be possible for the term of the post to be extended.

⁴⁴ It is understood that MIRS is already working with OHR to address resource issues as it believes a restructure is needed within MIRS primarily because the current structure no longer fits its needs but also so that it can cope with any increase in its workload when the Equality Bill is introduced.

⁴⁵ As the Bill is much broader than just employment issues it is likely that the Cabinet Office would be the most appropriate place for such a role to be based.

- 1.141. It should be noted that although there are some differences between the Bill and the UK Act, because the Bill is closely based on the UK Act much of the information provided by the EHRC on its website⁴⁶ will already be relevant and useful to businesses, service providers and others who are interested in how the Bill will work and be interpreted in the Island. It is intended that the documentation that will be prepared for the Bill will be based on the UK documentation with only those adaptations that are necessary to take account of the limited differences between the Bill and the UK Act. This means that the Island will not be “reinventing the wheel” and it will save a considerable amount of time and resources. It also means that businesses that operate both in the Island and the UK should mainly just need to take account of the limited differences.
- 1.142. Since the Island will not have its own EHRC, as indicated above, it envisaged that the proposed Equality Officer will initially coordinate and lead on the initial preparation of the necessary guidance, codes of practice, etc. Subsequently, as the Bill cuts across most of Government, it is likely that the Cabinet Office will retain overall responsibility, in consultation with relevant Departments and other bodies, for ensuring that such documentation is kept up to date.
- 1.143. Although some work can be started in advance, obviously until the final shape of the Bill is known it is not possible to finalise any guidance on the Bill.
- 1.144. Those who responded to the question about the Tynwald Advisory Council for Disabilities (TACD) were generally supportive of its role being extended to cover all of the protected characteristics. A meeting with the TACD also confirmed that the members of that body had no overriding objection to the proposal for the body to become the Tynwald Equality Consultative Council (TECC). However, a number of the responses, and indeed that of the TACD itself, suggested that the number and the range of experience of the members should be expanded to reflect the proposed change.
- 1.145. It should be emphasised that the purpose of the TECC is not to be the Island’s Equality and Human Rights Commission. Its role and remit in respect of the protected characteristics will be very much the same as that of the TACD in respect of disability. That role includes considering such matters in respect of any of the protected characteristics as it sees fit and giving advice to any relevant part of the Government on matters relating to the operation of the Bill or the exercise of any power conferred by the Bill or otherwise relating to persons with a protected characteristic. Another important role of the TECC (as with the TACD at present) will be to provide a politically led body that is independent of the Government that can be a point of contact for a person with a protected characteristic to be able to raise issues and concerns.
- 1.146. Although it was suggested in the consultation that the TECC should include a representative with each of the protected characteristics, or even sub-divisions of the characteristics such as mental health and physical disability, this is not considered to be necessary or practical. Not only could this make the operation of the TECC unwieldy, in some cases it could be divisive (if the person on the TECC with responsibility for religion was a Catholic, it might be argued that there should also be a Protestant, a Muslim, a Jewish person, a humanist, etc) and some roles might be difficult to fill (such as a person who is undergoing or has undergone gender

⁴⁶ <http://www.equalityhumanrights.com/>

reassignment). Of course there will be some cases where a single member of the TECC will have personal experience or knowledge of more than one protected characteristic – for example, a woman with a disabled child or an older black man.

- 1.147. The most important attribute for the members of the TECC will be to be generally open-minded and sympathetic with a range of life experience. Where TECC considers that it requires further advice, expertise or information there will be nothing to prevent it from approaching other persons or bodies for assistance.

ACTION: The provisions of Bill in these areas will generally be retained. However, it is proposed that the lay membership of the TECC should be increased from three to five members (with two Tynwald Members retained as the Chairperson and Deputy Chair).

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

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

- 1.148. Under the UK Act discrimination is generally not a criminal offence and a person who considers that they have been discriminated against must seek redress through civil action; cases relating to discrimination in employment are dealt with by an employment tribunal but cases concerning discrimination in the provision of goods and services are dealt with by the county courts in England and Wales and the sheriff courts in Scotland.
- 1.149. Under the Bill it was proposed that although civil action should still be main way of seeking redress instead of splitting jurisdiction between a tribunal and the courts it was proposed that the remit of the Island's Employment Tribunal should be expanded to deal with all cases and that its name should be consequentially changed. One reason for this departure from the UK Act is that it is considered it will be easier for claimants to be able to take their cases to a tribunal rather than the court. Another reason is that in a small jurisdiction where the number of cases will be much smaller than in the UK it may be more advisable to concentrate experience and expertise within a single body.
- 1.150. The large majority of those who responded to these questions supported the proposal that the Island should follow the UK by having civil action through the Tribunal as the main way for the Bill to be enforced. There was also widespread support for the existing Employment Tribunal to be renamed and its remit expanded to cover claims of discrimination in the provision of goods and services.
- 1.151. However, one existing lay member of the Employment Tribunal opposed both the expansion of the Tribunal's remit and its renaming. This was largely because it was argued that its lay members are appointed because of their expertise in employment matters.

"The Employment Tribunal is most certainly not a suitable forum for dealing with the question of goods and services. Its lay members are appointed because of their expertise in employment matters, which is quite another matter."

(Mr Murcott)

1.152. A number of the responses also referred to the need for the members of the proposed Employment and Equality Tribunal to have adequate training.

"many of the procedures will be the same as already in place at the moment. Assuming appropriate training etc is in place then this would be a practical solution."
(Mr Young)

"The RCN agrees with renaming the Employment Tribunal to the Employment and Equality Tribunal but would urge the IOM government to ensure that appropriate equality and diversity training is provided to Tribunal judges and panel members."
(Royal College of Nursing)

"No. The Consultation Document should have addressed the cost of training the Employment Tribunal panel members so that they are fully up to speed with a complicated area of the law. The legislation and case law is so complex that a couple of hours training will not be sufficient."
(Isle of Man Chamber of Commerce)

"...members of the proposed EET must have the required skills and knowledge required."
(Prospect)

"Is there any evidence about the effect on the workload for broadening the powers of the Tribunal to include goods and services [in] Jersey ... some pointers from how this has operated in practice may be helpful. I suspect that folk on the island may be less aggressive about these rights than a cross-section of the UK. I see no need to change the constitution of the Tribunal. The present ET panels are likely to have sufficient skills and experience as a key ingredient will be life-experience plus guidance from a legally qualified Chair. However no doubt in future the Appointments Commission could include reference to the wider range of tasks to be expected. If based on experience it proves that the task is too tricky, then it is likely to be easier to create a special pool of panel members than to create one now and then need to disband. It will potentially create logistical problems within the Tribunal system generally because of shortage of hearing-rooms and staff to sit as Clerks - something that is already a problem in my experience."
(Douglas Stewart, Deputy Chair, Employment Tribunal)⁴⁷

1.153. The current structure of the Employment Tribunal is as follows:

- (a) a person to act as chairperson of the Tribunal;
- (b) a panel of persons to act as deputy chairpersons of the Tribunal;
- (c) two panels of persons to act as members of the Tribunal, one panel consisting of persons appointed after consultation with such organisation or organisations as appear to the Appointments Commission to be representative of employers, and the other panel consisting of persons appointed after consultation with such organisation or organisations as appear to the Appointments Commission to be representative of employees.

1.154. The chairperson, deputy chairpersons and lay members of the Tribunal are appointed by the Appointments Commission in accordance with the Tribunals Act 2006.

1.155. The chairperson and deputy chairpersons must each be a barrister, advocate or solicitor, in each case of not less than seven years' standing. Whilst those persons who apply to be the Tribunal's chairperson or a deputy person will obviously have an

⁴⁷ Douglas Stewart, Deputy Chair of the Employment Tribunal at the time of the consultation but after the consultation closed he was appointed as Chair of the Tribunal after the consultation closed. This document will refer to Mr Douglas as the Deputy Chair as this was his position when his comments were received.

interest in employment issues, in a small jurisdiction such as the Isle of Man in practice most appointees are legal generalists rather than employment law specialists.

- 1.156. Similarly with the lay members of the Tribunal, whilst those who apply and are appointed to the "employer" panel and to the "employee" panel will undoubtedly have an interest in employment issues (and probably some knowledge and/or experience from one side or the other) in the Island they are unlikely in most cases to be employment law "experts" as such. Again, they will normally be interested generalists.
- 1.157. Although there have been very few sex discrimination claims made to the Tribunal since the Employment (Sex Discrimination) Act 2000 came into the operation, the principles of considering a claim of discrimination in employment will be comparable, if not identical, whether the discrimination is alleged to be on the grounds of sex or one of the other protected characteristics such as disability or race. The main principles involved are fair and impartial consideration of the information available to the Tribunal and consistency of decision making.
- 1.158. Those same principles will also apply whether the discrimination is alleged to have taken place in the course of employment or during the provision of goods and services.
- 1.159. Very little can yet be drawn from experience of the Employment and Discrimination Tribunal in Jersey, as the Discrimination (Jersey) Law 2013 only came into force on 1 September 2014, and only in respect of the protected characteristic of race. The Tribunal, in its Annual Report⁴⁸ for the calendar year 2014, advised that three discrimination complaints had been received during the first four months of operation of the new Law, one of which had been rejected, compared to 173 complaints under the Employment (Jersey) Law 2003. It may be more instructive to consider the profile of complaints to the Jersey Tribunal when the Discrimination (Jersey) Law 2013 is extended to cover the protected characteristics of sex, sexual orientation, gender reassignment, and pregnancy and maternity as from 1 September 2015.
- 1.160. In relation to training for members of the Tribunal this is recognised by the Appointments Commission as an important issue for the members of all the Tribunals for which it is responsible.
- 1.161. It is envisaged that a major part of the role of the proposed Equality Officer would be to provide training to a wide range of persons and bodies and the preparation of training and information resources for future reference.
- 1.162. It may be noted that section 11 of the Tribunals Act 2006 makes specific provision for the remuneration of members of tribunals to which the Act applies who attend relevant training:

"11 Training

(1) *This section applies to —*

(a) *a member of a Part 1 tribunal or a Part 2 tribunal, and*

(b) *a member of a panel from which members of a Part 2 tribunal are drawn.*

(2) *The Treasury may —*

⁴⁸ <http://www.jerseyemploymenttribunal.org/media/1060/annual-report-2014.pdf>

- (a) defray the whole or part of the cost of the attendance by a person to whom this section applies at a course of training relevant to his duties as a member of the tribunal in question and approved by or on behalf of the Treasury for the purpose of this section, and
- (b) pay to such a person allowances, of such amounts and subject to such conditions as the Treasury may determine, in respect of his attendance at any such course of training.”.

ACTION: It is considered that the remit of the Employment Tribunal should be expanded to deal with all discrimination cases under the Equality Bill and the Tribunal should be renamed as the Employment and Equality Tribunal.

However, it is recognised that Part 9 (enforcement) in the consultation draft of the Bill requires further work, and that Part of the Bill will be redrafted to make it more consistent and streamlined.

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- Q23. Do you have any comments about the Manx Industrial Relations Services dealing with conciliation/mediation for employment related equality cases?**
- Q24. Do you have any comments about the Office of Fair Trading dealing with conciliation/mediation for goods and services related equality cases?**
- Q25. Do you have any comments about the Education Council having a role in trying to resolve disputes involving pupils in schools?**

1.163. It was proposed that under the Bill the Manx Industrial Relations Service should have the power to carry out conciliation/mediation in all employment related equality cases (as it currently does with cases under the Employment (Sex Discrimination) Act 2000); that the Office of Fair Trading should deal with cases relating to discrimination in the provision of goods and services; and the Education Council could have role in trying to resolve disputes involving pupils in schools.

1.164. There was complete support for the Manx Industrial Relations Services (MIRS) dealing with conciliation/mediation in employment related equality cases, subject to MIRS having sufficient resources and any necessary training being made available to its officers. For example:

"Chamber members all agree that the service provided by the MIRS is excellent. However, members have expressed strong concern about the additional pressure that this will place on the MIRS."

(Isle of Man Chamber of Commerce)

"This is supported by the CIPD. There needs to be additional resource included in the scope for implementation due to the impact both supporting employers and employees." (CIPD)

"whilst there are no real issues arising from this we do have some concerns in relation to demand as opposed to resources available." (Prospect)

1.165. Officers in MIRS routinely keep up to date with developments in employment legislation and case law, including important developments in the United Kingdom. It is understood that MIRS is currently working with the Office of Human Resources to address resource issues as it believes a restructure of the Service is needed, primarily because the present structure no longer fits its needs but also so that it can cope with an increase in its workload when the Equality Bill is introduced. However, as advised elsewhere in this document, it is envisaged that initially additional training,

advice, support resource will be provided which will not only assist MIRS but also deal with some of the workload relating to the Bill that would otherwise have fallen to MIRS.

- 1.166. There was also strong support for the Office of Fair Trading (OFT), including from the OFT itself, being responsible for conciliation/mediation for goods and services related equality cases; again subject to there being adequate resources and training available. However, the Trustees of the Manx Blind Welfare Society stated that it would be more appropriate for this role to be carried out by an independent body and the Association of Teachers and Lecturers suggested that the OFT was possibly perceived as "a weak and ineffective body".
- 1.167. The OFT advised that it already has staff trained in mediation and conciliation under the Financial Services Ombudsman Scheme. Although training and guidance about the Bill and its requirements will be available to these staff, it is considered that training in mediation and conciliation in one area should generally be quite portable for use in other areas.
- 1.168. As regards the Education Council having a role in trying to resolve disputes involving disabled pupils in school some of the responses questioned whether this body was sufficiently impartial. Under paragraph 1 of Schedule 3A to the Education Act 2001 the constitution of the Education Council is as follows:
- "1. The Council shall consist of not more than 20 persons, who —*
- (a) shall be appointed by the Appointments Commission after consultation with the Department; and*
 - (b) shall not include —*
 - (i) a member of the Council or the Keys,*
 - (ii) a member of the Isle of Man Civil Service,*
 - (iii) any employee of the Department, or*
 - (iv) a teacher who works at a provided school, maintained school or special school."*
- 1.169. It would appear from the provision set out above that the impartiality of this body is guaranteed in legislation.
- 1.170. However it has recently come to light that in practice the Education Council does not operate in the way that had been expected from the provision above. The Minister for Education and Children is the Chair of the Education Council and it appears that the Department's political Members also attend meetings of the Council and act as the Chair if the Minister is absent. As such, at present the Education Council could well be considered to be insufficiently impartial and independent to carry out the mediation role that had been envisaged.
- 1.171. Following further deliberation on this matter it is considered that attempting mediation in cases of disputes involving in schools might initially rest with the OFT. If mediation is unsuccessful there will still be the option of bringing a case to the Tribunal.
- 1.172. If in the future a more independent person or body were to be appointed, such as a Children's Commissioner or Schools Ombudsman, consideration could be given to that person or body taking over mediation in school equality cases.

ACTION: The proposals in respect of MIRS and the OFT will be retained but with mediation in schools cases initially also resting with the OFT rather than the Education Council. The Bill will be amended accordingly.

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

1.173. Under the Bill all public authorities in the Island (within the meaning of section 6 of the Human Rights Act 2001) will be subject to a "public sector equality duty".

1.174. The responses to this question were largely supportive of the proposed public sector equality duty (PSED), with UNITE – the Union describing it as a "vital requirement".

1.175. However, Mr Murcott stated:

"It can cause a crisis of conscience, especially where those in the public sector hold particular religious beliefs."

and the Office of Human Resources (OHR) said:

"The UK review of the PSED seems to indicate that this has just [led] to management information being created so public bodies can evidence their compliance – why bring it in here when the conclusion of the UK review appears to indicate that it has not had meaningful effect yet in UK."

1.176. The question of religious freedom is dealt with later in this document under question 36.

1.177. The UK review that is referred to by the OHR was announced by the Home Secretary in May 2012 as part of the UK Government's "Red Tape Challenge" and it was carried out by an independent steering group which reported in September 2013⁴⁹. The steering group found:

"There is undoubtedly support for the principles which underpin the Duty – and some public bodies are doing a good job in mainstreaming equalities considerations in their work. But, in far too many cases, we have uncovered useless bureaucratic practices which do nothing for equality. No-one seems to ask, "Could I do less and have the same beneficial effect?"".

1.178. The steering group did not recommend any changes to the Equality Act 2010 but it did make a number of recommendations on improving the implementation of the PSED, including the need for appropriate guidance and the need to be proportionate in the implementation of the Duty. Since the steering group published its report the Equality and Human Rights Commission has produced and updated a number of guidance document for public authorities about the PSED.

1.179. In summary, those subject to the public sector equality duty must, in the exercise of their functions, have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people who share a protected characteristic and those who do not.

⁴⁹ <https://www.gov.uk/government/publications/the-independent-steering-groups-report-of-the-public-sector-equality-duty-psed-review-and-government-response>

- Foster good relations between people who share a protected characteristic and those who do not.

1.180. In the UK these are referred to as the three aims of the general equality duty⁵⁰.

1.181. These three aims already apply in the Island in respect of the protected characteristic of race under the Race Relations Act 2004.

1.182. Like the UK Act, the Equality Bill explains that the second aim (advancing equality of opportunity) involves, in particular, having due regard to the need to:

- Remove or minimise disadvantages suffered by people due to their protected characteristics.
- Take steps to meet the needs of people with certain protected characteristics where these are different from the needs of other people.
- Encourage people with certain protected characteristics to participate in public life or in other activities where their participation is disproportionately low.

1.183. It states that meeting different needs includes (among other things) taking steps to take account of disabled persons' disabilities. It describes fostering good relations as tackling prejudice and promoting understanding between people from different groups. It explains that compliance with the general equality duty may involve treating some people more favourably than others.

1.184. To comply with the general equality duty, a public authority needs to have due regard to all three of its aims. There is UK case law concerning what is involved in having "due regard" for something. The case of *R (Brown) v Secretary of State for Work and Pensions and another*⁵¹ established what are now known as the six "Brown Principles":

- decision-makers must be made aware of their duty to have due regard to the identified needs;
- the Duty must be fulfilled both before and during consideration of a particular policy, and involves a "conscious approach and state of mind";
- it is not a question of ticking boxes, the Duty must be approached in substance, with rigour and with an open mind, and a failure to refer expressly to the Duty whilst exercising a public function will not be determinative of whether due regard has been had;
- the Duty cannot be delegated;
- the Duty is continuing;
- it is good practice for an authority to keep a record showing that it has considered the identified needs.

1.185. A good overview can be found in the House of Commons' Library Standard Note "The Public Sector Equality Duty and Equality Impact Assessments"⁵².

ACTION: The proposals in respect of the Public Sector Equality Duty will be retained.

⁵⁰ The Bill only included the general public sector equality duty and omitted the provision concerning more specific duties.

⁵¹ *R (Brown) v Secretary of State for Work and Pensions and another* (Equality and Human Rights Commission intervening) [2008] EWHC 3158 (Admin) - <http://www.bailii.org/ew/cases/EWHC/Admin/2008/3158.html>

⁵² <http://www.parliament.uk/briefing-papers/sn06591.pdf>

Q27 Do you have any comments about positive action?

1.186. The consultation document explained the Bill would allow particular groups to be treated more favourably provided that certain circumstances applied.

1.187. There were few responses to this question. The majority of those responses supported the principle of positive action and the Manx Deaf Society stated:

"Positive action is essential to bring about a more equal society. It must be recognised that not everyone is playing on a level playing field and sometimes a boost is needed. Just treating everyone the same does not ensure fairness or equality. Positive action needs to be substantive to ensure equality of opportunity for some minority groups and disabled people."

1.188. However, some consultees were not supportive:

"The notion of equality is not just undermined by being selective of which characteristics the state chooses to protect, Part 11 of the Bill goes further to provide for, accept and promote "positive discrimination". Welcome to the work of tokenism, quotas, diversity monitoring and bureaucracy that will in perception if not reality impact on the Island's hard won reputation as a place where it is easy to do business. To support this view, the case of Hardwicke in Scotland has led to the appointment of an assessor to support the equality act. An additional post to oversee legislation that is not required epitomises the well meaning, but poor execution of many of the ideas in the Bill.

...

I do not support the provisions regarding positive action, which is nothing more than tokenism and quota driven employment. Such moves are detrimental to feelings of equality in the workplace for the employee and the other employees (clause 136)".
(Hon Juan Watterson MHK)

1.189. The idea that positive action amounts to "nothing more than tokenism and quota driven employment" is rejected.

1.190. The reference to the "case of Harkwicke in Scotland" is actually a reference to a report by the legal firm Harkwicke about the use of the power in the County Courts Act 1984 (of Parliament) to appoint assessors to assist courts in certain cases under the UK Act⁵³. This is not new: there was provision for assessors in earlier UK discrimination legislation. The Island has a comparable provision in section 17 of the High Court Act 1991⁵⁴. The difference in the UK Act is that the power to appoint assessors must be exercised unless the judge is satisfied that there are good reasons for not doing so, rather than the court simply exercising the power to engage an assessor/expert to assist it if the judge considers this is required. The Bill differs from the UK Act in that it is proposed that almost all cases will be considered by the Employment and Equality Tribunal rather than the court. Although not currently included in the Bill, it is considered appropriate that the Tribunal should have the power to engage an assessor/expert to it assist in cases where it considers this to be necessary, but there will be no positive obligation on either the Tribunal or the Island's courts to consider the appointment of an assessor.

⁵³ <http://www.hardwicke.co.uk/insights/articles/equality-act-2010-possession-claims-and-assessors>

⁵⁴ Section 17(1) of the High Court Act 1991:

"In any civil cause or matter before the High Court the court may, if it thinks it expedient to do so, call in the aid of one or more assessors specially qualified, and hear and dispose of the cause or matter wholly or partially with their assistance."

1.191. In addition, as stated in the consultation document, positive action under the Bill is never compulsory – it will be entirely up to individual employers and other bodies as to whether they wish to consider any form of positive action. Even if positive action is considered it must meet certain criteria; otherwise the action may itself constitute discrimination.

1.192. For positive action to be permitted the following three criteria must apply:

- i. A person must reasonably think⁵⁵ that a group of people who share a protected characteristic:
 - suffer a disadvantage linked to that characteristic;
 - have a disproportionately low level of participation in employment, a service or activity; or
 - need different things from other groups.
- ii. The action is intended to:
 - meet the group's different needs;
 - enable or encourage the group to overcome or minimise that disadvantage; or
 - enable or encourage the group to participate in that activity.
- iii. The action is a proportionate way to increase participation, meet different needs or overcome disadvantage. This means that the action is appropriate to that aim and that other action would be less effective in achieving this aim or likely to cause greater disadvantage to other groups.

1.193. It is perhaps worth considering some circumstances where positive action might be appropriate and permitted and also where it would not be permitted:

- If the NHS identified that lesbians are less likely to be aware that they are at risk of breast or cervical cancer and less likely to access health services such as screening programmes, it might decide to run an awareness campaign specifically targeted at lesbians on the importance of cancer screening. This would be a form of positive action that would be permitted.
- If a school identified that its male pupils were significantly underperforming compared to the school's female pupils, the school might decide to run supplementary maths classes exclusively for the boys. This could also be a permitted form of positive action.
- A police force employs disproportionately low numbers of people from an ethnic minority background compared to the population profile of the area. When recruiting, the police force sees 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 be lawful to give preferential treatment to that candidate, provided the comparative merits of other candidates were also taken into consideration, but it would be unlawful if, taking everything into account, a different candidate was more qualified for the post.
- An employer offers a job to a woman on the basis that women are under-represented in the company's workforce. However, if a male candidate was more qualified for the post this would be unlawful direct discrimination.

ACTION: The proposals in respect of Positive Action will be retained.

⁵⁵ "Reasonably think" means that the disadvantage, low level of participation or different needs can be seen but there is no requirement to show any detailed statistical or other evidence.

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

1.194. Paragraphs 3.104 to 3.124 of the consultation document described the necessary exceptions to the general principles of equality set out in the Bill. These exceptions are very largely in line with the UK Act and are required to ensure that, for example, it is still possible run separate sporting competitions for men and women, provide age-related services and concessions, operate immigration and work permit systems,

1.195. There were few responses to this question and those that were received were generally content with the proposals. For example, the Manx Deaf Society said:

"The exceptions and examples described in the public consultation document sound reasonable and MDS would support them."

and the Royal College of Nursing stated:

"The RCN agrees with the exceptions that are included within the Bill as these generally mirror the UK's Equality Act 2010."

1.196. There are a number provisions in the Bill under which it is possible for exceptions to be amended in future and it was suggested that these powers should be used with caution:

"It is vital that exceptions agreed through Orders in the Council of Ministers should be in the spirit of the Act and not used as a 'get around'". (Jacqueline Yates)

1.197. For convenience, the main powers to amend the Bill (or specific parts of it) by secondary legislation in relation to certain exceptions, or to make further provision in respect of exceptions, are summarised in the table below. In each case the power is based on a similar provision in the UK Act and any subordinate legislation made under these powers cannot come into operation unless it is approved by Tynwald.

Provision	Who has the power	What can the power do
Clause 52(8)	Treasury (following consultation with such persons as it considers appropriate)	It is not a breach of a non-discrimination rule for the employer or the trustees or managers of an occupational pension scheme to maintain or use in relation to the scheme rules, practices, actions or decisions relating to age which are of a description specified by order by the Treasury.
Clause 159	Council of Ministers	Amend the Bill to provide that any of the following does not contravene the Bill so far as relating to age — (a) specified conduct; (b) anything done for a specified purpose; (c) anything done in pursuance of arrangements of a specified description.
Schedule 3, paragraph 37	Council of Ministers	Amend Schedule 3 (services and public functions: exceptions)
Schedule 5, paragraph 5	DEFA	Amend Schedule 5 (premises: exceptions)

Provision	Who has the power	What can the power do
Schedule 7, paragraph 7	Treasury	Amend Part 2 (occupational pension schemes) of Schedule 7 (equality of terms: exceptions)
Schedule 11, paragraph 6	Council of Ministers	Amend Part 2 (religious or belief-related discrimination) of Schedule 11 (schools: exceptions)

1.198. It is certainly intended that any future use of these powers should be within the spirit of the Bill, i.e. the only exceptions should be those that are really necessary.

1.199. The UK equivalent of clause 159 (s.139 of the UK Act) has been used to make the Equality Act 2010 (Age Exceptions) Order 2012⁵⁶ - the majority of the amendments made to the UK Act by that Order were incorporated into the Bill prior to the consultation exercise. The UK has also used the power that is equivalent to clause 52(8) to make additional provision in respect of occupational pension schemes⁵⁷ and it is considered that an order to make similar provision in the Island will be required.

1.200. Both the Department of Education and Children (DEC) and the Office of Human Resources (OHR) suggested that additional exceptions might be required:

"DEC would request an exception in relation to student awards to avoid increasing student awards costs. At present, applicants must be under 60 at the start of a course. Support is restricted to means tested tuition fees only for those aged 39 or over if studying at the IOM College and for those aged 29 and over if studying off Island."

"...[OHR] wonder if an exemption relating to pay protection should be included. There will be a need for service related benefits to be reviewed to avoid age related indirect discrimination claims".

1.201. It is accepted that an additional age-related exception is likely to be required in relation to student awards and this will be included in the next version of the Bill.

1.202. Pay protection (sometimes known as "red circling" or "grandfather rights") is a more complex issue. Pay protection can be an issue in relation to equal pay claims where new staff may receive lower pay or benefits than existing staff who are engaged in like work or work of equal value. This might lead a female employee to claim that she is being discriminated against compared to a male colleague (or vice versa). However, as referred to under question 16, there is relevant UK case law⁵⁸ which indicates that (subject to the circumstances of the case) pay protection may be justified as a proportionate means of achieving a legitimate aim. Nevertheless, it has been decided that an enabling power will be included in the Bill so that secondary legislation can be made to give more clarity to what may constitute "a proportionate means of achieving a legitimate aim" in secondary legislation. The issue of benefits related to length of service, which can also be justified in appropriate circumstances, is covered under question 16 above.

⁵⁶ <http://www.legislation.gov.uk/ukxi/2012/2466/contents/made>

⁵⁷ [The Equality Act \(Age Exceptions for Pension Schemes\) Order 2010](#) and [The Equality Act \(Age Exceptions for Pension Schemes\) \(Amendment\) Order 2010](#)

⁵⁸ [Haq & Ors v The Audit Commission \[2012\] EWCA Civ 1621](#)

1.203. Some additional limited exceptions are to be included in the Bill for the purposes of legal certainty following the consultation and further consideration. These exceptions are:

- an exemption for those households who offer Homestay accommodation to TT visitors from the duty to make reasonable adjustments for disabled persons⁵⁹;
- an exceptions from the age discrimination requirements for housing associations and other bodies which offer accommodation to those of a particular age group (such as Saddle Mews which is for persons who are age 50 years or older.

ACTION: Subject to the additional exceptions described above, the exception provisions will be unchanged.

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

1.204. The consultation document advised that the Bill would repeal and, where appropriate, replace the following Acts and provisions:

- (a) Factories and Workshops Act 1909;
- (b) Sex Disqualification (Removal) Act 1921;
- (c) Factories and Workshops (Amendment) Act 1931;
- (d) Factories and Workshops Amendment Act 1936;
- (e) Factories and Workshops Amendment Act 1939;
- (f) Disabled Persons (Employment) Act 1946;
- (g) Chronically Sick and Disabled Persons Act 1981;
- (h) Chronically Sick and Disabled Persons (Amendment) Act 1992;
- (i) Employment (Sex Discrimination) Act 2000;
- (j) Race Relations Act 2004;
- (k) Disability Discrimination Act 2006;
- (l) in the Employment Act 2006 —
 - (i) sections 125 to 127;
 - (ii) section 128(12) to (14);
 - (iii) section 132(2) paragraphs (l) to (n);
 - (iv) Schedule 3; and
 - (iv) in Schedule 5, paragraphs 1(3) and 14(2)(b);
- (m) the Breastfeeding Act 2011;
- (n) in the Regulation of Care Act 2013, section 165(3).

1.205. Hon Juan Watterson MHK enquired:

"What assessment has been made of the repeals within Schedule 24 and the extent to which the Equality Bill replaces, changes or repeals them altogether? I would like to know how this will apply to each of the items in Schedule 24."

⁵⁹ It is likely that in most cases where the owner or occupier of the property (or a relative of that person) intends to continue to reside in the property whilst the Homestay visitors are present would be covered by the "small premises" exemption in paragraph 3 of Schedule 5 to the Bill. Under this provision only discrimination on the grounds of race is unlawful. Small premises include those that are not normally sufficient to provide residential accommodation for more than six persons (in addition to the usual resident and members of the same household).

1.206. The IOMTUC collated response also included some comments. Because of the form in which those comments were provided it was not entirely clear as to which of the provisions they were referring, although it is assumed that the majority related to the repeal of the Factories and Workshops Act 1909 and the amendments to it:

"The repeal of a great many of these acts would remove, at a stroke, much of the health and safety provision for workers, especially in older industries.";

"NO! Still plenty of Health and Safety therein!";

"May also inadvertently affect sick and disabled provision, in spite of the not - clearly - defined elements relating to this in the Bill.";

"VERY CAREFUL SCRUTINY REQUIRED!";

"Further aspects of the Employment Act that require scrutiny."

1.207. The rationale for the repeals proposed in the Bill is set out in the following paragraphs.

1.208. The Factories and Workshops Act 1909 came to light during the drafting of the Bill as it includes a number of outdated provisions that are, in modern terms, unnecessarily discriminatory towards women. This led to the question being asked as to whether any of the provisions in the 1909 Act and the subsequent amendment Acts were still required. When the former Health and Safety at Work Inspectorate⁶⁰ was consulted it advised that it was content for all these provisions to be repealed as it considered that they were no longer required due to more modern health and safety legislation⁶¹. The more modern health and safety legislation applies to all work environments, regardless of whether they are in older industries or new industries.

1.209. The Sex Disqualification (Removal) Act 1921 was important at the time it was enacted but it is now spent and superseded. It provided that a person was not disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society (whether incorporated by Royal Charter or otherwise)⁶²; it made provision for women to be able to become advocates if they had studied law at a university that did not provide degrees to women; and repealed any existing legislation that was inconsistent with that Act. Schedule 24 to the Bill includes a saving provision which confirms, for the avoidance of doubt, the repeal of the Act does not revive any discriminatory rule of law applying before the commencement of that Act.

1.210. The Disabled Persons (Employment) Act 1946 was enacted in the immediate aftermath of World War II and, like the UK's 1944 Act of the same name on which it was very closely based, was largely intended to address the issue of employment for returning service personnel who were disabled as a result of the war. Much of the Act

⁶⁰ Now the Environment, Safety and Health Directorate in the Department of Environment Food & Agriculture

⁶¹ Health and Safety at Work etc Act 1977 (of Tynwald) – power to apply provisions of the UK's Health and Safety at Work etc Act 1974 and instruments made under that Act to the Island with any appropriate modifications or adaptations; Health and Safety at Work Order 1998 – made under the 1977 Act to apply provisions of the UK 1974 Act to the Island; Construction (Design and Management) Regulations 2003 – made under the 1974 Act as applied to the Island. Based on similar UK Regulations; Management of Health and Safety at Work Regulations 2003 made under the 1974 Act as applied to the Island to impose general obligations on employers and others to ensure health and safety at work; Employment of Children Regulations 2005 – made under the Education Act 2001 to regulate the working conditions of persons under the age of 18 years.

⁶² However, the Act still contains a provision that allows the Civil Service Commission to by Order authorize regulations to be made "providing for and prescribing the mode of the admission of women to the civil service of the Isle of Man, and the conditions on which women admitted to that service may be appointed to or continue to hold posts therein."

is about what the Department (now the Department of Health and Social Care) may do (rather than what it must do), such as providing vocational training or industrial rehabilitation courses for disabled persons but such legislation is no longer required.

- 1.211. Other provisions of the 1946 Act have either fallen into misuse or have become redundant. These include the requirement for there to be a register of disabled persons, the imposition on larger employers of quotas for employing disabled persons, and the designation of certain occupations as being especially suitable for disabled persons.
- 1.212. The DHSC and its predecessors Departments have not maintained a register of disabled persons for many years. Many people who would qualify as disabled under the Act would not wish to be classified as such by being on a register and the imposition of quotas and reserved occupations for disabled persons would now be likely to be seen as patronising and outdated. The Equality Bill will instead ensure that disabled persons have opportunities in relation to mainstream employment and other areas of life.
- 1.213. It should be noted that the DED's Disability Employment Service (DES) already exists to assist individuals with disabilities to gain employment, which may be paid or unpaid, and it assists employers by providing guidance, assistance and equipment where appropriate. The DED also runs the Employment (Persons with Disabilities etc.) Scheme 1999 which can offer financial assistance⁶³ to disabled persons, or their employers, to enable a person to obtain or retain employment.
- 1.214. The Chronically Sick and Disabled Persons Act 1981 established the Chronically Sick and Disabled Persons Committee, which was later renamed as the Tynwald Advisory Council for Disabilities (TACD), and it created a number of duties for Government in respect of disabled persons. As discussed in the context of question 20 above, the TACD will be continued (and renamed as the Tynwald Equality Consultative Council) under the Equality Bill. Many of the duties in the 1981 Act are covered by the responsibilities of the DHSC under the Social Services Act 2011 and the Equality Bill with further strengthen the Government's responsibilities towards disabled persons (and those with the other protected characteristics) through the Public Sector Equality Duty. However, for the avoidance of doubt, two of the provisions of the 1981 Act – section 1 (information as to need for and existence of social welfare services) and section 2 (provision of welfare services) – are re-enacted as provisions to be inserted in the Social Services Act 2011 (see paragraph 7 of Schedule 23 to the consultation draft of the Bill).
- 1.215. The substantive provisions of the Chronically Sick and Disabled Persons (Amendment) Act 1992 have not been brought into operation and are covered by the comprehensive equality requirements of the Bill.
- 1.216. The provisions of the Employment (Sex Discrimination) Act 2000, the Race Relations Act 2004 and the Disability Discrimination Act 2006 are superseded, and indeed expanded upon, by the requirements of the Equality Bill. For example, the Disability Discrimination Act 2006 (which, in July 2015, Tynwald resolved should be brought into operation during 2016) provides no rights or protections for disabled persons in relation to employment.

⁶³ Assistance to or in respect of any one person may not exceed £10,000 over any period of 3 years from the date when the first offer of assistance is made.

- 1.217. Section 125 (racial discrimination and dismissal), 126 (religious discrimination and dismissal) and 127 (dismissal on ground of sexual orientation) of the Employment Act 2006 are repealed because they are superseded by the provisions of the Equality Bill. A new section is inserted by the Bill into the 2006 Act so that the dismissal of an employee will be automatically unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal would constitute unlawful discrimination under the Equality Bill.
- 1.218. Subsections (12) to (14) of section 128 (dismissal on ground of redundancy) provide that if the reason (or, if more than one, the principal reason) for which the employee was selected for redundancy is because of his or her race, religion or sexual orientation this will automatically constitute unfair dismissal. The repeal of these subsections of section 128 is linked to the repeal of section 125 to 127 and the Bill inserts a new subsection into section 128 so that if the reason (or, if more than one, the principal reason) for which the employee was selected for redundancy is because of the employee has one of the protected characteristics under the Equality Bill this will automatically constitute unfair dismissal.
- 1.219. Schedule 3 to the 2006 Act deals with the constitution and proceedings of the Employment Tribunal. It is repealed because it is to be replaced by Schedule 16 to the Equality Bill which deals with the constitution and proceedings of the new Employment and Equality Tribunal.
- 1.220. In Schedule 5 to the 2006 Act paragraph 14(2)(b) is repealed because it refers to the Employment (Sex Discrimination) Act 2000 and the provision will be redundant when the 2000 Act is repealed.
- 1.221. However, it appears that the repeal of paragraph 1(3) of Schedule 5 to the 2006 Act is a mistake in the draft Bill and this will be corrected in the next draft.
- 1.222. The Breastfeeding Act 2011 is superseded because under the Bill, like the UK's Equality Act 2010 it is unlawful for a business to discriminate against a woman because she is breastfeeding a child. A business may still ask a breastfeeding woman to leave their premises but only if the reason for this request is not due to her breastfeeding. However, if the woman later claimed that discrimination occurred because she was breastfeeding, the business would have to show that it was not discrimination (for example, if the woman was asked to leave because she was being abusive to staff). The Tribunal will be able to award compensation if it finds that a woman has been discriminated against because she was breastfeeding. The repeal of the 2011 Act will not remove section 17A (breastfeeding) of the National Health Service Act 2001 which was inserted into that Act by the 2011 Act.
- 1.223. The repeal of section 165(3) of the Regulation of Care Act 2013 is a minor consequential amendment to be made as result of the corrective substitution of the term "children's home" for "childrens home" wherever it appears in that Act.

ACTION: Except for the repeal of paragraph 1(3) of Schedule 5 to the Employment Act 2006, the repeals set out in the Bill will be retained. It should be noted, however, that the final Bill will contain some additional repeals that had not been identified at the time the draft Bill was published for consultation.

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

1.224. Paragraphs 4.1 to 4.20 described certain differences between the Bill and the UK Act. In summary those differences, and the reasons for them, are:

- a) No provision in the Bill in relation to HM Armed Forces. The UK Act does have to deal with the interaction between that Act and service law⁶⁴. The Island is not in a position to deal with matters under UK service law. In non-service situations though, as under the UK Act, a person who is serving in the Armed Forces who has one of the protected characteristics would have the same protection against discrimination in the Island as any other person in the areas that are covered by the Bill.

The only comment on this was from the IOMTUC which said: "Fair enough".

- b) In the UK there has been a long running campaign for discrimination on the grounds of "caste" to be specifically included within the scope of the protected characteristic of race. The UK Act contains provision for the UK Government to be able to address this issue through secondary legislation. Although the UK Government has not yet to make such a change to the UK Act, discrimination against a person on the grounds of their caste will be explicitly included within the definition of "race" for the purposes of protection from discrimination from the outset, as this is considered to be both the most straightforward approach and the right thing to do.

Three responses were received on this point: two welcomed the inclusion of discrimination on the grounds of caste within the scope of the protected characteristic of race; comments in the IOMTUC collated response suggested that the term "caste" was outmoded and offensive in itself.

- c) The UK Equality and Human Rights Commission (EHRC) has a power under the Equality Act 2006 (not the 2010 Act) to issue Codes of Practice in connection with any matter addressed by the 2010 Act with a view to ensuring or facilitating compliance with the 2010 Act or an enactment made under it and to promote equality of opportunity. The corresponding power in the Bill rests with the Council of Ministers. As discussed in relation to questions 19 and 20, it is not intended that the equivalent of the UK's EHRC will be established as it is considered that it would be overly bureaucratic and expensive for the Island. It is also not considered that the renamed Tynwald Advisory Council for Disabilities (i.e. the Tynwald Equality Consultative Council - TECC) will have sufficient administrative or drafting resources available to it for it to be able to undertake this role. By giving the power to the Council of Ministers this will ensure that appropriate resources from across Government can be allocated to complete the task.

On this point, Prospect asked: "why not refer to the UK Commission or the Tynwald Council for guidance rather than CoMin?", and the IOMTUC suggest that wider consultation may be appropriate in some areas.

In practice it is envisaged that the Island's Codes of Practice will be based on those produced by the EHRC to the maximum extent possible but some modifications will inevitably be required to adapt them for use in the Island. It is intended that consultation will take place with relevant stakeholders, including the TECC before the Codes of Practice are issued.

⁶⁴ Which applies to Armed Forces personnel wherever in the world they may be and if they are discriminated against in the course of their duties in the services the provisions of the UK's Armed Forces legislation will apply.

- d) Unlike the UK Act, the Bill does not include a power for Regulations to be made to require all larger employers to publish information about the pay of their employees for the purpose of showing whether there are differences in the pay of their male and female employees. The relevant provision in the UK Act⁶⁵ has not yet been brought into force, although a consultation on how the provision should be brought into force was launched by the UK Government in July 2015⁶⁶. The UK provision does not apply to employers with fewer than **250** employees or to public authorities. Although a lower number of employees could have been chosen as the threshold for the Isle of Man this could have been unduly burdensome for the smaller employers. The table below provides some information on the size of employers in the private sector in the Isle of Man.

Firm size	Number of employers	Total jobs in size band
1 to 5	2633	5500
6 to 10	511	3900
11 to 20	298	4300
21 to 50	183	5600
50 to 100	45	3250
101 to 200	37	5100
201 to 300	8	1900
301 to 400	3	1000
401 to 500	3	1550
501 to 600	2	1300

(It should be noted that figures above, which were based on information provided to DED by Treasury in November 2014, are approximate, jobs do not equate to full time employment, self-employed persons are not included, and this data lags by up to 12 months for some businesses.)

The Bill does include an enabling power for regulations to be made requiring (subject to certain exceptions) the Tribunal to order the respondent to carry out an equal pay audit in any case where it finds that there has been an equal pay breach. Regulations made under the equivalent provision in the UK Act came into force on 1 October 2014⁶⁷.

The responses from UNITE the Union, Prospect, the IOMTUC and one individual wished to see the general equal pay audit power included in the Bill. It was suggested that the provision could be adapted for the Island's circumstances by lowering the number of employees necessary for a business to be required to carry out an audit.

It is considered that the Bill takes a balanced line on these points.

- e) In the UK 2010 Act, the prohibition against harassment does not cover the protected characteristics of religion or belief or sexual orientation in a number of circumstances, as follows:
- when providing services or exercising public functions;
 - the disposal or management of premises;
 - the treatment of a pupil or a person who has applied for admission as a pupil by the responsible body of a school;

⁶⁵ Section 78 (gender pay gap information)

⁶⁶ <https://www.gov.uk/government/consultations/closing-the-gender-pay-gap>

⁶⁷ [The Equality Act 2010 \(Equal Pay Audits\) Regulations 2014.](#)

- the treatment by an association of a member; a person seeking to become a member; an associate; a guest or a person seeking to be a guest.

The omission of provisions concerning harassment from the UK Act in these cases is due to that Act largely just replicating and consolidating the previous legislation. The Bill does prohibit harassment in these areas as the UK exclusions are not considered to be necessary.

Prospect in its response considered this to be a slight improvement on the UK provisions but it is felt that the inclusion of marriage/civil partnerships and maternity/pregnancy as protected characteristics was required, as failing to include them may suggest justification of discrimination [within the general harassment provision in clause 27].

Section 212(5) (general Interpretation) of the UK Act makes it clear that harassment on certain omitted grounds would constitute direct discrimination. It states that:

"Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 [Direct discrimination] because of that characteristic."

An equivalent provision was inadvertently omitted from clause 3 (interpretation) of the Bill and it will be included in the next draft.

- f) Unlike under the UK Act where awards of compensation are not subject to a statutory maximum, under the Bill the maximum amount that may be awarded as compensation (e.g. for loss of earnings) in cases of employment discrimination will be limited to the amount set by the DED under section 144 of the Employment Act 2006. This amount is currently £50,000 (although there are some exceptions where the limit does not apply). However, since this limit has not been increased since it was raised to the current level in July 2009, the DED is open to considering whether this amount is still appropriate. The UK is obliged to follow European Union case law in this area which does not apply to the Isle of Man. It is perhaps worth noting that the Central Tribunals Administration is not aware of a case where the Employment Tribunal in the Island has made any award of the maximum amount available to it.

This was the provision that resulted in the most comments. The Chamber of Commerce supported this departure from the UK Act; the Trustees of Manx Blind Welfare Society, the Royal College of Nursing, Unite the Union, Prospect and one individual want the Bill to follow the position in the UK and have no maximum limit. The IOMTUC noted that the level of the maximum amount did not take account of inflation.

It is considered that the Bill takes a balanced approach to this issue.

- g) The Bill does not include the provision in the UK Act which allows political parties to operate, for example, women only shortlists from which they will select candidates to stand for them in a particular constituency at a General Election. Given the size of the Island and its political structure, this provision is considered to be unnecessary.

Two of the consultation responses referred to this point. The IOMTUC collated response included a number of comments, including:

"It might be suggested that this lack of provision could apply as being prejudiced to the formation and maintenance of political parties and lobby groups, and, plausibly trade union involvement in the political milieu."

and Jacqueline Yates said:

"What would be the situation should political parties develop? Positive action has had a very positive impact in terms of women's representation in the national parliaments of other jurisdictions. Indeed it could be argued that the UK should be going further in this regard. Surely we should not close off this option should developing political parties in the IOM wish to consider it."

The view can certainly be taken that women are under-represented in Tynwald but, even if Party politics were to become more prevalent in the Isle of Man it is not clear how the inclusion of a provision like that in the UK would address this gender imbalance; more cultural/structural change may be required to begin to address that issue. It may also be noted that the absence of the specific provision in respect of political parties would not preclude positive action under clause 135 of the Bill.

- h) The Bill defines "public authority" (for the purpose of the Public Sector Equality Duty (PSED)) as having the same meaning as in section 6 of the Human Rights Act 2001. In the UK 2010 Act the "public authorities" to which the PSED applies are explicitly listed in a lengthy Schedule which may be amended by Order. The approach taken in the Bill is considered to be more straightforward and convenient than the UK approach. In addition, the powers in the UK 2010 Act for a Minister of the Crown to impose specific public sector equality duties (as opposed to the general duty) on a public authority is omitted from the Bill as the general duty is considered to be sufficient in the Isle of Man context.

No comments were received on this point.

- i) The Bill does not include Part 1 (sections 1 to 3) of the UK 2010 Act concerning the public sector duty regarding socio-economic inequalities which has not been brought in to operation in the UK. The substantive provision in section 1 of the UK Act requires certain public authorities, when making decisions of a strategic nature about how to exercise its functions, to have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.

UNITE the Union, Prospect and the IOMTUC wanted this provision to be included in the Bill:

"Having the socio-economic clause in the Equality Act 2010 is a significant step towards equality where inequality and discrimination is exasperated by class. The UK Government did not enforce this section which is an overarching clause addressing inequality, ignoring massive objections. The Equality Bill can [put] this right."

(UNITE the Union)

"...we are strongly opposed to this stance. The provision ought to be included here as there will then be a choice whether to commence or not. It is possible that this will be enacted in the UK at some time in the future and ... it is difficult to argue its exclusion as it does not need to commence immediately and there will be difficulties in making any necessary changes to the Bill once enacted."

(Prospect)

"Could be said to undermine many of the points of the whole Bill; it could in theory mean that unless specifically applied, a public authority could do and act

pretty much how it wished, contrary to the act. It thus abnegates ministerial responsibility!";

"Opportunity lost!";

"Socio-economic inequalities"

Yet, we have one of the most unequal societies in Europe, and not even the slightest nod is being given to even alleviate, let alone change, this in order to bring about a more equal society.

In other words, to those who have, things shall be kept easy, and opportunity for the poor denied."

(IOMTUC collated response)

"Socio-economic disadvantage" is a complex concept that is difficult to define although it is closely related to the similar and far more commonly used term "poverty" – which in itself is also difficult to define. Although it is accepted that socio-economic disadvantage is a very important issue, it not considered that this highly complex matter can be addressed by a simple provision in the Equality Bill. It is understood that it is UK Government policy to repeal the provisions of the UK Act concerning socio-economic inequalities⁶⁸.

ACTION: The exceptions described above will be retained. The interpretative provision from the UK Act in to relation to harassment which was inadvertently omitted will be inserted into the Bill.

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

1.225. The consultation document advised that the Bill followed the UK Act so that the prohibition of unlawful discrimination in relation to schools did not apply to the protected characteristics of age or marriage and civil partnership. This is obviously necessary in respect of age as the whole basis of primary and secondary education is that it is provided to children of certain ages. However, young people can get married or enter into a civil partnership from the age of 16 and could potentially still be in school after doing so. Whilst it may be unlikely that an Island school would discriminate against a young person because they were married or in a civil partnership it was not clear that there was any good reason why schools should not be prohibited from doing so under the law, so views were invited.

1.226. Few comments were received on this question and of those only one said that the Bill should "leave well alone". It is intended that in the next draft of the Bill schools will be prohibited from discriminating against pupils on the grounds of marriage and civil partnership.

ACTION: Schools in the Island will be prohibited from discriminating against pupils aged 16 and older on the grounds of marriage and civil partnership.

⁶⁸ <https://www.gov.uk/government/speeches/equalities-red-tape-challenge-and-reform-of-the-equality-and-human-rights-commission-outcome>

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

1.227. Paragraph 35(2) of the Schedule 3 to the Bill states:

"Section 30 (provision of services, etc.) does not apply to anything governed by Regulation (EC) No.1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air."

1.228. This is based on a provision in the UK Act which is required because the rights of disabled persons and persons with reduced mobility when travelling by air are covered by the EU Regulation in question, which applies directly to the United Kingdom through its membership of the EU. To avoid conflict between the UK Act and the EU legislation the Act makes it clear that in areas covered by the EU Regulation the Regulation applies rather than the Act.

1.229. The EU Regulation does not apply directly as part of the law of the Isle of Man under the Island's limited relationship with the EU but because of the way the Regulation is written it will apply to most journeys between the Island and its neighbours:

"Article 1

"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..."

1.230. For the avoidance of doubt, the table below sets out where EU Regulation 1107/2006 does and does not apply to the Island.

Where EU Regulation 1107/2006 applies in relation to flights to and from the Island	Where EU Regulation 1107/2006 does not apply to flights to and from the Island
Treatment of passengers at all EU airports with commercial flights departing to the Island	Treatment of passengers at Ronaldsway airport
Treatment of passengers at all EU airports with commercial flights arriving from the Island	Treatment of passengers by airlines operating commercial flights departing from Ronaldsway for an EU airport if the airline is <u>not</u> an EU air carrier
Treatment of passengers by all airlines operating commercial flights departing from an EU airport to the Island	No requirement for the Island to have enforcement and complaints procedures and penalties for non-compliance ⁶⁹

⁶⁹ This means, for example, that if a disabled Island resident wished to formally complain about their treatment by Flybe flight in respect of a flight from the Island to Manchester they would have to do so under the UK's complaints/enforcement provisions rather than in the Island.

Where EU Regulation 1107/2006 applies in relation to flights to and from the Island	Where EU Regulation 1107/2006 does not apply to flights to and from the Island
Treatment of passengers by airlines operating commercial flights departing from Ronaldsway for an EU airport if the airline is an EU air carrier	—
EU Member States required to have enforcement and complaints procedures and penalties for non-compliance ⁷⁰	—

- 1.231. All of the responses to this question supported the full implementation of this EU Regulation in the Island. This could most conveniently be achieved in a timely manner by using the powers to apply and implement EU legislation in the European Communities (Isle of Man) Act 1973.
- 1.232. One of the responses to this question suggested that EU Regulation 1177/2010⁷¹ which, *inter alia*, covers the rights of disabled persons and persons with reduced mobility when travelling by sea should also be looked at. The reason that the UK Act does not refer to this EU Regulation is because the Act was passed before the EU Regulation was adopted. This EU Regulation applies to journeys to and from the Island by sea in a similar way to how Regulation 1107/2006 applies to flights to and from the Island.

ACTION: It is proposed that the approval of the Council of Ministers and Tynwald be sought for this course of action. Further consideration about the possible implementation of Regulation 1177/2010 in the Island will be carried out in parallel with consideration of Regulation 1107/2006.

Q33 Do you have any comments about dual discrimination?

- 1.233. As the consultation document explained, dual discrimination occurs where a person is treated less favourably because of a combination of two of the protected characteristics. Although in most cases where direct discrimination has been alleged it will be possible to make the case on the grounds of a single protected characteristic, a possible example of dual discrimination that is sometimes referred to is the treatment of women television presenters who may be dropped as they get older. As there are many older male presenters and many younger women presenters, it is possible that a claim based purely on either age discrimination or sex discrimination would not succeed but a claim of dual discrimination on the grounds of being an older woman might have more chance of success⁷². The equivalent provision in the UK Act is not yet in force.
- 1.234. There were a number of responses to this question, all of which supported the inclusion of the dual discrimination clause in the Bill, with the majority wanting it to be brought into operation without undue delay. In addition, some of those who

⁷⁰ Regulation 1107/2006 is most recently implemented in the UK by the Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2014 - <http://www.legislation.gov.uk/uksi/2014/2833/contents/made>

⁷¹ [REGULATION \(EU\) No 1177/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation \(EC\) No 2006/2004](http://www.legislation.gov.uk/eu/2010/1177/contents/made)

⁷² However, in the 2011 case of former BBC Countryfile presenter, Miriam O'Reilly, an employment tribunal found the BBC had discriminated in its treatment of her as an older woman notwithstanding the fact that discrimination on dual grounds cannot be claimed in the UK (she claimed both age and sex discrimination, with the claim of age discrimination being successful). See <http://www.theguardian.com/media/2011/jan/11/countryfile-miriam-oreilly-tribunal>

responded wanted it to go further than the UK provision, which does not apply to respect of certain protected characteristics⁷³ and dual discrimination can only be claimed in cases of direct discrimination.

- 1.235. It appears that the reason that the UK dual discrimination provision has not been brought into operation was because it was considered as part of the UK's "red tape challenge" to be potentially complex and an additional burden for businesses, with the view of the UK Government being:

"Current legislation already provides sufficient protection for individuals, so bringing this power into effect would duplicate the burden to businesses unnecessarily."⁷⁴

- 1.236. Although it may be debateable as to whether there is sufficient protection for individuals without being able to claim dual discrimination or whether it would be a burden to businesses, it is considered that it would not be advisable to make the application of the legislation in the Isle of Man any wider than that in the UK. Whilst direct discrimination is fairly straightforward in principle (i.e. a person is discriminated against because of a protected characteristic), indirect discrimination (where a policy which applies in the same way for everybody has an effect which particularly disadvantages people with a protected characteristic) requires more thought and any requirement for policies to be considered for their possible effect on combinations of two protected characteristics could well be complex and burdensome.

ACTION: The dual discrimination provision will be retained in the Bill and its commencement will be considered in due course following the passage of the Bill.

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

- 1.237. Until 21 December 2012 insurers in EU Member States were permitted to discriminate in the cost of providing, for example, motor insurance to men and women, even if all other factors such as age, experience, type of car, etc were equal. Article 5(1) of the EU's Gender Equality Directive (Council Directive 2004/113/EC) states:

"Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits."

- 1.238. However, Article 5(2) the Directive set out the following derogation:

"Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission."

⁷³ Marriage and civil partnership or pregnancy and maternity

⁷⁴ <http://www.redtapechallenge.cabinetoffice.gov.uk/wp-content/uploads/2011/06/Equalities.xlsx>

- 1.239. A number of Member States, including the United Kingdom, operated the derogation above. However, this derogation was challenged in the European Court of Justice ("ECJ") by a Belgian consumer group, *Association Belge des Consommateurs Test-Achats*, on the basis that it conflicted with the overarching principle of equal treatment of men and women under EU law. The ECJ ruled⁷⁵ on 1 March 2011 that the transitional derogation, which was a last minute addition to the Directive, was invalid. The ECJ's reasoning was that there was a risk that the derogation could persist indefinitely and this was incompatible with the overriding principle of equal treatment of men and women. The ECJ's decision did not come into force immediately and it did not have any retroactive effect; instead the ECJ gave insurers until 21 December 2012 to comply with the change in law and its ruling applied to all new contracts of insurance entered into or renewed after this date.
- 1.240. Although there was a good deal of concern from insurance providers following the ECJ judgement it appears that the industry across the EU has adapted. In the case of motor insurance, premiums for some male drivers have gone down and premiums for some female drivers have increased to a degree, with the effect most significant for younger drivers.
- 1.241. As a result of the ECJ's judgement in the *Test-Achats* case (as it is usually known) the UK Government amended the Equality Act 2010 to remove the exception in relation to discrimination on the grounds of sex for insurance that had existed in the Act.
- 1.242. The Isle of Man is not bound by EU law in respect of the provision of services such as insurance; indeed, under the Island's limited Protocol 3 relationship with the EU, the freedom to provide services across the Union which is enshrined in the EU Treaties does not apply to insurers based in the Island. In basing the Equality Bill on the UK Act as it currently stands, the Bill follows the position in the UK⁷⁶. Insurance policies that are in place prior to the commencement of the Bill will not be affected. However, debate will no doubt continue about where the balance should lie when there is a general principle of equality between men and women but it also appears that data shows differences in behaviours and risks between the sexes.
- 1.243. However, the UK Government in its impact assessment⁷⁷ for the Regulations that amended the UK Act following the *Test-Achats* case considered that some actions in relation to gender were still permitted:
- "43. Article 5(1) provides that the use of gender as an actuarial factor should not result in individual differences in premiums and benefits between men and women. It is our view that this prohibition does not prevent an insurer from making a proper and realistic assessment of the underlying risks and to reserve or purchase reinsurance according to that assessment.*
- 44. It is our view that the use of gender in the marketing and distribution of products (and setting appropriate reserves for that business once written, and also in transactions with reinsurance companies) may continue, provided it does not result in individual pricing differences on the grounds of gender. For example:*

⁷⁵ <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-236/09>

⁷⁶ Jersey in its recent Discrimination (Sex and Related Characteristics) (Jersey) Regulations 2015, which come into force on 1st September 2015, has taken a different approach. These Regulations amend Discrimination (Jersey) Law 2013 (which currently prohibits discrimination on the grounds of race) to prohibit discrimination on the grounds of sex, sexual orientation and gender reassignment. The Regulations include an exception to continue to permit different treatment of men and women in respect of financial and insurance arrangements: <http://www.jerseylaw.je/Law/Display.aspx?url=LawsInForce%2fhtm%2fprofiles%2fr%26OYear2015%2fr%26O-061-2015.htm>

⁷⁷ <http://www.legislation.gov.uk/ukxi/2012/2992/impacts>

- *An insurer may reserve on the basis of gender as part of prudent risk management (for example: a provider of life assurance may hold more in reserves if their business book has a higher concentration of males; or an annuity provider may hold more in their reserves if they have a higher concentration of females; or a motor firm may hold more in their claims reserve provisions for young male policyholders)*
- *An insurer might buy reinsurance that is priced on the basis of the gender mix in the business they are reinsuring*
- *Some firms may target advertising at one gender (for example: motor insurance specifically targeted at female drivers)".*

1.244. Of the five responses that referred to this question one considered that the Island should follow the UK/EU approach in this area:

"we agree as a matter of principle that this should be brought in as the Island's reputation may be adversely affected if it was not".

(Prospect)

1.245. The IOMTUC collated response contained a number of comments, including:

"Could be argued that this is purely a commercial matter based on free market economics? But - should be based on an individuals actions and nothing else."

1.246. The remaining three responses are basically summed up by following comment:

"Insurers should be left to decide".

(Mr Murcott)

1.247. It is perhaps of interest that persons who deal with insurance matters, including the Manx Insurance Association, did respond to the consultation but they did not comment on this question.

ACTION: It is intended that the Bill should continue to follow the UK on this issue.

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

1.248. Although some short, straightforward Bills come into operation immediately on the announcement of Royal Assent in Tynwald, the majority do not. In common with most Acts of Tynwald the Bill includes a provision that allows it to be brought into operation by one or more orders (Appointed Day Orders). The power in this Bill to make such orders, which can bring different parts of the Bill into operation on different dates, rests with the Council of Ministers. The consultation document advised that it was not envisaged that the whole Bill would be brought into operation immediately after Royal Assent and it stated that in some cases it was important to ensure that there was sufficient time for businesses and others to adapt to the new requirements. In addition, in some cases it may be necessary to prepare and consult on secondary legislation and/or guidance before provisions of the Bill can be brought into operation.

1.249. The consultation document also reiterated that it was proposed that there should be a lead-in period before the provisions concerning equal pay for work of equal value came into operation and that there might be other cases where a lead-in or transitional period would be necessary or desirable.

1.250. There were a significant number of responses to this question and a wide range of views were expressed, a representative selection of which are set out below:

"I do not support the Bill";

(Mr Murcott)

"Chamber considers is unhelpful and vague that the Consultation Document does not provide a rough plan for practical implementation of the Bill. No indication at all is provided as to the likely timescale of the actual introduction of the legislation. This point is absolutely critical as businesses will need to budget and prepare for it (as will the Government). Whilst it is acknowledged that the Royal Assent date is not always the same date as the date its provisions will actually come into effect (although sometimes they are the same), the exact time scale in real terms has been left up in the air. Transitional arrangements will be key and are an area that more information should have been provided on and which should have been consulted on.";

(Isle of Man Chamber of Commerce)

"We recognise that there may be sense in a phased approach to compliance with parts of the Bill but we will not support any attempts to delay the implementation of the Bill or any parts of the Bill into law as this would be counterproductive to the underlying issue and would cause a major loss of credibility in our Parliament";

(Trustees of the Manx Blind Welfare Society)

"The RCN believes that the provisions in the Bill [should be] brought into operation immediately after the Bill receives Royal Assent rather than via a staged process. We see no reason why the provisions of the Bill cannot be brought into effect immediately given the importance of equality issues in modern society. We also see no reason why there should be a lead-in period of 2 years for claims for equal pay for work of equal value.";

(Royal College of Nursing)

"The Island has a disgraceful record in regard to the implementation of the Disability Discrimination Act 2006 and it is absolutely essential that we do not repeat that mistake here. If this legislation is needed (as it is) then it should be enforced without delay.";

(Ms Yates)

"The Society was disappointed that the Disability Discrimination Act 2006 was not implemented after receiving Royal Assent and has now been repealed (sic). It is strongly hoped that the Equality Bill will not suffer the same fate and early implementation will be possible.";

(Manx Deaf Society)

"We would like to see a staged introduction, especially in relation to comments above regarding the implications of equal value";

(Office of Human Resources)

"[We] would be concerned if inordinate delays occurred in commencing this Bill once Royal Assent is received. Given the circumstances surrounding the Disability Discrimination Act 2006 where that Act has been on the statute book since 2006 and not been commenced, the Island has clearly failed in this respect in the past – we would not want history to repeat itself in this regard.";

(Prospect)

"Why does the Council of Ministers wish to introduce different parts of the Bill into operation on different dates? The stated comment is that it will be "important to ensure that there is sufficient time for businesses and others to adapt to the new requirements". This is almost certainly a reference to Access to Goods & Services by physically disabled people... If it is a genuine belief that businesses still require additional time before they stop discriminatory practices, then the exact time when

the Act will be implemented should be clearly documented in a timetable within the primary legislation. Remember the Act only requires "reasonable adaptations".";
(Mr Fitton)

"Beware! Especially in regard to contractual revision. "businesses and others to adapt" - Whilst it may be said that some provisional lead-in is necessary, one should beware of employers rushing to revise or re-write employment contracts, especially for those on short term contracts, and finding loopholes to exempt themselves from liabilities and responsibilities.".
(IOMTUC)

- 1.251. It can be seen from the comments above that the majority of those who responded to this question did not wish to see an undue delay to bring the Act into operation after it had been passed.
- 1.252. The point made by the Isle of Man Chamber of Commerce about the need for a clear timetable is accepted; however, until the timetable for the Bill to be passed by the House of Keys and the Legislative Council is clearer and the final content of the legislation known it is not possible to develop any definitive timetable for its implementation. If such a timetable had been included in the consultation document it is likely that it would already be out of date.
- 1.253. If, as is now hoped, the Bill can be introduced into the Legislative Council and complete its passage of that Branch before the 2016 House of Keys General Election, it will be in the hands of the new administration after the Election as to when (or if) the Bill is picked up to be taken through the House of Keys. The Bill might then complete its passage of the House of Keys and receive Royal Assent by summer 2017, with its provisions being brought into operation from late 2017/early 2018 onwards.
- 1.254. It is still proposed that there should be a phased approach to the implementation of the legislation and that there should be some lead-in and transitional periods but with these being kept to the minimum that is realistically practical. One of the work strands that will be undertaken during the passage of the Bill will be the development of the implementation timetable.

ACTION: Further work on a timetable for bringing the various provisions of the Equality Bill into operation will be carried out when the timetable for the passage of the Bill is clearer.

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

- 1.255. This question was included to give people an opportunity to comment on anything that they wished to in relation to the Bill, discrimination and equality in general, or the consultation document and consultation process.
- 1.256. A significant number of responses did not refer to the questions in the consultation document. In a number of cases where it was clear that a response, or part of a response, related to an issue that was covered by one or more of the specific questions it was considered along with those questions. In other cases such responses have been considered as a whole under this question.

1.257. Although many of the “any other comments” responses consisted of standalone points, it was also possible to identify a numbers of themes. Some of the main themes were as follows:

- Business and cost related issues;
- Same sex marriage;
- Balance of rights (mainly in respect of religion/belief and sexual orientation).

Business and cost related issues

1.258. There was a significant concern amongst a number of businesses and business bodies about the possible impact of the Equality Bill.

1.259. This was perhaps understandable given that it is impossible to advise individual businesses about the exact financial costs and benefits that this legislation will have for them, and because it is not possible at this stage (as explained under question 35 above) to provide a firm timetable for the introduction of the Bill’s various provisions.

1.260. It has to be emphasised that even the UK was unable to produce an accurate calculation of the overall costs and benefits of equality legislation in the impact assessment on the Equality Act 2010. The main message from the UK though was that even allowing for some initial costs the legislation would be of overall financial benefit to the economy in the ten year period following its introduction; and there are the social benefits on top of that which must also be taken into account.

1.261. With regard to the issue of cost, it was clear that the main areas of concern for business were:

- the duty to make reasonable adjustments for disabled persons to whom they are providing goods and services;
- the duty to make reasonable adjustments for disabled workers or prospective disabled workers;
- the requirement not to discriminate against older workers and changes to the law regarding retirement; and
- the introduction of equal pay for work of equal value⁷⁸.

1.262. These four areas have already been largely covered under the relevant questions above but it is perhaps worth reiterating certain points.

1.263. Businesses (and other bodies) that provide goods and services will not be required to make wholesale adjustments to allow for every conceivable type of disability that their customers or clients may have. What they will need to do, however, is consider what adjustments it may be reasonable for them to make to improve the accessibility for disabled persons who would otherwise be at a substantial disadvantage⁷⁹ compared to non-disabled persons, taking into account all of the circumstances including the practicality and cost of an adjustment. Every case will obviously need to be considered on its own merits but it is a certainty that it will not be reasonable for every single business and service providers to, for example, have ramps to automatic

⁷⁸ In the UK, this has traditionally been more of a difficulty for public sector bodies that have not properly addressed the issue of equal pay than the private sector, although there is now an ongoing case involving ASDA workers, the outcome of which is unlikely to be known until sometime during 2016.

⁷⁹ Under the Bill, as in the UK Act, a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis.

doors, hearing loops for deaf persons and braille translations available for blind persons.

- 1.264. In addition, although this duty is anticipatory (i.e. a business or other body should consider accessibility issues as a matter of course without being asked to do so), as stated elsewhere in this document, following the Resolution adopted by Tynwald at its July 2015 sitting that the Disability Discrimination Act 2006 should be brought into operation during 2016 businesses and service providers should be familiar with the main requirements in this area by the time that the Bill has been enacted and its provisions are brought into operation in so far as they relate to the protected characteristic of disability in its application to the provision of goods and services..
- 1.265. The duty on employers to make reasonable adjustment for their employees, etc. is not anticipatory and it only has effect when they have an existing employee who is disabled or becomes disabled during the course of their employment, or where an applicant for a job has a disability. Further, if an employer does not know that an employee or job applicant has a disability within the scope of the Bill there is no obligation to consider or make any adjustments. Many reasonable adjustments can be low cost and financial assistance may be available through the DED's Employment (Persons with Disabilities etc) Scheme 1999.
- 1.266. At present in the Isle of Man there is no default retirement age. An employer can set whatever compulsory normal retirement age it wishes for its employees provided that it is the same for men and women. The employer does not have to provide any justification for the age it has set. When an employee has reached the normal retirement age which has been set by the employer (or if the employer has not set a normal retirement age, the age of 65) that person generally loses the right to claim unfair dismissal⁸⁰ or to claim a redundancy payment. The compulsory retirement of a person on the grounds of their age when they are still capable of carrying out the duties of their employment to a satisfactory level is obviously contrary to the principle of eliminating age discrimination. This unsatisfactory situation is compounded where workers with little or no occupational pension are compulsorily retired before the State Pension Age. Where workers are unable to obtain alternative employment⁸¹ they can face real hardship.
- 1.267. Allowing capable skilled persons to continue in employment for longer, where they wish to work for longer⁸², should be beneficial both to the individual and to the organisation by which they are employed. It is accepted, however, that employers may well have to invest more time and effort into capability procedures for their employees and training of managers as it will be more difficult to avoid addressing any capability issues by simply waiting for a person to retire. Of course, capability issues can occur at any point during a person's working life and failure to deal appropriately with those issues is likely to have negative consequences for any employer.
- 1.268. Under the Bill, as under the UK Act, it will be possible for employers to set a retirement age for their employees and workers where this can be justified as a proportionate means of achieving a legitimate aim. There is UK case law on this issue which will be of assistance to employers in the Isle of Man. Proposed changes to the

⁸⁰ Subject to certain exemptions, set out in section 132(2) of the Employment Act 2006.

⁸¹ Unless general age discrimination is addressed it is of course quite possible that the person will not be able to find alternative employment.

⁸² It is accepted that with State Pension age increasing in line with life expectancy some workers may consider that it is financially necessary for them to continue working longer but, subject to that, no person can be forced to continue working in a particular job if they either do not wish to do so or are not capable of doing so.

provisions concerning redundancy payments (as described in the next part of this document) will ensure that the potential exposure of employers for these payments does not become excessively burdensome.

- 1.269. The Isle of Man has accepted an international obligation under the United Nations' Convention on the Elimination of all Forms of Discrimination Against Women to implement the right to equal pay for work of equal value. Failure to comply with international law that applies to the Isle of Man is damaging to the Island's reputation, while asking the UK to contact the UN to withdraw its extension of this Convention to the Island would very likely be even more damaging to the Island's reputation.
- 1.270. Implementing equal pay for work of equal value is one of the main ways of addressing the historic undervaluing of types of employment that have traditionally been seen as "women's work" and of trying to close the gender pay gap.
- 1.271. Although some people may consider that equal pay for work of equal value is like comparing apples with oranges that is an overly simplistic and unhelpful way of looking at this issue. Two roles within a business or public sector body may be very different in terms of the purpose of those roles but still have very similar levels of responsibility, staff management, decision making, skill, physical demands, etc. This is not a new concept, particularly within the public service where very different roles have long been assigned to the same pay grade on the basis of various requirements of the role.
- 1.272. There is significant UK case law concerning equal pay for work of equal value and it is accepted that in the UK a number of cases have been complex, costly and lengthy. However, the Island can benefit from the experience of the UK, its case law and the considerable amount of guidance and advice that has been developed on this issue. To allow the businesses and bodies in the Island further time to consider equal pay issues it is envisaged that there will be a lead-in period of two years after the Bill has been passed before the equal pay for work of equal value provisions are brought into operation. No claim for equal pay for work of equal value will be permitted in respect of any time period prior to the relevant provisions coming into operation and the maximum amount of pay arrears that the Tribunal will be able to award in a successful case will be limited to two years⁸³ rather than the six years in the UK.
- 1.273. There will obviously be certain costs relating to businesses and other bodies familiarising themselves with the requirements in respect of each of the points referred to above, but this should be mitigated to a degree by the following:
- the relatively long lead-in period between the publication of this response to the Equality Bill consultation and the legislation being brought into operation;
 - following the Resolution adopted by Tynwald at its July 2015 sitting that the Disability Discrimination Act 2006 should be brought into operation during 2016 businesses and service providers should be familiar with the main requirements in relation to disability discrimination in the provision of goods and services⁸⁴ by the time the Bill has been enacted;

⁸³ Since no claim can relate to any time prior to the equal pay for work of equal provisions coming into operation it will be a further two years after the commencement of those provisions (i.e. four years after the Bill has been passed) before the Tribunal will be able to award the maximum period of pay arrears in a successful case.

For the avoidance of doubt, equal pay claims which are made on the basis of equal pay for like work and equal pay where there has been a job evaluation study, which can already be made under the Employment (Sex Discrimination) Act 2000, will be unaffected by the lead-in and transitional periods for equal pay for work of equal value claims.

⁸⁴ Although not in relation to disability discrimination in employment as the DDA 2006 does not deal with this issue.

- as the Bill is based closely on the UK's Equality Act 2010 there is a wide range of relevant guidance and other information (such as UK case law) on the general requirements that is freely available; and
- the intention that an Equality Officer should be appointed when (or shortly before) the Bill has been passed to lead on the preparation of Isle of Man specific documentation, provide briefings and training to businesses and other bodies, etc.

Same sex marriage

- 1.274. Although, in following the UK's Equality Act 2010, the Bill did not make provision for the introduction of marriage equality (i.e. same sex marriage) in the Island, a few responses did refer to this issue. Those responses generally suggested that the Equality Bill should include provisions to allow same sex couples to be married in the Island.
- 1.275. It is still considered that this issue should not be included in the Equality Bill as it would further increase the length and complexity of the Bill. It is also considered that it would be desirable to properly consult on this issue.
- 1.276. However, particularly in the light of developments in the Island's neighbours this year (e.g. the referendum in favour of same sex marriage in the Republic of Ireland⁸⁵)⁸⁶ and also further afield, it is believed that there is a case for a separate Bill on marriage equality to be considered either in parallel with or shortly after (depending on the availability of resources) the introduction of the Equality Bill into the Branches. It is envisaged that marriage equality legislation would be the subject of public consultation prior to its introduction.
- 1.277. It is accepted that for some religious bodies the issue of same sex marriage is a controversial and emotive matter of religious principle; for this reason, in any legislation that may be brought forward, should not require a religious body that does not accept the concept of same sex marriage to conduct such marriages. Whilst it is appropriate for religious bodies such as the Church of England (and persons acting in their capacity as officials of these bodies) to be exempted from any requirement to conduct same sex marriages it is not considered to be appropriate for individuals who may have a role in the course of their employment in relation to conduct or recognition of same sex marriages to have such an exemption. This leads into the issue of the balance of rights which is discussed below.

Balance of rights

- 1.278. A small number of the responses to the consultation raised the issue of the balance of rights in cases where the rights in relation to one protected characteristic were considered to be conflict with the rights in respect of a different protected characteristic. This point was only raised in relation to the requirement not to discriminate against a person on the grounds of their sexual orientation and the right to freedom of religion.

⁸⁵ A referendum on this issue was necessary in the ROI because the introduction of marriage equality would require an amendment to the Constitution of Ireland and such amendments must be approved by a referendum.

⁸⁶ It has been reported that Jersey plans to introduce same sex marriage by January 2017.

In Guernsey, which currently does not have civil partnership legislation, a consultation has recently closed on the Guernsey Policy Council's preferred option of the introduction of a *Union Civile* for same sex couples, which stops short of marriage equality. Although the outcome of that consultation has not been formally published, it is understood that there was a large response which showed greater support for full same sex marriage than for *Union Civile*. The Policy Council will now bring forward its proposals for politicians to consider before next April's general election in Guernsey.

1.279. In some other countries certain people have argued that people who consider that same sex relationships⁸⁷ are against their religious beliefs should have an exemption from the requirement not to discriminate against sex couples in the provision of certain functions and services; for example, a registrar not being required to conduct a civil partnership or civil same sex marriage or a hotel owner not having to provide accommodation to a same sex couple. It has been argued that such exemptions would not be on the grounds that the service provider is homophobic (which they may or may not be) but purely on the grounds of freedom of religion – such an exemption is commonly known as a “conscience clause”. It has been said that without such a conscience clause the right to freedom of religion is put under threat because the protected characteristic of sexual orientation is given more weight than that of religion or belief. It could equally be said though that a conscience clause would simply put religious rights ahead of the rights of persons who are gay, lesbian or bisexual not to be discriminated against.

1.280. It should be noted that under Article 9 of the European Convention on Human Rights that freedom of religion is specifically protected:

Article 9 – Freedom of thought, conscience and religion

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

2. *Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

1.281. Freedom of expression and freedom of association in relation to a person’s religion (and in relation to any other matter) are also explicitly protected under Article 10 and Article 11 of the European Convention respectively.

1.282. None of these rights is absolute, however; they are qualified rights that (as can be seen from Article 9(2) of the Convention above) may be limited by law on a number of grounds, including the protection of the rights and freedoms of others.

1.283. There have been some high profile cases in the United Kingdom concerning the balance of rights that have been considered by the courts⁸⁸, with some of those cases having been taken as far as the UK Supreme Court or the European Court of Human Rights in Strasbourg. These cases have been given very careful and detailed consideration by a range of highly qualified and experienced lawyers and judges. It is accepted that this is a divisive issues but the essential outcome from these cases has been that while religious rights must be respected it is acceptable for the law to require equality of treatment in the provision of goods, services and public functions even if such treatment is contrary to a person’s religious convictions.

1.284. Although there are limited examples of conscience clauses in a restricted number of highly emotive areas in UK legislation (e.g. nurses do not have to participate in

⁸⁷ This may also extend to gender reassignment

⁸⁸ *Bull and another (Appellants) v Hall and another (Respondents)* [2013] UKSC 73
Case of Eweida and Others v. the United Kingdom – EctHR Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10
Gareth Lee v Ashers Baking Co Ltd and Colin McArthur and Karen McArthur - [2015] NICty 2 (to be appealed)

abortion treatment if it is against their moral, religious or ethical beliefs⁸⁹) there is no conscience clause in relation to the UK's equality or same sex marriage legislation. Attempts to introduce a clause relating to same-sex marriage into the Equality Acts in England and Wales and in Scotland have failed on the grounds that it is contrary to the principle of equal treatment. These attempts were not supported by either the UK or Scottish Governments notwithstanding the fact that certain religious leaders, politicians and judges are supportive of conscience clauses.

- 1.285. The operation of conscience clauses can also be problematic. Taking the example of same sex marriage, it must be remembered that a wedding often involves a wide range of businesses and service providers (for example: the registrar, hotelier, waiter, caterer, florist, photographer, dressmaker, hairdresser, car hire, gift shop, printer, etc.). Should all be exempt from providing services to the couple? Would it be reasonable, for example, for a waiter at a hotel which is to host a same sex wedding reception to have a religious exemption from working a shift that would involve serving the wedding party? Should the manager of a Registrar who conducts same sex marriage have an exemption from any responsibility for the Registrar's work in this area if the manager considers that same sex marriage is contrary to their religious beliefs?
- 1.286. It may be possible, for example, for a Registry Office to normally accommodate the religious views of a particular Registrar who does not wish to conduct civil partnerships or same sex marriage by having a different Registrar generally conduct such ceremonies if this does not involve providing a less favourable service to a same sex couple. Such accommodations are acceptable and appropriate where possible. However, if the Registry Office found itself in the position of needing the Registrar in question to cover for sickness or leave which would otherwise mean the Office was unable to provide a service to same sex couples, it should be able to rely on the Registrar to do so. If not, this could potentially lead to the cancellation of arrangements that had been made well in advance. All couples should have a legitimate expectation of being able to rely on the Registrar to carry out the duties of their role despite their religious convictions. If a person believes that they are unable to carry out the full range of duties which may be required of them in a particular role for religious (or other) reasons, it is open to them to consider that role is appropriate for them.
- 1.287. Similarly, to take another example, if a hotelier, B&B proprietor or landlord considers that they are unable to provide services to a same sex couple (or indeed because a person has undergone or is undergoing gender reassignment or because a person is of a different religion) without discriminating against them compared to other persons, the business may need to consider its options for the future.
- 1.288. The Bill will therefore not include provision for a conscience clause.

Other Issues

"Need for the Bill" - proportionality/length/complexity

- 1.289. Some responses to the consultation suggested that such comprehensive equality/anti-discrimination legislation was not required in the Isle of Man, with one saying that the Bill was "a sledgehammer to crack a nut".

⁸⁹ However, even this right is limited. In December 2014, the UK Supreme Court decided that the right to conscientious objection did not extend to the labour ward co-ordinators, when it ruled that two Catholic midwives did not have the right to avoid supervising other nurses involved in abortion procedures.

- 1.290. The reasons for closely basing the Bill on the UK Act have been set out elsewhere in this document. It is, however, worth making a few further points.
- 1.291. The fact that the Isle of Man is obviously much smaller than the UK with a much smaller population is not a reason in itself for not having comprehensive legislation to ensure that minority and vulnerable groups are treated equally and are protected from discrimination. It has been argued in the past, for example as recently as when what became the Race Relations Act 2004 was introduced into the Branches of Tynwald, that there is not really a problem in the Island with discrimination so no legislation is required. Even if this entirely unfounded view was correct, this would not excuse the Isle of Man from having to comply with modern international standards and obligations which require discrimination to be prohibited by all necessary means including legislation. International treaty bodies are extremely sceptical about claims that discrimination does not exist in any country.
- 1.292. As stated earlier in this document in relation to Questions 1 and 2 in the consultation document, there is sometimes a perception that lengthy and detailed legislation is "bad" legislation. Although there might be some examples which support this view, in general legislation is lengthy and detailed (or complex) for good reasons. This is definitely the case with the Equality Bill. So far as possible, people and businesses want certainty about the rules that apply to them. It may not be possible to provide absolute certainty on points such as what is "reasonable" in relation to reasonable adjustments for a disabled person, or what is a "proportionate means of achieving a legitimate aim", because each individual case will be different and this is why, ultimately, there has to be an independent Tribunal to adjudicate on such matters. However, the Bill (along with the secondary legislation and guidance to be made under it⁹⁰) has to be detailed to provide as much certainty as realistically possible. A very significant amount of the Bill is in fact about making the general principle of equality workable in practice, about situations where businesses and others have legitimate exceptions and exemptions available to them, and to ensure that as few issues as possible have to be referred to the Tribunal for consideration.

Questions about disability and health

- 1.293. Some responses to the consultation raised the issue of restriction on enquiries about disability and health of job applicants:
- "With regard to Section 51 of the bill; does subsection (4) contradict subsection (1)? Is not the phrase in subsection (1), "must not ask about the health of the applicant", too broadly drawn? Is Section 51 meant to apply only to applicants with one of the 'protected characteristics'? If so, it should state this, because if not it appears that it becomes illegal to ask anyone about, for example, their sickness record prior to offering them a job. Section 51 (3), might be construed to make it illegal to simply pass on information concerning a job applicant's health: potentially barring a referee from mentioning a poor sickness record. We need to take particular care that capability procedures in respect of staff whose issues stem from poor attendance due to health issues are not affected by the provisions of the bill." (Dr Couch)*
- 1.294. The subsections within the relevant clause of the Bill have been slightly reordered but the content is basically identical to the equivalent section of the UK Act. There is

⁹⁰ And, as stated elsewhere in this document, since the Bill, secondary legislation and guidance will be closely based on the UK Act the large body of relevant case law which has developed in the UK will also provide further clarity on how particular provisions should be interpreted, because whilst UK case law is not binding on the Island it is highly persuasive in the Island's courts/tribunals when equivalent matters are considered in the absence of specific Isle of Man case law.

detailed guidance on this issue in the Employment Statutory Code of Practice⁹¹ produced by the UK's Equality and Human Rights Commission. The UK Government's Equalities Office has also produced a quick start guide⁹² on this issue. It is intended that such documents will be adapted for use in the Island.

- 1.295. The provision is designed to ensure that disabled applicants are assessed objectively for their ability to do the job in question, and that they are not simply rejected because of their disability. Questions relating to previous sickness absence are considered to be questions that relate to disability or health.
- 1.296. Except in the specific circumstances, it is unlawful for an employer to ask any job applicant about their disability or health until the applicant has been offered a job (on a conditional or unconditional basis) or has been included in a pool of successful candidates to be offered a job when a position becomes available. This includes asking such a question as part of the application process or during an interview.
- 1.297. An employer can ask an applicant about their disability or health in the following cases:
- to help decide if an applicant can carry out a task that is an essential part of the work;
 - to help find out if an applicant may need assistance to take part in an interview;
 - to help decide if the interviewers need to make reasonable adjustments for an applicant in a selection process;
 - to help monitoring the diversity of applicant;
 - if the employer wants to increase the number of disabled people they employ;
 - if the employer needs to know for the purposes of national security checks.
- 1.298. As employers may no longer ask questions about a candidate's health until at least a conditional job offer has been made, referees should therefore not be asked to comment on a candidate's health or their sickness absence record. A referee would not be committing an offence if he or she volunteered such information unprompted, but if the employer then uses that information as the reason (or, if there is more than one reason, the primary reason) for refusing to appoint the person the employer may be open to a claim of disability discrimination.
- 1.299. If a person thinks that an employer has acted unlawfully by asking questions about health or disability that are not permitted, the person can complain to the Attorney General who has powers to take enforcement action against the employer. A person does not need to have a disability to complain to the Attorney General in this situation.
- 1.300. A person cannot bring a claim to the Employment and Equality Tribunal against an employer for asking unlawful questions about disability and health. It is only where such questions are asked and the employer uses the information gained to discriminate against the person that he or she can bring a disability discrimination case in an Employment Tribunal. If an employer asks unlawful questions but does not use the information to discriminate against the person because of disability (for example the disabled person is nevertheless offered the job) no discrimination has occurred and there is no case to bring.

⁹¹ <http://www.equalityhumanrights.com/publication/employment-statutory-code-practice>

⁹² <https://www.gov.uk/government/publications/equality-act-guidance>

Process

1.301. In his response to the consultation Hon Juan Watterson MHK stated:

"I am concerned that Council of Ministers priorities have been subverted to achieve the Chief Minister's personal agenda. The document states at 1.3 "the Chief Minister asked for the drafting of the Bill... to be accelerated". It should be understood that he asked the Attorney General, not Council of Ministers who had considered such an act as low priority. I am concerned that there appears to be a perception of prerogative power that allows is to happen. This should be clarified in the response to consultation."

1.302. The Equality Bill was approved for inclusion in the Government's legislative programme by the Council of Ministers in November 2011, replacing the narrower Employment Equality Bill which had been in the programme for a number of years previously. At the time that the Equality Bill was included in the legislative programme, and indeed until quite recently, there was little differentiation on the priority of Bills except where an issue came to light that needed to be addressed urgently; instead, there were simply lists of priority Bills to be progressed in particular years⁹³.

1.303. How quickly a Bill was then progressed depended largely on the availability of the limited drafting resources in the Attorney General's Chambers, along with the time available to responsible officer(s) in the lead Department(s) to prepare drafting instructions, consultation documents, etc. taking into account the pressure of other work, and also the interest and time of the relevant Minister or Political Member in seeing the Bill progressed within a particular timetable. The factors influencing the progression of a Bill sometimes changed, as was the case with the Equality Bill, and there was nothing that was either untoward or inappropriate in the Chief Minister asking for this Bill, which had previously been approved by the Council of Ministers as one of its priority Bills, to be taken forward more quickly in response to the negatively publicity that the Island received in 2013⁹⁴.

Miscellaneous

1.304. A number of miscellaneous questions and points are addressed in the following paragraphs.

"Clause 32(3) appears to allow an exemption from the Act for B&B owners. How is this justified?"

1.305. This provision, which is identical to section 32(3) of the UK Act, ensures that the provisions of Part 2 of the Bill concerning to the disposal⁹⁵ and management of premises do not apply to a short-term let, such as a holiday let, or premises provided in the exercise of a public function, such as a police cell or accommodation in a hospital ward.

⁹³ See, for example the written response to Mr Hall's Tynwald question to the Chief Minister at the October 2012 sitting of Tynwald in which the Equality Bill was listed as a priority for introduction in the year 2012/13. T130 p.46 <http://www.tynwald.org.im/business/hansard/20002020/t121016.pdf>

⁹⁴ As a result of the case where a landlord with religious belief refused to rent accommodation to a lesbian couple.

⁹⁵ 'Disposal' could include selling, letting, subletting or granting an occupancy right

1.306. As is clear from UK case law⁹⁶, this provision does not allow an exemption for B&B owners, who are operating an ongoing business rather than providing a short-term let such as is the case with the Island's TT Homestay scheme.

"I am concerned at the impact on the shipping and aviation industries that ships and aircraft that have no relationship to the Island other than registration will be subject to this Bill. That is to say a Manx ship or aircraft, crewed by foreign nationals and which may never visit an Isle of Man port will still be subject to these rules. I am concerned that the impact of clause 163 has not fully been assessed."

1.307. In fact, the purpose of clause 163 is to confirm that that the Bill does not apply to Manx ships or aircraft – unless the Department of Economic Development (DED) makes an order to apply certain of the Bill's provisions to those ships and aircraft. The order making power is a contingency for the future because at this time it is not envisaged extending the provisions of the Bill to Manx ships and aircraft⁹⁷. As DED is home to the Isle of Man Ship Registry and Isle of Man Aircraft Registry it has no wish to damage their success or continued viability.

How is it in the interests of equality to permit exclusion from charitable activities on the grounds of sex (Cl.156(6))?

1.308. As in the UK there is no wish or intention to prohibit to the continued operation of charitable bodies such as the Women's Institute (WI) or impact of work of charities such as rape counselling centres or those that deal exclusively with male or with female cancers.

Presumably a section 203 order relates to the UK Act (Cl.168(3))?

1.309. Clause 168 of the Bill 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.

1.310. 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 2010 Act (and equality law of the UK more generally) deals 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.

1.311. In these cases powers in the European Communities Act 1972 would not be sufficient to amend all relevant parts of the equality 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.

⁹⁶ Bull and another (Appellants) v Hall and another (Respondents) [2013] UKSC 73

⁹⁷ It is not envisaged that the provisions of the Bill would be extended to the international fleet of vessels registered in the Island but DED may give consideration to whether any of Bills provisions should be applied to domestic vessels.

- 1.312. 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.
- 1.313. 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 by a section 203 order under the UK Act.

Why does Schedule 3, para 23 refer to the UK Act 2004, not the Isle of Man Gender Recognition Act 2009?

- 1.314. The reference to the UK's Act 2004 is correct because under the Isle of Man Gender Recognition Act 2009 the definition of a person's acquired (i.e. changed) gender is by virtue of that person having received a full gender recognition certificate from the UK Panel established under the UK Act. A person's acquired gender in accordance with the UK 2004 Act is then merely recognised for certain legal purposes under the Island's 2009 Act.

With the continual reorganisation of Government, why are Schedule 6 & Schedule 20(2) not amendable by Order?

- 1.315. This point is accepted and enabling powers to allow such amendments by order will be included in the next draft of the Bill.

How does the Bill apply in respect of paternity provisions, especially if the father (rather than the mother) is the main care provider in the child's early years?

- 1.316. In line with the UK Act, the Bill does not specifically deal with paternity rights within the protected characteristic of "pregnancy and maternity". Whilst it can no longer be assumed that in all cases the mother always will be the primary carer for babies and young children it is still a fact that it is mother who carries the child during pregnancy, the mother who is likely to need some time to recover physically after the birth of the child, and it is still the mother who is in the overwhelming number of cases the primary carer for babies and young children.
- 1.317. Nevertheless, the DED is mindful of developments in the United Kingdom in respect of improved rights to paternity leave, the right to shared parental leave and the right to request flexible working⁹⁸ and the Department is giving consideration to the possibility of introducing such rights in the Isle of Man.

Will the Bill require Government to provide free foreign language provision in schools?

- 1.318. The Bill will not impose any additional obligations on the Government in relation to free foreign language provision (either where English is the second language of a pupil or as part of the curriculum where English is the first language of pupils) over

⁹⁸ There is already the right in Manx law for a father to request flexible working if he has a young child to care for. Although an employer is not bound to agree to such a request (any more than if it was the child's mother making the request), the employer does have to give the request proper consideration.

and above those that may already exist under the Education Act 2001 or under international obligations such as right of all children to receive appropriate education in the United Nations Convention on the Rights of the Child⁹⁹.

To whom is an application for a "transitional exemption order" under Schedule 11(3) made?

- 1.319. There is a drafting error in Schedule 11 which will be corrected in the next draft of the Bill. The power to make a "transitional exemption order" if a single sex school wished to turn co-educational should rest with the Department of Education and Children and any application for such a transitional exemption order would be addressed to that Department.

Schedule 21 is not in a form of language that cross references to the Communications Bill.

- 1.320. The language in Schedule 21, as with the great majority of the Equality Bill, follows the language of the UK Act. This Schedule was, however, discussed with officers in the Communications Commission prior to the publication of the Equality Bill for consultation. 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 UK, the provisions of the UK Act apply to anything done by it in providing the information society service in another EEA state. 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 for in respect of intermediary internet service providers who carry out activities essential for the operation of the internet.

- 1.321. The E-Commerce Directive does not apply directly as part of the law of the Island and, to date, its provisions have not been applied to the Island using the powers in the European Communities (Isle of Man) Act 1973 or other means. Schedule 21 to the Bill was discussed with officers in the Communications Commission prior to the publication of the Equality Bill for consultation and most of the provisions in Schedule 25 to the UK Act appeared to be relevant to the Island even though the E-Commerce Directive does not apply.

- 1.322. The final form of the Communications Bill was not known at the time the Equality Bill was published but if it is considered to desirable to do so Schedule 21 to the Equality Bill can be amended to more closely cross reference the language of that Bill.

What is the purpose of Schedule 23(7), and why has it been included?

- 1.323. Paragraph 7 of Schedule 23 to the Bill inserts two provisions into the Social Services Act 2011 which generally mirror (although rewritten in more modern form, two sections of the Chronically Sick and Disabled Person Act 1981 which is to be repealed.

⁹⁹ <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

This paragraph was included in the Bill following consultation with the Department of Health and Social Care.

I presume this will apply to all business headquartered in the Isle of Man, even though they may have elements in other countries, i.e. its reach will be extra-jurisdictional. What assessment has been made on the effects of this Bill on international businesses?

- 1.324. The Bill will not have extraterritorial effect. A business headquartered in the UK has to comply with the UK Act in the United Kingdom but a branch of that business in the Isle of Man is not bound by the UK Act (although under group policies the branch may be required by its head office to conform with some or all of the UK Act's requirements). The same situation will apply to the Island's legislation.

Typographical errors and other drafting issues

- 1.325. In addition to specific instances mentioned elsewhere in this document, it should be noted that a number of responses drew attention to possible typographic errors and other drafting issues in the version of the Equality Bill which was issued for public consultation. All these points have been carefully considered and where appropriate amendments will be made to the next draft of the Bill.
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Part 2 – Schedule 22 – Additional Employment Law Amendments

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

(a) General comments

2.1. Few comments were received from consultees regarding the Department of Economic Development’s (DED) proposals and the Department stands by the proposals in the consultation document.

(b) Written statements

2.2. Whereas Prospect would like the Tribunal to be required to make an award even where an employer had not complied with the duty to issue written particulars in some minor respect, it remains the Department’s view that the Tribunal should have a discretion in such cases. Further, the proposals as a whole, set out on page 39 of the consultation document, are balanced and not unfavourable to employees. In particular:

- it is no longer necessary for an employee to make a written request to the employer that he or she be given a written statement as a pre-condition of receiving an award; and
- in a case falling under section 18 of the Employment Act 2006 (Tribunal’s duties to look at whether written statements were issued where an employee has made a complaint other than one concerning a written statement), whereas at present the Tribunal is only able 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.

(c) Pay statements

2.3. The Department remains of the view that the proposed remedy for not issuing pay statements (up to 4 weeks’ pay) will be better understood by employers and employees than the existing remedy (a sum not exceeding the aggregate of any unnotified deductions made by an employer in the 13 week period before the relevant Tribunal claim).

(d) Unlawful deductions – 6 year cut off point

2.4. The Bill makes any claim for unlawful deductions subject to a 6 year cut off point. The Department notes that there are differences of opinion as to how far back in time it should be permissible for a claimant to bring a claim where there has been a series of unlawful deductions (with the Deputy Chair of the Employment Tribunal questioning *why it should be more than 3 years from the date of the claim*, while Prospect implied that claimants should be able to go back beyond 6 years). The Department remains of the view that 6 years is the appropriate period of time, both because this is the standard limitation period and because such claims can, in any case, be made in the ordinary courts within that same period.

ACTION: No additional action is proposed in response to consultees’ comments though further work on the draft clauses is to be undertaken.

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

[The proposals would increase protection in cases where an employee was dismissed on the ground of a spent conviction etc., membership of the Reserve Forces, or for his or her political opinions]

- 2.5. Few comments were received from consultees regarding the DED's proposals in respect of these three cases. In general, the Department's proposals received the support of consultees.
- 2.6. One consultee asked what would happen in cases where the Rehabilitation of Offenders Act 2001 did not apply. The new protection against unfair dismissal will not apply in cases which are treated as exceptions to the general principles in the Act.

ACTION: No additional action is proposed in response to consultees' comments though further work on the draft clauses is to be undertaken.

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

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

- 2.7. Since the consultation the Treasury has made available additional statistical information on rebates paid since 1999/2000:

Year	No. claims	No. Employees	Total paid	Average per claim	Average per employee
1999/2000	13	16	N/K	N/K	N/K
2000/2001	20	37	N/K	N/K	N/K
2001/2002	19	58	N/K	N/K	N/K
2002/2003	22	60	N/K	N/K	N/K
2003/2004	42	88	£119,772.92	£2,851.74	£1,361.06
2004/2005	27	39	£99,708.18	£3,692.90	£2,556.62
2005/2006	43	65	£89,186.47	£2,074.10	£1,372.10
2006/2007	37	62	£75,582.96	£2,042.78	£1,219.08
2007/2008	34	66	£92,522.69	£2,721.26	£1,401.86
2008/2009	48	83	£96,728.89	£2,015.19	£1,165.41
2009/2010	67	110	£132,806.56	£1,982.19	£1,207.33
2010/2011	59	82	£85,564.44	£1,450.24	£1,043.47
2011/2012	38	60	£65,670.98	£1,728.18	£1,094.52
2012/2013	72	114	£155,070.62	£2,153.76	£1,360.27
2013/2014	51	96	£149,893.82	£2,939.09	£1,561.39
2014/2015	62	88	£186,294.82	£3,004.76	£2,116.99

- 2.8. Consultees were divided as regards the proposal to modify or abolish rebates. The Chamber of Commerce stated that its members strongly disagreed with any proposal to modify or abolish rebates and similar comments were expressed by Capital International. Other consultees, however, considered that rebates should be abolished and that there was a sound basis for doing so.

- 2.9. The Department considers that some arguments put forward for retaining rebates are misleading. In particular, the terms of particular groups of public sector workers are a completely separate matter to statutory employment rights, the latter of which are intended to provide a safety net to all workers and consequently have to be set at a relatively low level. Many private sector workers will, of course, have contractual terms which greatly exceed the statutory minima. Similarly the fact that “almost 300 claims have been made in the last 5 years” does not necessarily show that there is a need for the rebate as is argued, although it does show that where employers are making employees redundant and there is a Government scheme to defray a portion of the costs that employers will use that Scheme.
- 2.10. The Department maintains that there are good reasons for modifying or abolishing rebates:
- Comparable payments have long been abolished in the UK and the Island is in an era of public austerity;
 - The average pay out per employer (not employee) is fairly low, £3,005.

The Department’s proposals

- 2.11. The Department maintains that there is a good *prima facie* case for removing or phasing out redundancy rebates. At the same time, however, it is acknowledged that the Department’s proposals to abolish the age limit on claiming a redundancy payment (see commentary in respect of Questions A1 and A2 below) could mean that some employers might potentially face two simultaneous increases in redundancy costs. For this reason the Department proposes to:
- (a) introduce enabling powers to modify or abolish rebates by Regulations as proposed; but to
 - (b) look in more detail at the interaction and timing of abolition of the age limit on claiming a redundancy payment and abolition or phasing out of rebates; and
 - (c) look in more detail at the size of employers claiming rebates and to make the enabling powers sufficiently flexible so as to allow for a range of possible options, including the possibility of rebates being restricted to organisations of a particular description¹⁰⁰.

ACTION: No additional action is proposed other than that at (b) and (c) above.

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

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

- 2.12. As expected, the question as to whether Tribunal claimants should be required to pay a fee to bring a complaint proved to be divisive. The Chamber of Commerce and some employers would like to see a system of charges based closely on the UK

¹⁰⁰ Note that the Redundancy Payments Act 1990 already contains powers for the Treasury to modify Schedule 2 “rebates in respect of redundancy payments” by substituting for the numbers of employees and the proportions specified in the table in paragraph 1 such other numbers or proportions as may be specified in an order (RPA Sch. 2 para. 10). Employers with more than 40 employees are already precluded from claiming a redundancy rebate.

system, while trade unions and others were equally passionate in their opposition to fees. Some consultees suggested there was a case for a small fee but not a large one.

The UK fees regime

2.13. A system of fees was introduced in July 2013. Claimants have to pay £160 to lodge a claim and a further £230 for a tribunal hearing for basic claims so that a relatively straightforward unlawful deduction claims may now, in some cases, cost more to bring than the amount sought by the worker. Those challenging unfair dismissal, discrimination in the workplace, or a dismissal arising from whistleblowing face higher charges: £250 to lodge a claim and a further £950 for a hearing. It is possible to claim remission for fees due if an applicant can pass both a disposable capital test and an income test but the regime is apparently difficult to negotiate. Unsurprisingly, the number of claims (and particularly discrimination claims) has fallen sharply. The average number of claims per quarter in 2012/2013 (before the introduction of higher fees) was 48,000, whereas in the last quarter of 2014 there were 18,943 – 60% fewer claims. The introduction of fees has had no discernible impact on the outcome of cases indicating that some meritorious claims are not being pursued because of fees.

The situation in the Island

2.14. The following table shows the numbers of claims received and dealt with by the Employment Tribunal from 2007 to 2013.

Employment Tribunal claims 2007 - 2013			
Year	No. of claims	Settled at conciliation	Claims heard
2007	116	50	15
2008	137	88	23
2009	106	62	26
2010	115	70	32
2011	111	64	27
2012	129	79	26
2013	179	73	42

2.15. The main jurisdictions in respect of which almost all claims are received are unfair dismissal and unlawful deductions.

2.16. Most claims do not result in a Tribunal hearing. A majority are settled at conciliation through the Manx Industrial Relations Service (MIRS) whilst, in addition, other claims may be withdrawn or struck out by the Tribunal where they are not actively pursued by the claimant.

- 2.17. With the exception of the increase in claims in 2013¹⁰¹, the number of claims that have been received by the Employment Tribunal has remained fairly consistent.
- 2.18. Total Employment Tribunal running costs were £117,021 for 2014/15 (comprised of expenses claimed by chairpersons and tribunal members and estimated officer salary costs - apportioned to take into account officers servicing other tribunals). The Tribunals Centralised Administration administers 26 different tribunals but only 6 of these give rise to a significant number of claims; of these the greatest number of claims are received by the Employment Tribunal - although as pointed out only a minority of claims will proceed to a hearing.

Arguments in favour of the introduction of fees

- 2.19. There are a number of arguments in favour of the introduction of fees:
- There may be some vexatious, unreasonable and weak claims. Some employees may apply to the Tribunal in an attempt to pressurise employers to settle in order to avoid the trouble of a hearing. Yet the system allows employees and other workers to bring claims with little or no risk to themselves, even though the risks to businesses were considerable. A system of fees might deter some of these claims.
 - Fees could potentially defray some of the costs of running the Employment Tribunal and raise some additional monies for Government. This would be in keeping with Government's strategic aim of balancing the budget.
 - Leaving aside the question as to whether or not claims are meritorious, it is likely that the introduction of fees would lead to a reduction in claims. Hon Juan Watterson MHK pointed out that in the UK the fall in claims and reduction in spending on defending claims has been a major boost for UK businesses; some kind of boost might also occur in the Island.

Arguments against the introduction of a UK style regime

- 2.20. There are, however, a number of arguments against the introduction a system of fees based on that in the UK:
- Historically, part of the rationale for individual employment rights legislation in both the UK and the Isle of Man has been to reduce the need for the workforce as a whole to take collective action such as strikes, which have the potential to cause significant economic damage and disruption. If workers do not have an accessible system of individual employment rights to pursue legitimate grievances then the long term impact of this could well be an increase in collective actions by groups of employees and their representatives.
 - The requirement to pay to make a claim may restrict access to justice as appears to have happened in the UK. Introduction of such a fees regime in the Island would appear to be inconsistent with the Government's overarching aim of protecting the vulnerable and in bringing forward the Equality Bill. While the Bill will significantly strengthen individual employment rights, the introduction of fees at levels which may effectively restrict access to these rights would seem to risk adopting an inconsistent approach.

¹⁰¹ Included in the figure for 2013 are 65 claims of Unfair Dismissal and 23 claims of unlawful deductions from pay brought by various bus drivers against the former Department of Community, Culture and Leisure. This collective dispute means the figures are not wholly representative of a typical year.

- The introduction of a fee might in some many cases deter employers from entering into conciliation. Furthermore, if was a two stage fee regime was introduced employers might not engage with the Manx Industrial Relations Service until both sets of fees had been paid, at which point a hearing would be close to being scheduled.

Views of the Tribunal and of the Manx Industrial Relations Service

- 2.21. While it is likely that some employees may apply to the Tribunal to try to force employers to settle in order to avoid the trouble of a hearing, there is no body of evidence that there are a large number of spurious or weak cases. The Deputy Chair of the Tribunal stated that he had come across "very few hopeless claims" whilst the Industrial Relations Officer in MIRS informed the Department that she did not believe that there are many frivolous or vexation claims submitted to the Tribunal; she stated that she had seen less than 5 such claims over a 10 year period.

The DED's view

- 2.22. Having considered the wide range of views which were received, the Department considers that it is important that any new system is balanced, fair and does not deter any legitimate claims. It is also important to ensure that any fees system is simple to operate. Ultimately, the Department is not in favour of fee proposals based on the new UK fees regime but it would support the following system:
- Simple moderate "threshold" fees designed to deter weak or vexatious claimants – based upon perhaps up to £50 for simple claims and up to £100 for unfair dismissal or discrimination claims.
 - The fee would cover both lodging a claim and any tribunal hearing.
 - Where the claimant wins his or her claim the Tribunal should have power to require the respondent pay the amount of the fee to the claimant in addition to any other award.
- 2.23. It is to be noted that the Equality Bill will only contain enabling powers for the introduction of fees. Any fees regime would need to be implemented by way of subsidiary Rules (and the Bill will necessitate such new Rules when the Employment Tribunal becomes the Employment and Equality Tribunal).

Consultation by General Registry

- 2.24. The following comment was received by the General Registry which is responsible for the Tribunals' Centralised Administration including the Employment Tribunal:

"In relation to Tribunal Fees consideration is being given to the introduction of fees in relation to the Employment Tribunal, however at this time consideration is not being given to extending this review to other Tribunals."

- 2.25. Following the Consultation on the Equality Bill the General Registry undertook a limited consultation concerning the possible introduction of a UK style system of fees for the Employment Tribunal. Neither the Department of Economic Development (DED) nor the Cabinet Office was invited to make a submission.
- 2.26. The DED considers that consultation by the General Registry begs the question as to where responsibility for the policy on the introduction of fees, and setting their level,

should lie. While the General Registry consultation paper noted that Treasury is “the Department with political responsibility for the General Registry” the Employment Act 2006 confers powers on the DED to make Rules in respect of the Employment Tribunal and the Council of Ministers has general rule-making powers for tribunals under the Tribunals Act 2006 Act¹⁰². If the Employment Tribunal is to become the Employment and Equality Tribunal as proposed and its jurisdiction is to be expanded to deal with discrimination claims covering both employment (as at present) and goods and services then in the DED’s view it is logical for future policy in respect of tribunals, including policy in relation to fees, should rest in one place, under the Council of Ministers. The Department will draw this matter to the attention of the Council of Ministers.

ACTION: the draft Bill will continue to contain enabling powers for the introduction of fees. DED will ascertain where responsibility for policy in this area should lie and will continue to argue the case for a system of moderate fees.

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

- 2.27. As in the case of Employment Tribunal fees, consultees were divided as to whether the existing cost limits that the Tribunal can award should be increased, with organisations representative of employers seeking to increase the existing limit on costs and workers’ organisations seeking to retain the existing limit.
- 2.28. The Department took particular note of the views of the Deputy Employment Tribunal Chair, Mr Douglas Stewart that:
- "A cap of £500 on the amount a Tribunal can assess against a miscreant party was in my view misconceived even when introduced in 2008. It was far too low then and is even more outmoded now. A figure of £10,000 would be more appropriate to highlight a real sanction open to the Tribunal. Awareness of that type of figure will concentrate minds. The change does not mean that more Claimants or Respondents will be exposed to a costs sanction - the gateway to pass through is still narrow..."*
- 2.29. The Department notes that up to £20,000 costs may be awarded in UK tribunals, 40 times the amount specified in the Isle of Man Rules.
- 2.30. The Island’s Employment Tribunal or the Chair can make a "costs order", that is, an order requiring a claimant or respondent to make a payment in respect of costs incurred by another party. The general principle is that a costs order will not normally be made in any proceedings. However, an order can be made in certain circumstances:
- where a party has, in opinion of the Tribunal or its Chair, acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or (either personally or through a representative) conducting the proceedings;
 - where costs have been incurred as a result of a full hearing or a pre-hearing review being postponed;

¹⁰² In addition, the Interpretation Act 2015 (which had received Royal Assent but had not been brought into operation at the time of writing) contains a general powers in relation to fee which may be exercised by the Treasury, Departments and Statutory Boards.

- where a party has not complied with an order of the Tribunal.
- 2.31. Where consideration is given to making a costs order, the Tribunal or Chair must take into account a party's ability to pay when determining whether or not to make the order and, if so, the amount of the order.

Cost awards made by the Tribunal

- 2.32. The award of costs is very rare as one might expect in line with the current Rule provisions. No statistical information is gathered in this regard.¹⁰³
- 2.33. The Department is content to substantially increase the existing costs limit provided that, in the words of Mr Stewart, "the gateway to pass through is still narrow". In the Department's view it should remain the case that costs are only payable in exceptional circumstances but that the system should seek to deter anybody from wasting the Tribunal's time and public funds.
- 2.34. The Department notes that the UK's 2013 Rules also allow costs to be paid where a claimant brings a case "having no reasonable prospect of success". (In previous Rules this was referred to as bringing a case which was "misconceived"). The Department considers that the present circumstances in respect of which costs are payable should be extended to include such cases.
- 2.35. One consultee, Mr Keith Fitton, suggested that costs might be limited at a low level unless the claimant was either advised not to proceed with the claim by the Manx Industrial Relations Service (MIRS) and/or they had refused to partake in an approved Mediation Service. However, this would be problematic for MIRS, as it could impact on the Service's impartiality and DED would prefer a narrow but objective set of grounds that could lead to a costs award being made.

ACTION: No additional action is proposed. The increase in costs would be made by way of new or amended Employment Tribunal Rules.

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

[Those proposals concerned the following:

- (a) Employment Tribunal – power to for Chairperson sitting to sit alone without a full Tribunal;
- (b) Making payments from the Manx National Insurance Fund to employees of insolvent etc. employers subject to the maximum amount of a week's pay;
- (c) Power for DED to take a case on a worker's behalf in certain cases;
- (d) Power to arrange a conciliated settlement under the Redundancy Payments Act 1990;
- (e) Strengthening the provisions enforcing Tribunal awards]

(a) Employment Tribunal – Chairperson sitting alone

- 2.36. The proposal to extend the types of case where the Chair of the Tribunal can sit alone received little comment. The types of case where the Chair would sit alone are largely restricted to cases which involve a simple determination of the facts (e.g. was the worker paid her annual leave; did he receive a pay statement; was a particular deduction unlawful?). For this reason the Department does not consider it necessary,

¹⁰³ The following two historical Decisions did involve cost awards, the latter of which was £ 1,000 for which the two applicants were jointly and severally liable and which is thought to be the largest award made. See http://www.gov.im/lib/docs/registries/tribunal/oet806_05.pdf; and <http://www.gov.im/lib/docs/registries/tribunal/oet10041005.pdf>

as Prospect suggested, to review this issue after a period of time to check whether there might be any bias in the decision making process.

- 2.37. One consultee asked if it was possible for the Chair to sit alone in cases of unfair dismissal and discrimination claims if a party does not contest a claim. It is already the position that if it appears to the Chair that the complainant does not intend to pursue the complaint, or that the respondent does not intend to contest the complaint, then the Chair may sit alone (Employment Act 2006, Sch. 5, Part II, para. 6(b)).

(b) Insolvency and cessation of business of employer

- 2.38. The Department proposed to make payments from the Manx National Insurance Fund where their employer becomes insolvent or ceases trading subject to the maximum amount of a week's pay which applies to many other types of payment made under the both UK and Isle of Man employment law.

- 2.39. The Chamber of Commerce commented:

"...adverse changes to the fund that compensates employees whose employers have been made insolvent is considered to be an important scheme particularly in unsettled economic times. Further, members feel that this is indicative of a continual cost shift on to the private sector.....Chamber is not supportive of the introduction of caps to the payments that are available to employees in the event of insolvency of an employer. There is a lack of data supplied as to how often this is used and the Consultation Document should have provided this detail."

- 2.40. In response, the Department would point out the following:

- The purpose of the relevant provisions (Part XI of the Employment Act 2006) is to provide a safety net to employees. (Moreover it should be noted that Schedule 4 of the Employment Act excludes Crown employees, such as civil servants from any entitlement under Part XI).
- The maximum amount of a week's pay (MWP) is a well-established concept in both the Island and in the UK. Statutory redundancy payments are already capped in terms of the maximum amount of a week's pay while insolvency payments in the UK are also capped. The MWP limits many potential liabilities of employers, not only redundancy payments but also various tribunal awards such as the Basic Award in unfair dismissal cases.
- It would be incorrect to describe the proposal as indicative of a continual cost shift on to the private sector. It is the Manx NI Fund (MNIF) which meets the insolvent employer's liabilities; there is no burden placed on other employers whatsoever. And by capping such payments from the NI Fund, arguably NI contributions will not have to be increased to meet increasing liabilities.
- Where payments are made out of the MNIF to former employees of an insolvent employer, recompense is then sought from the employer in liquidation. By capping the amount paid to eligible employees out of the MNIF, the amount for which recompense is sought - in respect of higher paid employees - is actually reduced.
- Income to the MNIF by way of NI contributions now falls short of expenditure. Therefore, short of increasing NI contributions (which would likely place additional costs on employers), the Treasury has to seek to curtail expenditure

going forward. It is logical and reasonable to limit the amount a person can be compensated by the NI Fund in the event that their employer is unable to pay.

- As regards the apparent lack of data in the consultation document, expenditure from the Manx NI Fund for the last five financial years in relation to "insolvency payments" has been as follows:-

2014-15	£285,079
2013-14	£321,277
2012-13	£120,028
2011-12	£ 25,023
2010-11	£249,911

2.41. Prospect stated:

"We would question the set amount of capped weekly pay for calculating payments in these instances. What are the criteria for that figure? Given the IOM context maybe it ought to be set at the average wage level. Is it going to be subject to annual earnings increases?"

2.42. The MWP is based on median¹⁰⁴ earnings. While the present limit, £480, has not been increased since 2009, earnings have risen only slowly since that year. The latest current median earnings figure is £545.71 (source Isle of Man Earnings Survey 2014¹⁰⁵) and (subject to the approval of the Council of Ministers) the Department of Economic Development plans to increase the present MWP limit under the Employment Act 2006 in due course.

(c) Enforcement of employment rights

2.43. The proposal for DED to be exercise a remedy on a worker's behalf at the Tribunal, with the consent of the worker, received little comment.

(d) Powers to arrange a conciliated settlement under the Redundancy Payments Act 1990

2.44. This proposal, concerned broadening the powers of the Manx Industrial Relations Service (MIRS) to conciliate and removing a conflict between the Employment Act 2006 and the Redundancy Payments Act 1996 in respect of MIRS' power to arrange a conciliated settlement in respect of the latter Act. The proposal received little comment although the IOM Trade Union Council collated response included the following unsupported comment: *"it makes me fearful, particularly after recent dealings with MIRS."* The Department is unsure why the proposal should make the IOMTUC fearful particularly since individual workers cannot be obliged to enter into conciliated settlements.

(e) Enforcement of awards

2.45. The proposal to strengthen the provisions enforcing awards was generally supported.

2.46. It is of note that since the consultation document on the Equality Bill was published the UK Government's Small Business, Enterprise and Employment Act 2015¹⁰⁶ has

¹⁰⁴ The "average" is where all the amounts in a list are added together and then divided by the number of amounts in the list. The "median" is the "middle" value in the list of amounts. The median value is used rather than the average value because the average value can be distorted by a comparatively small number of very high earnings.

¹⁰⁵ <https://www.gov.im/categories/working-in-the-isle-of-man/earnings/>

¹⁰⁶ <http://www.legislation.gov.uk/ukpga/2015/26/contents>

received Royal Assent. The Act includes new powers to impose a financial penalty for failure to pay sums ordered by employment tribunals.

ACTION: No additional action is proposed though further work on the draft clauses is to be undertaken.

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

2.47. Because of the difficulty in separating the responses to this question and question 53, the latter of which asks about other employment law issues, consultees' responses to both questions have been combined under [question 53](#).

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

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

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

2.48. Consultees provided relatively little information as to the extent of usage of zero-hours contracts. However, the Chamber of Commerce stated that *"it is understood that that they are not widely used across all sectors"* while the Isle of Man Government's Office of Human Resources (OHR) stated that the Government *"currently has in the region of 1850+ contracts that would be described as zero hours."* Michael Manning (Graih) stated that zero-hours contracts existed in the hospitality (hotel) and cleaning sectors.

2.49. Some consultees pointed out that zero-hours contracts can be and are legitimately used. Keith Fitton told the Department about usage in his own organisation:

"There is a danger that zero hours contracts become demonised due to their abuse by some employers. The organisation that I work for uses zero hours contracts widely (and I'd like to think 'wisely'). We have sufficient 'regularly contracted' staff to cover the required shifts. We then have a large 'bank' of zero hours staff (we refer to as "Occasional Hours" staff). The Occasional Hours staff receive the same training as our regular staff, including access to QCF (NVQ as-was). There is no expectation that they be available to work for us, other than if someone has not worked any shifts during a six month period, we will stop using them. This is simply because their skills are unlikely to remain current and the needs of the people they would be required to support may have changed. The majority of our regularly contracted staff were recruited as Occasional Hours staff in the first place, then offered permanent hours as they become available. For many people, working flexibly meets their personal circumstances while allowing them to gain skills and training. For the organisation, we have a pool of staff available at short notice to cover sickness etc, who we know are of the required standard and sufficiently trained to meet the needs of the people who we support."

2.50. Others revealed some possible misuse of these contracts. OHR stated that:
"Anecdotally, there is strong evidence to suggest that these contracts are often abused by granting long-term and regular work, for example to cover long term vacancies or for service provision where manpower approval has not been secured."

2.51. Graih stated:
"We have a great amount of anecdotal evidence that people, often under the Permit system, are being exploited by an abuse of zero-hours contracts."

Recent developments in the UK

2.52. Since the consultation document on the Equality Bill was published the UK Government's Small Business, Enterprise and Employment Act 2015¹⁰⁷ has received Royal Assent. The Act, inter alia, amends the UK Employment Rights Act 1996 to provide for exclusivity terms, which prohibit a worker from doing work or performing services under another contract or under any other arrangement, or prohibit the worker from doing so without the employer's consent, to be unenforceable against the worker. The prohibition on exclusivity terms was brought into operation on the UK on 26 May 2015. In addition, there are enabling powers to make regulations which may make further provision towards this end.

2.53. The DED accepts that use of zero-hours contracts is perfectly legitimate in many circumstances.

2.54. The Department further notes that the Chamber of Commerce and several other consultees were broadly supportive of regulation for zero-hour contracts. One Chamber of Commerce member, Triumph Actuation Systems, stated:

"Regulation of zero hours contracts – causes us no problems but we do recognise these work well for some sectors from both an employee and employer standpoint, so care and consultation required."

2.55. The Department accepts that such a cautious method, as advocated, is required and the best approach is to insert a new section into the Employment Act 2006 which will provide appropriate enabling powers for the making of Regulations. The Department will consult on draft Regulations in due course.

2.56. Finally, Sean Young asked: *"what if a person is on a zero hours contract, but actually works regularly full time or part time hours when compared to a regular employee on a normal contract. Will they gain the same rights and protections after a given period?"* Regulations could provide for this to be the case.

2.57. The Department would point out that, in addition to the recent UK provisions, sections 165 and 166 of the Employment Act provide enabling powers for, respectively, part-time employees and limited-term employees to be treated no less favourably than other workers. Such an approach is likely to be adopted for zero-hours contract workers.

ACTION: No additional action is proposed though drafting work remains to be undertaken.

¹⁰⁷ <http://www.legislation.gov.uk/ukpga/2015/26/section/153>

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

- 2.58. A majority of consultees supported broadening the existing powers in the Employment Act 2006 to make new regulations. However, some consultees suggested that extension of the existing right could cause problems and pointed out that there were limits to organisations' flexibility.
- 2.59. The DED looked carefully at all of the comments. It is accepted that some potentially negative consequences could flow from an extension of the existing right. Particular organisations, for example in the manufacturing sector where there may be shift working, will have limits as to the number of workers that can be granted flexible working. In some cases workers who make an early request to work flexibly will be more likely to have their requests granted than those who make a request in subsequent years. Further, as Capital International pointed out, if there is a finite amount of flexible working capacity some existing categories of worker may find it more difficult for their requests to be granted.
- 2.60. The other side of the argument, however, is that employees may have many and diverse reasons for seeking flexible working and the DED considers that it would be overly prescriptive for the Department to determine which grounds should or should not be acceptable. Further, the right is only a right to *request* flexible working. As the consultation document pointed out, the basic right to request is unchanged. Employees can make up to one written request every year, the employer needs to deal with it within three months, and can refuse on any of eight (very wide) business grounds. The Tribunal cannot normally investigate the rights and wrongs of the refusal, only whether the procedure has been properly followed. So if an organisation can justify cannot not offering flexible working to an applicant then this would be perfectly defensible.
- 2.61. One consultee, Mr Fitton suggested that the Manx Industrial Relations Service (MIRS) should be able to determine whether flexible working should or should not be granted in particular cases. While MIRS may play a role in achieving agreement between employers and workers in some cases, determination of these matters by MIRS would not be compatible with its fundamental impartial role.
- 2.62. For these reasons the Department intends to proceed with the proposal to include new enabling powers for the making of Regulations.

ACTION: No additional action is proposed though drafting work remains to be undertaken.

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

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

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

- 2.63. Consultees provided limited feedback to the Department of Economic Development as to the use of interns, although the Isle of Man Government's Office of Human Resources stated that there appeared to be a number of private sector companies offering internships.
- 2.64. The trade union Prospect suggested that some internships could be exploitative.
- 2.65. While some organisations supported additional regulation the Chamber of Commerce stated it was not aware that this was an issue which required addressing and, as such, questioned whether this should be a priority of DED.
- 2.66. The Department carefully considered consultees' views particularly the points made by the Chamber of Commerce. The Department intends to take the opportunity presented by the Bill to include a simple enabling power in the Minimum Wage Act 2001 to make regulations applying or disapplying the minimum wage to people on work experience of a particular description and to make rules limiting the length of time persons can work without being paid at least the minimum wage.

ACTION: No additional action is proposed though drafting work remains to be undertaken.

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

(Because of the difficulty in separating the responses to this question and question 45, the latter of which asks about minor amendments which could be dealt with in the present Bill consultees responses to both questions have been combined below).

(a) Chamber of Commerce's general concerns

2.67. The Chamber of Commerce made the following comment:

"All of the legislative initiatives that the Government seem to introduce results in increased costs to businesses, more red-tape and regulation. The legislation also appears to be much more employee than employer focussed and a balance needs to be struck if businesses are not to be placed in jeopardy."

- 2.68. The Department would dispute this assertion and point out that the Island's employment law places significantly less obligations on employers in the Isle of Man than UK employment law places on employers in the UK. To give some examples, in the Isle of Man there is currently no legislation providing for:
- the regulation of working time (other than for paid annual leave and maximum working hours of shop workers);
 - statutory recognition of trade unions;
 - transfer of undertakings (other than in relation the rules of continuous employment);

- fixed term employees and agency workers to be treated no less favourably than other workers.

2.69. The Department notes that the trade union Prospect has raised both the issues of statutory recognition of trade unions and transfer of undertakings (see further below).

(b) Control of Employment legislation

2.70. As part of the Chamber of Commerce's response Island Aggregates stated:

"In terms of work permits, we have had difficulty recruiting the best people in the past due to the current legislation. In one recent case, we were unable to consider a well-qualified gentleman who had taken up residence on the island with his Manx partner and was willing to work, because a work permit was not forthcoming. While noting that 'nationality' is not one of the protected characteristics, I would question how the 2 pieces of legislation would exist side by side. In our view, any new measures which require (or in this case enable) us to recruit the best person for the job, regardless of anything, are to be welcomed."

2.71. The Department is aware of some employers' frustration with the work permit system. The Control of Employment Act 2014 (CEA) is due to come into force in October 2015; the Department considers that the new Act, together with Regulations made under the CEA, and sub-legislative policy will lead to an improvement to the present situation.

2.72. The CEA and the Equality Bill can *exist side by side* because the continued operation of work permit legislation is, in general, an allowable exception under the Equality Bill.

(c) Continuous employment to bring a case of unfair dismissal

2.73. The Chamber of Commerce made the following comment:

"Chamber believes that the Government should give serious consideration to extending the eligibility period to claim unfair dismissal to 2 years' service, like the UK has. This will assist businesses greatly in being able to properly assess an employee over a reasonable period of time. The experience in the UK has led to much fewer Tribunal claims. Members continue to periodically raise concern in relation to the work permit system and whether it hampers a business's ability to recruit appropriately."

2.74. The Government's Office of Human Resources made the following comment:

"We still believe the 2 year rule for applying to an ET should be introduced."

2.75. In the UK, from 6th April 2012 two years' continuous employment up to the effect date of termination has been required for an employee to bring a claim of unfair dismissal.¹⁰⁸ The previous one year qualifying period continues to apply in cases where the period of continuous employment began before that date.

2.76. The DED does not support an increase in the qualifying period for the following reasons:

¹⁰⁸ The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (SI 2012/989).

- In recent years the Department has twice consulted as to what the length of the qualifying period should be and on each occasion a clear majority of consultees, including the Chamber of Commerce, supported a one year qualifying period;¹⁰⁹
- The Department remains of the view that a one year qualifying period should be sufficient for an employer to establish whether an employee is capable and to assess their conduct;
- The Department has not consulted on this matter, which would be a very significant change to the Island's employment law;
- The only reason to extend the qualifying period seems to be because the UK has changed its qualifying period. However, the UK has, on several occasions altered its qualifying period and it is quite possible that the qualifying period will revert back to 1 year at some point in the future.¹¹⁰

(d) TUPE/Pensions Protection

2.77. The trade union Prospect stated that trade unions on the Island had long sought additional legislation in the areas of TUPE/Pensions Protection.

2.78. If Transfer of Undertakings (TUPE) provisions were introduced this would probably be accomplished by new primary legislation. The question of TUPE was last raised in the Branches in January 2012 in response to a Member's question on the topic. The then Minister, Hon. John Shimmin MHK, replied as follows:

"There are arguments both for and against introducing additional provisions similar to the UK's 2006 [TUPE] Regulations. However, the Department is of the view that the impact the new Regulations might have on otherwise normal commercial activity would need to be very carefully considered, particularly at this critical time."

2.79. The Minister went on to say that he would be prepared to look closely at the case for TUPE once the then Control of Employment Bill [now Act] and the Equality Bill had been dealt with. This remains the Department's present position.

(e) Statutory recognition of trade unions

2.80. The trade union Prospect stated that trade unions on the Island had long sought additional legislation in the areas of trade union recognition and that -

"We would welcome the re-opening of consultation in the area. In the case of Trade Union recognition, this was many years ago on the schedule of legislative considerations, but appears to have 'dropped off'. We would seek the current Code of Practice to be replaced by actual legislation; given the issues we have had in obtaining recognition both within and without Government employers in cases where the majority of employees have been seeking this."

2.81. In the UK the Labour Government introduced a right of statutory recognition in the Employment Relations Act 1999 (ERA). The former Department of Trade and Industry did consult on the question of recognition but there was no consensus on the matter

¹⁰⁹ The former DTI consulted on the matter as part of the consultation which preceded what is now the Employment Act 2006. Subsequently, Bill Henderson former MHK (now MLC) suggested that the qualifying period should be reduced and the successor to the Department, DED again sought views on the matter deciding in May 2010 to retain the one year qualifying period. The IOM Law Society, the then Chair of the Employment Tribunal, Mrs Sharon Roberts and the Chamber of Commerce all informed the Department that a one year qualifying period was most appropriate. The Chamber itself had stated that *"We consider that the extant one year qualifying period broadly balances the interests of employers and employees alike"*. The IOMTUC had, however, favoured a three month qualifying period.

¹¹⁰ In the 1970s the qualifying period in the UK was just 6 months. It was raised to two years in 1980s before being lowered to one year in 1999. It was extended to 2 years again in 2012.

and ultimately the Department decided to introduce a voluntary code of practice, the Code of Practice on the Recognition of Trade Unions 2001, rather than to introduce a right to statutory recognition.

2.82. Since 2001 the Department has not pursued the question of statutory recognition further for a number of reasons:

- Other legislative priorities such as the modernisation of individual employment rights;
- the length and complexity of UK legislative model (Schedule 1 of ERA *Collective Bargaining: Recognition* comprised 170 paragraphs when enacted);
- The lack of recognition disputes on the Island. When asked about the prevalence of such disputes the Industrial Relations Officer advised that: "We have never had to deal with one formally. We have had two queries about de-recognition that employers raised with us this, but which, following discussions with MIRS, they chose not to pursue."

2.83. Nevertheless, as in the case of TUPE, the Department would be prepared to look closely at the case for statutory recognition of trade unions once the Control of Employment Act and the Equality Bill have been dealt with.

(f) Mandatory early conciliation

2.84. The Chamber of Commerce made the following suggestion:

"..consideration should be given to mandatory early conciliation prior to the issuing of proceedings (subject to sufficient support being provided to the MIRS for this). This has been successfully introduced in the UK and has reduced spurious claims and the cost to businesses of defending tribunal claims greatly."

2.85. The Department of Economic Development discussed this idea with the Manx Industrial Relations Service (MIRS). MIRS is opposed to the idea for the following reasons:

- In their view the existing system works very well indeed. MIRS has powers under the Employment Act s. 157, to promote a settlement of a dispute both prior to and following any complaint that may be made to the Tribunal and in practice they are involved in almost all significant disputes. MIRS has estimated that there is approximately one case a year where an employee refuses conciliation and that it is actually more likely for an employer to refuse conciliation but this too is rare.
- There may be a minority of cases where it may not be appropriate for conciliation to take place; so that it would be wrong to make conciliation in all cases.
- If conciliation were compulsory then the time limits to bring a complaint to the Tribunal might have to be extended in certain circumstances. Yet the existing time limits are well known.

2.86. For these reasons it is not proposed to introduce mandatory conciliation.

(g) Cap on detriment awards etc.

2.87. The following point was raised by Douglas Stewart, Deputy Chair of the Employment Tribunal:

"Other Ideas - Detriment"

Tidy up Employment Act 2006 with regard to Detriment....Possible cap on awards to match unfair dismissal."

- 2.88. Part V of the Employment Act 2006 relates to detriment on ten protected grounds (such as whistleblowing, or asserting rights in relation to paid annual leave) while, in addition, there is protection against detriment in both the Shops Act 2000 and the Minimum Wage Act 2001. In some cases protection applies to *employees* only, in others to the wider group of *workers* (which term comprises not only employees, but also other workers such as casual workers, agency workers etc.).
- 2.89. Part X of the Employment Act [unfair Dismissal] protects employees against dismissal on all of those grounds and some additional ones. Where an employee is dismissed on a protected ground Part X of the Act will apply to him or her and not Part V. Therefore in the case of an employee, any claim of detriment will be limited to action short of dismissal e.g. demotion.
- 2.90. Workers who are not employees are not, however, protected against dismissal. Therefore in these cases protection against detriment encompasses both action short of dismissal and termination of the contract on any of the protected grounds.
- 2.91. Whereas an unfair dismissal award is subject to a maximum limit, except in the case of a dismissal for a health and safety reason or for making a protected disclosure, no limit applies in cases of detriment. This could give rise to anomalies of the following kinds:
- a worker could potentially receive greater compensation than an employee even though their contracts were terminated on the same protected ground; or
 - a worker who had suffered a detriment short of dismissal could receive greater compensation than an employee who had been dismissed.
- 2.92. The DED therefore considers that s. 72 of the Employment Act 2006 [Remedies for Detriment] should be amended so that compensation for detriment cannot exceed the limit in s. 144(1) [maximum compensation in unfair dismissal awards] except where the detriment is on the ground of a dismissal for a health and safety reason or for making a protected disclosure (in keeping with the two exceptions in Part X of the Act where the limit does not apply). The same limits also need to apply to the two cases of detriment outside the Employment Act. These are detriment for not working on a Sunday etc. in the Shops Act 2000 and for claiming the minimum wage etc. in the Minimum Wage Act 2001.

(h) Assertion of a statutory right

- 2.93. Douglas Stewart, also mentioned "*the catch-all provision of breach of a statutory right.*"
- 2.94. There is potential overlap between a claim to the Tribunal alleging detriment or dismissal for asserting a statutory right (respectively at Employment Act (EA) ss. 70 and 119) and particular rights which may also be the subject of specific provisions. For example, an employee who is dismissed for asserting rights in respect of annual leave could theoretically bring a claim under both section 116 [dismissal re annual leave etc.] and section 119 [dismissal re assertion of a statutory right] of the Employment Act 2006.

2.95. The Department has brought the need to avoid the theoretical possibility of double payment of compensation arising from overlapping claims to the attention of the legislative drafter in the Attorney General's Chambers.

(i) Whistleblowing

2.96. Douglas Stewart also raised the issue of possible additional protection for whistleblowers and the ongoing case in the UK of *Hudson-Maitland v Dempsey*, wherein the in-house lawyer "blew the whistle" on alleged money laundering etc within the solicitors' firm. Mr. Stewart suggested that no legal action for compensation or other relief should be commenced against any Compliance Officer (or perhaps even any whistleblower) without leave of the High Court or Tribunal, and leave should not be granted without the employer or other claimant establishing a higher burden of proof such as prima facie gross negligence or malice.

2.97. The DED does not propose to look into this issue within the context of the current Bill but will, however, monitor the outcome of the case and review whether it is desirable to make any amendments to Island's employment law. Part of the rationale is that there have been recent amendments to the whistleblowing provisions of the UK Employment Rights Act 1996 made by both the Enterprise and Regulatory Reform Act 2013 and the Small Business, Enterprise and Employment Act 2015. The Department would like to look at all potential changes to Part IV of the Employment Act 2006 [Protected Disclosures] at the same time.

(j) Employment Tribunal Rules 2008

2.98. Douglas Stewart, raised the following concern:

"Employment Tribunal Rules 2008

Rule 6. The time-limit for action by the Clerk is too short. 7 days really needs to be changed to 14 days."

2.99. The DED will look at this point when the Rules are next replaced or amended. It would not be appropriate to deal with the matter in the present Bill.

(k) Tribunal's powers to strike out feeble claims

2.100. Douglas Stewart suggested that there should be a more robust approach under the Tribunal Rules to strike out feeble claims and also raised the following idea:

"I have discussed whether a Claim might be rejected as being "misconceived." I like the idea. I have heard it suggested that this might be a hammer used unfairly by a Respondent but what I envisage is that only the Tribunal when presented with a misconceived Claim Form could strike out without the Respondent being involved - but the Respondent who would still have the vexatious etc grounds open if the Claim survives a misconceived attack by a Chair."

2.101. The DED would contend that the Tribunal already has at least some of the requisite powers. The Chair can, for example, decide to strike out a claim that is outside the time limits without the case going to the Tribunal and the Rules also contain powers for a pre-hearing review at which any preliminary matter may be considered and which may result in the proceedings being struck out or dismissed.

2.102. Nevertheless, the Department will look at the approach in the UK Employment Tribunals Act 1996 s. 7 regarding determination of proceedings without any hearing. This section contains enabling powers for regulations which can be used to strike out claims in certain circumstances.

2.103. In addition, when the Rules are revised the Department will reconsider the existing powers and, in particular, look at whether the Tribunal should have explicit powers to strike out cases "having no reasonable prospect of success" without the Respondent being involved. (In previous UK Rules such cases were defined as "misconceived"). At present the Island's Rules do not provide for a pre-hearing review to be held without the Respondent being involved.

(I) The Disability Employment Service

2.104. Leonard Cheshire Disability raised the following point:

"We would welcome a review of the Isle of Man's Disability Employment Service (DES) alongside of the provision of additional support and investment for this service.

The Island has a significant unmet need in terms of access to employment for disabled people, particular in terms of support for young disabled people leaving."

2.105. Keith Fitton made the following observations:

"I would like to see the Disability Employment Service reviewed, supported & invested in. The Island has an unmet need in terms of access to employment for people who have a disability. This actually begins in school, where access to education remains poor in comparison to the UK. Also, it is my opinion that there is not an expectation that disabled children would go on to either tertiary education or in to employment. The DES should begin working with young people who have a disability while they are still in education. The government should also promote the employment of disabled people. Studies have shown that disabled people are more loyal employees and have less time off sick than the non-disabled employee. Employers on the Isle of Man need to know this. Government has schemes where they can employ a disabled person without that person being on the 'head count', yet from the July Tynwald, it would appear that government do not collate figures regarding the number of disabled people that they employ? DED should be focussing upon the employment of disabled people as a matter of great urgency. "

2.106. The Disability Employment Service (DES) is part of the Skills and Employment Group of the DED. The remit of the two DES officers is to assist people with disabilities find and retain employment. These officers also administer the Department's Employment Persons with Disabilities etc Scheme 1999 under which funding is made available to meet any additional employment expenses of people with disabilities and their employers.

2.107. While the comments are not perhaps of direct relevance to the Bill itself, they have been passed to the Manager of the Skills and Employment Group who will explore the concerns raised, with a view to seeing whether any improvements to the DES can be made.

ACTION Points (g), (h) and (k) above will be brought to the Drafter's attention.

QA1 Do you have any comments on the proposal to remove the age limit on older employees being entitled to claim a redundancy payment?

QA2 If the age limit for claiming a redundancy payment is removed which system should be used for calculating redundancy payments and the Basic Award for Unfair Dismissal? (Please choose an option from paragraph 28 above or suggest an alternative system).

- 2.108. The Cabinet Office and the Department produced a second addendum to the main consultation document entitled "*Considerations regarding redundancy and the basic award for unfair dismissal*". The purpose of the paper was to set out the possible consequences of the Bill in respect of redundancy and invite consultees to give their views regarding certain options. The paper pointed out that if (capable) employees were to be protected against being dismissed on the ground of their age as part of the anti-age discrimination strand of the Bill then, in order to prevent any circumvention of new protection against unfair dismissal, it would also be necessary to make corresponding changes regarding the law on redundancy. This would be accomplished by removing the existing exclusion on older employees being eligible to claim a redundancy payment. At the same time, however, in order to prevent redundancy payments from being unduly onerous on employers it was proposed that statutory redundancy payments should be subject to a cap with regard to the number of years that can be taken into consideration - as they are in the UK - and to seek views as to which one of a number of possible systems should be used to determine an employee's entitlement.
- 2.109. Few responses were received from consultees, possibly because the two questions were in a supplementary document.
- 2.110. Some consultees disagreed with the central principle contained within the Bill of following the UK approach to retirement, which since 2011 has made it unlawful to retire workers on the ground of age or to set a retirement age unless it is a proportionate means of achieving a legitimate aim. Thus the Chamber of Commerce stated that they would prefer a default retirement age (DRA) linked to state pension age with no entitlement to a redundancy payment over the DRA.
- 2.111. The Chamber also considered that extending the current system to older employees would have massive cost implications. However, the following factors will limit any additional costs:
- The proposed cap as to the number of weeks' pay that can be awarded to employees who are made redundant;
 - Most employees will continue to seek retirement at some point;
 - Employees are made redundant because the need for them to do the job ceases – there can be no other reason. Older employees are more likely to be dismissed on capability than redundancy, in which case an employer's costs will be limited to notice pay and pay in lieu of any untaken annual leave.
- 2.112. The larger question as to what should be the chosen policy in respect of retirement has, however, been discussed in relation to Question 19 ["Do you have any comments about the proposals in the Bill relating to retirement?"] wherein it was concluded that the Island should adopt the UK approach for the reasons given in the discussion on that question. As policy in respect of redundancy has to be consistent with that overall policy then it follows that the age limit on older employees being

entitled to claim a redundancy payment must necessarily be removed (just as it has been in the UK).

Which system should be used for calculating redundancy etc. payments?

2.113. The supplementary paper presented five options for reforming the existing redundancy system by ceasing to exclude older employees from entitlement.¹¹¹ Few responses were given by consultees as to which might be the best option.

2.114. Having given the matter careful consideration the Department's preference is for option (d), to "retain the IOM system but extend entitlement to older employees and impose a cap of 26 weeks' pay". This is on the grounds that:

- in contrast to option (b) it avoids having to take account of the age an employee is when made redundant and to vary the number of weeks' pay (1/2, 1 or 1 1/2) that is to be paid for each year of employment (a system which is possibly age discriminatory and which the UK has had to make an allowable exception in its Equality Act 2010); and
- a maximum of 26 weeks' pay, that is 6 months' / 1/2 a year's pay rounds up the maximum amount to a memorable amount for both employers and employees.

ACTION: No additional action is proposed. The Department has advised the Drafter as to the extent of amendments which are required to implement the proposals.

Additional Proposals

2.115. Following publication of the consultation document the DED decided to bring forward the following additional proposals:

(a) Inclusion of a provisions on vexatious claims

2.116. The Department considers that in order to allay certain concerns of some employers it would be useful to include a provision which would permit the Attorney General to issue a restriction of proceedings order against a serial vexatious litigant, to prevent him or her making further claims.

2.117. In an ordinary case where a claim has been brought, it is often possible for the respondent to avoid further litigation by avoiding further contact with the claimant. That opportunity is not available to employers advertising for employees or to recruitment agencies acting on their behalf. Because the Bill covers applicants, employers cannot prevent any particular individual from applying for a role, and any attempt to have no further dealing with a vexatious or serial litigants could result in a victimisation claim. In particular:

¹¹¹ The options presented were as follows:

- (a) The DED could retain the existing system (1 week's pay for each year of continuous employment) but extend entitlement to older employees;
- (b) DED could adopt the UK system in which a maximum of 20 years is taken into consideration and a maximum of 30 weeks' pay can be awarded;
- (c) DED could retain the IOM system but extend entitlement to older employees and impose a cap of 20 weeks' pay;
- (d) DED could retain the IOM system but extend entitlement to older employees and impose a cap of 26 weeks' pay;
- (e) DED could retain the IOM system but extend entitlement to older employees and impose a cap of 30 weeks' pay. (The maximum number of weeks' pay would be the same as the UK, albeit that it would take half as long again as in the UK for an older worker to be eligible for the maximum payment).

- Under clause 28 of the Bill, A victimises B if A subjects B to detriment for doing a protected act, or because A believes B may do a protected act. A “protected act” includes bringing a discrimination claim. A claimant can be successful in a victimisation claim even if the original discrimination claim has no merit at all.
- If a recruitment agency refused to put a person forward for further roles on the basis that he or she had submitted vexatious tribunal claims against the agency in the past, that would amount to a detriment under clause 28.

2.118. The Department considers that in order to deal with this possible predicament, it should be possible to request the Attorney General to issue a restriction of proceedings order if a person habitually, persistently and without any reasonable grounds institutes vexatious proceedings (whether or not against the same or different respondents), or makes vexatious applications in proceedings to the Tribunal.

2.119. Section 33 of the UK Employment Tribunals Act 1996 could be used as a model; this enables the Attorney General or Lord Advocate to apply to the Employment Appeal Tribunal (EAT) for a restriction of proceedings order against a serial vexatious litigant, to prevent him or her making further claims. (The Island has no EAT so that it is proposed to apply to the Attorney General instead).

(b) Computation of period of employment

2.120. Schedule 5 of the Employment Act 2006 sets out the Rules for computing an employee’s period of continuous employment with his or her employer. The Schedule is largely technical in nature.

2.121. The DED considers that it would be useful to insert an appropriate enabling power in the Schedule which would permit it to be able to amend the schedule by Regulations. Such Regulations would require the approval of Tynwald.

(c) Value of a week’s pay – broaden existing Regulation making power

2.122. Schedule 6 of the Employment Act 2006 sets out the Rules for calculating an employee’s normal working hours and the amount of a week’s pay of any employee. As in the case of (b) above the Schedule is largely technical in nature. The amount of a week’s pay is used to calculate, for example, holiday pay which is required under the Annual Leave Regulations 2007. Whereas most cases are straightforward it can be more difficult to calculate the pay of certain atypical workers who may be earning variable amounts of pay. While the Schedule attempts to deal with such workers there may be some types of atypical workers who are not explicitly covered by its provisions.

2.123. Paragraph 4 of the Schedule already includes a power to make Regulations:

“The Department may by regulations provide that in cases prescribed by the regulations the amount of a week’s pay shall be calculated in such manner as may be so prescribed.”

2.124. The Department considers that it would be useful to broaden the power at paragraph 4 so as to be able to also modify Schedule 6. Any regulations made under the paragraph would continue to require the approval of Tynwald.

ACTION : These three matters have been brought to the Drafter’s attention.

List of direct consultees

Tynwald Members

Clerk of Tynwald

Acting Attorney General

Isle of Man Courts of Justice

Local Authorities

Chief Officers of Government Departments, Boards and Offices

Manx Industrial Relations Service

Appointments Commission

Isle of Man Chamber of Commerce

Isle of Man Trade Union Council

Isle of Man Employers Federation

Isle of Man Law Society

Positive Action Group

Liberal Vannin Party

Tynwald Advisory Council for Disabilities

Multi-agency Forum for the Disability Discrimination Act

Isle of Man Council of Voluntary Organisations



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