Please note: this is draft for consultation and should not be taken as final text

The Equality and Human Rights Commission

Employment Statutory Code of Practice

Draft for Consultation

This draft code is based on the Equality Bill as printed on 3 December 2009 (introduced into the House of Lords on 4th December 2009).

Equality and Human Rights Commission

Foreword

The new Equality Bill is the most significant piece of equality legislation for a generation. It will simplify, streamline and strengthen the law. It will give individuals greater protection from unfair discrimination. It will make it easier for employers and companies to understand their responsibilities. And it will set a new standard for public services to treat everyone, no matter what their background or personal circumstances, with dignity and respect.

As I write, the Bill is before parliament. We in the Equality and Human Rights Commission hope to see it on the statute book in a matter of months. Our biggest priority, in the short term, is to do what we can to help make that happen.

The point of legislation, however, is not to put ink on vellum. If the Bill is to fulfil its potential, it needs to be translated into practical change in the way companies act, the way public authorities plan and deliver services, the opportunities each of us enjoys in our everyday life.

As the statutory champion for fairness, the Equality and Human Rights Commission monitors compliance with the law, enforcing and litigating where necessary. But our role is not limited to picking up the pieces when things go wrong. First and foremost we aim to provide information, support and encouragement so that organisations can get things right.

The Commission places great importance on illuminating the Equality Bill. It is our job to help individuals understand and assert their rights, and to help organisations (both public and private) understand what legislative change means for them. With some elements of the law possibly coming into force as early as October 2010, there is no time to lose. That is why we are planning to publish two significant documents before the legislation comes into effect.

The first is a set of statutory codes, setting out clearly and precisely what the legislation means. They will draw on precedent and case law. They will explain the implications of every clause in technical terms. The statutory codes will be the authoritative source of guidance for anyone who wants a rigorous analysis of the legislation's detail. For lawyers, advocates and human resources experts in particular, they will be invaluable.

The second document will be non-statutory guidance. Our goal is to make equality and diversity part of everyday business for everyone, not just the experts. Indeed, we will have failed if what we produce speaks only to a small circle of people. That's why the non-statutory guidance is designed to be down-to-earth, practical, and accessible.

As we draft these documents we are acutely aware that they should reflect the needs, expectations and language of the people who are going to use them. Many individuals and organisations have already been kind enough to share their thoughts on what good guidance looks like, and what they expect to see in our documents. We are grateful for their input.

This document is the draft statutory code on the employment provisions of the Equality Bill. This publication starts a formal period of consultation. (The draft of non-statutory guidance, and formal consultation on it, follow shortly.)

We look forward to hearing reactions and comments, and responses to a number of specific questions in this text. Clear and authoritative codes will be vital to enable new equality law to fulfil its promise: this is your chance to help us get them right.

Neil Kinghan

Interim Director General of the Equality and Human Rights Commission

Chapter 1
Introduction

Purpose of the Equality Act

The Equality Act 2010 (the Act) brings together discrimination law introduced over four decades through legislation and regulations. It replaces most of the previous discrimination legislation, which is now repealed. The Act covers discrimination because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. These categories are known in the Act as 'protected characteristics'.

An important purpose of the Act is to create a single approach to discrimination against people with different protected characteristics, where this is appropriate. However, there are some important differences in the way that discrimination is defined, particularly for disability. There are also some circumstances that would amount to discrimination against people with some protected characteristics, but not with other characteristics. People using the Act therefore need to be familiar with the differences that relate to people with different characteristics.

The Act has also brought in provisions to strengthen the law by making discrimination unlawful in circumstances not covered under previous discrimination law. Broadly speaking, discrimination in most areas of activity, against people with protected characteristics described in the Act, is now unlawful. These areas of activity include, for example, employment, education, housing, the provision of services and the exercise of public functions. An organisation may have duties under more than one area of the Act

because, for example, it employs people and provides services to customers.

These different areas of activity are covered under different parts of the Act. Part 3 of the Act deals with discrimination in the provision of services and public functions. Part 4 deals with discrimination in the sale, letting, management and occupation of premises, including housing. Part 5 covers employment and other work-related situations. Part 6 covers education including schools, further education, higher education, and general qualifications bodies. Part 7 deals with discrimination by membership associations.

Scope of the Code

This Code covers discrimination in employment and work-related activities set out in Part 5 of the Act. Part 5 is based on the principle that people with the protected characteristics set out in the Act should not be discriminated against in employment, when seeking employment or when engaged in occupations or activities that are not, in legal terms, employment but are nevertheless related to work.

In Part 5 of the Act, there are some provisions relating to equal pay between men and women. These provisions create an implied sex equality clause in employment contracts, in order to ensure equality in pay and other contractual terms for women and men doing equal work. Equal pay between men and women is covered in the Equality and Human Rights Commission's Equal Pay Code. Where a person experiences sex discrimination in employment or occupation and also experiences discrimination in pay because of that person's sex, reference may need to be made to this Employment Code and to the Equal Pay Code.

Part 5 of the Act also contains sections which make discrimination by trade organisations (including trades unions) and vocational qualifications bodies

unlawful (clauses 53, 54 and 57). These organisations are included in the work provisions of the Act because they provide a gateway to employment and progression or give support to people when in employment. Because the duties of qualifications bodies and trade organisations are different to the duties of employers, both legally and practically, these duties are covered in a separate Code.

This Code applies to England, Scotland and Wales.

Purpose of the Code

The main purpose of this Code is to provide a detailed explanation of the Act and to apply legal concepts in the Act to everyday work-related situations. This will assist courts and tribunals when interpreting the law and help lawyers, advisers, trades union representatives, human resources departments and others who need to apply the law.

Because the Act is long and complex, this Code is detailed, and some parts may be difficult to understand for someone with no knowledge of discrimination law. The Equality and Human Rights Commission (the Commission) has also produced practical guidance for employees and employers which assumes no knowledge of the law. The practical guidance explains what employers should do in a range of work-related situations and explains what rights employees, job applicants and others have in these situations. It can be obtained from the Commission, or downloaded from the Commission's website. The practical guidance has been designed to relate closely to the Code and will help people to use the Code and the Act.

The Code, together with the practical guidance produced by the Commission will:

- help employers and others who have duties under the employment provisions of the Equality Act to understand their responsibilities and how to avoid disputes in the workplace.
- help individuals to understand the law and what they can do if they believe they have been discriminated against because of a protected characteristic.
- help lawyers and other advisers to advise their clients
- give employment tribunals and courts clear guidance on good equal opportunities practice in employment; and
- ensure that anyone who is considering bringing legal proceedings under the Equality Act 2010, or attempting to negotiate equality in the workplace, understands the legislation and is aware of good practice in employment.

Status of the Code

The Commission has prepared and issued this Code under the Act on the basis of a request by the Secretary of State. It is a statutory Code. This means it has been approved by the Secretary of State and laid before Parliament. The Code does not impose legal obligations. It is not an authoritative statement of the law; only the tribunals and the courts can provide such authority. However the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings. If employers, and others who have duties under the Act's provisions on

employment and occupation, follow the guidance in the Code, it may help to avoid an adverse decision by a tribunal or court in such proceedings.

Role of the Equality and Human Rights Commission

The Equality and Human Rights Commission was set up under the Equality Act 2006 to encourage and support the development of a society in which:

- people's ability to achieve their potential is not limited by prejudice or discrimination,
- there is respect for and protection of each individual's human rights,
- there is respect for the dignity and worth of each individual,
- each individual has an equal opportunity to participate in society, and
- there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

The Commission has duties to promote human rights and equality and to provide advice about the law so that discrimination is avoided. It also has powers to enforce discrimination law in some circumstances. The Commission can bring proceedings where an employer has issued an instruction to discriminate, or where that employer has caused or induced another person to discriminate. It can bring proceedings to prevent an employer from using a discriminatory job advertisement. It can also issue enforceable non-discrimination notices.

Where the Commission has information to suggest that an employer has committed an unlawful act, it can carry out an investigation under s. 20 of the Equality Act 2006. Where the Commission has information to suggest that there is a pattern of discrimination by employers generally, for example in a particular sector or against a group of people with particular protected characteristics, it can carry out an Inquiry under s.16 of the Equality Act 2006. As part of an investigation or Inquiry the Commission can require the employer to provide information about its policies or practices under schedule 2. The employer cannot unreasonably refuse to provide such information. The Commission will use these powers of investigation and Inquiry strategically to promote equality and human rights, and to tackle entrenched discrimination.

These provisions of the Equality Act 2006 have not been repealed by the Equality Act 2010.

Human Rights

Public authorities have a duty under the Human Rights Act (HRA) to act compatibly with rights under the European Convention for the Protection of Fundamental Rights and Freedoms (the Convention). It is unlawful for public authorities to breach Convention rights in any area of their activity, including employment and work-related activities. Organisations not in the public sector have a duty to act compatibly with Convention rights only in relation to functions of a public nature that they may carry out.

Where an organisation has such an obligation in relation to employment or work-related activities, it will find it easier to ensure compliance with the HRA and the Convention if it follows the advice given in this Code and other Codes relevant to human rights.

Courts and tribunals also have a duty to interpret primary legislation (including the Equality Act 2010) and secondary legislation in a way that is compatible with Convention rights, unless it is impossible to do so. This duty applies to courts and tribunals whether a claim is made by an individual against a private or a public authority. So in any employment discrimination claim made under the Act, the court or tribunal must ensure that it interprets the Act compatibly with the Convention where it can.

In practice, human rights issues in the workplace are likely to arise in relation to forced labour, privacy and data protection, freedom of expression and thought, trade union activity and harassment. Discrimination in the enjoyment of other Convention rights is also prohibited. Because of the close relationship between human rights and equality it is good practice for employers, when drawing up policies, to consider equality and human rights within these policies, to ensure that all employees are treated with dignity and to avoid discrimination and human rights violations. It is advisable for all employees to have training in these policies.

Managing different needs of people with different protected characteristics

The principle of equality that underpins the Equality Act 2010 is intended to promote and protect the dignity of all people in society. This involves, where appropriate, dealing with the specific needs of persons with particular protected characteristics. In some cases this may involve balancing different needs associated with different characteristics.

Under the Act a person is not entitled to treat another person less favourably simply because the first person has a protected characteristic.

Where an employer perceives that the needs of an employee could conflict with the needs of another

employee, or a service user, the employer must ensure:

- first that both are treated with dignity and respect by the employer and;

- second that each treats the other with dignity and respect. This will involve ensuring that neither person unlawfully harasses the other whilst permitting responsible freedom of expression.

Employers can avoid possible conflicts by noticing problems at an early stage and attempting to deal with them by, for example, talking to the people involved in a non-confrontational way. It is important to encourage good communication between employees and managers in order to understand the underlying reasons for potential conflicts. Where conflict cannot be resolved by a manager or employer alone, it may be better to seek outside help, particularly if there are concerns that there could be a breach of a person's rights under the Equality Act or the Human Rights Act. Employers should also have effective grievance procedures which can be used if informal methods of resolving the issue fail.

There may be situations where an employer must intervene to prevent an employee discriminating against another employee or against another person to whom that employer has a duty (such as a customer). This may entail for example, taking disciplinary action against an employee who discriminates. Clear policies setting out employees' right to dignity and respect, and their obligation to provide such dignity and respect to others, can help employers to avoid such situations and can also help if such situations arise.

Large and small employers

It is inevitable that employers and others who have duties under the Act's provisions on employment and occupation have different ways of complying with the Act, depending on the size of the organisation and the number of people they employ. While all employers have the same legal duties under the Act, the way that these duties are put into practice may be different. Small employers may have more informal practices, have fewer written policies, and may be more constrained by financial resources. This Code should be read with awareness that large and small employers may carry out their duties in different ways, but that no employer is exempt from these duties because of size. Small employers are less likely to have a human resources team or legal team to provide advice, so may need to take advice on compliance with the Act from an external organisation (such as the Equality and Human Rights Commission) or to use the Commission's practical guidance.

How to use the Code

Chapter 1 (this chapter) gives an introduction to the Code.

Chapter 2 explains the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Chapter 3 explains the different forms of discrimination, harassment and victimisation that are unlawful under the Act, including combined discrimination and the duty to make reasonable adjustments for disabled people.

Chapter 4 describes good practice measures that should be taken by employers in order to prevent discrimination. The exact measures taken will depend on the size of the organization.

As explained above, discrimination claims can be made under Part 5 of the Act in situations that are wider than legally-defined "employment" (i.e. through an employment contract). **Chapter 5** explains the circumstances under which these duties arise, covering the questions of "Who has rights?" and "Who has duties?"

Chapters 6 to 10 cover the different issues that arise at different stages of the employment journey from recruitment to termination of employment. These chapters include good practice advice. **Chapter 6** covers recruitment. **Chapter 7** explains positive action. **Chapter 8** explains Occupational Requirements. **Chapter 9** covers issues that arise during the employment relationship, such as terms and conditions, training and disciplinary matters. Practical issues, such as dress codes and managing absence are included in this chapter. **Chapter 10** covers termination of employment including retirement and dismissal.

Chapter 11 explains discrimination in work-related situations that are not employment. This chapter covers contract workers, police officers, partners, barristers and advocates, office-holders and employment services.

Chapter 12 explains how to make a claim for discrimination under the Act, how employment discrimination claims will be dealt with, and remedies.

Appendix 1 contains further information about the meaning of disability in the Act; about the territorial scope of the legislation; and about workforce monitoring.

Examples in the Code

Examples of good practice and how the Act is likely to work are given in boxes. They are intended simply to illustrate the principles and concepts used in the legislation and should be read in that light. The examples should not treated as complete or authoritative statements of the law.

While the examples refer to particular situations, they should be understood more widely as demonstrating how the law is likely to be applied generally. They can often be used to test how the law might apply in similar circumstances. They can also be used to test how the law might apply to someone with different protected characteristics, but only to the extent that those provisions apply to the different protected characteristics. The examples attempt to use as many different protected characteristics as possible and as many work-related situations as possible, to demonstrate the breadth and scope of the Act. Examples relating to women or men are given for realism but could, in almost all cases, refer to people of either sex.

Use of the words ‘employer’ and ‘employee’

As explained in this introduction and in Chapter 5 of this Code, the Act imposes obligations on people who are not necessarily employers in the legal sense – such as partners in firms, people recruiting their first employee, or people using contract workers. In this Code, these people are also referred to as ‘employers’ for convenience.

Similarly, people who are working for an 'employer' but are not under a contract of employment with that 'employer' are called 'employees'. These include, for example, contract workers, police officers and office holders. The word 'employees' may also include job applicants, except where it is clear that the provision in question specifically does not relate to job applicants. The term 'employment' is also used to refer to these wider work-related relationships, except where it is specified that the provision in question does not apply to these wider relationships.

References in the Code

In this Code, 'the Act' means the Equality Act 2010. References to particular clauses and Schedules of the Act are shown in the margins. Occasionally other legislation or regulations are also referenced in the margins.

Changes to the legislation

This Code refers to the law as it is expected to be at the time the Equality Act 2010 comes into force. There may be subsequent changes to the Act or to other legislation which may have an effect on the duties explained in the Code. Readers of this Code will need to keep up to date with any developments that affect the Act's provisions. Further information can be obtained from the Equality and Human Rights Commission. See below for contact details.

Further information

To be added to the final publication

How to get hold of the Act [TBC]

How to get hold of the Code [TBC]

Contact details for The Equality and Human Rights Commission (the Commission)

Equality and Human Rights Commission England
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M4 3EQ

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The Optima Building
58 Robertson Street
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Equality and Human Rights Commission Wales
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3 Callaghan Square
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Chapter 2
Protected characteristics

2. Introduction

Part 2 of the Act contains the key concepts of equality. These are sub-divided into (a) 'protected characteristics' which are distinguishing qualities of individuals and (b) 'prohibited conduct' which are types of behaviour outlawed by the Act. This Chapter explains each of the protected characteristics and Chapter 3 explains prohibited conduct.

The following characteristics are 'protected characteristics' under the Act: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Prohibited conduct includes: direct and indirect discrimination, discrimination arising from disability, victimisation and harassment.

Unlawful discrimination occurs when protected characteristics and prohibited conduct are connected in specified ways, for example: because of an employee's sexual orientation (a protected characteristic) her employer treats her less favourably than other employees (the prohibited conduct of direct discrimination).

Not all personal characteristics are protected characteristics and therefore not all types of discrimination are unlawful. In this Code we are only concerned with unlawful discrimination. Therefore any references in this Code to 'discrimination' or to 'unlawful discrimination' mean discrimination which is prohibited by the Act.

It should be emphasised that the relevant protected characteristic does not always have to be a characteristic of the victim of the discrimination. In some cases, for example where direct discrimination or harassment are alleged, the question is whether or not any less favourable treatment received by an employee is because of or related to a protected characteristic, not because of a protected characteristic of that employee.

This means that unlawful discrimination may occur where:

- an employee is treated less favourably because the employee has the protected characteristic, for example, because the employee is male or black or Muslim;
- an employer wrongly perceives that an employee has a protected characteristic, for example, where an employee is treated less favourably because the employer thinks that he is gay even though he is not – the less favourable treatment in that case would still be because of a protected characteristic; and
- an employee is treated less favourably because someone else has a protected characteristic. This is usually referred as 'discrimination on the basis of association.' For example: an employer treats a white, female employee less favourably because she has a black boyfriend.

In other cases it is necessary for the relevant protected characteristic to be a characteristic of the employee claiming discrimination. For example: indirect discrimination looks at whether a provision, criterion or practice applied by an employer, is discriminatory in relation to a protected characteristic of the employee in question and others with whom the employee shares that characteristic.

This Chapter now examines each of the protected characteristics in detail. The types of unlawful conduct are set out in Chapter 3 Prohibited Conduct.

Age

What the Act says

2.1 Age is defined by the Act by reference to a person's age group. Where people fall within the same age group, they share the protected characteristic of age. **Clause 5**

2.2 An age group can mean people of the same age or people of a range of ages. Age groups can be very wide (for example, "people under fifty") or can be relatively narrow (for example, "people in their mid-forties") or relative (for example, "older than me" or "older than us").

2.3 The notion of age group is rooted in chronological age, but some age-related terms can have different meanings depending on the context. For example, whether someone is seen as 'youthful' can depend on their role: compare a youthful bar tender with a youthful CEO. Age groups can also be linked to physical appearance, which may have little relationship with chronological age – for example, ''grey- haired' workers.

2.4 There is also some flexibility in the definition of someone's age group. For example, a 40 year old could be described as 'aged 40', 'under 50', '35 to 45' 'over 25' or 'middle aged'.

Example: A woman employee aged 25 could be viewed as sharing the protected characteristic of age with a number of different age groups. These might include '25 year olds', 'the under 30s', 'the over 20s' and 'younger workers'.

Example: A man aged 86 could be said to share the protected characteristic of age with the following age groups: '86 year olds', 'over 80s', 'over 65s', 'pensioners', 'senior citizens', 'older people' and 'the elderly'.

2.5 Where it is necessary to compare the situation of a person of a particular age group with others, the Act does not specify the age group with which comparison should be made. It could be everyone outside the person's age group, but in many cases the choice of comparator age group will be more specific; this will often be led by the context and circumstances.

Example: In the first example above, the 25 year old woman might compare herself to the' over 25's, or 'over 35's', or 'older workers'. She could also compare herself to 'the under 25's' or ' 18 year olds'.

Disability

What the Act says

2.6 A person who has a disability has the protected characteristic of disability. Where people have the same disability, they share the protected characteristic of disability.

2.7 A person will have the protected characteristic of disability if they have had a disability, even if they no longer have the disability, (except in relation to Part 12 (transport) and section 183 (improvements to let dwelling houses)).

2.8 Only people who have a disability, who have had a disability or who are perceived to have a disability, or are associated with a disabled person, are protected against discrimination on this ground. The status of being non-disabled is not protected. This asymmetrical protection originates in the need to prohibit the historic discrimination against disabled people.

2.9 A person has a disability if they have a physical or mental impairment which has a

- long term and
- substantial adverse effect on their ability to carry out day to day activities

Physical or mental impairment includes sensory impairments.

2.10 An impairment which consists of a severe disfigurement is treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities. So long as it is long term, it will be covered by the Act.

2.11 Long term means that it has lasted or is likely to last for at least a year or for the rest of the affected person's life. Substantial means more than minor or trivial.

2.12 Where a person is taking measures to treat or correct an impairment, and, but for those measures, the impairment would have a substantial adverse effect on the ability to carry out normal day to day activities, it is still to be treated as though it does have such an effect.

This means that "hidden" impairments are also covered (for example, mental illness or mental health problems, and conditions such as diabetes and epilepsy).

2.13 Cancer, HIV infection and multiple sclerosis are deemed disabilities under the Act.

2.14 Progressive and recurring conditions will amount to disabilities in certain circumstances

2.15 For a fuller understanding of the concept of disability under the Act, reference should be made to the Appendix to this Code.

Gender reassignment

What the Act says

2.16 The Act defines gender reassignment as a protected characteristic. **Clause 7(1)**

2.17 People who are proposing to undergo, are undergoing or have undergone a process (or part of a process) to reassign their sex by changing physiological or other attributes of sex have the protected characteristic of gender reassignment.

2.18 A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment. **Clause 7(2)**

2.19 Under the Equality Act 'Gender reassignment' is a **personal** process, i.e. moving away from one's birth sex to the preferred gender, rather than a **medicalised** process.

2.20 Thus it may be proposed but never gone through; the person may be in the process; or the process may have happened previously. It may include undergoing the medical procedures involved, or may simply include choosing to dress in a different way as part of a person's desire to live in the opposite gender.

2.21 A person can show that they have reached a definitive position point and are 'proposing' to undergo gender reassignment. Once they are proposing to undergo reassignment they are protected.

2.22 There are lots of ways in which some one may show that they have reached a definitive position point:

- Making their intention known to someone (even if they do not take any further step)
- Starting to dress, or behave, like someone who is changing their gender or is living in an identity of the opposite sex.
- Somebody who was driven by their gender identity to cross dress would also be in the process of gender reassignment, however intermittently it manifested itself.
- Although undergoing a medical process is not required, where someone has decided to attend counselling sessions related to that process, this would signal that they are proposing to undergo gender reassignment and are therefore protected.

This is a non-exhaustive list and the characteristic should be given a broad interpretation because it seeks to encompass the personal process involved.

2.23 Because the provision does not follow a medical model of gender reassignment it is capable of providing wide protection. This is particularly important for gender variant children: although some children do transition whilst at school, there are others who are too young to make such a decision. Nevertheless they may have begun a personal journey and are moving their gender identity away from their birth sex. Manifestations of that personal journey, such as mode of dress, indicate that a process is in place and they will be protected.

2.24 Protection is provided from the moment when someone proposes to move along the pathway away from their birth sex. The Act does not however require that person to have reached a *decision* that they will do it and never turn back. As soon as there is a manifestation the duty not to discriminate comes in.

Example: A person who was born physically female decides to spend the rest of her life as a man. He starts and continues to live as a man. He decides not to seek medical advice as he successfully passes as a man without the need for any medical intervention. He would be protected as someone who has undergone gender reassignment.

Example: Someone may show that they are proposing to undergo gender reassignment by attending counselling sessions relating to the commencement of a gender reassignment.

2.25 Also, people who have started a gender reassignment process but have withdrawn still have the protected characteristic because they have undergone part of a process of gender reassignment. So for example a woman born physically male may start the process and decide to go no further; she will still have the characteristic.

> **Example:** A person born physically male lets her friends know that she intends to reassign. She attends counselling sessions to start the process. However she decides to go no further. Although she no longer intends or proposes to undergo reassignment, she will remain protected against discrimination based on her gender reassignment characteristic because she has undergone part of a process to change attributes of sex.

2.26 Further, where someone is discriminated against because they are perceived to be proposing, undergoing or having undergone the personal process of gender reassignment, protection is provided from direct discrimination and harassment, even if they are not in fact proposing to undergo gender reassignment. The effect of these provisions is to provide protection against any direct discrimination and harassment connected with the protected characteristic of gender reassignment.

Thus, where someone is a transvestite, but is not driven by their gender identity to cross dress, they will be protected from direct discrimination and harassment if they are perceived to be proposing to undergo gender reassignment.

Similarly, if someone were directly discriminated against because they were associated with someone proposing to undergo gender reassignment, such as family and friends, they too would be protected.

Marriage and Civil Partnership

What the Act says

2.27 A person who is married or in a civil partnership has the protected characteristic of marriage or civil partnership. **Clause 8(1)**

2.28 Marriage is not defined for the purposes of the Act but will cover any formal union of a man and woman which is legally recognised in the UK as a marriage. A civil partnership refers to a registered civil partnership under the Civil Partnership Act 2004, including those registered outside the UK.

2.29 Only people who actually are married or in a civil partnership are protected against discrimination on this ground. The status of being unmarried or single is not protected. This "asymmetrical" protection originates in the need to prohibit the historic discrimination against married women.

2.30 People who are living as couples but not legally married or civil partners are not protected from discrimination on this ground – even if they are engaged to be married or planning to become civil partners. A person who is divorced or whose civil partnership has been dissolved does not have this protected characteristic.

2.31 People who are married or in a civil partnership share the same protected characteristic. So for example a married man and a woman in a civil partnership share the protected characteristic of marriage and civil partnership. **Clause 8(2)(b)**

2.32 Unlike most other protected characteristics, discrimination based on association or perception (see Chapter [XX]) does not apply to this ground. Only people who are in fact married or civil partners and who themselves experience less favourable treatment on this ground are protected. **Clause 13(4)**

Discrimination on the ground of marriage and civil partnership is only unlawful in relation to work.

Race

Clause 9

What the Act says

Meaning of 'Race'

2.33 The Act does not exhaustively define 'race'. The Act simply defines 'race' as including colour, nationality (including citizenship) and ethnic or national origin.

Ethnic Origin

2.34 Being of a particular ethnic origin will depend on whether a person belongs to an ethnic group. An ethnic group is one which regards itself or is regarded by others as a distinct and separate community by virtue of certain characteristics. These characteristics usually distinguish the group from the surrounding community.

2.35 An ethnic group must have two essential characteristics: a long shared history and a cultural tradition of its own. Other relevant characteristics of an ethnic group may include a common language, a common literature, religion or a common geographical origin or a sense of being a minority or an oppressed group.

2.36 The term 'ethnic' can be interpreted relatively widely, in a broad and cultural/historic sense. To date, the courts have confirmed that the following are ethnic groups for the purpose of equality laws: Sikhs, Jews, Romany Gypsies and Irish Travellers.

2.37 There can be a relationship between ethnic origins and religion. As demonstrated by the examples above, a religious group with a common ethnic origin will be covered by this part of the Act. Religious groups may include a variety of ethnic groups. Whilst religion is protected by the Act, religious groups are not protected as ethnic groups unless they satisfy the above test for ethnic origin.

National Origin

2.38 A national group must have identifiable elements, both historic and geographic, which at least at some point in time indicates the existence or previous existence of a nation. For example, as England and Scotland were once separate nations, the English and the Scots have separate national origins. National origins may include origins in a nation that no longer exists (for example, Czechoslovakia) or in a 'nation' that was never a nation state in the modern sense (for example, 'the Basques or Kurds).

2.39 National origin is distinct from nationality but often these will be the same, for example, people of Chinese national origin may be citizens of China but also of the UK, Canada, Taiwan, Malaysia or Singapore.

2.40 An ethnic group or national group could include members new to the group, for example, a person who marries into the group.

Meaning of 'Racial Group'

2.41 A racial group can be a group of people who have or share a colour, or ethnic or national origin or a group with the same nationality.

For example, a racial group could be "British" people. All racial groups are protected from unlawful discrimination under the Act.

2.42 A person may fall into more than one racial group. For example, a "Nigerian" may be defined by colour, nationality or ethnic or national origin.

2.43 A racial group can be made up of two or more distinct racial groups. For example, a racial group could be "black Britons" which would encompass those people who are both black and who are British citizens. Another racial group could be "Asian" which may include Indians, Pakistanis, Bangladeshis and Sri Lankans.

2.44 Racial groups can also be defined by exclusion. For example, those of "non-British" nationality could form a single racial group.

Religion or belief

What the Act says

2.45 The protected characteristic of religion or belief includes any religion and any religious or philosophical belief. It also includes a lack of any such religion or belief.

Clauses 10(1) & (2)

2.46 Therefore, Christians are protected against discrimination because of their Christianity and non-Christians are protected against discrimination because they are not Christians, whether they have another religion, another belief or no religion or belief.

Clauses 10(1) & (2)

2.47 The meaning of religion and belief in the Act is broad and is consistent with Article 9 of the European Convention on Human Rights.

Meaning of religion

2.48 "Religion" means any religion and includes a lack of religion. The term religion includes the Baha'i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism. It is for tribunals to determine what constitutes a religion. **Clause 10(1)**

2.49 A religion need not be mainstream or well known to gain protection as a religion. It must, though, be identifiable and have a clear structure and belief system. Denominations or sects within religions, such as Methodists within Christianity or Sunnis within Islam may be considered a religion. Cults and new religious movements may also be religions.

Meaning of belief

2.50 Belief means any religious or philosophical belief and includes a lack of belief. **Clause 10(2)**

2.51 "Religious belief" goes beyond beliefs about and adherence to a religion or its central articles of faith and may vary from person to person within the same religion.

2.52 A belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include Humanism and Atheism.

2.53 A belief need not include faith or worship of a God or Gods, but must affect how a person lives their life or perceives the world.

> **Example:** A person who is a vegan chooses not to use or consume animal products of any kind. That person eschews the exploitation of animals for food, clothing, accessories or any other purpose and does so out of an ethical commitment to animal welfare. This person is likely to hold a belief which is covered by the Act.

2.54 For a belief to be protected under the Act:

- It must be genuinely held;
- It must be a belief and not an opinion or viewpoint based on information available at the moment;
- It must be a belief as to a weighty and substantial aspect of human life and behaviour;
- It must attain a certain level of cogency, seriousness, cohesion and importance;
- It must be worthy of respect in a democratic society;
- It must be compatible with human dignity and not conflict with the fundamental rights of others.

Example: A person believes in a philosophy of racial superiority for a particular racial group. It is a belief around which they centre the important decisions in their life, such as where they live. This is not compatible with human dignity and conflicts with the fundamental rights of others. It would therefore not constitute a "belief" for the purposes of the Act.

Manifestations of religion or beliefs

2.55 The Act protects people of a particular religion or belief; there is not always a clear line between a religion or a belief and the manifestation of that religion or that belief. Manifestations of a religion or a belief could include treating certain days as days for worship or for rest, following a certain dress code, following a particular diet, carrying out or avoiding certain practices. Direct or indirect religion or belief discrimination may be based on manifestation of a religion or a belief. If an employer applies a provision criterion or practice which disadvantages an employee in relation to a manifestation of religion or belief this may be indirect discrimination if it is not objectively justified (see chapter 3 on indirect discrimination).

Example: An employee who is a committed Christian requests not to work Sundays because she wishes to attend church. Employee B, who is an Orthodox Jew, also requests not to work Saturdays because she wishes to observe the Sabbath. The employer agrees to A's request but not B's because he does not accept that observing the Sabbath is as important as attending Church. This may amount to direct discrimination.

Example: A hairdressing salon owner does not employ anyone who covers their hair because he believes it is important that staff show off their flamboyant haircuts. This may be indirect discrimination against Muslim women and Sikh men who cover their hair unless the criterion can be justified.

Sex

What the Act says

2.56 Sex is a protected characteristic and refers to a man or a woman of any age. In relation to a group of people it refers to either men or women. **Clauses 11(a) & (b) & 204(1)**

2.57 A comparator for the purposes of showing unlawful sex discrimination will be a person of the opposite sex. Sex does not include gender reassignment (see 2.16) sexual orientation (see 2.59).

2.58 Pregnancy and maternity discrimination are considered at 3.73 and XX. **Clauses 13(7) (a) & 13(8)**

Sexual Orientation

What the Act says

2.59 Sexual orientation is a protected characteristic. It means a person's sexual orientation towards: **Clause 12(1)**

a) persons of the same sex (i.e. the person is a gay man or a lesbian);

b) persons of the opposite sex (i.e. the person is heterosexual); or

c) persons of either sex (i.e. the person is bisexual).

Sexual orientation discrimination includes discrimination because someone is of a particular sexual orientation, and it also covers discrimination connected with manifestations of that sexual orientation. That may include someone's appearance, the places they visit or the people they associate with.

2.60 Sexual orientation relates to how people feel as well as their actions.

2.61 When the Act refers to the protected characteristic of sexual orientation it means: **Clause 12(2)**

a) a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation; and

b) a reference to people who share a protected characteristic is a reference to people who are of the same sexual orientation.

2.62 Gender reassignment is a separate issue and unrelated to sexual orientation despite a common misunderstanding that the two issues are related.

Chapter 3
Prohibited Conduct

3. Introduction

The introduction to Chapter 2 above describes how unlawful discrimination occurs where 'protected characteristics' are combined with 'prohibited conduct.' This Chapter explains what the Act means by 'prohibited conduct'. It explains direct and indirect discrimination, harassment and victimisation. It also explains situations in which conduct is prohibited in relation to only one prohibited characteristic for example, the two types of prohibited conduct that relate only to disability: discrimination arising from disability and the duty to make reasonable adjustments.

In addition this Chapter explains combined discrimination, where less favourable treatment is because of a combination of two protected characteristics, for example, where a person is treated differently because they are a gay Christian or a black woman.

Generally the Act describes prohibited conduct by reference to a person 'A' who is the person discriminating and a second person 'B' who is the victim of the discrimination. In employment 'A' is usually the employer and 'B' is usually the employee although, as set out in Chapters 5 and 9, the Act covers a wider range of work related relationships.

One of the objectives of the Act was to harmonise and simplify the equality law that preceded it. The Act does simplify and standardise definitions, tests and exceptions, for example the harmonised occupational requirement exception described in this Chapter. However, there are some specific differences in approach when prohibited conduct is applied to the various types of protected characteristic.

Direct discrimination cannot be justified except where the protected characteristic is age. In addition, it is not unlawful to treat a disabled person more favourably than a non-disabled person or more favourably than a person with a different disability. Nor is it unlawful to treat a non-disabled person less favourably than a disabled person.

The expression ‘justification’ is used here as shorthand. In the Act justification means that the treatment is a ‘proportionate means of achieving a legitimate aim’. Although this expression is not defined in the Act we know from European law that a ‘legitimate aim’ must be legal, should not be discriminatory in itself and it must represent a real, objective consideration. We also know that treatment is ‘proportionate’ if it is an appropriate and necessary means of achieving that legitimate aim. Justification may be relevant in cases, for example, of indirect discrimination or discrimination arising from disability. Victimisation and harassment however, can never be justified.

This Chapter now examines each type of prohibited conduct in detail.

Direct discrimination

What the Act says

3.1 Direct discrimination occurs when a person (A) treats or would treat another (B) less favourably than others and the treatment is because of a protected characteristic. **Clause 13(1)**

3.2 Apart from the limited exceptions explained below, and the specific exceptions referred to in chapter 8, direct discrimination is always unlawful. It can only be justified when the protected characteristic is age (see below).

3.3 The motive or intention behind the treatment is generally irrelevant. The law recognises that discrimination can be conscious or unconscious; for example, people may have prejudices that they do not even admit to themselves or they may act out of good intentions. A cannot base their decision on another criterion that is itself discriminatory. **Clause 13(2)**

> **Example:** A magazine aimed at young people created by a team of young journalists does not recruit an older journalist on grounds that he will not 'fit in' with the rest of the team. If it becomes apparent that they think the older journalist will not 'fit in' because of his age then this would be direct age discrimination.

What is "less favourable" treatment?

3.4 A person (B) is treated "less favourably" if he or she is put at a disadvantage compared with others. If the disadvantage is obvious, it will be clear that the treatment has been less favourable: for example, B may have been refused a job. Less favourable treatment could also involve being denied a choice or excluded from an opportunity.

> **Example:** Whilst being interviewed for a job, a female applicant mentions she has a same sex partner. Although she is the most qualified candidate and has all the skills and competencies required of the role, the employer decides not to offer her the job. This decision may constitute an act of less favourable treatment because of her sexual orientation.

3.5 However B does not have to experience adverse consequences (economic or otherwise) for the treatment to be less favourable; it is enough that B can reasonably say that they would have preferred not to be treated differently from the way A treated – or would have treated – another person.

> **Example:** An employee's appraisal duties are withdrawn following complaints about her appraisal reports. Her male colleagues at her grade continue to carry out appraisals. Although she did not get demoted or suffer any financial disadvantage, she feels demeaned in the eyes of those she managed and in the eyes of her colleagues, once it was known that a part of her normal duties had been taken away from her following a complaint. The removal of her appraisal duties may constitute an act of less favourable treatment.

3.6 It is not possible for A to balance or eliminate less favourable treatment by offsetting it with more favourable treatment – for example, extra pay to make up for loss of job status.

> **Example:** A saleswoman who was born physically female informs her employer that she intends to spend the rest of her life living as a man. After informing her employer of this, she is demoted to a non-client facing role. The employer increases her salary to make up for the loss of job status. Despite the increase in pay, the demotion will constitute less favourable treatment.

3.7 For direct discrimination because of pregnancy or maternity, the test is whether the treatment is **unfavourable** rather than less favourable (and hence there is no need for a comparator). See [XX].

Segregation

3.8 When the protected characteristic is race, deliberately segregating a person or group of persons from others of a different race automatically amounts to less favourable treatment. There is no need to identify a comparator, because segregation on race grounds is always an act of unlawful direct discrimination. The segregation will only be unlawful if it is a deliberate act or policy rather than a situation that has occurred inadvertently; congregation, i.e. where individuals choose to group together, is not segregation.

Clause 13(5)

> **Example**: A British marketing company which is staffed predominantly by British staff recruits Polish nationals and seats them in a separate room nick-named 'Little Poland'. The company argues that it is an unofficial policy of theirs to seat the Polish staff separately from British staff so that they can speak amongst themselves in their native language without disturbing the staff who speak English. This is segregation as the company has a deliberate policy of separating staff because of race.

3.9 Segregation linked to other protected characteristics **may** be unlawful direct discrimination. However, it is necessary to show that it amounts to less favourable treatment.

Identifying a comparator

3.10 Except in the case of racial segregation or pregnancy and maternity, A's treatment of B must be less favourable than the way A treats, has treated or would treat a person to whom the protected characteristic does not apply. This person is referred to as a 'comparator'. The comparator can be a co-worker whose circumstances are the same; or someone in similar circumstances whose treatment sheds light on the reasons why B was treated in a particular way. Alternatively, it may be possible to construct a hypothetical comparator, using evidence of how A has treated people in the past. Comparators are discussed in more detail in Section 23 of the Act (see [XX]).

Example: An Irish applicant is refused a job as a chef in a restaurant. An appropriate comparator will be an applicant who is not Irish but is otherwise similarly qualified.

Shared protected characteristics

3.11 Direct discrimination can take place even though A and B share the same protected characteristic. **Clause 13(6)**

Example: A Muslim businessman working in London wishes to recruit a personal assistant. The businessman decides not to recruit a Muslim woman, even though she is the best qualified candidate, and instead recruits a woman who has no particular religious belief. The businessman believes that this will create a better impression with clients and colleagues in London, the majority of whom are either Christian or have no particular religious belief. This decision is an act of direct discrimination even though the businessman shares the same protected characteristic (religion) with the candidate he has rejected because of her faith.

"Because of a protected characteristic"

3.12 **'Because of'** a protected characteristic is intended to have the same meaning as the phrase 'on grounds of' in previous equality legislation. It means that the protected characteristic is an effective cause of the less favourable treatment – but it need not be the only or even the main cause.

3.13 In some instances, the discriminatory basis of the treatment will be obvious from the treatment itself. In cases such as this, what was going on in the mind of the discriminator will be irrelevant. In other cases, it will be necessary to look at why A acted in the way that they did.

Example: If an employer advertising a vacancy makes it clear in the advert that Roma need not apply, this would amount to direct race discrimination against a Roma who might reasonably have considered applying for the job but was deterred from doing so because of the advertisement. In this case, the discriminatory basis of the treatment is obvious from the treatment itself.

Example: During an interview, an applicant informs the employer that he has multiple sclerosis. The applicant is unsuccessful and the employer gives the job to an applicant who does not have a disability. In this case, it will be necessary to look at why the employer did not give the job to the unsuccessful applicant with multiple sclerosis to determine whether there was an act of direct discrimination because of his disability.

3.14 A person (B) experiencing less favourable treatment 'because of a protected characteristic' may, but does not have to, possess the characteristic themselves. Rightly or wrongly, B might be perceived as having the characteristic ('discrimination by perception'); or might be associated with someone who has – or is believed to have – the characteristic ('discrimination by association'). These concepts are explained in more detail below. See 3.17 and 3.19.

3.15 It does not matter what A's intentions are or whether A's less favourable treatment of B is conscious or unconscious. A may even think that they are doing B a favour, or simply be unaware that they are treating B differently because of a protected characteristic. Unintentional less favourable treatment is more likely to occur within a culture or atmosphere where certain behaviour or conduct which is considered as normal has the effect of treating B less favourably.

3.16 Direct discrimination also includes less favourable treatment of a person based on a stereotype relating to a protected characteristic, whether or not the stereotype is accurate.

> **Example:** An employee in his 60s works in an office with a team of younger colleagues in their 20s and 30s. The manager often goes out socialising with the team. She does not invite the employee in his 60s because she feels that he would not like the venues she chooses for such events. However, the employee finds out that many workplace issues and problems are discussed and resolved during these informal meetings. He feels undervalued and disengaged by this unintended action. The manager's conduct is influenced (albeit unconsciously) by a stereotype that persons of the employee's age group would only socialise at certain venues. Such treatment is therefore likely to amount to direct discrimination because of age.

Discrimination by association

3.17 It is direct discrimination if A treats B less favourably because of B's association with another person who has a protected characteristic. Discrimination by association can occur in various ways – for example, where B has a relationship of parent, child, partner, lover, primary carer or friend of someone with a protected characteristic. However B's association with the other person need not be a permanent one.

> **Example:** An employer refuses to promote an employee because she is married to a Christian. This would be direct religious or belief-related discrimination because of her association with her husband.

Example: A manager treats an employee (who is heterosexual) less favourably because she has been seen out with a person who is gay. This is direct discrimination because of sexual orientation.

3.18 Direct discrimination because of a protected characteristic could also occur if B experiences less favourable treatment because of campaigning to help someone with a protected characteristic or refusing to act in a way that would disadvantage a person or people who have (or whom A believes have) the protected characteristic.

Example: An employer asks a manager to interview only applicants under 30 for a position within its marketing team. When the manager refuses to do so, he is demoted. This could constitute direct discrimination.

Discrimination by perception

3.19 It is also direct discrimination where the person treated less favourably is thought to have a protected characteristic, even though in fact they do not. If A treats B less favourably because A thinks that B has a protected characteristic, then that will be direct discrimination even though A is mistaken about this.

Example: An employer rejects a job application form from a white woman whom he wrongly thinks is black, because the applicant has an African-sounding name. This would constitute direct race discrimination based on the employer's mistaken perception.

Example: If an employer thinks that an employee is Irish and treats them less favourably because of that perception, then that is still direct discrimination because of race even if the employee is in fact not Irish.

Advertising an intention to discriminate

3.20 If A advertises that in offering employment they will treat people less favourably because of a protected characteristic, this amounts to direct discrimination. An advertisement can include a notice or circular, whether to the public or not, in any publication, on radio, television or in cinemas, via the internet or at an exhibition. It would include a notice or announcement banning people sharing a protected characteristic from entering a particular place.

> **Example:** An advertisement in a local newspaper for a Turkish machinist for a dress manufacturing company would be unlawful.

Marriage and civil partnership

3.21 In relation to employment if the protected characteristic in question is marriage or civil partnership, the definition of direct discrimination only covers less favourable treatment because a person is married or a civil partner. Single people and people in relationships outside of marriage or civil partnership (whether or not they are cohabiting), are not protected on this ground.

Clause 13(4)

> **Example:** If a recently married woman is not considered for promotion because of a belief that she is likely to start a family, and this is not taken into account for an unmarried woman, this would be direct marital discrimination.

Provisions relating to sex, pregnancy and childbirth

Clause 13(6)

3.22 Specific provisions apply to sex, pregnancy and childbirth.

- In considering discrimination against a man, it is not relevant to take into account any special treatment given to a woman in connection with pregnancy or childbirth, such as maternity leave or additional sick leave.

Example: A man who is given a warning for being repeatedly late to work in the mornings alleges that he has been treated less favourably than a pregnant woman who has also been repeatedly late for work, but who was not given a warning. The man cannot compare himself to the pregnant woman, because her lateness related to her pregnancy. The correct comparator would be a non pregnant woman who was also late for work. Men cannot claim comparable treatment with any special treatment given to women which is connected with pregnancy or childbirth.

- Treating a woman unfavourably because of her pregnancy or because she has given birth is covered separately under sections 17 and 18 of the Act (see 3.73 of the Code). The protected ground of sex would not apply in this situation.

When can direct discrimination be lawful?

Disabled people

3.23 It is not discrimination to treat a disabled person more favourably than a non-disabled person. **Clause 13(3)**

Age

3.24 A different approach applies to the protected characteristic of age, because some age-based rules and practices are seen as acceptable. Less favourable treatment of a person because of their age is not direct discrimination provided that A can show the less favourable treatment is a proportionate means of achieving a legitimate aim (see [XX] of the Code). **Clause 13(2)**

Legitimate aim

3.25 The concept of 'legitimate aim' is taken from European law, but it is not defined by the Act. The aim should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. According to the EU Directive 2000/78, which addressed age discrimination in the workplace, legitimate aims can include legitimate employment policy, and labour market and vocational training objectives. The health, welfare and safety of individuals may also qualify as legitimate aims.

3.26 Although business needs and economic efficiency may be legitimate aims, case law suggests that an employer simply trying to reduce costs or improve competitiveness cannot expect to satisfy the test.

3.27 Even if the aim is a legitimate one, the means of achieving it must be proportionate.

Proportionality

3.28 Although not defined by the Act, the term 'proportionate' has been clarified by cases drawing on European law. Treatment is proportionate if it is an appropriate and necessary means of achieving a legitimate aim. But something may be 'necessary' in this context without being the only possible way of achieving the legitimate aim – it is sufficient that less discriminatory measures could not achieve the same objective. A balance must be struck between the discriminatory effect of the treatment and A's reasons for applying it, taking into account all the relevant facts. If challenged in an Employment Tribunal, an employer will need to produce evidence supporting the decision.

3.29 The financial cost of using a less discriminatory approach cannot, by itself, provide a justification for direct discrimination because of age. An employer cannot argue that to discriminate is cheaper than avoiding discrimination. But cost can be taken into account as part of the employer's justification, if there are other good reasons for adopting the chosen means.

Example: A haulage company introduces a blanket policy forcing its drivers to stop driving articulated lorries at 55, because statistical evidence suggests an increased risk of heart attacks over this age. The aim of public safety would be a legitimate one. However, the company would have to show that its blanket ban was a proportionate means of achieving this objective. This might be difficult, as medical checks for individual drivers could offer a less discriminatory ans of achieving the same aim.

Example: A fashion retailer decides to employ only sales assistants who are under 25. They say this is to attract a young customer base. This would correspond to a real business need on the part of the retailer, and so would probably qualify as a legitimate aim. However, the age bar for older workers is unlikely to be a proportionate means of achieving this; a requirement for knowledge of the products and fashion awareness would be less a discriminatory means of achieving the same aim.

Example: An employer tells a 50 year old office administrator that she is unsuitable for promotion because officer managers need to demonstrate a 'young image' to fit in with the brand. This is unlikely to be a legitimate aim, as the role is not customer facing.

Example: An employer decides that staff under 30 will make up the selection pool for redundancy, so they can make savings on redundancy pay. Avoiding the increased financial cost of making older workers redundant is not a legitimate aim for justifying direct discrimination because of age, especially as this pool has been selected without any regard to the actual needs of the business.

Example: An employer with a normal retirement age of 65 decides that staff over 55 should have no more than three days' training per year. They say they have a limited training budget and do not want to invest this in older workers who will retire before the full benefit of the training is recovered. Making best use of a limited training budget may be a legitimate aim, but the blanket rule affecting everyone aged 55 to 65 is unlikely to be a proportionate means of achieving it. Carefully assessing individual training needs would be a less discriminatory approach to managing the training budget.

Occupational Requirements

3.30 The Act creates a general exception to the prohibition on direct discrimination in employment for Occupational Requirements. It applies where the job genuinely requires that the person employed is or is not of a particular sex, race, disability, religion or belief, sexual orientation or age, and applying this requirement is a proportionate means of achieving a legitimate aim. The exception also applies where not being a transsexual person, married or a civil partner is a requirement for the work. The effect of this exception is that someone who does not fulfil the requirement cannot make a claim of unlawful discrimination. The Occupational Requirement exception is covered in more detail in chapter 8 of the Code.

Sch 9 Para 1

Combined discrimination: dual characteristics

Clause 14

What the Act says

3.31 Combined discrimination occurs when because of a combination of two relevant protected characteristics a person (B) is treated less favourably than others are or would be treated.

Clause 14(1)

3.32 Combined discrimination is similar to direct discrimination, but it concerns treatment because of a combination of two characteristics, rather than treatment because of a single characteristic.

3.33 For combined discrimination, marriage and civil partnership and pregnancy and maternity are not relevant protected characteristics. However, where less favourable treatment is because of a combination of pregnancy or maternity and another characteristic, that treatment may constitute combined discrimination because of sex and that other characteristic.

Clause 14(2)

For combined discrimination, disability is treated as a single characteristic, which may be combined with any other relevant protected characteristic, for example visual impairment combined with sexual orientation, or HIV combined with race. Even where a person has more than one disability, disability can only be one characteristic within the combination of characteristics.

- Less favourable treatment because of two different disabilities, for example visual impairment and HIV, will not be combined discrimination under the Act. A person who is treated less favourably because of two disabilities would be able to bring claims for direct discrimination because of each disability separately.
- It may be combined discrimination if a person experiences less favourable treatment because of the combination of more than one disability and a different protected characteristic, for example a woman with a learning disability and hearing impairment who is treated less favourably because of the combination of her sex and her disabilities could bring a claim of combined discrimination because of sex and disability.

What is a combination of characteristics?

3.34 Treatment will only be combined discrimination where the reason for the treatment is the combination of two characteristics.

Example: A hotel rejects an application from a black man for a job as a room cleaner. The hotel employs black women and white men as room cleaners. However, the black male applicant is rejected because of a presumption that he is more likely to steal from guests or from the hotel. The reason for the less favourable treatment is not the applicant's race or sex, but rather a presumption based on the combined characteristics of his sex and race.

Example: A DIY company does not shortlist a young woman for interview for a role on the shop floor. The company believe that she is unlikely to give the impression of having the necessary skills and knowledge to advise and sell DIY goods to customers. The company's shop floor staff are mostly older men with some older women and some younger men. The reason for the less favourable treatment would appear to be a combination of the applicant's sex and age.

3.35 Combined discrimination is often based on specific stereotypes, assumptions or prejudices about people who have the particular combination of characteristics.

> **Example:** A manager at a child care centre does not employ a gay man because they think that the safety of the children who attend the centre will be compromised. This treatment is based on the manager's prejudice and assumptions about gay men, rather than any preconceptions about gay women or men who are not gay. This treatment will be an act of combined discrimination because of the applicant's combined characteristics of sexual orientation and sex.

3.36 To complain about combined discrimination, B does not need to show that each characteristic was individually an effective cause of the less favourable treatment. She need only show that the combination of characteristics was an effective cause of the treatment.

> **Example:** An older woman is unsuccessful in her application for a job at a shop selling game consoles and computer games. She suspects that the employer did not think that older women have enough of a grasp of technology and computer games to be able to sell the products. She does not have to show that her application was rejected because of her sex – which might be difficult because some young women were short listed. Nor does she have to show that her application was rejected because of her age – again this might be difficult because the shop employs a number of older men. The focus of this woman's case should be on whether the combination of being older and a woman was the cause of the rejection of her application.

3.37 Where a person is treated less favourably because of two separate protected characteristics and the person can show that this amounted to direct discrimination because of each characteristic separately, the treatment will not be combined discrimination. For example, where a disabled lesbian can show less favourable treatment because of sexual orientation and can also show less favourable treatment because of disability, she can claim direct discrimination relating to each of these grounds separately. Since it is not the combination of characteristics, but each characteristic separately, which caused the treatment, she cannot claim combined discrimination.

Identifying a comparator

3.38 A's treatment of B must be less favourable than the treatment of a person who lacks both of B's protected characteristics. This person is referred to as a 'comparator'. The comparator can be an actual co-worker whose circumstances are the same or similar to B's circumstances, whose treatment sheds light on the reasons why B was treated in a particular way. Alternatively, it may be possible to construct a hypothetical comparator, using evidence of how A has treated people in the past.

Clause 14(1)

3.39 It may be helpful to consider the treatment of persons whose circumstances are not the same as B's to develop a picture of how a hypothetical comparator would be treated. The way in which A treats persons who have one but not both of the protected characteristics in question may enable an inference to be drawn as to how A would treat a hypothetical comparator who has neither protected characteristic. For example, if a black woman finds that both black men and white women are treated more favourably than her, this might suggest that A only treats black female employees less favourably, and, therefore, that a hypothetical white man would

have been treated more favourably. This would also show that it was neither race nor sex alone which caused A's less favourable treatment, but the combination of the two.

3.40 In considering whether a hypothetical comparator would have been treated more favourably, it may be simpler to concentrate on the reason for B's treatment. The facts may suggest that the reason for B's treatment is a prejudice or an assumption relating to the combination of characteristics. When it is clear that the reason for A's treatment of B is the combination of characteristics, it will follow that a hypothetical comparator without the characteristics would have been treated more favourably.

> **Example:** A Muslim man with a long beard employed as a security scanner at an airport is moved to an administrative role away from the public. His manager says that with the threat of terrorism from Islamic extremists his managers are more suspicious of him and also believe that his presence on the security scanner could cause passengers to fear for the safety of their flight. The facts suggest that the reason for the treatment was the combination of his sex and his religion.

3.41 Comparators are discussed in more detail in Section 23 of the Act.

Meaning of "because of"

3.42 An employer's treatment of an employee could be 'because of a combination of protected characteristics' even where the employee does not possess that combination of characteristics herself. As with direct discrimination, the employee might be perceived as having the combination of characteristics ('discrimination by perception'); or might be associated with someone who has – or is believed to have – the combination of characteristics ('discrimination by association'). These concepts are explained in paragraphs 3.17 and 3.19 relating to direct discrimination.

Clause 14(1)

> **Example:** A prison officer has a gay son. The officer's colleagues know that the son is a practising Christian and give the officer the worst shifts. They would not treat a colleague with a non-Christian gay son in the same way. The officer's colleagues also would not treat a colleague with a Christian son who was not gay in this way. The officer has been singled out because of the combined factors of his son's Christian faith and sexual orientation. This is discrimination based on the prison officer's association with his son who has a combination of protected characteristics.

Are there any restrictions on claiming combined discrimination?

3.43 Less favourable treatment because of a combination of two characteristics is not combined discrimination if direct discrimination is permitted under the Act or any other law in relation to either or both of the characteristics within the combination because for example an exemption or exception applies.

Clause 14(3)

[**Example:** A nursing home refuses to employ a black man to look after female patients. At first glance this might appear to be combined discrimination because of race and sex. However, if the nursing home is able to show that being female is an occupational requirement so that refusing a man would not be direct sex discrimination, this is also not combined discrimination.

Discrimination arising from disability

Introduction

3.44 This section explains the duty of employers to ensure that disabled people are not treated less favourably than other people for a reason relating to their disability. This type of discrimination is known as 'discrimination arising from disability' and is only applicable to disabled people.

What is discrimination arising from disability?

Clause 15(1)

3.45 The Act says that treatment of a disabled person amounts to discrimination if:

- an employer treats the disabled person unfavourably
- this treatment is because of something arising in consequence of the disabled person's disability, and
- the employer cannot show that this treatment is a proportionate means of achieving a legitimate aim.

How does it differ from direct discrimination?

3.46 Discrimination arising from disability is different from direct discrimination. Direct discrimination occurs because of the protected characteristic of disability. By contrast, in the case of discrimination arising from disability the reason for the treatment does not matter. The question is whether the disabled person has been treated unfavourably because of something arising in consequence of their disability.

Example: A building society asks an employee to move to a new branch it is opening in a neighbouring town. The society is entitled to move the employee under the terms of her contract of employment. Unfortunately, the move requires a slightly longer journey to work which means that she has to leave home 30 minutes earlier each day and will get home 30 minutes later. This interferes with the eating patterns she has established for breakfast and for her evening meal which help to control her diabetes.

Unlike direct discrimination, the employee does not have to show that the reason for her treatment is her diabetes. It is not as a matter of fact and in any event the reason for the treatment is irrelevant. To show discrimination arising from disability she must instead show that the relocation decision results in unfavourable treatment because of something arising in consequence of her diabetes. The legal analysis then moves on to consider whether the decision to move her can be justified and whether the society has made reasonable adjustments.

How does it differ from indirect discrimination?

3.47 Discrimination arising from disability is also different from indirect discrimination. Indirect discrimination occurs when a disabled person is disadvantaged by a provision, criterion or practice which:

- is (or would be) also applied to everyone; and
- puts (or would put) people who have the disabled person's disability at a disadvantage when compared with non-disabled people.

3.48 In the case of discrimination arising from disability there is no need to show that a provision, criterion or practice has been (or would be) applied to other people. Nor is there any need to show group disadvantage, that it puts (or would put) other people with the person's disability at a disadvantage when compared with people who do not have the disabled person's disability. The only question is whether the unfavourable treatment the particular disabled person experiences is because of something arising in consequence of their disability.

No comparator required

3.49 There is no need to show that a person without a disability or with a different disability would not have been treated unfavourably in the same circumstances. Both direct and indirect discrimination require comparison but there is no need for a comparator when considering whether there has been discrimination arising from disability. It is only necessary to demonstrate that the unfavourable treatment is because of the something arising in consequence of their disability.

Example: To complete their end of year figures the employees in a manufacturing company's accounts department are instructed to work into the night until their individual tasks are all completed. An employee with osteoarthritis takes longer than his colleagues to complete his tasks and as a result works several hours longer than his colleagues. In analysing whether or not the employee has suffered discrimination arising from disability it is only necessary to ask whether the instruction to stay until all the work was done was unfavourable treatment of the employee in question arising as a consequence of his osteoarthritis. Whether or not the instruction was a 'provision, criterion or practice' and any comparison with the employee's colleagues or any hypothetical comparator are irrelevant.

Unfavourable treatment

3.50 For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must be put at a disadvantage. If the disadvantage is obvious, it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

What does 'something arising in consequence of their disability' mean?

3.51 The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided. Others may not be obvious, such as :

- The need for regular rest breaks or toilet breaks
- Restricted diet
- Slower typing speeds
- Difficulties in using public transport
- Regular hospital appointments
- Need for specialist computer equipment
- Need for private and/or quiet working environment.

3.52 The unfavourable treatment must be because of *something that arises* in consequence of the disability.

> **Example:** An office worker is asked to move desks to join her team in an open plan office. He needs a quiet office space to work because he has difficulty concentrating in a noisy office as a consequence of his disability (which is Asperger's syndrome).

> **Example:** A shift worker is given a new shift pattern which includes late night shifts. She is unable to work late at night as a consequence of her disability (which is kidney failure, for which she has nightly dialysis).

> **Example:** A woman is disciplined for losing her temper with a colleague. This behaviour was out of character and was a consequence of severe pain that that she was experiencing due to her disability (which is arthritis). This disciplinary action is unfavourable treatment because of something that has arisen in consequence of her disability.

So long as the unfavourable treatment arises as a consequence of the disability, it will be unlawful unless it can be justified.

Justification

3.53 In some circumstances, treating a disabled person unfavourably because of something arising from a consequence of their disability can be justified. Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a ‘proportionate means of achieving a legitimate aim’. This test is also known as ‘objective justification’.

3.54 It is for the employer to justify the treatment, so it is up to the employer to produce evidence to support their assertion that it is justified and not rely on mere generalisations.

Legitimate aim

3.55 The notion of legitimate aim is taken from European law, but is not defined by the Act. The aim should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as a legitimate aim.

3.56 Although business needs and economic efficiency may be legitimate aims, an employer simply trying to reduce costs or improve competitiveness cannot expect to satisfy the test.

> **Example:** If communicating with people on the telephone was the main part of a job, ensuring that callers could easily understand the person doing this work would be a legitimate aim as there would be a real need for clear speech.

Even if the aim is a legitimate one, the means of achieving it must be proportionate.

What amounts to proportionate treatment?

3.57 Treatment is proportionate if it is an appropriate and necessary means of achieving a legitimate aim. This means it must be reasonably necessary to achieve it. It does not have to be the only possible way of achieving the legitimate aim but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective. A balance must be struck between the discriminatory effect of the treatment and the need to apply it, taking into account all the relevant facts. If one of the reasons for the treatment is financial cost, this can be taken into account, but if it is the only reason for the treatment this will not be proportionate. So an employer cannot argue that to discriminate is

cheaper than avoiding discrimination as a justification for the treatment.

> **Example:** A manager of a high profile organisation wants to extend the hours that the media can contact the organisation by telephone if an emergency arises. This would be a legitimate aim. She asks the head of the public relations team to be available over the telephone two early mornings per week to cover this eventuality. He is unable to be available over the phone in the early morning as a consequence of his disability (a mental health problem, for which he takes medication before bed-time). The Manager suggests other ways of meeting this legitimate aim which would avoid discrimination against him arising from his disability

3.58 Where health or safety reasons are said to be the 'legitimate aim', they must not be based on generalisations and stereotyping of disabled people. For example, fire regulations should not be used as an excuse to place unnecessary restrictions on wheelchair users or others with mobility impairments working in certain jobs or at certain workplaces. It is for the employer, using appropriate advice, to make any specific provision needed for disabled staff to ensure their safety in the event of fire.

3.59 Employers should ensure that any action taken in relation to health or safety is proportionate to the risk. In many cases organisations will have a risk assessment procedure. Any risk assessment should take full account of a disabled person's circumstances (including that person's coping strategies), of reasonable adjustments to mitigate risk, of the employer's obligations not to discriminate and, where appropriate, the disabled person's own views. There must be a balance between protecting against the risk and restricting disabled people from access to employment.

3.60 Disabled people are entitled to make the same choices and to take the same risks within the same limits as other people**.** Health and safety law does not require employers to remove all conceivable risk, but to ensure that risk is properly appreciated, understood and managed. Employers are advised to develop risk management policies which address the risks posed by or to all employees, rather than just focusing on the risks posed by or to disabled employees. If a disabled employee is singled out for a risk assessment, based on stereotypical assumptions, this may amount to direct discrimination or harassment.

Knowledge

3.61 If the employer can show that they

- did not know that the disabled person had the disability in question, and
- could not reasonably have been expected to know that the disabled person had the disability

then the unfavourable treatment does not amount to unlawful discrimination.

3.62 However, it is not enough for an employer to show that they did not know that the disabled person had the disability. They must show both that they did not know about the disability and also that they could not reasonably have been expected to know about it.

3.63 An employer must do all they can reasonably be expected to do to find out if a person has a disability. The action that it is appropriate to take to find out about a person's disability may vary depending on the circumstances.

3.64 People who have disabilities may be reluctant to disclose them. Employers are encouraged to monitor their workforce by reference to disability but for monitoring to be successful any concerns that disabled people might have must be overcome. Employers should explain why the information is being collected, what it will be used for and what security measures are in place to prevent the information being disclosed more widely. Employers may have cause to suspect that an employee has a disability even where one has not been disclosed. For example, where an employee's performance or attendance deteriorates there may be an underlying cause which is related to a disability. It would be good practice for the employer to make discreet enquiries of the employee in the course of addressing the performance or attendance issues.

3.65 If an employer's agent or employee (such as an occupational health adviser, a personnel officer or a recruitment agent) knows, in that capacity, of an employee's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability, and that they cannot therefore have subjected a disabled person to discrimination arising from disability.

3.66 Employers therefore need to ensure that where information about disabled people may come through different channels, there is a means - suitably confidential - for bringing that information together to make it easier for the employer to fulfil its duties under the Act.

Example: An occupational health adviser is engaged by a large employer to provide it with information about its employees' health. The occupational health adviser becomes aware of an employee's disability. However, she does not pass that information on to Human Resources or to the employee's line manager. As the occupational health adviser is acting as the employer's agent the occupational health adviser's knowledge is imputed to the employer. It is not a defence for the employer to claim that it did not know about the employee's disability.

Example: An employer contracts with an agency to provide an independent counselling service to employees. The contract states that the counsellors are not acting on the employer's behalf while in the counselling role. Any information obtained by a counsellor during such counselling would not be imputed to the employer.

Can employers treat a disabled person more favourably?

Relevance of reasonable adjustments

3.67 In relation to discrimination arising from disability, whether or not a person has complied with a duty to make adjustments will be often relevant in deciding whether or not the treatment of the disabled person is a proportionate means of achieving a legitimate aim.

3.68 A person can still subject a disabled person to discrimination arising from their disability despite the fact that they have complied with a duty to make reasonable adjustments in relation to the disabled person. This is likely to apply where, for example, the adjustment is unrelated to the particular treatment complained of.

3.69 Failing to comply with a duty to make adjustments will not automatically mean that B has subjected a disabled person to discrimination arising from disability. But if B has failed to make a reasonable adjustment which would have prevented the treatment experienced by the disabled person it will be very difficult for them to show that the treatment was a proportionate means of achieving a legitimate aim.

Gender reassignment – absence from work

What the Act says

3.70 It is unlawful to treat a transsexual person less favourably for being absent from work because they propose to undergo, are undergoing or have undergone gender reassignment or part of that process than they would be treated if they were ill or injured.

Clause 16

3.71 It is also unlawful to treat a transsexual person less favourably than they would be treated when they are absent for reasons other than sickness or injury, if it would be unreasonable to treat them that way.

> **Example:** A female to male transsexual person takes time off to receive hormone treatment as part of his gender reassignment. His employer cannot discriminate against him because of his absence from work for this purpose.

3.72 The Act does not define a minimum or maximum time which must be allowed for absence for treatment. It would be good practice for employers to discuss with transsexual staff how much time they will need in relation to the gender reassignment process and accommodate those needs in accordance with their normal practice and procedures.

Pregnancy and maternity discrimination: work cases

Clause 18

What the Act says

3.73 For the purposes of Part 5 (Work) of the Act, it is unlawful direct discrimination to treat a woman unfavourably because of her pregnancy or a related illness, or because she is exercising, has exercised or is seeking or has sought to exercise her right to maternity leave. There is no need to compare her treatment to anyone else's, and such discrimination cannot be justified.

Clauses 18(1)-(4)

3.74 The Act states that such unfavourable treatment during 'the protected period' is unlawful pregnancy and maternity discrimination, and is not treated as direct sex discrimination.

Clause 18(7)

The protected period

3.75 The protected period starts when a woman becomes pregnant, and its duration depends on her statutory maternity leave entitlements. It will therefore be different for different individuals. The maternity leave scheme is set out in Part VIII of the Employment Rights Act (ERA) and the Maternity and Parental Leave etc Regulations 1999 (MPLR).

3.76 The Act refers to the three kinds of maternity leave regulated by the ERA:

- Compulsory maternity leave – the minimum 2 week period (4 weeks for factory workers) immediately following childbirth when a woman cannot work for her employer;
- Ordinary maternity leave – all pregnant employees are entitled to 26 weeks ordinary maternity leave (which includes the compulsory leave period), provided they give proper notice; and
- Additional maternity leave - all pregnant employees are entitled to a further 26 weeks maternity leave, provided they give proper notice.

3.77 The protected period in relation to a woman's pregnancy ends either: **Clause 18(6)**

a) if she is entitled to ordinary and additional maternity leave, at the end of the additional maternity leave period or when she returns to work after giving birth, if that is earlier; or

b) if she is not entitled to maternity leave, for example because she is not an employee, two weeks after the baby is born.

If a woman experiences unfavourable treatment after the end of the protected period, but which results from a decision made during it, it is regarded as occurring during the protected period. **Clause 18(5)**

3.78 Otherwise, unfavourable treatment of a woman because of her pregnancy or maternity outside the protected period would be considered as sex discrimination.

'**Pregnancy of hers'**

3.79 The unfavourable treatment must be because of the woman's own pregnancy, and does not extend to association unlike other protected characteristics. However, it may be sex discrimination because of association with a pregnant woman if a man is treated less favourably because of his partner's pregnancy.

Clauses 18(2)

18(7)

> **Example:** A man and a woman working for the same employer are a couple expecting their first child. The woman complains to her partner that she needs to be able to sit down at work. Her partner raises it as a health and safety issue with the employer, and is dismissed as a result. He could claim sex discrimination because of his association with her.

Knowledge of pregnancy

3.80 Unfavourable treatment will only be unlawful if the employer is aware the woman is pregnant. The employer must know, believe or suspect that she is pregnant – whether this is by formal notification or through the grapevine.

No need for comparison

3.81 It is not necessary to show that the treatment was unfavourable compared with the treatment of a man or a woman who is not pregnant or any other worker. The unfavourable treatment will be discrimination if the woman would not have been treated that way but for her pregnancy or maternity. This is often referred to as 'automatic discrimination' as a result of her 'protected status'. A comparator may however be useful to help determine if the treatment is in fact related to pregnancy or maternity leave.

> **Example:** A company producing office furniture decides to exhibit at a trade fair. A pregnant member of the company's sales team, who had expected to be asked to attend the trade fair to 'man' the company's stall and talk to potential customers, is not invited. In demonstrating that, but for her pregnancy she would have been invited, it would help her to show that other members of the company's sales team, either male or female but not pregnant, were invited to the trade fair.

Not the only reason

3.82 A woman's pregnancy or maternity does not have to be the only reason for her treatment, but it does have to be an important factor or effective cause.

Clause 18(2)

> **Example:** An employer dismisses an employee on maternity leave shortly before she is due to return to work because the person covering her maternity leave is regarded as a better performer. Although the employer says that the reason for dismissing the woman on maternity leave relates to her performance, these performance issues had not previously been raised. The evidence suggests that had the employee not been absent on maternity leave she would not have been sacked. The effective reason for her unfavourable treatment is her having taken maternity leave, so her dismissal is unlawful.

Unfavourable treatment

3.83 An employer must not demote or dismiss an employee, or deny her training or promotion opportunities, because she is pregnant or on maternity leave. Nor must an employer take into account any period of pregnancy-related sickness absence when making a decision about her employment.

3.84 As examples only, it will amount to pregnancy and maternity discrimination to treat a woman unfavourably during the protected period for the following reasons:

- The fact that, because of her pregnancy, the woman temporarily will be unable to do the job for which she is specifically employed whether permanently or on a fixed term contract.
- The woman's inability to work because to do so would be a breach of health and safety.
- The costs to the business of covering her work.
- Any absence due to pregnancy related sickness.
- Inability to attend a disciplinary due to pregnancy sickness.
- Performance issues due to pregnancy sickness.
- Being disciplined for refusing to carry out tasks due to pregnancy related risks.
- Being forced to resign as a result of the employer's failure to carry out a risk assessment.

This is not an exhaustive list but indicates the range of treatment that may be unlawful.

3.85 There are separate legal provisions in the Employment Rights Act 1996 (ERA) protecting employees from dismissal and other disadvantage (except pay) where the principal reason is related to pregnancy or maternity leave. These ERA rights can overlap with the discrimination provisions and if they are breached this may also constitute pregnancy and maternity discrimination.

3.86 If any employer employs women of child-bearing age and the work is a kind which might involve risk to the health and safety of an expectant mother or her baby from any processes, working conditions or physical, chemical or biological agents, a health and safety risk assessment must include an assessment of those risks.

Pay and conditions during maternity leave

3.87 Employers are obliged to maintain a woman's benefits except contractual remuneration during both ordinary and additional maternity leave. Unless otherwise provided in her contract of employment, a woman does not have a right to continue receiving her full pay during maternity leave.

3.88 Further information on what may be unlawful discrimination in terms and conditions for pregnant women and women on maternity leave is set out at [in the Equal Pay Code.

Clauses 72-76

Indirect discrimination

Clause 19

What the Act says

3.89 Indirect discrimination applies to all the protected characteristics, apart from pregnancy and maternity (although in pregnancy and maternity cases, indirect sex discrimination may apply).

Clauses 19(3)

3.90 Indirect discrimination occurs when A applies to B a provision, criterion or practice, which on the face of it has nothing to do with B's protected characteristic. A applies (or would apply) the provision, criterion or practice equally to everyone, but it:

Clause 19(2)

- puts, or would put, people who share B's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic; and

- puts, or would put, B at that disadvantage; and
- cannot be justified as a proportionate means of achieving a legitimate aim.

What constitutes a provision, criterion or practice?

3.91 In establishing whether there is indirect discrimination, the first stage is to ask whether there is a provision, criterion or practice, and if so what it is. The phrase "provision, criterion or practice" is not defined by the Act. The three terms frequently overlap and it is not always sensible to treat them as separate concepts. However, they should be construed widely so as to include, for example, any (formal or informal) policies, rules, practices, arrangements, criteria, prerequisites, qualifications or provisions. They may also include proposals – such as a proposed policy or criterion, as well as a 'one off' or discretionary decision. The Act also allows provisions, criteria or practices which have not yet been applied to persons but which would have a discriminatory effect to be challenged.

Example: A GP practice of four Hindu partners based in a predominantly Hindu area seeks to recruit both another partner and additional staff to meet the local demand for its services. Rather than advertising the roles the partners adopt a recruitment policy based on word of mouth and ask the local Hindu community to assist in spreading the word that they are recruiting. A word of mouth recruitment policy is a provision, criterion or practice. In this case such a policy would be indirectly discriminatory because of religion or belief.

Example: An IT company decides to fly its staff out to its head office in San Francisco for a week of team building events. Although this is a 'one off' event it has the potential to be a 'provision, criterion or practice' which puts female employees at a particular disadvantage when compared to male employees because child care commitments might mean they are unable to attend.

Is the provision, criterion or practice a neutral one?

3.92 On the face of it, the provision, criterion or practice has to be neutral and apply to everybody, whether or not they have the protected characteristic in question. If the provision, criterion or practice expressly applies to people with a specified protected characteristic then it may amount to direct discrimination.

Example: A bus company adopts a policy that all drivers over 40 must re-sit their theory and practical tests every five years to obtain their category D licence. Such a policy may amount to direct age discrimination unless it can be objectively justified.

What is a disadvantage?

3.93 'Disadvantage' is not defined by the Act. The courts have found that 'detriment' – a similar concept – has to be something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. It must include some damage or loss, although this does not have to be quantifiable. A disadvantage could involve denial of an opportunity, denial of choice, rejection or exclusion, for example.

3.94 The disadvantage may be clearly linked to a protected characteristic, for example a dress code at a workplace may create a disadvantage for an employee with particular religious beliefs. But there will often be no connection between the disadvantage and the protected characteristic and there is no need to demonstrate a causal link between the two.

> **Example:** During a review of its recruitment procedures a consultancy firm discovers that men score less well in their psychometric test than women. The test could be indirectly discriminatory regardless of the reason why they scored less well.

3.95 It is not enough that the provision, criterion or practice puts, or would put, at a particular disadvantage a group of people with a protected characteristic. It must also have or be capable of having that effect on the individual concerned. So for a person merely to establish that they are a member of that particular group will not be enough.

The comparative approach

3.96 The next stage is to make a comparison between people with the protected characteristic and those without. Comparing the situation of the two groups will make it clear whether the provision, criterion or practice puts – or would put – the group with a protected characteristic at a particular disadvantage when compared with others who do not share the characteristic. The circumstances of the two groups must be sufficiently similar for a comparison to be made – there must be no material differences in circumstances.

3.97 It is important to be clear which protected characteristic is relevant. In the case of disability, this would not be disabled people as a whole but people with a particular disability – for example, a specific visual impairment. For race, it could be all ethnic minorities generally but could also be, for example, Africans or Somalis or non-UK citizens.

3.98 Sometimes, a provision, criterion or practice is **intrinsically** liable to disadvantage a group with a particular protected characteristic. For example, a dress code policy which prohibits headwear would obviously disadvantage Sikhs. There will also be cases where the disadvantage is common knowledge.

> **Example:** It is common knowledge that a much larger proportion of women than men are restricted, by childcare responsibilities, in the hours of work they can offer to an employer. So women tend to be disadvantaged by a requirement to work long hours. In such cases, it is not necessary to demonstrate that substantially higher proportion of this group will be affected – it will be a matter of common sense.

3.99 There will be many situations where the disadvantage is less obvious. If such cases go to an Employment Tribunal, the use of statistics may be helpful in showing the effect of the provision, criterion or practice on the group with the protected characteristic compared to the effect on the other group. However, a statistical analysis may not be appropriate or practicable, especially when there is inadequate or unreliable information, or the numbers of people are too small to allow for statistically significant comparison. In these cases, it may be helpful to have evidence from an expert to help the Employment Tribunal understand the protected characteristic or the behaviour of the group sharing the characteristic – for example, evidence about the principle of a particular religious belief.

In some circumstances there may need to be evidence of the disadvantage itself.

Example: A Muslim man who works for small manufacturing company wishes to undertake the Hajj. However, his employer only allows its staff to take holiday during designated shut down periods in August and December. The employee considers that he is a victim of indirect religious discrimination. In assessing the case the Tribunal may benefit from expert evidence from a Muslim cleric or an expert in Islam on the timing of the Hajj and its significance.

Choosing the 'pool'

3.100 The people used in the comparative exercise are usually referred to as the "pool". It is important to choose the right pool for comparison, but this may not be easy. In general, the pool should consist of the group whom the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding people who are not affected either way. In most situations, there is likely to be only one appropriate pool, but there may be circumstances where there is more than one.

Example: A marketing company employs 45 women and 55 men. Ten women work part time. No men work part time. A receptionist who works Tuesdays, Wednesdays and Thursdays does not dispute the calculation of her pro rata annual leave allowance, which includes a pro rated allowance in respect of public holidays. However, the annual leave policy requires that all employees take time off on public holidays. In one year a significant proportion of the public holidays fall on a Monday. The receptionist argues that the policy is indirectly discriminatory against women and that it puts her at a disadvantage as she has proportionately less control over when she can take her annual leave.

The appropriate pool for comparison is not the pool of receptionists or the pool of part time employees, but all the employees affected by the annual leave policy.

Making the comparison

3.101 Looking at the pool, a comparison must then be made between the impact of the provision, criterion or practice on people **without** the relevant protected characteristic, and its impact on people **with** the protected characteristic. Apart from the protected characteristic, the circumstances of the two groups of people within the pool must be similar enough to allow comparison.

3.102 How the comparison is carried out will depend on the circumstances, including the protected characteristic involved. Once the person has proved there is a 'particular disadvantage' to the group of which they are a member, they must then show that they have also suffered that disadvantage as an individual.

3.103

Example: Where a female security guard is able to show that an employer's shift pattern puts women at a particular disadvantage because of child care commitments she must also show that it puts her at that disadvantage because of her child care commitments. If it does the employer will have to justify the shift pattern.

Information on pools:

If the Employment Tribunal is asked to decide an indirect discrimination claim, it will generally ask itself these questions:

What proportion of the pool has the particular protected characteristic under consideration?

Within the pool, how does the provision, criterion or practice affect people without the protected characteristic?

How many are not (or would not be) disadvantaged by it?

Within the pool, how does the provision, criterion or practice affect people with the protected characteristic?

How many of these are (or would be) put at a disadvantage by it?

Finally, the Tribunal would compare (a) the proportion of people with the protected characteristic who are, or would be, disadvantaged by the provision, criterion or practice, with (b) the proportion of disadvantaged people without the characteristic. It can then address the question of whether the group with the protected characteristic experiences a 'particular disadvantage' in comparison with others. Whether a difference is significant will depend on the context, such as the size of the pool.

Intention

3.104 Indirect discrimination is unlawful whether it is intentional or not and whatever A's motivation. Even if it never occurred to the person applying the provision, criterion or practice that someone with a protected characteristic could be particularly disadvantaged by it, the indirect discrimination will be unlawful unless it can be justified. However, an employer which unintentionally commits an act of indirect discrimination may not have to pay damages (see chapter 12 on Enforcement).

Example: A large employer providing training to all staff on its new equal opportunities policy starts the training session with an ice breaker designed to introduce every one in the room to the others. Each employee is required to provide information about themselves including whether they are in a relationship and if so, the name of their partner. One employee is in a relationship with a same-sex partner and does not wish to disclose her sexual orientation to her colleagues. It is no defence that it did not occur to the employer or the trainer that this employee may feel disadvantaged by the requirement to disclose such information.

When can a provision, criterion or practice be justified?

3.105 It will not be indirect discrimination where the person applying the provision, criterion or practice can show that it is 'a proportionate means of achieving a legitimate aim'. This test is also known as 'objective justification'. It is for the employer to justify the provision criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified, and not rely on mere generalisations.

What is a legitimate aim?

3.106 The concept of 'legitimate aim' is taken from European law, but it is not defined by the Act. The aim should be legal, should not be discriminatory in itself, and it must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as a legitimate aim.

3.107 Although business needs and economic efficiency may be legitimate aims, case law suggests that an employer simply trying to reduce costs or improve competitiveness cannot expect to satisfy the test. They cannot simply argue that to discriminate is cheaper than avoiding discrimination.

Example: A cycle courier company want all their courier staff to complete a rigorous fitness test. The company believes that this will increase their competitiveness, as couriers will be able to cover a minimum mileage a day. A fitness test is potentially indirectly discriminatory against older employees. The company would need to demonstrate that the minimum level of fitness fulfils a legitimate aim. They would also have to show that imposing a rigorous test was proportionate means of achieving the aim.

Example: An employer offers a developmental opportunity to their employees to work on a project with children. The staff can only apply if they are currently able to use social networking websites. The employer would probably have little difficulty showing that it was a legitimate aim to require staff working on the project to engage effectively with parents. But they would also have to show that insisting on staff using the websites was a proportionate means of achieving the aim as this could potentially indirectly discriminate against older employees. They would need to show they had considered options that were less discriminatory, such as providing training for staff

who wanted to work on the project.

Example: An employer is looking to recruit staff. They ask for the applicants to be educated to degree level in order to ensure they are able to fulfil the requirements of the post. If they can demonstrate that there is a real business need for a degree this would be a legitimate aim, but the proposed means of achieving it may indirectly discriminate against older potential applicants, who are less likely to have degree level qualifications. The employer would have to prove there were not other ways they could recruit candidates for a particular standard - for example, by asking for equivalent work experience, or including a test that related to the role in question

3.108 Even if the aim is a legitimate one, the means of achieving it must be proportionate.

What is proportionate?

3.109 Although not defined by the Act, the term 'proportionate' has been clarified by cases drawing on European law. Treatment is proportionate if it is an appropriate and necessary means of achieving a legitimate aim. But applying a provision, criterion or practice may be 'necessary' in this context without being the only possible way of achieving the legitimate aim; it is sufficient that less discriminatory measures could not achieve the same aim. A balance must be struck between the discriminatory effect of the practice and A's reasons for applying it, taking into account all the relevant facts.

3.110 Although the financial cost of using a less discriminatory approach cannot, by itself, provide a justification for using a particular provision, criterion or practice, cost can be taken into account as part of the employer's justification, if there are other good reasons for adopting the chosen practice.

If challenged in an Employment Tribunal, an employer will need to produce evidence supporting the decision to apply the provision, criterion or practice, showing that it was a proportionate means of achieving a legitimate aim. But there is no need for evidence that the employer considered the proportionality question at the time when they applied the provision.

3.111 If an indirect discrimination case is considered by an Employment Tribunal, there will be a critical evaluation of the reasons put forward by the employer. The more serious the disadvantage caused by the discriminatory provision, criterion or practice, the more convincing the objective justification must be. Indirect discrimination should be seen as forming a continuum with direct discrimination [see 3.1 of Code]; the closer the practice comes to direct discrimination, the more difficult it will be for the employer to justify using it.

Example: A car manufacturer carrying out a redundancy exercise uses length of service as part of its matrix for selection. A young employee selected for redundancy because of his low score for length of service argues that using length of service as part of the selection matrix is indirect age discrimination. When considering whether this criterion is a proportionate means of achieving a legitimate aim, the Tribunal will closely examine the car manufacturer's reasons for including length of service as part of its scoring matrix. The fewer alternative criteria the employer includes in its selection matrix, the more rigorous the Tribunal's examination is likely to be.

Example: An employee with depression is dismissed by a Government Department because of her poor attendance record. Over a number of years the employee had repeated periods of short term absence relating to her depression. Although the Department made adjustments by increasing the number of days she could take off before implementing its attendance management policy, it ultimately decided that it could no longer support her short term absences. The employee brings a number of claims including indirect disability discrimination. She argues that the attendance management policy is indirectly discriminatory towards employees with depression. When considering justification the Tribunal will closely examine the reasons given by the Department as to why it could no longer support the employee's short term absences.

Duty to make adjustments

Introduction

3.112 One of the ways in which discrimination occurs under the Act is when an employer fails to comply with a duty imposed on it to make 'reasonable adjustments' in relation to a disabled person. This section looks at the circumstances in which a duty to make reasonable adjustments arises and outlines what an employer needs to do in order to discharge it.

3.113 The Act recognises that achieving equality for disabled people may require changing the way in which employment is structured and/or the removal of physical barriers. Employers are therefore obliged to make 'reasonable adjustments' for disabled people. This may involve treating disabled people 'more favourably' than non-disabled people.

When does an employer's duty to make reasonable adjustments arise?

3.114 The duty to make reasonable adjustments arises where:

- a provision, criterion or practice applied by or on behalf of an employer ; or
- any physical feature of premises occupied by the employer
- puts a disabled person at a substantial disadvantage compared with people who do not have the particular disability.

3.115 The duty to make adjustments also arises where:

- but for the provision of an auxiliary aid a disabled person would be put at a substantial disadvantage compared with people who do not have the particular disability.

3.116 When the duty to make adjustments arises an employer has to take such steps as it is reasonable for it to have to take in all the circumstances to avoid that disadvantage or to provide the auxiliary aid. In other words, the employer has to make a reasonable adjustment.

Where the duty arises, an employer cannot justify a failure to make a reasonable adjustment.

Which disabled people does the duty protect?

3.117 The duty to make reasonable adjustments applies when a disabled person is considering applying or actually applying for a job and during all stages of employment, including dismissal. It may also apply after employment has ended. There is one exception to this: the duty to make adjustments in order to avoid disadvantage caused by the physical features of an employer's premises only applies to disabled employees.

3.118 The extent of the duty to make reasonable adjustments depends on the employment circumstances of the disabled person in question. For example, in relation to what reasonable steps the employer is obliged to take, more extensive duties are owed to employees than to people merely thinking about applying for a job. More extensive duties are owed to current employees than to former employees.

3.119 In order to avoid discrimination, it would be sensible for employers not to attempt to make a fine judgment as to whether a particular individual falls within the statutory definition of disability, but to focus instead on meeting the needs of each employee and job applicant.

What are 'provisions, criteria or practices'?

3.120 There is no definitive list of what is a provision, criterion or practice. But, in general, provisions, criteria and practices are about the way an employer does things and its workplace arrangements. They include, for example, the arrangements for deciding to whom to offer employment should be offered, and terms, conditions or arrangements on which employment, promotion, a transfer, training or any other workplace benefit is offered or afforded. Provisions, criteria or practices can also cover a one off decision or action.

Example: A call centre normally employs supervisors on a full-time basis. A woman with sickle cell anaemia applies for a job as a supervisor. Because of pain and fatigue relating to her condition she asks to be able to do the job on a part-time basis. The call centre agrees. The hours of work which are offered amount to an adjustment to a working practice. This is likely to be a reasonable adjustment to the call centre's working practice.

Example: An employer has a policy that designated car parking spaces are only offered to senior managers. A woman who is not a manager, but has a mobility impairment and needs to park very close to the office, is given a designated car parking space. This is likely to be a reasonable adjustment to the employer's car parking policy.

What is a 'physical feature'?

Clause 20(7)

3.121 The Act says that the following are to be treated as a physical feature of the premises occupied by the employer:

- any feature arising from the design or construction of a building;
- any feature of an approach to, exit from or access to a building;
- a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on the premises;
- any other physical element or quality of the premises.

All these features are covered, whether temporary or permanent.

3.122 Physical features will include steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, lighting and ventilation, lifts and escalators, floor coverings, signs, furniture and temporary or movable items. This is not an exhaustive list.

Example: Clear glass doors at the end of a corridor in a particular workplace present a hazard for a visually impaired employee. This is a substantial disadvantage caused by the physical features of the workplace.

Example: The design of a particular workplace makes it difficult for someone with a hearing impairment to hear, because the main office is open plan and has hard flooring.

What is an 'auxiliary aid'?

3.123 An auxiliary aid is something which provides support or assistance to a disabled person. It can include provision of a specialist piece of equipment such as an adapted keyboard or text to speech software. Auxiliary aids include auxiliary services, so for example, provision of a sign language interpreter or a support worker for the disabled employee.

What disadvantages give rise to the duty?

3.124 The Act says that only substantial disadvantages give rise to the duty to make adjustments. Substantial disadvantages are those which are not minor or trivial. Whether or not such a disadvantage exists in a particular case is a question of fact. What matters is not that a provision, criterion or practice, a physical feature or the non-provision of an auxiliary aid is capable of causing a substantial disadvantage to the disabled person in question, but that it actually has this effect or that it would have this effect.

Is knowledge of the person's disability relevant?

3.125 An employer only has a duty to make an adjustment if it knows or could reasonably be expected to know that the employee or potential or actual job applicant has a disability and is likely to be placed at a substantial disadvantage. The employer must, however, do all it can be reasonably be expected to do to find out whether this is the case.

Sch 8, part 3, para 20

> **Example:** An employee has depression which sometimes causes her to cry at work, but the reason for her behaviour is not known to her employer. The employer makes no effort to find out if the employee is disabled and whether a reasonable adjustment could be made to her working arrangements. The employee is disciplined without being given any opportunity to explain that the problem arises from a disability. The employer may in breach of the duty to make adjustments because it failed to do all it could reasonably be expected to do to establish if the employee was disabled and substantially disadvantaged.

> **Example:** An employer has an annual appraisal system which specifically provides an opportunity for employees to notify the employer in confidence if they are disabled and are put at a substantial disadvantage by the working arrangements or premises. This gives the employer the opportunity to find out if an employee requires reasonable adjustments, although it would not mean that the employer should not consider reasonable adjustments for an employee at other times of the year.

3.126 If an employer's agent or employee (such as an occupational health adviser, a personnel officer or a recruitment agent) knows, in that capacity, of an employee's or applicant's or potential applicant's disability, the employer will not usually be able to claim that it does not know of the disability and that it therefore has no obligation to make a reasonable adjustment. Employers therefore need to ensure that where information about disabled people may come through different channels, there is a means - suitably confidential - for bringing that information together to make it easier for the employer to fulfil its duties under the Act.

3.127 Information will not be imputed to the employer if it is gained by a person providing services to employees independently of the employer. This is the case even if the employer has arranged for those services to be provided.

> **Example:** An employer contracts with an agency to provide an independent counselling service to employees. The contract says that the counsellors are not acting on the employer's behalf while in the counselling role. Any information about a person's disability obtained by a counsellor during such counselling would not trigger the employer's duty to make reasonable adjustments.

What is meant by 'reasonable' steps?

3.128 The duty to make adjustments requires employers to take such steps as it is reasonable, in all the circumstances of the case, to have to take in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

3.129 There is no onus on the disabled person to suggest what adjustments should be made (although it is good practice for employers to ask) but, where the disabled person does so, the employer must consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

3.130 Effective and practicable adjustments for disabled people often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms - for example, compared with the costs of recruiting and training a new member of staff - and so may still be a reasonable adjustment to have to make.

3.131 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

a) whether taking any particular steps would be effective in preventing the disadvantage

b) the practicability of the step

c) the financial and other costs of making the adjustment and the extent of any disruption caused

d) the extent of the employer's financial or other resources

e) the availability to the employer of financial or other assistance to help make an adjustment

f) the type and size of the employer

3.132 Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

Who is the comparator for the purposes of the duty to make reasonable adjustments?

3.133 The object of the duty to make adjustments is, so far as is possible by reasonable means, to avoid a substantial disadvantage which a disabled person experiences because of their disability. Although the duty requires a comparison with others, this a general comparative exercise. The comparator is identified by reference to the disadvantage that the disabled person is placed at. The purpose of the comparison is to establish whether it is because of disability that, for example, the provision, criterion or practice, disadvantages the disabled person. The disabled person does not need to identify an actual comparator as long as they can show that someone without a,or the particular disability, is or would not be not similarly disadvantaged.

Can failure to make a reasonable adjustment ever be justified?

3.134 The Act does not permit an employer to justify a failure to comply with a duty to make a reasonable adjustment. However, an employer will only breach such a duty if the adjustment in question is one which it is reasonable for it to have to make. So, where the duty applies, it is the question of 'reasonableness' which alone determines whether the adjustment has to be made.

What happens if the duty is not complied with?

Clause 21

3.135 If an employer does not comply with the duty to make reasonable adjustments it will be committing an act of unlawful discrimination. A disabled person will have the right to take a claim to the Employment Tribunal based on this.

When else does the duty to make reasonable adjustments apply in employment and occupation?

3.136 This section explains when it may be necessary to make an adjustment in relation to employment. The Act imposes similar requirements to the occupations it covers, subject to certain differences explained in XX. Reasonable adjustments may also be required in relation to occupational pension schemes as explained in XX.

Reasonable adjustments in practice

Conducting a proper assessment of what reasonable adjustments may be required is a good starting point. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled person in question before they are made.

3.137 Examples of steps it might be reasonable for employers to have to take include:

- Making adjustments to premises

  An employer makes structural or other physical changes such as widening a doorway, providing a ramp or moving furniture for a wheelchair user: relocates light switches, door handles or shelves for someone who has difficulty in reaching; or provides appropriate contrast in decor to help the safe mobility of a visually impaired person.

- Allocating some of the disabled person's duties to another person

  An employer reallocates minor or subsidiary duties to another employee as a disabled person has difficulty doing them because of his disability. For example, the job involves occasionally going onto the open roof of a building but the employer transfers this work away from an employee whose disability involves severe vertigo.

- Transferring the person to fill an existing vacancy

  An employer should consider whether a suitable alternative post is available for an employee who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the employee to continue doing the current job. Such a post might also involve retraining or other reasonable adjustments such as equipment for the new post.

- Altering the person's hours of working or training

  This could include allowing a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue arising from his disability. It could also include permitting part time working, or different working hours to avoid the need to travel in the rush hour if this is a problem related to an impairment. A phased return to work with a gradual build-up of hours might also be appropriate in some circumstances.

- Assigning the person to a different place of work or training

  An employer relocates the work station of a newly disabled employee (who now uses a wheelchair) from an inaccessible third floor

office to an accessible one on the ground floor. It may be reasonable to move his place of work to other premises of the same employer if the first building is inaccessible.

- Allowing the person to be absent during working or training hours for rehabilitation, assessment or treatment

  An employer allows a person who has become disabled more time off work than would be allowed to non-disabled employees to enable him to have rehabilitation training. A similar adjustment would be appropriate if a disability worsens or if a disabled person needs occasional treatment anyway.

- Giving, or arranging for, training or mentoring (whether for the disabled person or any other person)

  This could be training in particular pieces of equipment which the disabled person uses, or an alteration to the standard employee training to reflect the employee's particular disability. For example, all employees are trained in the use of a particular machine but an employer provides slightly different or longer training for an employee with restricted hand or arm movements, or training in additional software for a visually impaired person so that he can use a computer with speech output.

An employer provides training for employees on conducting meetings in a way that enables a deaf staff member to participate effectively.A disabled man returns to work after a six-month period of absence due to a stroke. His employer pays for him to see a work mentor, and allows time off to see the mentor, to help with his loss of confidence following the onset of his disability.

- Acquiring or modifying equipment

  An employer might have to provide special equipment (such as an adapted keyboard for someone with arthritis or a large screen for a visually impaired person), an adapted telephone for someone with a hearing impairment, or other modified equipment for disabled employees (such as longer handles on a machine). There is no requirement to provide or modify equipment for personal purposes unconnected with an employee's work, such as providing a wheelchair if a person needs one in any event but does not have one. The disadvantages in such a case do not flow from the employer's arrangements or premises.

- Modifying instructions or reference manuals

  The format of instructions and manuals might need to be modified for some disabled people (e.g. produced in Braille or on audio tape) and instructions for people with learning disabilities might need to be conveyed orally with individual demonstration.

- Modifying procedures for testing or assessment

  A person with restricted manual dexterity would be disadvantaged by a written test, so the employer gives that person an oral test instead.

- Providing a reader or interpreter

  A colleague reads mail to a person with a visual impairment at particular times during the working day. Alternatively, the employer might hire a reader.

- Providing supervision or other support

  An employer provides a support worker, or arranges help from a colleague, in appropriate circumstances, for someone whose disability leads to uncertainty or lack of confidence.

- Allowing a disabled employee to take a period of disability leave

  An employee who has cancer needs to undergo treatment and rehabilitation. His employer allows a period of disability leave and permits him to return to his job at the end of this period.

- Participating in supported employment schemes, such as Workstep.

  A man applies for a job as an office assistant after several years of not working because of depression. He has been participating in a supported employment scheme where he saw the post advertised. As a reasonable adjustment he asks the employer to let him make private phone calls during the working day to a support worker at the scheme

- Employing a support worker to assist a disabled employee

  An adviser with a visual impairment is sometimes required to make home visits. The employer employs a support worker to assist her on these visits.

- Modifying disciplinary or grievance procedures

  A women with a learning disability is allowed to take a friend (who does not work with her) to act as an advocate at a meeting with her employer about a grievance. The employer also ensures that the meeting is conducted in a way that does not disadvantage or patronise the disabled woman.

- Adjusting redundancy selection criteria

  A woman with an autoimmune disease has taken several short periods of absence during the year because of the condition. When her employer is taking absences into account as a criterion for selecting people of redundancy, he discounts these periods of disability-related absence.

- Modifying performance-related pay arrangements.

  A disabled woman who is paid purely on her output needs frequent short additional breaks during her working day – something her employer agrees to as a reasonable adjustment. It is likely to be a reasonable adjustment for her employer to pay her at an agreed rate (e.g. her average hourly rate) for these breaks.

It may sometimes be necessary for an employer to take a combination of steps.

Example: A women who is blind is given a new job with her employer in an unfamiliar part of the building. The employer (i) arranges facilities for her guide dog in the new area, (ii) arranges for her new instructions to be in Braille and (iii) provides disability equality training to all staff.

3.138 Advice and assistance (which may include financial assistance) in relation to making adjustments may be available from the Access to Work scheme.

3.139 In some cases a reasonable adjustment will not work without the co-operation of other employees. Employees may therefore have an important role in helping to ensure that a reasonable adjustment is carried out in practice. Subject to considerations about confidentiality, employers must ensure that this happens. It is unlikely to be a valid defence to a claim under the Act that staff were obstructive or unhelpful when the employer tried to make reasonable adjustments. An employer would at least need to be able to show that it took such behaviour seriously and dealt with it appropriately. Employers will be more likely to be able to do this if they establish and implement the type of policies and practices described at paragraph XX.

> **Example:** An employer ensures that an employee with autism has a structured working day as a reasonable adjustment. As part of the reasonable adjustment, it is the responsibility of the employer to ensure that other employees co-operate with this arrangement.

Comparators

Who will be an appropriate comparator?

3.140 Other than in cases of racial segregation or pregnancy or maternity discrimination, to establish direct discrimination a claimant must show that the employer treats or has treated them less favourably because of a protected characteristic (or in the case of combined discrimination, because of a combination of protected characteristics) than the employer treats, has treated or would treat a person to whom that protected characteristic (or that combination of characteristics) does not apply. This person is referred to as a 'comparator'.

3.141 The Act says that in comparing people for the purpose of direct discrimination there must be no material difference between the circumstances relating to each person. It is not necessary for the circumstances of the two people to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the claimant are the same or nearly the same for the claimant and the comparator.

Example: When an employer has a vacancy for IT director, both the Deputy IT Directors apply for promotion to the post. One of them is Scottish and has extensive experience. The other is English and has more limited experience. Both are of a similar age, have no disability, are male, heterosexual, and are non practising Christians. When the Scottish man is promoted, the English man alleges direct race discrimination because of his national origin. The employer is able to point to the Scottish man's more extensive experience as the reason why he was promoted. In this case the comparator's circumstances are sufficiently similar to enable a valid comparison to be made.

Example: A Japanese company has a wholly owned UK subsidiary. The head office seconds a limited number of staff from Japan to work for the subsidiary alongside locally recruited UK staff. One of these local employees complains that his salary and benefits are lower than a secondee from Japan employed at the same grade. Although the two employees are working for the same company at the same grade, the circumstances of the Japanese secondee are materially different. He has been recruited in Japan, reports at least in part to the Japanese parent company, has a completely different career path and his salary and benefits reflect the fact that he is working abroad.

3.142 The relevant circumstances must not themselves be discriminatory, for example where the treatment in question is based on a decision to follow a discriminatory external rule.

> **Example:** A chemical company operates a voluntary redundancy policy which provides enhanced terms to women aged 55 or older and men aged 60 or older. A woman of 56 is able to take advantage of the policy and leave on enhanced terms but a man of 56 cannot do this. The company argues that their policy was based on the original state pension age of 60 for women and 65 for men. The policy is discriminatory against men because the company cannot rely on an external policy which is itself discriminatory.

3.143 In practice it is rarely possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.

3.144 In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same; nevertheless their treatment may help to construct a hypothetical comparator.

> **Example:** A person who has undergone gender re-assignment works in a restaurant. She makes a mistake on the till, resulting in a small financial loss to her employer, because of which she is dismissed. The situation has not arisen before, and so there is no actual comparator. Nevertheless, six months earlier a fellow employee who had not undergone gender re-assignment received a written warning for taking home items of food without permission. The treatment of that person might be used as evidence that a hypothetical employee making an error on the till who had not undergone gender

re-assignment would not have been dismissed for that reason.

3.145 To compare the treatment of a hypothetical comparator will involve considering the treatment of persons whose circumstances are not the same as the claimant's but whose treatment sheds light on the reason why the claimant was treated as they were. In some cases it may be necessary to make an inference from the behaviour of the employer towards other people in similar circumstances or in different circumstances which are analogous but materially different in certain respects.

3.146 In a claim of combined discrimination, evidence as to the way the employer treats persons to whom only one of the protected characteristics apply may enable an inference to be drawn as to how a hypothetical comparator who has neither protected characteristic would be treated.

Example: If a black woman finds that her employer treats both black men and white women more favourably than they treat her, an inference could be made that the employer only treats black female employees less favourably and therefore that a hypothetical comparator, a white man, would have been treated more favourably. This would also show that it was neither race alone nor sex alone that was the reason for her less favourable treatment, but the combination of the two.

3.147 Who could serve as a hypothetical comparator may also depend on the reason why the employer treated the person as they did. In many cases it may be more straightforward to establish the reason for the employer's treatment. This could include a consideration of the treatment by the employer of persons whose circumstances are not the same as those of the person making the claim but whose treatment illuminates the reason why

that person was treated in the way they were. If the reason is because of a protected characteristic, then hypothetical comparator(s) can be identified.

3.148 The facts in a case may suggest that the reason for the less favourable treatment is a prejudice, stereotype or assumption relating to the particular characteristic, or, in the case of combined discrimination, relating to the combination of characteristics.

3.149 When it is clear from the facts that the reason for the treatment is the combination of characteristics, it will follow that a hypothetical comparator without both characteristics would have been treated more favourably.

3.150 For disability, the Act states that relevant circumstances include the disabled person's abilities. A comparator will be a person who does not have the disabled person's disability, and should have the same abilities or skills as the disabled person. If a suitable comparator can be identified with the same skills or abilities this makes the match a closer one and makes the comparison more useful in determining whether the treatment was less favourable treatment because of disability.

Example: When deciding whether or not an employee has been discriminated against because of a visual impairment a comparison is made with the treatment received by an actual or hypothetical person who does not have a visual impairment. In deciding whether the comparison is appropriate the comparator must not be in materially different circumstances to the disabled employee. In showing that the disabled employee's circumstances are not materially different to his comparator, the disabled employee can highlight the abilities that they share such as manual dexterity, speech, hearing and physical co-ordination.

3.151 For sexual orientation the Act states that the fact that one person is a civil partner while another is married is not a material difference between the circumstances relating to each case.

> **Example:** Henry, who is gay, complains that he was refused promotion because of his sexual orientation. Frank, his colleague, who is not gay, is promoted instead. The fact that Frank is married and Henry is a civil partner will not be a material difference in their circumstances, so Henry would be able to refer to Frank as a comparator in this case.

Harassment

What the Act says

3.152 The Act prohibits three types of harassment. These are: **Clause 26 (1), (2), (3)**

a) Harassment related to some, but not all, of the protected characteristics;

b) Sexual harassment; and

c) Less favourable treatment of an employee because s/he submits to or rejects sexual harassment or harassment related to sex or gender reassignment.

Harassment related to a protected characteristic

3.153 Harassment related to a protected characteristic occurs when a person engages in: **Clauses 26(1)**

- unwanted conduct which is
- related to one or more of the relevant protected characteristics (see below for those

which are not relevant)

and which has the purpose or the effect of:

a) violating the dignity of another person; or

b) creating for that person an intimidating, hostile, degrading, humiliating or offensive environment

3.154 Not all protected characteristics are given protection. from harassment Pregnancy and maternity and marriage and civil partnership are not protected. **Clause 26(5)**

3.155 Unwanted conduct can include any kind of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

3.156 The word "unwanted" means essentially the same as 'unwelcome' or 'uninvited'. "Unwanted" does not mean that express objection must be made to the conduct before it is deemed to be 'unwanted'.

3.157 A single act of harassment or sexual harassment (see below) which is sufficiently serious can found a complaint: harassment is a matter of fact and degree.

Example: In the course of general conversation during a work break, someone makes a joke about Muslim women wearing the veil. The group starts swapping jokes about Muslim people and Islam and this continues over a period of weeks. One worker, who is not known to be a Muslim, finds this increasingly and seriously upsetting. This is likely to be harassment even though the jokes are not intended maliciously and are not directed at the worker in question.

By contrast, if the Muslim worker remarks at an early stage that he finds such jokes upsetting and

there are no further such incidents, this is unlikely to amount to harassment.

But if a group of workers exclude a Muslim colleague from the staff room during a break on the grounds that "you might be carrying a bomb", then that might amount to harassment even if it happens only once and the workers concerned genuinely intend it as a joke.

What does 'Related to' mean?

3.158 'Related to' a protected characteristic has a broad meaning: conduct will be related to a protected characteristic if the person experiencing harassment has the protected characteristic or if there is any connection with the protected characteristic.

3.159 This could include sex- specific conduct which is pursued, not because of the sex of the complainant, but which is clearly related to her sex. So, for example, where women in an office are referred to as dumb blondes, dollybirds or floozies an individual woman may be able to establish that she has been subjected to unwanted conduct related to sex.

Example: An employee, A, who has a disabled child is required to work alongside a colleague, B, who expresses the view that disabled people are given far too much favourable treatment by society. B continually and unfairly criticises the work of a third colleague, C, who is disabled. Although B does not know that A has a disabled child and his criticisms are aimed at C, this could amount to harassment of A because it is related to a protected characteristic.

Harassment occurs even if the person harassed does not have the characteristic: a person might be perceived wrongly to have the characteristic or be harassed because of their association with someone who has the characteristic such as a family member, friend or lover.

> **Example:** A male worker who appears very youthful is called Sonny by his manager, frequently asked if he has started to shave and subjected to other banter implying that he is not yet an adult. Although the manager knows that the worker is in fact an adult and the banter may be genuinely funny rather than offensive, this may amount to harassment related to age.

3.160 Protection is also provided where someone is subjected to harassment related to a protected characteristic even where it is known that they do not have that characteristic.

> **Example:** an employee is subjected to homophobic banter and name calling, even though his colleagues know he is not gay and he is aware that they know he is not gay. Nevertheless the form the abuse takes relates to sexual orientation and therefore is prohibited under the Act.

3.161 The conduct does not have to be **directed** at the complainant - it will be prohibited by the Act if, as stated above, it is related to a protected characteristic and has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

3.162 For example:

- Where a trainer makes comments of a sexual nature to a mixed audience this may amount to harassment where it creates a humiliating or offensive environment for a person in the audience.
- Where racist/homophobic/disabilist etc. office banter creates a hostile environment for an employee this could amount to harassment.
- A Black worker who sees a White colleague being subjected to racially abusive language could have a case of harassment if the language also causes an offensive environment for her.
- An employer who displayed any material of a sexual nature, such as a topless calendar, may be harassing her employees where this makes the workplace an offensive place to work for any employee, female or male.

Sexual harassment

3.163 Sexual harassment occurs when a person engages in any unwanted verbal, non-verbal or physical conduct of a sexual nature which has the purpose or effect of:

- violating a person's dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

Conduct 'of a sexual nature' can include unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings or sending emails with material of a sexual nature.

Example: Male members of staff download pornographic images on to their computers in an office where a woman works; she may claim harassment even if the images where not shown to her, if she is aware that they are being downloaded and this creates a hostile and humiliating environment to her.

"Purpose or effect"

3.164 If the person engaged in the unwanted conduct with **the purpose** of:

a) Violating the dignity of the other person; or

b) creating for them an intimidating, hostile, degrading, humiliating or offensive environment

then it amounts to harassment irrespective of its actual effect on the person.

3.165 In some cases, conduct which is intended to be friendly could amount to harassment.

3.166 Even where there is no intention to create one of the negative environments described above, conduct will amount to harassment if the conduct has the effect of creating such an environment.

3.167 In deciding whether conduct had that **effect** each of the following must be taken into account: **Clause 26(4)**

- **the perception of the complainant** i.e. did the complainant regard it as creating an intimidating environment, etc. This part of the test is a subjective question and depends on how the complainant regards the treatment.
- **the other circumstances of the case.**

- **whether it is reasonable for the conduct to have that effect.** This is an objective test.

3.168 Circumstances that may be relevant and therefore need to be taken into account can include:

- Circumstances of the person experiencing the conduct, for example their health including mental health, mental capacity, cultural norms, previous experience of harassment. The following examples illustrate treatment that would amount to harassment in particular circumstances.

Example: A worker who suffers from depression, which is successfully controlled by medication, finds his manager's constant inquiries as to whether he is "feeling all right" oppressive and demeaning, as she does not make similar inquiries of the worker's colleagues.

Example: An employee with learning disabilities is teased by colleagues who tell him to go to the stores and ask for non-existent items such as a "long weight". Other new employees have been through the same sort of teasing and shared the joke but this worker finds it humiliating and upsetting.

Example: A worker whose religious beliefs forbid her from drinking alcohol strongly prefers to avoid places where it is consumed. As a result, she is unable to participate fully in the social life of her workplace, which is centred on after-work drinking. She does not object to this but finds herself increasingly isolated at work as her colleagues regard her as "stand-offish". They exclude her from general gossip by stopping conversations when she appears, talk behind her back and do not invite her to join them in canteen lunches.

Example: A young employee comes from a cultural background which places great emphasis on respect for one's elders. Because of this, younger people do not look their seniors or superiors in the eye but tend to look downwards during conversations. This is misinterpreted by the worker's manager as extreme shyness and by other older colleagues as rudeness. As a result the employee is often put under pressure by managers to "cheer up" and to be "more outgoing". She is also cold-shouldered by colleagues, which she finds highly stressful.

Example: An employee who has experienced serious and continued homophobic harassment at work is moved, with his agreement, to another part of the company's operations. If in his new post he once again encounters harassment because of his sexual orientation, it is likely that a lower level of intensity will amount to unlawful harassment.

- differences in age, status, fluency in English or other relevant language;

Example: A man in his 40s takes a job as a warehouseman. The other workers are all in their 20s. They nickname him "granddad" and ask him questions about historical events long before his own birth, and pretend that he needs to sit down frequently.

- the impact of the conduct: to what extent was the person inhibited in making relevant choices; or
- whether the perpetrator of the alleged harassment was exercising any of her or his rights under the Human Rights Act 1998.

Less favourable treatment for rejecting or submitting to unwanted conduct

3.169 The third type of harassment occurs when someone is treated less favourably because they have submitted to (or rejected) (a) unwanted conduct related to sex or gender reassignment as described above or (b) conduct of a sexual nature, as described above. The less favourable treatment under this type of harassment may be perpetrated by the same person who did the original unwanted conduct, or by another person.

Clause 26(3)

> **Example:** A shopkeeper propositions one of his shop assistants, he rejects his advances and then is turned down for promotion which he believes he would have got if he had accepted his boss's advances. The shop assistant would have a claim of harassment.

> **Example:** A worker does not make a complaint even though she is subjected to ongoing taunts from colleagues that she has undergone gender reassignment. Her line manager decides that she is not suitable for promotion because she did not assert herself in that situation. The worker would have claims of harassment related to gender reassignment and in connection with the decision not to offer her promotion.

Employees and applicants: harassment

3.170 Employers may be liable for harassment of their employees by third parties, such as customers and clients, where:

- an employee has been harassed on at least two occasions (whether by the same person or different people), and
- the employer is aware harassment has taken place but fails to take reasonably practicable steps to prevent it happening again.

> **Example:** A shop assistant with a strong Nigerian accent tells his manager that he is upset and humiliated by a customer who regularly uses the shop and each time makes derogatory remarks about Africans in his hearing. If his manager does nothing to try to stop it happening again, he would be liable for racial harassment.

3.171 Harassment because of a combination of two characteristics may constitute combined discrimination where the claimant can show that they have been treated less favourably than another is or would be treated in similar circumstances because of their combination of characteristics. See 3.31 for information on combined discrimination.

Statutory Defence in employment cases

3.172 As with other breaches of the Act, employers may avoid liability for harassment of a member of staff by other employees where they can demonstrate that they took all reasonable steps to prevent the harassment.

Victimisation

What the Act says

3.173 The Act prohibits victimisation. Victimisation arises when a person (A) subjects another (B) to a detriment because B has done a protected act or because A believes that B has done or may do a protected act in the future. Victimisation cannot be justified.

Clause 27

3.174 Only individuals are protected against victimisation.

3.175 An individual need not have a particular protected characteristic in order to be protected against victimisation under the Act. But victimisation is only unlawful if it is linked to a protected act.

Example: a non-disabled employee gives evidence on behalf of a disabled colleague at an Employment Tribunal hearing. If the non-disabled employee is subsequently refused a promotion because of that action they would have suffered victimisation in contravention of the Act.

What is a protected act?

3.176 A protected act is any of the following:

- bringing proceedings under the Act;
- giving evidence or information in connection with proceedings brought under the Act;
- doing anything which is related to the provisions of the Act;
- making an allegation that another person has done something in breach of the Act; or
- having a "relevant pay discussion" with a colleague (including a former colleague).

3.177 A "relevant pay discussion" is defined in the Act as a discussion with a colleague or a former colleague, which concerns a connection between pay and possession of a "protected characteristic". **Clause 74(2)**

3.178 Detrimental treatment amounts to victimisation if a "protected act" is an effective cause of the treatment. The protected act need not be the only reason for the treatment

What is a detriment?

3.179 "Detriment" in the context of victimisation is not defined by the Act and could take many forms.

> **Example:** An employee who is a keen participant in her employer's sports club finds that she has been dropped from the netball team after she gives evidence in a colleague's grievance about sex discrimination. She finds out that her divisional manager told the netball captain that the manager did not want her representing the firm because she was clearly disloyal. This is likely to amount to detriment even though it has no impact on the employee's pay or conditions.

> **Example:** A senior manager hears an employee's grievance about harassment. He finds that the employee has been harassed and offers a formal apology and directs that the perpetrators of the harassment be disciplined and required to undertake diversity training. As a result, he is not put forward by his director to attend an important conference on behalf of the company. This is likely to amount to detriment.

> **Example:** An applicant for a job is not given an interview because the managing director of the company to which they are applying believes that they are a "troublemaker" who is likely to encourage other employees to make complaints about discriminatory practices at the company. This is likely to amount to detriment

Example: A contract worker discusses rates of pay with an employee of their principal. The principal wishes to prevent this happening again and, as a condition of allowing the contract worker to continue work, requires the contract worker to work in a separate room from other personnel and not to use the staff canteen. This is likely to amount to detriment.

Example: An employee raises a grievance about discrimination at work. While the grievance is being considered, she applies for a promotion but is turned down because her qualifications are not appropriate to the post. This is not likely to amount to a detriment for the purposes of the Act.

3.180 Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. There is no need to demonstrate physical or economic consequences. However an unjustified sense of grievance alone would not be enough to establish detriment.

What other factors are involved in proving that victimisation has occurred?

3.181 Victimisation does not require a comparator. The individual need only show that they have been subjected to a detriment because they have done a protected act or because the person subjecting them to the detriment believes (rightly or wrongly) that they have done a protected act or intend to carry out one.

3.182 Victimisation is not limited by time: it can occur at any time after an individual has done a protected act.

> **Example:** In 2006 Mr M, a union staff representative, acted on behalf of Mrs C in claim of sex discrimination. In 2009, he applies for a promotion but is rejected. He asks for his interview notes which makes a reference to his loyalty to the company and in brackets was written the words 'tribunal case'. Mr M can claim victimisation.

3.183 An individual cannot claim victimisation linked to an act of bad faith such as maliciously giving false evidence or information or making a false allegation. Such actions would not amount to a protected act.

3.184 However, an individual will still be protected from victimisation if they give evidence or provide information in good faith even if this is factually wrong or provided in relation to proceedings which are unsuccessful.

Relationships that have ended

What the Act says

3.185 The Act protects individuals who were previously in employment relationships covered by the Act from discrimination or harassment which arises from and is closely connected to the relationship even after it has ended.

Clause 104

> **Example:** An employee who receives an inaccurate and negative job reference from her former employer because she is a lesbian would have a claim against her former employer.

3.186 This protection will apply even if the relationship in question came to an end before this section came into force.

3.187 This protection includes a duty to make reasonable adjustments for disabled ex-employees who continue to be disadvantaged by workplace arrangements.

> **Example:** A former employee has life-time membership of a works social club but cannot access it due to a physical impairment. Once the employee's former employer is made aware of the situation it will need to consider making reasonable adjustments.

A person will be able to enforce protection against discrimination/harassment as if they were still in the relationship which has ended.

3.188 If the conduct or treatment which an individual receives after a relationship has ended amounts to victimisation, this will be dealt with under the victimisation provisions (see 3.173).

Liability of employers and principals

Clause 108

What does the Act say?

3.189 The Act makes employers liable for acts of discrimination, harassment or victimisation committed by their employees in the course of employment. Principals (including employers) are also liable for such acts committed by their agents while acting under the principal's authority. It does not matter whether the employer or principal knows about or approves of the acts of their employee or agents.

3.190 Employers' and principals' liability does not extend to criminal offences. The only exception to this is offences relating to disabled persons and transport under part 12 of the Act.

When is an act "in the course of employment" or "within the authority of a principal"?

3.191 The phrase "in the course of employment" carries its ordinary meaning but case law has given the phrase a very wide scope. Work related social functions outside normal work hours and premises may be in the course of employment. For example, an employer could be liable for an act of discrimination which took place during work drinks attended by employees. The same breadth of meaning should be given to acting "with the authority of the principal" in the case of agents.

The employer's defence

3.192 An employer will not be liable for unlawful acts committed by their employees where the employer has taken all reasonable steps to prevent such acts. A principal will not be liable for unlawful discrimination carried out by its agents where the agent acted in contravention of the principal's express instructions not to discriminate. In such circumstances the agent will not have acted "with the authority of the principal".

Example: A manager subjects an employee to sexual harassment. The company which employs both the manager and the employee has a clearly-stated policy against sexual harassment and has ensured that all its managers are taught about the meaning and application of the policy before being appointed. They are also required to undergo annual refresher courses, and it is made clear that anyone who breaches the policy will be disciplined. The company may not be held liable for the actions of the manager (but the manager is likely to be held liable).

Example: However if, in the example above, the employee could show that in practice managers did engage in sexual harassment and that the company turned a blind eye to such practices, or that employees had complained of being sexually harassed and their complaints were ignored, the fact that the company had published a policy and given training would probably not be enough for it to escape liability.

Example: Company A arranges work experience for one of its trainees with Company B, which is acting as Company A's agent for this purpose. The placement involves a contract between Company A and the trainee. A second contract is made between Company A and Company B, which gives Company B authority to terminate the placement. The trainee announces that she is pregnant. Company B complains, for the first time, about her 'unsatisfactory performance' and terminates the placement, which the trainee suspects is because of her pregnancy. Company A would be liable for any unlawful discrimination as it has given Company B the authority to terminate the placement. But Company A could have avoided liability if it had expressly insisted that B's placement should not be terminated in a discriminatory manner, for example because of pregnancy, as in these circumstances the agent would not have acted with the authority of the principal.

3.193 The steps an employer takes will be reasonable if there were no further reasonably practicable steps the employer could have taken. In deciding if a step is reasonable it is legitimate to consider the effect it is likely to have if there are other reasonably practicable steps the employer could have taken. However, a step does not have to be effective to be reasonable.

3.194 Reasonable steps are likely to include:

- implementing an equality policy;
- ensuring employees are aware of the policy;
- providing equal opportunities training;
- reviewing the policy as appropriate; and
- dealing effectively with employee complaints.

Liability of employees and agents

What the Act says

3.195 The Act makes employees personally liable for unlawful acts which they commit during the course of employment where the employer is also liable. Employees may be liable for their actions even when their employer is able to rely successfully on the 'reasonable steps' defence. Agents are also personally liable for acts which they commit under their principal's authority.

Clause 109

Knowledge that the act is unlawful

3.196 It is not necessary for the employee or agent to know that they are acting unlawfully to be liable for their actions.

However, if the employee or agent reasonably relies on a statement by the employer or principal that an act is not unlawful, then the employee or agent is not liable for the unlawful act.

Instructing, causing or inducing discrimination

What does the Act say?

3.197 It is unlawful to instruct someone to discriminate against, harass or victimise another person because of a protected characteristic or to instruct a person to help another person to do an unlawful act.

Clause 110

Example: A GP instructs his receptionist not to register anyone with an Asian name. The receptionist would have a claim against the GP if subjected to a detriment for not following the instruction. A potential patient would also have a claim against the GP if she discovered the instruction had been given and was put off applying to register. The receptionist's claim against the GP would be brought before the employment tribunal as it relates to employment, while the potential patient's claim would be brought in the county court as it relates to services (see the Code of Practice on Services and Public Functions for more detail on discrimination in services.)

Example: A customer in a shop complains about being served by a woman whom he perceives to be lesbian. He tells the manager that the shop should not employ "people like that" and that if the assistant is there next time he comes in, he will take his custom elsewhere. This is not unlawful under this section of the Act because the customer and the shop manager are not in a relationship in which it is unlawful for the customer to discriminate against, harass or victimise the manager.

3.198 The Act also makes it unlawful to cause or induce, or to attempt to cause or induce, someone to discriminate against, harass or victimise a third person because of a protected characteristic.

3.199 The Act also prohibits a person from causing or inducing someone to help another person to do an unlawful act.

> **Example:** The managing partner of an accountancy firm is aware that the head of the administrative team is planning to engage a senior receptionist with a physical disability. The managing partner does not issue any direct instruction but suggests to the head of administration that this would reflect poorly on their judgement and so affect their future with the firm. This is likely to amount to causing or attempting to cause the head of administration to act unlawfully.

3.200 An inducement may be direct or indirect. It may amount to no more than persuasion, and need not necessarily involve a benefit or loss.

> **Example:** The employees of a despatch company are all men and engage in a great deal of banter about sex. When the HR assistant receives a job application from a woman, he approaches one of the managers. The manager comments that it would probably be better for everyone if such applications were 'lost', bearing in mind how much the employees, including the HR assistant in particular, enjoy the regular banter. Although the manager has not made any direct threat or promise, this is likely to amount to unlawful inducement.

3.201 Does the person who is instructed, caused or induced actually have to commit the discrimination?

No. Instructing, causing or inducing discrimination (or attempting to do so) is in itself unlawful. The person who is instructed, caused or induced to discriminate does not have to go on to commit the discrimination.

3.202 When does the Act apply?

For the Act to apply, the relationship between the person giving the instruction or causing or inducing the discrimination and the person whom they instruct or cause or induce to commit the discrimination must be one in which discrimination, harassment or victimisation is prohibited, such as an employment relationship or other relationships governed by the Act.

3.203 Who is protected?

The Act provides a remedy for: **Clause 110(5)**

(i) the person to whom the causing, instruction or inducement is addressed; and

(ii) the person who is subjected to the discrimination or harassment or victimisation if it is carried out;

provided that they suffer a detriment as a result.

In addition, the Equality and Human Rights Commission has the power to bring proceedings.

Example: In the previous example, if the head of administration is subjected to a detriment as a result of the managing partner's actions, he is entitled to a remedy against the managing partner. The disabled candidate is also entitled to a remedy if they suffer a detriment as a result of the managing partner's actions.

Aiding contraventions

What does the Act say?

3.204 The Act makes it unlawful to knowingly help someone discriminate against, harass or victimise another person. A person who helps another in this way will be treated as having done the act of discrimination, harassment or victimisation themselves. It is unlawful to help a person to discriminate against or harass another person where the discrimination or harassment arises from and is closely connected with an employment relationship covered by the Act, even where the employment relationship has ended.

Clause 111

3.205 The Act also makes it unlawful to help with an instruction to discriminate or with causing or inducing discrimination.

What does it mean to help someone commit an unlawful act?

3.206 "Help" should be given its ordinary meaning. It does not have the same meaning as to procure, induce or cause an unlawful act. The help given to someone to discriminate, harass or victimise a person will be unlawful even if it is not substantial or productive, so long as it is not negligible.

> **Example:** A company manager wants to ensure that a job goes to a female candidate because he likes to be surrounded by women in the office. However the company's HR department, in accordance with their equal opportunities policy, has ensured that the application forms contain no evidence of candidates' sex. The manager asks a junior employee to look in the HR files and let him know the sex of each candidate so that he can find a pretext to reject the male candidates. It will probably be unlawful for the junior to give the manager this help, even if the manager is unsuccessful in excluding the male candidates.

What does the helper need to know to be liable?

3.207 For the help to be unlawful, the person giving the help must know at the time they give the help that discrimination, harassment or victimisation is a probable outcome. But the helper does not have to intend that discrimination, harassment or victimisation should result from the help.

> **Example:** In the example above, the help will be unlawful unless the junior fails to realise that an act of discrimination is a likely outcome of her actions. But she only needs to understand that discrimination is a likely outcome: she does not have to intend that discrimination should occur as a result of her help.

3.208 Help is not unlawful if the helper was told that they were helping a lawful act and it was reasonable for them to rely on this statement. It is a criminal offence to knowingly or recklessly make a false or misleading statement in this way.

'Reasonable' means having regard to all the circumstances including the nature of the act and how obviously discriminatory it is, the authority of the person making the statement and the knowledge that the helper has or ought to have.

Example: In the example above, the manager might tell the junior that, due to his position in the company, he has a responsibility to balance the sexes in the workforce and the HR department is mistaken in its approach. If it is reasonable for the junior to believe this, she will escape liability for the discrimination. Whether it is reasonable to believe depends on all the relevant circumstances including the nature of the action and the relationship of the helper to the person getting the help.

If the manager tells the junior that it is all right for her to get the information, and the manager either knows that that is not true or simply does not care whether it is true or not, the manager will not only have civil liability under the Act for discrimination but will also commit a criminal offence.

Chapter 4
Putting equality law into practice

4.1 Employers are not required by law to have equality policies. Although it is not a legal requirement, it is recommended that employers make a commitment to promote equality of opportunity in employment and demonstrate this commitment by developing and implementing equality policies.

4.2 An equality policy also enables employers to develop and use employment procedures and practices which provide equality of opportunity for all job applicants and employees and which do not discriminate against any job applicant or employee because of any protected characteristics. For information on protected characteristics and prohibited conduct under the Act, please see chapters 2 and 3 respectively.

4.3 Developing an equality policy is a cyclical process. It consists of four key stages: planning, reviewing, implementing and monitoring.

4.4 The content and details of equality policies and practices will vary according to the size, resources and needs of the employer. Some employers will require less formal structures but all employers should identify a time scale against which they aim to achieve their objectives.

Why have an equality policy?

4.5 There are a number of reasons why employers should have an equality policy. For example:

- it can give job applicants and employees confidence that they will be treated with dignity and respect;
- it can set the minimum standards of behaviour expected of all employees and outline what employees and job applicants can expect from the employer;
- it is key to helping employers and others comply with their legal obligations;
- it can minimise the risk of legal action being taken against employers and employees; and/or
- if legal action is taken, employers may use the equality policy to demonstrate to an Employment Tribunal that they take discrimination seriously and have taken all reasonable steps to prevent discrimination.

Example: Equality and diversity policies and practices are often drivers of good recruitment and retention practice. Information on these, as well as on equality employee network groups, on the organisation's website and/or in induction packs send a very positive and inclusive signal, encouraging people to apply to work for the organisation. This can indicate that, for example, that applicants' religion or belief and/or sexual orientation would be welcome in the organisation.

Example: For one organisation which is part of a multi-national corporation being sensitive to local contexts is an important part of its operation. All its branches aim to reflect the local communities in which they operate in terms of their customers and their staff. In ethnically mixed areas, they aim to reflect this in the products they sell and in the mix of staff. This is seen as making strong business sense since attracting a greater ethnic diversity of staff will attract more customers from that group. The branches also celebrate relevant religious festivals for staff and customers in store such as Eid and Hanukkah.

Planning an equality policy

What should an equality policy contain?

4.6 It is recommended that a written equality policy should set out the employer's general approach to equality and diversity issues in the workplace. The policy should make clear that the employer intends to develop and apply procedures which do not discriminate because of any of the protected characteristics, and which provide equality of opportunity for all job applicants and employees.

Most policies will include the following:

- a statement of the employer's commitment to equal opportunity for all job applicants and employees;
- what is and is not acceptable behaviour at work (also referring to conduct near the workplace and at work-related social functions where relevant);
- the rights and responsibilities of everyone to whom the policy applies, and procedures for dealing with any concerns and complaints;
- how the policy may apply to the employer's other policies and procedures;

- how the employer will deal with any breaches of policy;
- who is responsible for the policy; and
- how the policy will be implemented and details of monitoring and review procedures.

Example: An organisation informs new recruits that abuse and harassment are unacceptable and staff who make racist comments are automatically subject to disciplinary proceedings

4.7 An equality policy should cover all aspects of employment to demonstrate the scope of the employer's approach to equality and diversity, including those listed below (this list is not exhaustive). All these areas of the employment relationship are covered in more detail in this Code and cross-references to the relevant chapters/sections are provided below:

(a) monitoring (see 4.25])

(b) recruitment (see chapter 6)

(c) terms and conditions of work (see chapter 9)

(d) pay and benefits (see chapter 9)

(e) leave and flexible working arrangements (see chapter 9])

(f) the availability of facilities, such as quiet/prayer rooms and meal options in staff canteens (see chapter 9)

(g) pensions (see chapter 9)

(h) dress codes (see chapter 9.66)

(i) training and development (see chapter 9.90)

(j) promotion and transfer (see chapter 9.80)

(k) grievance and disciplinary issues (see chapters 4.64 and 9.62)

(l) treatment of employees when their contract ends see chapter 10)

4.8 An equality policy sets standards of good practice for all employers. There is no “one size fits all” policy and employers’ equality policies and procedures should be appropriate to their size, resources and needs.

Should employers have a separate equality policy for each protected characteristic?

4.9 It is for employers to choose whether they have separate policies or one policy. There is no requirement by law to have either one equality policy or separate equality policies for each protected characteristic e.g. a sexual orientation policy, an age policy or a religion or belief policy. One equality policy covering all protected characteristics may be more practical and can help to prevent issues relating to combined discrimination.

Where separate policies are developed, they should be consistent with each other and each policy should reflect the employer's commitment to promoting equality of opportunity in employment.

How should employers implement an equality policy?

4.10 An equality policy is not just about stating an employer's commitment to equal opportunity. It is also about implementation.

The policy should be in writing and drawn up and agreed in consultation with employees, any recognised trade unions or other workplace representatives including any equality representatives within the workforce.

Employers may wish to consider whether it is appropriate to make adherence to the policy an obligation under contracts of employment.

4.11 Employers will be of different sizes and have different structures but it is advisable for all employers to take the following steps to implement an equality policy:

(a) promote the policy 4.6)

(b) ensure the policy is communicated to all job applicants and employees and agents of the employer; and

(c) monitor the policy.

Promoting the equality policy

4.12 Employers should promote and publicise their equality policy as widely as possible and there are a number of ways in which this can be done. Promoting the policy is key to implementing it effectively and will help an employer demonstrate that it has taken all reasonable steps to prevent discrimination.

Example: A staff consultation suggested that the workplace had an important role in building positive relationships across religion and belief groups. While many people were willing to help colleagues understand their religion or belief, others identified factors that could limit their ability to be open. These included the negative media portrayal of certain faith communities, the use of language offensive to some faith groups in the workplace, and a view that certain groups got disproportionate publicity and resources. However, there was strong support for interfaith events and an interfaith group, to provide a well managed environment for staff to learn about different religions and beliefs.

4.13 It is recommended that employers use more than one of the following methods of communication to promote their policy:

- Email bulletins
- Intranet
- Website
- Induction packs
- Team meetings
- Office notice boards
- Circulars and letters
- Newsletters
- Cascade systems
- Training (see4.18)
- Contracts of employment
- Handbooks
- Annual reports

4.14 Electronic methods of communication are likely to be popular and widely used. They may not be appropriate in all cases. Some employees, for example those in customer-facing or shop floor roles, may not have regular access to computers. Alternative methods of communication, such as notice boards and regular staff meetings, should therefore be considered.

4.15 Promoting an equality policy should not be a one-off event. It is recommended that employers provide periodic reminders and updates to employees and other categories of workers. Employers should also periodically review their advertising, recruitment and application materials and processes.

4.16 Overall responsibility for implementing, supporting, monitoring and reviewing the policy, and for reporting regularly on its effectiveness, should rest with senior management.

4.17 The policy will carry greater force if it has the explicit backing of the chair, director or proprietor and the board and senior management (where applicable).

Generally, organisations feel that it is essential to have support from managers at the most senior levels in order to pursue an equalities agenda effectively. Support from senior managers (and in particular the Chief Executive, or equivalent) is vital in order to set up and resource the structures that can take forward the equalities agenda. It is crucial that senior managers visibly communicate and champion the equality agenda, the benefits to the organisation and the need to tackle discriminatory forms of behaviour within the workplace.

Diversity and equality should be built into organisations at every level. For example, addressing equality issues can be made a requirement of Departmental Heads in financial planning. Heads may need to consider equality issues and their implications and evidence this in their financial planning statements. As part of their performance reviews, senior and middle managers may be required to complete comprehensive forms detailing how they deal with equality and diversity issues in their areas.

Example: When a large company introduces a new disability policy, it might ask an external training company to run training sessions for all staff, or it might ask a human resources manager to deliver training to staff on this policy. The external training company might be one run by disabled people.

A small employer introducing a disability policy asks the managing director to devote a team meeting to explaining the policy to her staff and to discuss why it is important and how it will operate.

Training

4.18 Employers should ensure that all employees and agents understand the equality policy, how it affects them and the plans for putting it into practice. The best way to achieve this is by providing regular training.

4.19 Some employees may need more specific training, depending on what they do within the organisation. For example, line managers and senior management should receive detailed training on how to manage equality and diversity issues in the workplace.

4.20 The training will benefit from consulting employees and their representatives about their needs and incorporating feedback from any training into future courses.

4.21 Employers should make sure in-house trainers are themselves trained before running courses for other employees. External trainers also need to be fully informed about the employer's policies, including its equality policy.

4.22 Employers will find it helpful to give a named senior manager responsibility for equal opportunities training in the organisation.

4.23 Training on equal opportunities should include the following (this list is not exhaustive):

- The law covering all the protected characteristics and prohibited conduct
- The employer's equality policy, why it has been introduced and how it will be put into practice
- What is acceptable and unacceptable conduct in the workplace
- The risk of condoning or seeming to approve inappropriate behaviour and personal liability
- How prejudice can affect the way an employer functions and the impact that generalisations, stereotypes, bias, inappropriate language in day-to-day operations can have on people's chances of obtaining work, promotion, recognition and respect
- The monitoring process (see4.25)

Example: An organisation has an e-learning module, Respect for People, that everyone has to complete as part of their induction. This includes advice on terms to avoid using because they might cause offence.

Example: A major retailer has produced a religion toolkit that explains the features of the major world religions, which managers can use to promote understanding among their staff, by correcting major misunderstandings and challenging stereotypes

Example: A large employer trains all its employees in disability equality, the organisation's disability policy and the Equality Act. It also trains all occupational health advisers with whom it works to

ensure that they have the necessary expertise about the Act and the organisation's disability policy.

A small employer only uses occupational health advisers who can demonstrate that they have knowledge of the Act.

4.24 For a general overview of the recommended approach to training, see Chapter 9].

Monitoring

4.25 Monitoring employees is an important way of ensuring that equality of opportunity exists within an organisation and determining whether anti-discrimination measures taken by an employer are effective.

4.26 Monitoring is the process that employers use to collect, store and analyse data about protected characteristics of job applicants and employees. Employers can use monitoring to:

- establish whether an equality policy is achieving its aim;
- analyse the effect of other policies and practices on different groups;
- highlight possible inequalities and investigate their underlying causes;
- set targets and timetables for reducing disparities; and
- send a clear message to job applicants and employees that equality and diversity issues are taken seriously within the organisation.

4.27 Monitoring can be undertaken at various stages of the employment relationship, including recruitment, training, promotion, grievances and dismissals.

Why monitor?

4.28 There are a number of reasons why an employer should engage in monitoring:

Putting policy into practice

4.29 Without monitoring, an employer may never know whether its equality policy is working. Employers need not only to have, but also to properly implement, an equality policy. Monitoring is key to this process. It will help identify whether the policy is being put into practice, and will enable employers to investigate any disparities between groups. For example, monitoring may reveal that:

- applicants with a particular religion or belief are not selected for promotion
- women are concentrated in certain jobs or departments
- people from a particular ethnic group do not apply for employment or fewer apply than expected
- older employees are not selected for training and development opportunities

Example: An NHS Trust conducted a survey to identify the difficulties in recruiting nurses and midwives from the Muslim community by interviewing Muslim staff in the Trust and in the community.

Example: Through monitoring of candidates at the recruitment stage an employer becomes aware that, although several disabled people applied for a post, none was short-listed for interview. It uses this information to review the essential requirements for the post.

Example: A large employer notices through monitoring that the organisation has been successful at retaining most groups of disabled people, but not people with mental health problems. It acts on this information by contacting a specialist organisation for advice about good practice in retaining people with mental health problems.

Reputational value

4.30 A commitment to undertake monitoring can improve an employer's reputation within the marketplace. This can, in turn, enable employers to attract the best talent from the widest pool.

Boosting productivity

4.31 Monitoring can provide valuable data which can help employers shape plans and strategies to achieve an inclusive workplace. This can improve an employer's productivity and effectiveness.

Example: A retailer monitors its staff recruitment. It uses this information to see if its staff recruitment reflects the diversity of the local community in which it is based

Legal requirements

4.32 For [most] employers, employment monitoring is not mandatory [for all [protected characteristics/strands]].

4.33 [Public authorities are under a duty to have due regard to the need to:

- eliminate discrimination, harassment and victimisation and other prohibited conduct under the Act

- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not
- foster good relations between persons who share a protected characteristic and persons who do not]

4.34 [Specific duties are imposed on certain public authorities for the purposes of enabling better performance of the above duty.

In addition, public bodies with 150 or more employees are required to publish their gender pay gap, their ethnic minority employment rate and their disability employment rate. See [Code on Public Sector Equality Duty] for further detail.]

4.35 It is recommended that monitoring should be carried out by all employers. The methods used will depend on the size of the organisation and can be simple and informal.

For example, smaller organisations may only need a simple method of collecting information about job applicants and employees. Larger organisations are likely to need more sophisticated procedures and computerised systems to capture the full picture across the whole of their organisation.

4.36 Employers should not say or imply that monitoring questions are compulsory but explain why the information is likely to be helpful.

What to monitor?

4.37 It is recommended that monitoring takes place throughout the employment relationship to enable employers to evaluate whether job applicants and employees are treated fairly.

4.38 There is no definitive list of the areas that an employer should monitor. Please see Appendix for a list of the areas that employers could consider.

Data protection

4.39 Employers must take full account of the Data Protection Act 1998 (DPA) when they collect, store, analyse and publish data.

The DPA has an impact on monitoring as it creates:

- rights for individuals about whom data is held ("data subjects"); and
- obligations on those who hold the data ("data controllers")

Data should not be published in any way that makes it possible for an individual to be identified, without that individual's permission. In most cases, it will not be difficult to publish anonymously. However, where an organisation is small or certain functions are carried out by only a limited number of people, it may be easier to identify individuals from published monitoring data. Employers should therefore consider how best to give proper protection to people's data when publishing monitoring information.

In the context of employment monitoring the employer data controller must, when processing the monitoring data, comply with the eight "data protection principles" set out in Schedule 1 of the DPA. Further information about the DPA is contained in the Information Commissioner's Employment Practices Code, which is available on the Commissioner's website.

Planning to monitor

4.40 Planning is central to any monitoring exercise. Employers should ensure that decisions are made at the outset about:

- support and training
- consultation
- data collection
- results and follow up

4.41 It is recommended that employers consider the following key steps when planning a monitoring exercise:

Support and training

- Encourage the workforce to support, and participate in, the monitoring process
- Ensure detailed information and appropriate training is given to everyone who might have to answer questions about the process in their capacity as a line manager, HR or staff representative
- Provide training for those undertaking and analysing data collection

Consultation

- Communicate with employees and managers at all levels, trade union representatives or other staff associations (including appropriate network groups) about the monitoring process
- Explain the reasons for monitoring and why it is necessary

Data collection

- Assess what data should be collected
- Decide what questions should be answered and what level of detail is required
- Establish how data will be collected and stored to guarantee data security and confidentiality
- Decide who will be responsible for data collection, storage and analysis
- Consider whether IT systems need to be developed or expanded to support the monitoring process

Results and follow up

- Decide how to present and publish the data (e.g. tables, charts, written reports, online)
- Consider who should receive the data and how regularly
- Ensure that individuals cannot be identified from the published data
- Implement a process to follow up incomplete data
- Allocate responsibility for implementing procedures and/or taking any steps identified as necessary following the monitoring exercise

Obtaining the data

4.42 Employers should provide a full explanation to job applicants and employees about what data will be collected and the use to which it will be put.

Applicants

4.43 Information provided by job applicants for monitoring purposes should be provided anonymously, be detachable and not made known to members of the selection/short listing panel. If information from the application process will be used for monitoring purposes, this must be stated on the application form or relevant monitoring form.

Employees

4.44 Employers may wish to use a hard copy form of a questionnaire or an online version or a mixture of the two. Irrespective of the method, employers should explain how confidentiality will be protected.

4.45 If employees do not respond, employers should consider following up with those employees to emphasise the importance of data collection and to reassure them about the purpose of the exercise.

Considering categories

4.46 Monitoring in relation to ethnic groups is familiar to many employees. However, monitoring in relation to some of the other protected characteristics, for example, sexual orientation and religion or belief, is likely to be less familiar.

4.47 It is recommended that employers ask job applicants and employees to select the group(s) they want to be associated with from a list of categories.

4.48 The census provides comprehensive data about the population in England, Scotland and Wales. This is supplemented by the Labour Force Survey and other survey statistics produced by the Office for National Statistics. Employers can therefore use categories which are compatible with the categories contained in these sources, for consistency.

4.49 Please see Appendix for further information about the recommended categories.

Analysing the data

4.50 The purpose of analysing monitoring data is to identify differences in treatment, monitor trends and tackle unfair barriers. The overall aim for employers is to ensure that employees are treated fairly.

4.51 An employer's monitoring analysis should show the overall numbers and proportions of different groups in the workforce as a whole.

4.52 Employers can use this analysis to examine the differences between all the subgroups relating to each protected characteristic (and combinations of protected characteristics). For example, in relation to ethnic groups, employers could examine the recruitment and promotion trends between Asian Indian and Asian Pakistani people.

4.53 Employers should apply this approach to the key stages of the employment relationship, including:

- Recruitment
- Training
- Appraisals
- Grievances
- Disciplinary action
- Dismissals and other reasons for leaving

Interpreting the data

4.54 Employers should use benchmarks to interpret monitoring data. Benchmarks may be purely quantitative or may include other measures. Examples of sources of benchmarking are Investors in People or the Equality Standard for Local Government published by the Local Government Employers' Organisation.

4.55 External benchmarks may be helpful for employers monitoring snapshot data. Sources include the Census and the annual Labour Force Survey. Industry-specific benchmarks may also be appropriate.

4.56 Internal benchmarks may also be used and may provide employers with a more important benchmark than external data.

Reporting back

4.57 It is important for employers to have structures in place for internal reporting on equal opportunities monitoring. For example, employers can provide reports to senior management and those with an equalities remit, which summarise the detailed findings.

4.58 The key findings should be made available to all staff, for example, through the intranet or in a staff newsletter. Information should also be provided to the relevant staff representatives and networks. Care should be taken to ensure that individuals are not identifiable from the reports.

Taking action

4.59 Taking action based on any inequalities revealed by the monitoring exercise is vital to ensure that an employer's equality policy and strategy is constantly evolving. There are a number of steps employers can take (this list is not exhaustive):

- Examine decision making processes
- Consider whether training or further guidelines are required on how to avoid discrimination
- Consider positive action (see Chapter 7)
- Work with network groups to share information and advice
- Set targets on the basis of benchmarking data, and develop an action plan

Auditing policies and practices

4.60 It is a good idea for employers to keep both their equality policy and all other policies and procedures (such as those listed below) under regular review at least annually and to consider employees' needs as part of the process.

4.61 Policies which should be reviewed in light of an employer's equality policy might include:

- Recruitment
- Flexible working arrangements
- Leave arrangements
- Family friendly provisions
- Appraisal and performance-related pay systems
- Sickness absence
- Redundancy and redeployment
- Emergency evacuation procedures
- Procurement of equipment, IT systems, software and websites
- Information provision
- Training and development
- Employee assistance schemes offering financial or emotional support

Example: A large retail company has a wide range of flexible working packages that are available to all members of staff. Flexible work packages include a shift swapping scheme, grandparent's leave, carers leave, career breaks and emergency leave. In relation to religion or belief, employees are able to take time off for religious festivals (these are often celebrated in store which has the additional benefit of increasing staff awareness of religious festivals) and additionally staff are able to take unpaid leave for religious pilgrimages. All staff are entitled to apply for this type of extended leave and it need not be for religious reasons.

4.62 Part of the auditing process may entail employers taking steps to alleviate the disadvantage experienced by people who share a protected characteristic, meet their particular needs, consider reasonable adjustments and reduce their under-representation in relation to particular activities. This may entail the employer taking positive action in relation to certain employees.

> **Example:** An organisation has a policy of ensuring that all employees are kept informed about the organisation's activities through an intranet site. The policy says that the intranet site should be accessible to all employees, including those who use access software (such as synthetic speech output) because of their disabilities.

Resolving disputes

4.63 It is good practice, and in the interests of both employers and employees, to try and resolve disputes within the workplace so as to avoid resorting to legal proceedings.

Grievance procedures

4.64 Many employment concerns can be resolved informally. However, employers should ensure that they have grievance procedures in place for when an informal resolution is not possible.

4.65 Grievance procedures can provide an open and fair way for employees to make their concerns known, enabling grievances to be resolved quickly before they become significant problems. Use of grievance procedures can highlight areas of concern in employment and can prevent misunderstandings leading to complaints to tribunals.

4.66 ACAS has provided a Code of Practice as guidance to assist employers and employees deal with workplace grievances. Employers should ensure that they have grievance procedures in place which are consistent with this guidance. Employers should also ensure that their procedures are accessible to all employees, including disabled employees.

4.67 In accordance with the ACAS Code of Practice, where a grievance cannot be resolved informally:

- employees should set out the nature of their grievance in writing to their employer;
- the employer should then invite the employee to a meeting to discuss the grievance;
- the employer should decide what, if any, action should be taken and inform the employee of the reasons for the decision in writing;
- the employee should be allowed to appeal the decision.

4.68 The ACAS Code of Practice has replaced the statutory disciplinary and grievance procedures under the Employment Act 2002. Unlike the statutory procedures, adherence to the ACAS Code does not affect liability. Unreasonable failures to follow the ACAS Code by employers and employees may affect the level of compensation payable to an employee (if any). However, the most important practical consequence of this is that the time limit for raising a complaint of discrimination in the Employment Tribunal is no longer extended by the lodging of a grievance or an internal appeal with the employer, and remains at three months (see Chapter 12, Enforcement).

Disciplinary procedures

4.69 The ACAS Code also gives guidance for employers when dealing with disciplinary situations. Sometimes, an employee's grievance may identify circumstances where it would be appropriate for an employer to consider disciplinary action. For example, where an employer has upheld a female employee's complaint that she has been harassed in relation to her sex by a colleague. An employer should follow the guidance in the ACAS Code to help them determine what if any disciplinary action should be taken.

Mediation

4.70 Sometimes grievance and disciplinary procedures alone are not able to resolve workplace disputes. Mediation can help in such circumstances.

Other means to resolve disputes

4.71 Sometimes it is not possible to resolve disputes internally. One option in such circumstances is to bring legal proceedings. Chapter 12, explains when this may be done.

4.72 In addition to a person's own rights to bring legal proceedings, the Equality and Human Rights Commission has the power to investigate whether a person has committed an unlawful act. The Commission can also take action to prevent unlawful acts, including agreeing action plans with employers or applying for injunctions to prevent unlawful acts. This power applies to the making of arrangements which if applied would result in an unlawful act against a person. For example, the Commission could apply for an injunction to prevent an employer from using a job advertisement which discourages ethnic minorities from applying. The Commission is able to do this even when it is unaware of any person directly affected by the advertisement.

Chapter 5
Discrimination in the Employment Field

Introduction

For ease of reference this Code refers mainly to 'employees' and 'employers'. The Act defines employment broadly to include employment under a contract of employment, apprenticeship or a contract personally to do work as well as Crown employment. It also covers certain parliamentary staff. In addition the Act prohibits discrimination in relation to a broader category of relationships that also constitute 'work'. These include contract workers, police officers, partners and office holders. These relationships are described in more detail in Chapter 10.

The remainder of this Chapter is devoted to an examination of who has obligations under the Act and therefore who is liable for discrimination. This includes situations in which the employer is responsible not only for the discriminatory acts of its employees but also for harassment of its employees by third parties where the employer is in a position to prevent the harassment but fails to take reasonable steps to do so.

Who has rights under the Act?

5.1 The Act protects applicants for employment, employees who are in employment (regardless of length of service) and former employees. These rights are normally connected to whether a person has a protected characteristic. However, in some instances a person will have rights irrespective of whether they have a particular protected characteristic for example in relation to discrimination by association or perception, or when the person has been victimised.

Clause 39

Employment

5.2 The Act defines employment as: **Clause 83**

a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

b) Crown employment;

c) employment as a relevant member of the House of Commons staff; or

d) employment as a relevant member of the House of Lords.

3 **5.3** The definition of employment in the Act is much wider than under many other employment law provisions including unfair dismissal. For example, it includes people who are self-employed but who agree to perform work personally and partners in businesses (see Chapter 10 for further information).

Example: A residential developer decides not to offer a contract for plastering the interior walls of a house to a self employed worker because he is white. This would be an act of direct discrimination by the developer.

Example: A partner in a law firm decides not to shortlist an applicant for an interview because the applicant is a male to female transsexual. This would be an act of direct discrimination by the partner and the law firm.

4 **5.4** Discrimination rights are not solely based upon a contract of employment. An employee may therefore still have rights under the Act even if the contract of employment is illegal, provided that awarding compensation would not give the appearance of condoning illegal conduct.

Example: Employee A is aware that her employer is not deducting income tax and National Insurance contributions from her wages. She queries this but her employer tells her "It's the way we do business". Subsequently, A is dismissed after her employer becomes aware that she is pregnant. She alleges that the reason for her dismissal was her pregnancy and claims she has been discriminated against. Whilst A knew that her employer was not paying tax on her wages, she did not actively participate in her employer's illegal conduct and the illegal performance of the contract was in no way linked to her discrimination claim. In the circumstances, A is likely to be able to pursue her claim, notwithstanding her knowledge of her employer's illegal conduct.

Example: Employee B lies about his immigration status in order to obtain employment when he was not permitted to work in the UK. He also falsifies a number of documents to achieve this. He is subsequently dismissed for failing his probationary period. B complains that he was not given adequate training during his probationary period and alleges that this was because of his race. B is unlikely to be allowed to pursue his claim before an Employment Tribunal because his employment had been fraudulently obtained and was illegal.

5

5.5 In prescribed circumstances, protection under the Act extends to employment or work in relation to ships, hovercraft and seafarers within or outside Great Britain.

Clause 81

5.6 Chapter 6, Recruitment, explains in more detail the rights of applicants. Chapters 9, During Employment, and 10, Termination/End of Employment, explain in more detail the rights of employees and former employees.

Protected characteristics

5.7 Those with protected characteristics applying for work, in work or who are former workers are protected by the Act.

5.8 The protected characteristics are defined and explained in Chapter 2. They are age, disability, gender reassignment, pregnancy and maternity, marriage and civil partnership, race, religion or belief, sex and sexual orientation.

5.9 The prohibited conduct from which the Act protects an applicant, employee or former employee is dependent on the protected characteristic, or combination of protected characteristic, the person has. Specifically:

- people with any protected characteristic are protected from direct discrimination (see Chapter 2); **Clause 13**
- people with any protected characteristic except pregnancy and maternity are protected from indirect discrimination (see Chapter 2); **Clause 19**
- people with any protected characteristic except pregnancy and maternity and marriage and civil partnership are protected from harassment (see Chapter 2); **Clause 26**
- people with any combination of two protected characteristics, not including pregnancy and maternity and marriage and civil partnership, are protected from “combined discrimination” (see Chapter 2); and **Clause 14**
- where the protected characteristic is marriage and civil partnership status, the definition of direct discrimination only applies if the less favourable treatment is because a person is married or a civil partner (see Chapter 2).

- protection from discrimination arising from disability only applies to disabled people (see Chapter 2 for the definition of disability)

5.10 In addition, the Act provides a duty for an employer to make reasonable adjustments for existing employees with the protected characteristic of disability and for disabled job applicants and potential job applicants.(see Chapter 3) In some limited circumstances, employers will be under this duty in relation to former employees (see Chapter 10).

Clauses 39(5) & 107

Protection of people without protected characteristics

5.11 In some circumstances, an applicant, employee or former employee is protected under the Act when they do not themselves have a protected characteristic.

Past characteristics

5.12 People who have had a protected characteristic in the past are protected from discrimination and/or harassment even if they no longer have the characteristic. For example, those who no longer hold a religious belief might be harassed on the basis of previously held beliefs.

Association and perception

5.13 The Act protects people from direct discrimination and/or harassment because they are associated with a person who has a protected characteristic. The Act also protects people from direct discrimination and/or harassment because they are perceived to have a protected characteristic, even if they do not have that protected characteristic.

This is explained more fully, with examples, in Chapter 3.

People who have been victimised

5.14 The Act also gives rights to people who have been victimised, whether or not they have a protected characteristic or have had one in the past. The definition of victimisation and who is protected is explained in Chapter 3.

Clause 27

Protection other than to employees

5.15 The Act also provides protection to the following types of individuals who do not fall within the definition of employment:

- contract workers;
- police officers;
- partners in firms;
- barristers and advocates;
- office holders;
- people working through employment services; and
- local authority members.

5.16 Many of the principles which apply in employment apply equally in respect of these individuals. Further details about the application of the Act in these individuals are set out in Chapter 11.

Who has obligations under the Act?

Employers

5.17 Employers have obligations under the Act. These obligations mirror the rights of applicants, employees and former employees set out in Chapter5.

5.18 **An employer:** **Clauses 39/40**

a) Must not discriminate against, victimise or harass a person during recruitment for employment (see Chapter 3);

b) Must not discriminate against, victimise or harass an employee during employment (see Chapter 3);

c) Must not discriminate against or victimise an employee by dismissing them from employment (including constructive dismissal) (see Chapter [3); and

d) Must make reasonable adjustments for disabled employees (see Chapter 3).

5.19 An employer must also not instruct, cause or induce discrimination against or harassment or victimisation of its applicants, employees or former employees. An employer who acts in this way will be acting unlawfully even if the person instructed, caused or induced to discriminate does not go on to commit the act of unlawful discrimination. **Clause 110**

Example: A GP instructs the manager of the practice in which she works not to recruit a receptionist who is a Sikh. The GP will have acted unlawfully even if the receptionist does not follow her instructions.

5.20 A person who is seeking to recruit an employee has duties under the Act even if he is not yet an employer (because the new recruit will be his first employee). **Clause 83(4)**

5.21 As explained above, the Act defines employment widely and an employer's obligations include, for example, obligations to people employed under a contract of employment, contract of apprenticeship or contract personally to do work (i.e. self employed people in certain circumstances). **83(2)**

5.22 An employer's obligations do not apply to the armed forces in relation to the protected characteristics of age or disability.

Occupations not covered by "employment"

5.23 As set out in Chapter 11, the Act also imposes obligations similar to those imposed on employers on certain individuals and organisations whose responsibilities would otherwise fall outside the definition of employment. These are: **Clause 41 to 55**

- principals who make work available to contract workers;
- a "chief officer" in relation to police officers;
- a firm (or proposed firm) in relation to their partners;
- barristers and advocates and those who instruct them;
- employment service providers.

A more detailed explanation of these obligations is set out in Chapters11.

Others with obligations

5.24 The Act's provisions may also impose obligations upon the following people and organisations:

- trustees and managers of occupational health pension schemes;
- insurers who provide group insurance services for an employer's employees;
- landlords of premises occupied by an employer, or person or organisation with similar obligations to an employer, where there is a duty to make reasonable adjustments to the premises as a result of the employment, or other, relationship and the adjustment requires the consent of the landlord; **Sch 21, 5**
- employees and agents acting on behalf of an employer or other person of body with similar obligations to an employer;
- Ministers of the Crown, government departments and agencies.

Trade organisations and qualifications bodies

5.25 The Act also makes special provision in respect of discrimination by trade organisations and qualifications bodies. The nature and effect of the provisions in question is explained in Chapter 11 **Clause 57**

Who is liable for unlawful acts?

Responsibility for actions of employees and agents

5.26 Under the Act, employers may be responsible for the unlawful acts of their employees. **Clause 108**

5.27 For example, employers may be liable for acts of discrimination, harassment or victimisation committed by their employees in the course of employment.

5.28 Principals may also be liable for acts committed by their agents while acting under the principal's authority. Examples of such agents include occupational health advisors and recruitment agencies. See [Chapter 10] for further information about principals.

5.29 It does not matter whether the employer knows about or approves of the acts of their employee or agents.

Example: A shopkeeper goes abroad for 3 months and leaves his son, who is also his employee, in charge of the shop. While he is away his son bullies a shop assistant with a learning disability, by constantly criticising her work unfairly. The shop assistant leaves her job as a result of this bullying. The shopkeeper is responsible for the actions of his son.

Example: A firm of accountants is looking for a temporary receptionist. The firm engages a recruitment agency to find a receptionist and instructs the agency that they would very much prefer female candidates under the age of 30. The firm would be acting unlawfully by discriminating because of the protected characteristic of sex and possibly of age. This might also amount to combined discrimination against anyone who did not possess the dual characteristics of being female and under 30.

Defence

5.30 An employer will not be liable for unlawful acts committed by its employees where the employer has taken all reasonable steps to prevent such acts.

> **Example :** An employer ensures that all its employees are aware of its policies on harassment, and of the fact that harassment of employees related to any of the protected characteristics is unacceptable and will lead to disciplinary action. It also ensures that managers receive training in applying the policies. A Jewish employee is humiliated by anti-Semitic comments made by a colleague and disciplinary action is taken against the colleague. In these circumstances the colleague would be liable for the harassment but the employer might itself avoid liability because it had taken reasonably practicable steps to prevent the unlawful act.

5.31 A principal will not be liable for unlawful discrimination carried out by its agents where the agent acted in contravention of the principal's express instructions not to discriminate. In such circumstances the agent will not have acted "with the authority of the principal".

> **Example:** A hotel (the principal) uses an agency (the agent) to supply catering staff. The hotel management ensures that the agency knows that the hotel operates an equal opportunities and diversity policy. Despite this, the agency, without the hotel management's knowledge, decides never to send anyone whom its staff believe to be gay or lesbian for interview. In this case, the agency acted without the hotel's authority and the hotel would not, therefore, be liable for the unlawful discrimination by the agency.

5.32 A more detailed explanation of an employer's liability, as well as what is meant by "in the course of employment" can be found in Chapter 11.

Responsibility for acts of third parties

5.33 An employer may also be liable for harassment of its employees by third parties, such as customers or clients, over whom the employer does not have direct control.

Clause 40(2)-(4)

An employer will only be liable for the actions of such third parties if it:

a) is aware that the employee has been harassed in the course of employment on two previous occasions by third parties (it does not need to be the same third party on each occasion); and

b) has failed to take reasonably practicable steps to prevent the harassment happening again.

Example: An employer is aware that a female employee working in the employer's bar is harassed in relation to her sex on two separate occasions by different customers she is serving. The employer will be liable for a third act of harassment of the employee by the same or a different customer if the employer fails to take reasonably practicable steps to prevent such harassment, even if the third act of harassment is committed by an unconnected customer.

Liability of employees and agents

5.34 Employees may be personally liable for unlawful acts committed during the course of employment where, due to [[6.26]] above, the employer is also liable. Employees may be liable for their actions even when their employer is able to rely successfully on the 'reasonable steps' defence.

Clause 109

An agent will also be personally liable for unlawful acts committed under their principal's authority.

5.35 Employees or agents do not need to know that they are acting unlawfully to be liable for their actions.

> **Example:** The chief executive of a media company recruits as her deputy an employee who has multiple sclerosis. The chief executive is aware that the employee has multiple sclerosis. The employee has a period of sickness absence for 3 weeks as a result of her disability. The chief executive is not aware of the company's duty to make reasonable adjustments and dismisses the employee for unsatisfactory attendance. Although the chief executive was not aware that she may have acted unlawfully, she will be liable for her actions.

5.36 However, an employee or agent will not be liable if they rely on a statement by the employer or principal that the act is lawful and it is reasonable for them to do so.

A further explanation of employee and agent liability is found in Chapter [11].

Aiding an unlawful act

5.37 It is unlawful for a person to help someone do an act which they know to be unlawful under the Act. A person who helps another in this way will be liable in their own right.

Clause 111

> **Example:** An office manager, who believes that a new employee A is undergoing gender reassignment, discriminates against her by saying that certain office amenities are not available to people of her grade. Another employee, B, supports the manager's assertion, even though B knows that it is not true. B may be separately liable for helping the manager to discriminate.

5.38 A person can be liable for helping an employer to discriminate, harass or victimise, even where the helper is not an employee or agent of the employer.

> **Example:** A shopkeeper has a number of employees. His wife also helps out in the shop but is not an employee. One of the employees has asked for time off for a number of religious festivals. The shopkeeper thinks the employee is just using his religion as an excuse to be lazy and refuses his request. Although the shopkeeper knows that the employee's absence can be covered by the other employees, he tells the employee that there is no cover for the dates he has requested. When the employee raises the issue with the shopkeeper's wife, she tells the employee the same thing, even though she knows that this is not true. The shopkeeper's wife may be liable for helping the shopkeeper to discriminate.

5.39 For the help to be unlawful the person giving the help must know at the time that unlawful discrimination, harassment or victimisation is a probable outcome, although they do not have actually to intend that this should be the result.

Example: A works manager wants to find a reason to dismiss an employee who has made a complaint of discrimination. She asks a junior colleague of the employee in question to make a list of anything which the employee has said or done which might put them in a bad light, and to "make it look as bad as possible". The junior colleague makes the list, which the manager then uses as a basis on which to take disciplinary action against the employee who made the discrimination complaint. The disciplinary action amounts to victimisation because it is a detriment to which the victim is being subjected because they did a protected act. The junior employee will be liable for aiding a contravention if, but only if, they knew that it was likely that an unlawful act would be the outcome.

5.40 Help is not unlawful if the helper was told that they were helping a lawful act and it was reasonable for them to believe this. It is a criminal offence to knowingly or recklessly make a false or misleading statement in this way.

A more detailed explanation of aiding unlawful acts is found in Chapter 3.

Liability in contexts similar to employment

5.41 There are a number of relationships similar to employment but which are legally distinct from employment. For more information about how the Act gives people in these relationships protection from discrimination, see Chapter 10, Discrimination in Occupation.

Chapter 6
Recruitment

Introduction

Employment is fundamental in our society. Ensuring access to employment opportunities regardless of any protected characteristic is one of the core objectives of the Act. A fair and transparent recruitment process is vital since recruitment is the gateway to employment opportunities.

Nothing in the Act prevents an employer hiring the best person for the job. The Act does, however, prohibit unlawful discrimination in the recruitment process. With certain limited exceptions, employers must not directly or indirectly discriminate when recruiting and they must make reasonable adjustments for disabled candidates where appropriate.

This Chapter explains the main issues arising on recruitment. It makes best practice recommendations which are aimed at encouraging employers to open up employment opportunities to a wide pool of candidates to ensure access to the best talent available. Employers should avoid stereotypical assumptions of who is likely to be the best candidate for the job but instead follow a clear and objective selection process.

This chapter explains what the Act says about recruitment and sets out recommendations for good practice, which are aimed at encouraging employers to open up employment opportunities to a wide pool of candidates to ensure access to the best talent available. Employers should avoid stereotypical assumptions about who is likely to be the best candidate for the job and should follow a clear and objective selection process**.**

Employers have a duty to ensure that any recruit is entitled to work in the UK. The question can be asked at an early stage, for example on the job application form with the response verified towards the end of the recruitment process.

Job descriptions

6.1 It is recommended that employers prepare a job description for any vacant post they decide to fill. To avoid claims that a job description unlawfully discriminates against people who have any of the protected characteristics (including a combination of two protected characteristics), employers need to make sure that a job description:

Clause 39(1)(a)

- Contains a title and the aim of the job. Job titles should not show a predetermined bias for the recruitment of those with a particular characteristic (for example, “matron” suggests it has been predetermined to recruit a woman and “office junior” might indicate an intention to recruit a young candidate);
- Sets out the specific duties and responsibilities of the post. It would be helpful to describe the duties and the tasks a person would be expected to carry out over a certain period of time in order to get a clear picture of what the job entails. Employers should be able to justify each duty or task as being necessary. Good practice is to ensure that the job description of the previous incumbent is not just reproduced without proper review;
- Is concise and does not overstate a duty or the responsibilities attached to it;
- Does not include unnecessary requirements, criteria or conditions. For example employers should not ask for a degree where a vocational qualification would suffice or a driving licence where the job involves limited travel.

- Employers should also avoid specifying conditions such as working patterns or hours that are incompatible with childcare responsibilities which could lead to indirect discrimination against women. References, however oblique, to a protected characteristic should be avoided unless having a particular characteristic is a requirement for the job (see chapter 8);
- Is written in plain English (or Welsh in Wales).

6.2 There should be sufficient information in the job description and person specification to enable job applicants to make an informed decision about whether to apply. For example, details should be included which might enable a candidate to consider whether the duties or responsibilities of the job might conflict with their religious convictions or beliefs.

6.3 Job applicants who may require flexible working arrangements should not be discouraged from applying. This may require job descriptions to indicate that the job can be performed under a range of flexible working options.

6.4 It is recommended job descriptions and person specifications are reviewed (preferably by the Human Resources or Personnel department, where these exist) at regular intervals (at least at each recruitment stage) to ensure they are accurate and up to date.

Person specifications

6.5 A person specification describes the skills, knowledge, abilities, qualifications, experience and qualities that are considered necessary or desirable in a candidate, in order to perform all the duties in the job description satisfactorily. It is recommended that employers prepare a written person specification to accompany the job description.

Clause 39(1)(a)

6.6 To ensure that a person specification does not include requirements, criteria or conditions that might unlawfully discriminate against persons who have any of the protected characteristics (including a combination of two protected characteristics), employers need to make sure that:

a) As with job descriptions, unless there is an occupational requirement (see Chapter 8), avoid references or criteria, however oblique, to a protected characteristic.

> **Example**: Asking for 'so many years' experience could amount to indirect discrimination because of age unless this provision can be objectively justified. See [indirect discrimination]. Similarly, a requirement for continuous experience could indirectly discriminate against women who take maternity leave; and a requirement that staff work to a traditional '9 to 5' shift may be potentially discriminatory to women with family or caring responsibilities

b) The person specification includes only the criteria needed to perform the duties in the job description satisfactorily.

> **Example**: A requirement that the candidate must be 'active and energetic' when the job is a sedentary one is irrelevant and potentially discriminatory against disabled persons in that it could unjustifiably exclude some people (or deter them from applying) whose disabilities result, for example, in them getting more tired than others, or those who are less mobile

c) Criteria are ranked to show order of importance with essential and minor requirements clearly distinguished. Minor requirements are difficult to justify and may be a source of discrimination. Separating essential and minor tasks will help you to think about what aspects of the job could

be reassigned to another person if that was a reasonable adjustment to accommodate a person with a disability;

d) The person specification does not overstate the requirements;

> **Example:** Calling for 'excellent knowledge of English (or Welsh in Wales) when 'good understanding' is more appropriate may overstate the requirements. Such a requirement could lead to indirect discrimination against people from particular racial groups. Similarly, asking for higher qualifications than are actually needed to do the job satisfactorily could lead to indirect discrimination against people with certain protected characteristics.

e) The person specification does not specify how a task should be done but rather focuses on what outcome needs to be achieved;

> **Example:** Stating that a person must be 'willing to travel' where a job requires travel is better than stating that the person 'must have a driving licence'. The former requirement will not exclude people who cannot drive because of their disability.

f) As far as possible, all the criteria are capable of being tested objectively. For example, attributes such as 'leadership' need to be objectively defined in terms of measurable skill and qualities that contribute to it;

g) The person specification makes it clear that degrees or diplomas obtained abroad are acceptable, if they are an equivalent standard to UK qualifications. There are no blanket requirements or exclusions relating to health or disability and qualifications should only be requested where there is an occupational requirement; and

h) The person specification avoids stating that a certain personal, medical or health-related characteristic is essential or desirable where either it is not necessary for the role or reasonable adjustments could be made where a disabled person is otherwise unable to comply with the requirement.

6.7 Person specifications should be reviewed periodically to ensure they are accurate and up to date, particularly before recruiting.

Job advertisements

6.8 All forms of job advertisement, including emails, direct mail and signs in shop windows and company notice boards, as well as advertising to the general public in newspapers and on the radio, TV or internet are covered by the Act. An advertisement which suggests that an employer might discriminate could be direct discrimination (See Chapter 3).

Principles of good practice

6.9 It is recommended that employers take the following steps, to make sure that all opportunities for employment are advertised widely, fairly and openly:

- Employers should avoid recruitment, solely in the first instance, on the basis of recommendations by existing staff, particularly when the workforce is drawn largely from, for example, one racial group. Such practices can lead to perpetuating historical inequalities. . It is therefore better to advertise the role more widely so that the employer can select staff from a wider and more diverse pool. It should be made clear that all applications, regardless of source, will be treated in the same way and on merit only.

- Employers should consider whether there is any good reason for not advertising vacancies externally as well as internally. Before deciding to advertise a vacancy internally only, employers should consider whether there is any good reason for doing so. This is because if the workforce is made up of people of a particular characteristic internal advertising only will result in people of that particular characteristic being recruited which could prevent diversity. If vacancies are only advertised internally, they should be advertised openly so that everyone in the organisation is given the opportunity to apply.

- Employers should also ensure that employees absent from work (including women on maternity leave, those on long term sick leave, those working part-time or remotely) are informed of any jobs that become available to enable them to apply. Failure to do so is likely to amount to discrimination.

- All advertising material relating to employment should be reviewed to ensure that it does not present jobs in a stereotyped way e.g. women doing nursing, men as engineers. Such stereotyping tends to perpetuate segregation in jobs and can lead people to believe they would be unsuccessful in applying for a particular job. It may also amount to discrimination.

- Every effort should be made to ensure that the advertisement accurately reflects the job description and the requirements listed in the specification, and to make it clear that the vacancy is open to all.

- Particular care should be taken with the language of the advertisement, to ensure it does not give any suggestion of unlawful discrimination. For example, an advert that suggests only people of a particular sex should apply, for example, “waitress”, “salesgirl” or “stewardess.” This may deter a man from applying. The advertisement should use gender neutral terms such as "waiting staff" or alternatively use both terms for example "waiter" or "waitress."

- Employers should also avoid using language that might imply that they are looking for someone of a certain age, such as “mature”, “young” or “experienced”. The term “recent graduate”, for example, could be interpreted as someone in their early twenties, yet graduation can take place at almost any age. Employers should therefore make it clear in the advertisement that they are interested in the qualification and not the age of the applicant. Employers should avoid asking candidates to have qualifications that were not available a generation ago – such as GCSEs or ‘new style’ degrees.

- A job advertisement should not discourage disabled people from applying solely because adjustments may be required, for example, to the employer’s workplace. If an employer’s offices are on the first floor of a building, an advertisement might state: “although our offices are on the first floor, we welcome applications from disabled people and are willing to make reasonable adjustments”. However, an advertisement may still be lawful even if it does

indicate that having a particular disability will adversely affect an applicant's prospects of success. This will be the case where, for example, because of the nature of the job in question, the employer is entitled to take the effects of the disability into account when assessing the suitability of applicants. For instance, it would be lawful for a company specialising in inner city bicycle courier services to advertise for couriers who "must be able to ride a bicycle".

- Careful consideration should also be given to any illustration used to accompany the text to a job advertisement. Where possible use photographs or images which show a range of people as potential job holders, men and women, younger and older, different ethnic groups. For example, an advert for secretarial work, a profession traditionally undertaken by women, which uses a picture of a woman working at a computer, could reasonably indicate an intention to discriminate by implying that the employer is looking to recruit women. To counterbalance the message portrayed by this illustration, the advertisement should contain a prominent statement to indicate that the employer welcomes applications from all suitably qualified persons.

- When using illustrations to advertise jobs it is better to use an illustration relating to the nature of the work and not the person doing the job.

Example: An airline company is seeking to recruit pilots. The advert includes an image of two male pilots sitting in the cockpit of a plane. It may be inferred from this image that the airline company is seeking to recruit male pilots and may discourage women from applying. It would therefore be better if the advert included the image of a plane, rather than any pilots.

- Employers should also consider including a reference to the organisation's equality policy in the advertisement. For example "Our aim is to be an equal opportunities employer. We welcome applications, regardless of race, colour, nationality, ethnic or national origins, sex, disability, sexual orientation, gender reassignment, marital or civil partner status, pregnancy or maternity, age or religion or belief. All applications will be considered solely on merit."

- Employers should remember, when recruiting through recruitment agencies, job centres, career offices, schools or online agencies, that it is unlawful to: **Clauses 107(i)**

  - instruct them to discriminate, for example by suggesting that certain groups would (or would not) be preferred; or **107(2) & (3)**

  - cause or induce them to discriminate against people with a protected characteristic. See 3.197] for further detail.

- Recruitment and other agencies should be made aware of the employer's equality policy, as well as other relevant policies. They should also be given copies of the job descriptions and specifications for posts they are helping the employer to fill.

- Employers should advertise as widely as is practicable and use a variety of different media to publish their advertisements

When discrimination in job advertisements is lawful

6.10 There are limited circumstances when an employer can target specific groups with advertising: for instance, where the job has an occupational requirement for someone with a particular protected characteristic and the application of the requirement is a proportionate means of achieving a legitimate aim, that is it is objectively justifiable.

Guidance on what amounts to an occupational requirement can be found in Chapter 8..

It is also lawful for an employer to say that it welcomes applications from all groups especially people who are under-represented in the organisation.

Example: The vast majority of staff employed by a national retailer are under the age of 40. Consequently, people over the age of 40 are under-represented in the organisation. The retailer is looking to open new stores and needs to recruit more staff. It would be permissible under the Act for that retailer to place a job advert encouraging applications from all groups especially applicants over the age of 40.

6.11 Employers can lawfully advertise jobs as open to disabled applicants only.

Application process

6.12 It is recommended that, where practicable, all employers should use a consistent application process so that all applicants for a post are given an equal opportunity to succeed and can be compared on a like-for-like basis.

6.13 An important part of a standardised process will be an application form consistent for all applicants, whether this is on paper or on the internet. An application form should provide the essential information needed to sift out unsuitable candidates quickly and decide on the best shortlist for interview. Using a standard application form has the following advantages:

a) It reduces the time spent in sifting through a great deal of information that is not relevant to the job, which is usually the case with CVs and application letters.

b) It helps employers obtain the information they need, and in the form in which they need it, to make an objective assessment of the applicant's ability to do the job.

c) It makes it easier to request information about protected characteristics which should be held separately in order to monitor the recruitment process.

d) It provides employers with evidence that they have tried to meet their legal obligations, should they face allegations that they have unlawfully discriminated.

e) It gives all applicants the opportunity to compete on equal terms.

6.14 To reduce the risk of unlawful discrimination, employers should follow the guidelines below, relating to the content of application forms. Smaller organisations may adapt these to their particular circumstances:

a) The section of the application form requesting personal information (including information about protected characteristics) should be detachable from the rest of the form, and not made known to members of the selection panel before the interview. Alternatively, monitoring information could be obtained separately from the application process for example an e-mail or monitoring form could be sent out on receipt of application forms.

b) Any questions on the application form about protected characteristics should include a clear explanation as to why this information is needed, and an assurance that the information will be treated in strictest confidence, and will not be used to assess suitability for the job, or in the selection decision. Questions about protected characteristics should only be asked where they reflect occupational requirements for the post (see chapter 8 for an explanation of occupational requirements) or where they are included in support of positive action (see chapter 7). Beware of asking for dates of education and qualifications as this can indicate age. Questions related to an occupational requirement should only seek as much information as is required to establish whether the candidate meets the occupational requirements.

Sch 9 part 1 – occupational requirements

c) Only information that is relevant to the job, and to the skills and qualifications listed in the person specification, should be requested in the application form.

d) Applicants should not be asked to provide photographs, unless it is essential for selection purposes.

6.15 Where an employer provides information about a job, it is likely to be a reasonable adjustment for them to provide, on request, information in a format that is accessible to a disabled applicant – particularly if the employer's information systems, and the time available before the new employee is needed, mean it can easily be done. Accessible formats include email, Braille, Easy Read, large print, audio tape and computer disc. A disabled person's requirements will depend upon his impairment, but on other factors too. For example, many blind people do not read Braille but prefer to receive information by email or on audio tape.

6.16 Where an employer invites applications by completing and returning an application form, it is likely to be a reasonable adjustment for it to accept applications which contain the necessary information in accessible formats. However, a disabled person might not have a right to submit an application in his preferred format (such as Braille) if he would not be substantially disadvantaged by submitting it in some other format (such as email) which the employer would find easier to access.

6.17 Where applications are invited by completing and returning a form online, that form should be accessible to disabled people. Any accessible alternative should be provided in good time to enable a candidate using that format to have his/her application considered at the same time as other applicants using the application form

6.18 Whether or not an application is submitted in an accessible format, employers and their staff or agents must not discriminate against disabled people in the way that they deal with their applications.

6.19 An employer that accepts CVs might consider publishing guidance on its website, to help applicants organise their CVs as closely as possible to the employer's job application form (if it uses one), or the form in which the employer would prefer to receive the information.

6.20 The Employment Practices Code published by the Information Commissioner's Office (see Appendix) states that an application form should say to whom the information is being provided. If information from the application form will be used for any other purpose than to recruit for a specific job, for example for monitoring purposes, or passed to anyone else, this must be stated on the application form. Information collected on application forms and used for monitoring purposes, such as the applicant's ethnic origin, religion or belief and physical or mental health is "sensitive personal data" under the Data Protection Act 1998 and must be processed in accordance with that Act.

6.21 The Employment Practices Code also states that employers should only request information about an applicant's criminal convictions if and to the extent that the information can be justified in terms of the role offered. If this information is justified, the employer should make it clear that spent convictions do not have to be declared, unless the job being filled is covered by the Exceptions Order to the Rehabilitation of Offenders Act 1974.

6.22 Employers should review their job application process and forms periodically, as part of their equal opportunities review of the recruitment process, to make sure they do not contribute to any significant disparities between the success rates for different groups of people sharing protected characteristics.

See [4.25 monitoring] on why this process may be necessary.

6.23 Under the Immigration, Asylum and Nationality Act 2006, all employers (including small employers) are required to obtain information about a person's eligibility to work in the UK. Many people from ethnic minorities in this country are British citizens or are otherwise entitled to work here. Employers should not make assumptions about a person's right to work in the UK based on race. All applicants should be treated equally. Eligibility to work in the UK should preferably be verified in the final stages of the selection process rather than at the application stage, to make sure the appointment is based on merit alone, and is not influenced by other factors. Employers can, in some circumstances, apply for work permits and should not exclude potentially suitable candidates from the selection process. Depending on the employer's recruitment process, and the type of job being filled, candidates might be asked for the relevant documents when they are invited to an interview, or when an offer of employment is made. It is important to carry out these checks before the person's employment begins. The Border and Immigration Agency (see Appendix) has published a code of practice for employers on how to avoid unlawful racial discrimination when complying with this requirement.

6.24 Recruitment and employment agencies acting on behalf of an organisation should have copies of its equality policy, and understand its recruitment policies, and the role of the application form in the selection process.

Selection, assessment and interview process

General considerations

6.25 The next stage of the recruitment process is to select a preferred candidate from the group of people who have applied for the job. The selection process may involve a number of stages depending on the nature of the vacancy and the size and administrative resources of the employer. These stages may include shortlisting, selection tests, assessment centres and interviews.

6.26 Employers are responsible for making sure their selection procedures are fair, and operate consistently, to ensure the appointment of the best person for the job. Selection should be irrespective of any protected characteristic (with only very limited exceptions, for example in the case of occupational requirements – XX).

6.27 Every selection decision, from shortlisting to appointment, is equally important and it is recommended that employers keep records that will allow them to justify each decision, and the process by which it was reached. Employers need to be able to show that:

a) each selection decision was based on objective evidence of the candidate's ability to do the job satisfactorily, and not on assumptions or prejudices about the capabilities of certain groups of people sharing protected characteristics; and

b) all staff involved in the selection process had received training on the employer's equality policy, and its application to recruitment.

6.28 In deciding exactly how long to keep records after a recruitment exercise employers must balance:

a) their need to keep such records to justify selection decisions, including in response to discrimination questionnaires and legal claims; with

b) their obligations under the Data Protection Act 1998 to keep personal data for no longer than is necessary.

6.29 The records that employers should keep include:

a) the job advertisement, the job description and the person specification;

b) the application forms and any supporting documentation from every candidate applying for the job;

c) records of discussions and decisions by members of the selection panel; for example, on marking standards or interview questions;

d) notes taken by each member of the panel during the interviews;

e) each panel member's marks at each stage of the process; for example, on the application form, any selection tests and each interview question; and

f) all correspondence with the candidates.

6.30 In addition to keeping relevant recruitment records employers should retain any monitoring information requested for equality purposes. This information can be retained as general statistical data and used to monitor both short term and long term trends in the employer's recruitment processes. Provided it does not directly or indirectly identify individuals there should be no data protection issues in keeping and using this data.

6.31 To ensure consistency, it would be best if the same staff were responsible for selection decisions at all stages of the recruitment process for each vacancy.

6.32 Employers should also, so far as practicable, make sure that the arrangements they make for holding tests or interviews, or using assessment centres, do not put any candidates at a disadvantage in connection with a protected characteristic; for example, because the dates or times coincide with religious festivals or observance, or because they fail to take account of dietary needs or cultural norms. Certain tests could be indirectly discriminatory because of age, for example tests that favour good hearing, vision or muscular strength. An employer needs to justify these types of test as being a proportionate means of achieving a legitimate aim.

6.33 An employer is not required to make changes in anticipation of applications from disabled people in general – although it would obviously be good practice to do so. It is only if the employer knows or could be reasonably expected to know that a particular disabled person is, or may be, applying and is likely to be substantially disadvantaged by the employer's premises or arrangements, that the employer must make reasonable adjustments.

6.34 An employer should review each stage of its recruitment process, using the monitoring information it has received from the applicants for the job. The review should consider whether any stage of the selection process might have contributed to any significant disparities between the success rates for different groups of people sharing protected characteristics. If so, the employer should investigate further and take steps to remove any barriers.

6.35 Evidence of good practice throughout the recruitment process will help avoid litigation, or end it at an early stage. Employers will be in a better position to show that they took reasonably practicable steps to prevent unlawful discrimination or harassment, should the matter reach an employment tribunal.

Shortlisting

6.36 It is recommended that employers build the following guidelines for good practice into their selection procedures and practice:

6.37 a) Wherever possible, more than one person should be involved in shortlisting candidates, to reduce the chance of one individual's bias prejudicing an applicant's chances of being selected.

- The marking system, including the cut-off score for selection, should be agreed before the applications are assessed, and applied consistently to all applications.
- Each person involved in the selection should mark the applications separately, before meeting to agree a final mark.
- Assumptions about candidates as members of particular groups of people sharing protected characteristics, and the type of work they would be able or willing to do, should play no part in the process. Selection should be based only on information provided in the application form (where one is used), or in any formal performance assessment reports, in the case of internal applicants. If age is used as part of the shortlisting criteria, this must be justifiable as a proportionate means of achieving a legitimate aim.

- The weight given to each item in the person specification should not be changed during shortlisting; for example, in order to include someone who would otherwise not be shortlisted.

6.38 Some employers operate a guaranteed interview scheme, under which a disabled candidate who wishes to use the scheme will be shortlisted for interview automatically if he demonstrates that he meets the minimum criteria for getting the job.

6.39 Regardless of whether an employer operates a guaranteed interview scheme, an employer will need to consider whether to make reasonable adjustments when shortlisting for interview. This will be the case if an employer knows or ought to know that an applicant has a disability and is likely to be at a substantial disadvantage because of its recruitment arrangements or the premises in which any interviews are held. In these circumstances, the employer should consider whether there is any reasonable adjustment which would remove the disadvantage. Any such adjustment should be taken into account when shortlisting applicants. If the employer cannot make this judgment without more information it would be discriminatory for it not to put the disabled person on the shortlist for interview.

6.40 Shortlisting on the basis of an applicant's responses to a medical questionnaire may be discriminatory if the employer has not ascertained the likely effects of a disability or medical condition on the applicant's ability to do the job, or whether reasonable adjustments would overcome any disadvantage it causes. Even where there are medical requirements which must be met, it is good practice for employers not to require job applicants to answer a medical questionnaire until after a conditional job offer has been made.

Selection tests and assessment centres

6.41 It is recommended that ability tests and personality questionnaires should only be used as one of several assessment methods.

6.42 Well-designed, properly administered and professionally validated ability tests can be a useful method of predicting candidates' performance in a particular job. However, this depends critically on the design of the test; its validation as a reliable predictor of performance, irrespective of a candidate's membership of a group of people sharing protected characteristics; and its fair administration by professionals trained in assessment and in the organisation's equality policy.

6.43 If tests and assessment centres are used as part of the selection process, it is recommended that employers take account of the following guidelines.

- Tests should correspond to the job in question, and measure as closely as possible the appropriate levels of the skills and abilities included in the person specification.
- Special care should be taken to make sure candidates whose first language is not English (or Welsh in Wales) understand the instructions. Tests that are fair for speakers of English (or Welsh) as a first language may present problems for people who are less proficient in the language. The Welsh Language Act 1993 puts Welsh and English on an equal basis in the delivery of public services in Wales and bilingual tests may need to be used for recruitment to some public sector jobs, where the ability to speak Welsh is deemed to be essential or desirable.

- All candidates without exception should take the same test unless there is a health and safety reason why the candidate cannot do so, for example because of pregnancy. Reasonable adjustments should also be made where a disabled candidate would be put at a substantial disadvantage by the format of the test. Tests may need to be arranged in such a way to meet religious needs, for example avoiding certain festivals.

- Test papers, assessment notes and records of decisions should be kept on file for at least 12 months.

6.44 The Act does not prevent employers carrying out aptitude or other tests, including psychological tests. However, routine testing of all candidates may still discriminate against particular individuals. In those cases, the employer would need to revise the tests, or the way the results are assessed, to take account of, for instance, a disabled candidate. This does not apply however, where the nature and form of the test is necessary to assess a matter relevant to the job. The following are examples of reasonable adjustments employers could consider:

- allowing a disabled person extra time to complete the test;

- permitting a disabled person the assistance of a reader or scribe during the test;

- accepting a lower 'pass rate' for a person whose disability inhibits performance in such a test;

- Allowing a disabled person to take an oral test in writing or a written test orally.

The extent to which such adjustments might be required would depend on how closely the test is related to the job in question and what adjustments the employer might have to make if the applicant were given the job.

6.45 However, employers would be well advised to seek professional advice in the light of individual circumstances before making adjustments to psychological or aptitude tests.

Interviews

6.46 For many employers, the interview is the decisive stage of the selection process. It is also the stage when it is easiest to make judgements about a candidate based on instant, subjective and, sometimes, wholly irrelevant impressions. If assumptions about the capabilities or characteristics of people from a particular group of people sharing protected characteristics contribute to an unfavourable impression, this could lead to an unlawful discriminatory selection decision.

6.47 Employers should try to be flexible about the arrangements made for interviews. For example, a woman with childcare responsibilities may have difficulties attending an early morning interview.

6.48 When inviting a job applicant to attend an interview, it is good practice for an employer to ask whether any adjustments might be needed to enable a disabled candidate to participate fully in the process, and what those adjustments might be. However, an employer must not assume that no adjustments need to be made simply because the applicant has not requested any.

6.49 The practical effects of an employer's duties may be different if a person whom the employer previously did not know, and could not reasonably be expected to have known, to be disabled arrives for interview and is substantially disadvantaged because of the arrangements for the interview. The employer may still be under a duty to make a reasonable adjustment from the time that it first learns of the disability and the disadvantage. However, the employer might not be required to do as much as might have been the case if it had known (or if it ought to have known) in advance about the disability and its effects. It is good practice employers should ask candidates as to whether they need any reasonable adjustments in, for example, a letter inviting a candidate to interview.

6.50 It is also good practice to allow for some flexibility around interview times to avoid of significant religious times for example, Friday afternoons.

6.51 Whilst employers should be sensitive to the religious or belief needs of job applicants, individuals invited to attend a selection process should ensure that they make their needs known to the employer in good time so that it has an opportunity to take them into account when arranging the selection process. It is good practice for employers to invite applicants to make any special needs known.

6.52 It is recommended that employers take steps to make sure all job interviews are conducted strictly on the basis of the application form, the job description, the person specification, the agreed weight given to each criterion, and the results of any selection tests, so that all applicants are assessed objectively, and solely on their ability to do the job satisfactorily.

6.53 Staff involved in selection panels would benefit from equal opportunities training in interviewing techniques, to help them:

- recognise when they are making stereotyped assumptions about people;
- apply a scoring method objectively;
- prepare questions based on the person specification, and the information in the application form; and
- avoid questions that are not relevant to the requirements of the job.

6.54 At the interview or selection process questions should be asked or tests set to check for the skills and competences needed for the job. It is good practice to ask candidates the same questions, although supplementary questions may be required. Interviewers should not ask personal questions, which may be perceived to be intrusive and imply potential discrimination (for example, questions about plans to have a family or childcare arrangements). Where such information is volunteered, selectors should take particular care not to allow themselves to be influenced by that information. A woman is under no obligation to declare her pregnancy in a recruitment process. If she volunteers that information it should not be taken into account in deciding her suitability for the job. An organisation only needs to know if the person can do the job and if they are willing to do the job. Assumptions should not be made about who will and who will not fit in with the existing workforce.

6.55 Information about disability should not be sought from applicants unless it is relevant to the particular requirements of the job, relates to reasonable adjustments or for equality monitoring purposes. Disability-related questions must not be used to discriminate against a disabled person.

6.56 Asking a basic question as to whether or not a person is disabled is unlikely to yield any useful information for the employer and may simply lead to confusion. The fact that such a question was asked might subsequently be used as evidence of discrimination. An employer should only ask such questions if they are, or may be, relevant to the person's ability to do the job – after a reasonable adjustment, if necessary.

References

6.57 Employers should avoid making references part of the selection process. This is in order to make sure the selection decision is based strictly on the application form, the job description, the person specification, any selection tests and interviews, and is not influenced by other factors, such as potentially subjective judgements about a candidate by referees. It is recommended that references should only be obtained, and circulated to members of the selection panel, after a selection decision has been reached.

Eligibility to work in the UK

6.58 Under the Immigration, Asylum and Nationality Act 2006, employers have to carry out checks of a job applicant's eligibility to work in the UK. Employers should preferably do this in the final stages of the selection process, to ensure appointment on the basis of merit alone.

Offers of employment

Pre-employment checks

6.59 An employer may wish to carry out a number of final checks before making a job offer to a preferred candidate, including:

- medical checks; and
- references

In practice an employer will usually want to make an offer quickly to avoid losing a preferred candidate to another employer. Typically, job offers are therefore made conditional on the employer receiving satisfactory pre-employment checks in respect of the preferred candidate.

Medical checks

6.60 The Act does not prevent an employer from asking a person to have a medical examination. It would be good practice for an employer to consider whether this is really necessary and how the medical examination is relevant to whether the preferred candidate can do the job.

6.61 [To be revisited if it is proposed that there will be regulation of pre-employment medical inquiries of disabled applicants]

6.62 An employer should consider whether reasonable adjustments could be made in order to overcome any issues identified by the medical check.

> **Example:** An employer issues a health questionnaire to all successful job applicants but does not require them to undergo a medical examination unless they have a condition which may be relevant to the job, or the working environment. A successful job applicant indicates that he has a disabling lung condition. It is likely that the employer would be justified in asking him to have a medical examination provided it is restricted to assessing the implications for the particular job in question and to making reasonable adjustments.
>
> The medical report indicates that the job applicant should avoid exposure to certain substances. The employer makes reasonable adjustments to avoid this person's exposure to these substances in the workplace.
>
> Another successful job applicant has a mental health problem and declares this on his health questionnaire. He is not required to undergo a medical examination because this is not relevant to the job in question.

References

6.63 Employers should send referees copies of the job description and person specification, requesting evidence of the candidate's ability to meet the specific requirements of the job. This is more likely to ensure that the reference focuses on information that is relevant to the job.

Job offer

6.64 In general, an employer should not offer a job to a person who is a member of a group sharing one or two protected characteristics on terms which are less favourable than those which would be offered to people not in that group. For example, an employer should not extend its usual probation period from 3 months to 6 months because the preferred candidate is a woman returning from maternity leave or a person with a disability.

6.65 A refusal to recruit a woman because she is pregnant is unlawful even if she is unable to carry out the job for which she is to be employed. This is so even if the initial vacancy was to cover another woman on maternity leave. It is irrelevant that the woman failed to disclose that she was pregnant when she was recruited. A woman is not legally obliged to tell an employer during the recruitment process that she is pregnant because it is not a factor which can lawfully influence the employer's decision.

6.66 Employers do not discriminate because of age, by refusing to recruit someone who is older than 64 years and 6 months old or within 6 months of the normal retirement age where such normal retirement age is more than 65.

This does not alter an existing employee's right to request to work beyond retirement age.

Feedback to shortlisted unsuccessful candidates

6.67 Having secured a preferred candidate it would be good practice for an employer to offer feedback to unsuccessful shortlisted candidates on request.

Chapter 7
Positive action

Positive action

7.1 This Chapter explains what the positive action provisions in the Act say.

People with shared protected characteristics may be socially or economically disadvantaged, or may be affected by the consequence of past or present discrimination or disadvantage. The Act contains provisions which enable employers to take action to achieve fuller and more effective equality in practice for those that are socially or economically disadvantaged or otherwise face the consequences of past or present discrimination or disadvantage. These are known as "positive action" provisions.

Distinguishing positive action and "positive discrimination"

7.2 Positive action is not the same as positive discrimination or affirmative action, which are both unlawful. Positive discrimination and affirmative action involve preferential treatment to benefit members of a disadvantaged or underrepresented group which does not meet the conditions, the limitations or the proportionality requirement for positive action under the Act.

For example, an employer cannot try to change the balance of the workforce by selecting someone solely because they are from a particular group. Such action is likely to amount to unlawful direct discrimination. The only exceptions to this are:

- Disability, where the Act does not make discrimination in favour of disabled people unlawful; and

- Age, where direct discrimination can be justified, albeit in limited circumstances.

Example: an employer has a policy of short-listing and interviewing all disabled candidates who meet the minimum requirements for their jobs. This would be lawful because discrimination in favour of disabled people is not unlawful.

7.3 The Act sets out three circumstances or conditions in which positive action may be taken. These apply generally and are not limited only to work. The Act also permits specific measures to be taken by employers in respect of recruitment and promotion situations. These measures are explored in more detailed below.

When can positive action be taken?

7.4 Any person can take positive action where he or she reasonably think that: **Clause 157(1)**

- people who share a protected characteristic suffer a disadvantage connected to that characteristic;
- people who share a protected characteristic have needs that are different from the needs of people who do not share it; or
- participation in an activity by people who share a protected characteristic is disproportionately low.

7.5 Action may be taken to address any one or all of these three situations. Sometimes the bases on which action can be taken will overlap – for example, people sharing a protected characteristic may be at a disadvantage and that disadvantage may also give rise to a different need or may be reflected in their low level of participation in particular activities.

Employers may take proportionate action to achieve one of three legitimate aims, directly corresponding to the three situations described above:

- enabling or encouraging people to overcome or minimise disadvantage
- meeting different needs
- enabling or encouraging participation.

Example: National research shows that Bangladeshis are under-represented in teaching. A local education authority decides to tackle this under-representation by offering an access to teaching training program targeted at people from the Bangladeshi community.

Proving disadvantage, need or low participation

7.6 In order to take positive action, an employer must reasonably think that there is disadvantage, different need or low participation. Some evidence will be required to show this, but it does not need to be sophisticated statistical data or research. For example, it is sufficient for an employer to look at the profiles of its workforce or make enquiries of other comparable employers in the area or sector. Also, more than one group with a particular protected characteristic can be targeted by an employer provided that for each group the employer has evidence of disadvantage, different need or low participation.

Action to remedy disadvantage

What is a disadvantage for these purposes?

What amounts to ‘disadvantage’ is not defined by the Act. It may include exclusion, rejection, lack of

opportunity, lack of choice and barriers to accessing employment opportunities. It is generally understood to relate to legal, social or economic barriers or obstacles which make it difficult for a person to enter into, or make progress in, a trade, sector or workplace. For example, the requirement to work full time may act as a barrier for women to apply for a job because they need flexible working so that they can have time off for child caring responsibilities. An employer may therefore adopt flexible working policies to encourage more women to apply for such jobs.

What action might be taken to overcome or minimise disadvantage?

7.7 The Act enables action to be taken to enable or encourage people who share a protected characteristic and suffer a disadvantage connected to that characteristic to overcome or minimise the disadvantage. Provided that the action is a proportionate means of achieving that aim, the Act does not limit the action that could be taken. Such action could include:

- targeting training at specific disadvantaged groups
- mentoring
- shadowing

The action can be both enabling – such as providing group specific training – and/or encouraging – advertising a vacancy in a publication aimed at a particular protected group.

Action to meet needs

What are different needs?

7.8 Certain groups with protected characteristics may have needs which differ from those persons who do not have the protected characteristic. A need is something required because it is essential or important, rather than merely desirable to those with a particular characteristic. A need is not required to be unique to those with that particular characteristic, but it must be something that the employer reasonably believes relates to the characteristic.

Example: For example, an employer might consider that employees over the age of 50 have greater difficulty using IT systems and might institute training sessions targeted at such employees on the basis that employees under the age of 50 are more proficient with IT.

What action might be taken to meet those needs?

7.9 The Act enables action to be taken to meet the identified needs. Provided that the action is a proportionate means of achieving the aim of meeting the different needs, the Act does not limit the action that could be taken. Such action could include:

- providing training specifically aimed at meeting particular needs, for example, English language classes
- work shadowing
- crèche facilities

Action to encourage participation in activities

What activities does this apply to?

7.10 This provision applies to any activity, such as training. To take positive action an employer would need to think that participation by those with a protected characteristic is disproportionately low.

What does disproportionately low mean?

7.11 Low participation may or may not be disproportionate. Participation must be low compared with other groups or compared with the level of participation that could reasonably be expected. This might be evidenced by means of statistics, or, where these are not available, by qualitative evidence based on monitoring or consultation.

> **Example:** An employer with a factory in Oldham employs 150 people but only one Asian worker. They will be able to show low participation of Asian workers by looking at their workforce profile in comparison to the size of the Asian population in Oldham.

What action could be taken?

7.12 The Act enables action to be taken to enable or encourage people who share the protected characteristic to participate in that activity. Provided that the action is a proportionate means of achieving the aim of enabling or encouraging participation, the Act does not limit the action that could be taken. Such action could include:

- open days which are held exclusively for the targeted group
- bursaries to obtain qualifications in a professions such as journalism
- access training courses

Types of measures

7.13 As noted above, examples of positive action measures include soft measures such as open days which are held exclusively for the targeted group, work shadowing, mentoring, encouragement in the form of words in job adverts through to more substantial forms of positive action such as reserved places on a training course or a training course exclusively for a targeted group.

Whatever measure is contemplated, an employer should ensure that the measure is proportionate. See Chapter 3 for further information about proportionality.

Recruitment and promotion

7.14 The Act also specifically provides that in a recruitment or promotion situation an employer may choose a candidate from a disadvantaged group or a group where there is low participation, where they are as qualified as another one or more candidates to do the job provided that he or she does not have a policy or practice of automatically choosing people from that group in these circumstances. Employers should consider the individual merits of all candidates regardless of whether they come from a disadvantaged group or from a group where there is low participation.

7.15 The Act defines recruitment broadly, so that for example offers of partnership, apprenticeships, work as a contractor, appointments to public office, or pupillage or tenancy in barristers' chambers, are all included.

Clause 158(5)

When can an employer show preference to a candidate with a protected characteristic?

7.16 An employer can only show preference to a candidate from a disadvantaged or low participation group where that candidate is 'as qualified' as another one or more candidates to do the job. The meaning of 'as qualified' is explored in more detail at paragraphs 7.20– 7.23 below.

7.17 The preference can apply at any stage of the recruitment process but only after there has been an objective assessment of the candidates' suitability for the job, including an assessment of their personal circumstances. See paragraph 7.24 for more detail on the assessment process.

7.18 Fast tracking people with a protected characteristic is not permitted by the Act as this would involve the automatic preference of persons sharing a protected characteristic. See paragraph 7.24 on automatic preferences.

Clause 158(4)(b)

7.19 It is not mandatory to prefer a candidate from a disadvantaged or low participation group. Where the employer is faced with two or more candidates who are as qualified as each other, the employer still has the prerogative to choose one of the other candidates, provided the reason for the employer doing so does not in itself amount to direct or indirect discrimination.

What does 'as qualified' mean?

7.20 The phrase 'as qualified' is not defined by the Act but it should be given a broad meaning. It requires a full and objective assessment of each candidate's suitability, skills, qualifications (professional and academic), competence and professional performance. Although there are no absolutely fixed rules as to how this assessment should be undertaken, it will usually involve an employer preparing an objective set of criteria that relate to the job or post and then conducting an objective assessment or evaluation of each candidate against that set of criteria and against each other. If this results in two or more candidates being viewed as qualified as each other, then the employer may use a candidate's protected characteristic as the 'tipping factor' in any recruitment decision.

7.21 Candidates do not have to be identical in all ways before a preference can be shown. For example, candidates may have different strengths and weaknesses in different areas but both can be deemed to be 'as qualified' for the post.

> **Example:** a local police force starts its annual recruitment drive in April. Its monitoring data shows that women are currently under-represented and it takes positive action measures to encourage women to apply for the posts. All candidates have to undertake various assessment exercises and an interview. A number of candidates of both sexes are assessed as equally suitable for the posts on the basis of their test results, performance at interview, qualifications and experience. The force could decide to appoint the women candidates who are as qualified as the men to address under-representation.

7.22 An employer cannot show a preference to someone who is less qualified, where another candidate is clearly better qualified. However, where an employer considers both candidates satisfy the requirements of the role, and have the same band of capabilities, the employer may show a preference to the candidate from the disadvantaged group or the group where there is low participation.

7.23 However, it is important not to set the baseline for the job too low when comparing each candidate's skill set particularly if certain skills are more important than others for the post.

Automatic preferences

7.24 The Act prohibits employers adopting a policy of automatic preferences in a recruitment or promotion situation.

Clauses 158(4)(b)

When deciding whom to appoint to a post, employers must keep an open mind and carry out an objective assessment at all stages. It is only at the point of decision that the employer may decide to prefer a candidate from a disadvantaged or low participation group and only then where they are as qualified as other candidates. For example, an employer cannot implement a general policy of guaranteeing people who share a particular protected characteristic a job interview. The only exception to this being in respect of disabled people

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Example: A fire service is concerned about the under-representation of ethnic minorities as fire fighters. It decides that as part of its next recruitment exercise at least 20% of its intake will be ethnic minorities. It therefore shortlists all ethnic minority applicants who meet the minimum criteria but only those white candidates who have scored highest. This would be unlawful positive action because the fire service has a policy of automatically preferring ethnic minority candidates.

Chapter 8
Occupational requirements

Occupational Requirements

What is an Occupational Requirement?

8.1 An occupational requirement provides a general exception to what would otherwise be unlawful direct discrimination in relation to work. In certain limited circumstances, A is permitted to discriminate against B in relation to work if A can show that being of a particular sex, race, disability, religion or belief, sexual orientation or age - or not being a transsexual person or married or a civil partner - is an occupational requirement ("OR"). **Sch 9 Part 1 Para 1(1) 1(3)**

8.2 An OR can only be used by A if A is an employer, principal in relation to contract work (see 11.13), a partnership (or proposed partnership) (see 11.24), a limited liability partnership (or proposed limited liability partnership) (see 11.24), a person who has the power to appoint or remove office holders (see11.45) and a person who has the power to recommend an appointment to a public office (see [XX]). **Para 1(2)**

8.3 An employer will be able to apply an OR if it can show that having regard to the nature or context of the work: **Para 1(1)**

- the requirement of being of a particular sex, race, disability, religion or belief, sexual orientation or age - or not being a transsexual person or married or a civil partner - is an OR;
- the application of the requirement is a proportionate means of achieving a legitimate aim (see [XX]); and

- B does not meet the requirement or A, has reasonable grounds for believing, that B does not meet the requirement.

8.4 The OR must be crucial to the post and not merely one of several important factors. The requirement must not also be a sham or pretext.

> A Women's refuge may employ only women as counsellors because its client base is women fleeing violence in the home. This would be a lawful OR because there would be a legitimate aim of ensuring that the women living in the refuge are in a non-threatening environment, and having an all-female workforce would be a proportionate means of achieving this.

When can an OR be used?

8.5 Where A is an employer, partnership, limited liability partnership or office holder, an OR can only be used in relation to: **Paragraph 1(2)**

- the arrangements A makes for deciding to whom to offer employment, offer a position as a partner or member or appoint as an office holder;
- whether or not to offer employment or the position of partner or member to B, or appoint B as an office holder;
- the provision of access to opportunities for promotion, transfer, training, or any other benefit, facility or service to B; or
- the dismissal or expulsion of B, or the termination of B's appointment as an office holder.
-

Example: A local council decides to set up a health project to encourage older people from the Somali community to make more use of health services. The council wants to recruit a person of Somali origin for the post because it involves visiting elderly people in their homes and it is necessary for the post-holder to have a good knowledge of the culture and language of the potential clients. The council does not have a Somali worker already in post who would be available to take on the new duties. The council could rely on the GOR exception to recruit a health worker of Somali origin.

8.6 A principal can only use an OR to not allow a contract worker to do or continue to do the work in question. **Paragraph 1(2)**

8.7 Where A has the power to recommend or approve the appointment of B to a public office, an OR can only be used in relation to the arrangements A makes for deciding who to recommend or approve for appointment, not recommending or approving B for appointment or making a negative recommendation of B for appointment. **Paragraph 1(2)**

Religious requirements

8.8 Where A has an ethos based on religion or belief, A is permitted to discriminate in relation to work XX] if A shows that, having regard to that ethos and the nature or context of the work: **Paragraph 3**

- the requirement of having a particular religion or belief is an OR;
- the application of the requirement is a proportionate means of achieving a legitimate aim; and
- a person does not meet the requirement or A has reasonable grounds for not being satisfied that the person meets the requirement.

To use the above exception, A must be able to show that it has an ethos based on religion or belief, for example by using evidence such as its founding constitution.

An "ethos" is the important character or spirit of the religion or belief. It may also be the underlying sentiment that informs the customs, practice or attitudes of the religion or belief.

Example: A care home is managed by a religious charity. It only employs carers who are of the same religion as that followed by the charity and the care home residents because the carers duties are intended to fulfil both the physical and spiritual needs of its patients. This type of discrimination could be lawful. However, the charity may not be able to justify a similar requirement for its maintenance or administrative staff whose jobs do not require them to provide spiritual leadership or support to the patients.

8.9 The Act also permits an employer or appointer of persons to personal and public offices (including persons who have the power to recommend such appointments) (A) to discriminate against a person (B) by applying a requirement for them to be of a particular sex or not to be a transsexual, or make a requirement relating to B's marriage, civil partnership or sexual orientation if A can show that:

Para, 2(1)

Para 2(2)

2(3)

2(4)

2(5)

2(6)

2(7)

2(8)

- B does not meet the requirement in question or A has reasonable grounds for not being satisfied that the person meets it;
- the employment or appointment is for the purposes of an organised religion, that is it wholly or mainly involves leading or assisting in the observation of religious practices or ceremonies, or promoting or explaining the doctrine of the religion to followers of that religion or others; and

- employing or appointing a person who meets the requirement in question is a proportionate way of complying with the doctrines of the religion; or because of the nature or context of the employment or appointment, employing or appointing a person who meets the requirement in question is a proportionate way of avoiding conflict with a significant number of the religion's followers' strongly held religious convictions.

8.10 The requirement in question must be crucial to the post and not merely one of several important factors. The requirement must not be a sham or pretext.

Example: A church wants to employ a youth worker who would be primarily teaching Bible classes. The church would probably be able to impose a requirement that, if the youth worker is gay or lesbian, then he or she should be celibate. However, they are unlikely to be able to impose the same requirement if the youth worker were mainly organising sporting activities.

Example: A religious organisation seeks to restrict applicants for a job as a cleaner to heterosexual people as it is concerned that the appointment of a gay, lesbian or bisexual person would offend the religious convictions of the local congregation. This would be unlawful as the job of cleaner does not involve the promotion or representation of that religion.

Armed forces

8.11 The Act allows the armed forces to refuse a woman or a transsexual person employment or access to opportunities for promotion, transfer, training or benefits only if this is a proportionate way of ensuring the combat effectiveness of the armed forces. This does not include dismissal or any other detriment. **Para 4**

8.12 The Act also creates an exception allowing the armed forces to discriminate against a person because of their age and disability in deciding whether or not to offer employment or affording access to opportunities for promotion, transfer, training or for receiving any other benefit. This does not include dismissal or any other detriment. **Para 4(3)**

Employment services

8.13 The Act allows employment service providers, which includes those providing vocational training, to restrict access to the training or service to people with a protected characteristic lif it relates to work for which having that characteristic is an OR as described in chapter 2. **Para 5**

8.14 The employment service provider can rely on the above exception by showing that he or she reasonably relied on a statement from a person who could offer the work or training in question that having the particular protected characteristic was an OR. It is, however, a criminal offence for such a person to make a statement of that kind which they know to be false or misleading.

Chapter 9
During employment

9. Introduction

The employment relationship is governed by the terms of the contract of employment agreed between the employer and the employee. Sometimes, the contract of employment is no more than standard terms which the employee has little choice but to accept. It is incumbent on the employer to ensure that the terms of the contract of employment do not discriminate against the employee because of a protected characteristic.

Although the contract of employment will establish the main terms of employment such as hours of work and pay, the day to day workings of the relationship are more likely to be governed by the employer's working arrangements. Many of these will be communicated in the form of on-the-job training in the employer's practices and processes. Others will be reduced into writing in the form of policies and procedures.

In addition to ensuring that no contractual terms and conditions or practices and processes or written policies and procedures directly discriminate against employees, it is also important to ensure that they do not directly or indirectly discriminate. Separately, reasonable adjustments will be required to any provision criterion or practice that puts a disabled employee at a substantial disadvantage.

This Chapter runs through the main elements of the employment relationship as it operates in practice, highlighting areas where discrimination might occur, cross referencing overlapping statutory rules such as those contained in the Working Time Regulations 1998 and the Minimum Wage Act 1998 and making good practice recommendations for employers.

Terms and conditions

9.1 Once an offer of employment has been made, terms and conditions of service should be drawn up. Strictly speaking there is no statutory obligation to have a written contract of employment. However, sections 1-3 of the Employment Rights Act 1996 require that a written statement of particulars of employment, detailing the main terms and other basic information about the employment relationship, must be provided to the employee within 2 months of the start of the employment. It would however, be best practice to provide an employee with a detailed contract of employment covering more than the minimum statutory requirements.

9.2 The terms and conditions offered to the employee must not themselves discriminate because of any protected characteristic. Terms and conditions include, but are not limited to: pay, benefits including pension, hours of work, overtime, bonuses, holiday entitlement, sickness leave, maternity, paternity and adoption leave and disciplinary and grievance procedures.

9.3 Whilst the Act does not require an employer to have an equality policy, it is good practice to have one, to train staff in the requirements of the policy and to implement it actively and effectively. Details of the equality policy will vary according to the business of the employer. Further information can be found in Chapter 4.

Pay

9.4 Terms of employment relating to pay should not be discriminatory because of any protected characteristic.

9.5 However, there is an exemption in the Act which allows employers to base their pay structures for young employees on the pay bands for National Minimum Wage Regulations 1999.

9.6 These Regulations set minimum wage rates and have lower minimum wage rates for younger workers aged 16 and 17, and for those aged 18 to 21. Employers can either use the rates of pay proscribed in the Regulations or may pay higher wages provided they are linked to the same age bands. However, the higher rates of pay offered by the employer for each age band need not be in proportion to the corresponding rates of the national minimum wage for each age band.

Example: A supermarket decides to review its pay scales. It must pay at least the national minimum wage but wants to pay a more commercial rate. The Act permits the supermarket to pay different rates of pay for younger employees even though that would otherwise be discriminatory because of age, but only if the supermarket bases its pay scales on the pay bands set out in the National Minimum Wage Regulations 1999. The supermarket opts for the following rates which would be permissible under the Act:

- 16-17 years of age - 20p per hour more than the national minimum wage for employees in that age band;

- 18-21 years of age - 45p per hour more than the national minimum wage for employees in that age band; and
- 22 years of age or over - 70p per hour more than the national minimum wage for employees aged 22 or over.

9.7 An apprentice who is under the age of 19 or in the first year of their apprenticeship is not entitled to the national minimum wage. The Act permits an employer to pay an apprentice who is not entitled to the national minimum wage at a lower rate than an apprentice who is entitled to the national minimum wage.

Example: A garage takes on two apprentice mechanics each year, each on a two year apprenticeship. It currently has four apprentices two first year apprentices aged 18 and 20 respectively and two second year apprentices both aged 19.

Neither of the first year apprentices is entitled to the national minimum wage: both are in their first year of the apprenticeship and the first is also less than 19 years of age. Nevertheless, the garage pays the first year apprentices an amount equal to the national minimum wage for those persons aged 18 - 21.

The garage pays the second year apprentices £0.50 per hour more than the national minimum wage for those persons aged 18-21.

It is lawful for the garage to pay both the 18 year old and the 20 year old apprentices in the first year of their apprenticeships less than the two 19 year olds in the second year of their apprenticeships because neither of the first year apprentices is entitled to the national minimum wage.

9.8 Employers should note that there is a sex equality clause implied into each contract of employment. This clause has the effect of (a) modifying any term which is less favourable than that of a comparator of the opposite sex so as to ensure that both terms have the same effect; and (b) incorporating an equivalent term where the comparator benefits from a term not included in the employee's contract. The comparator must be employed on equal work which is defined by the Act as like work, work rated as equivalent or work of equal value. **Clause 61–63**

The effect of the sex equality clause in respect of pay is dealt with in more detail in the Equal Pay Code.

9.9 Employers should ensure that, where employees work less than full time hours, pay and benefits are in proportion to the hours worked to avoid placing part time employees at a disadvantage that could amount either to indirect discrimination because of sex or another protected characteristic or be unlawful under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, or both.

9.10 When awarding pay rises employers must not discriminate against employees because of a protected characteristic.

9.11 Terms and conditions of employment are unenforceable if they are designed to prevent or restrict an employee from discussing their pay with colleagues with a view to finding out if the differences that exist, if any, are related to a protected characteristic. Pay includes basic pay; non-discretionary bonuses; overtime rates and allowances; performance related benefits; severance and redundancy pay; access to pension schemes; benefits under pension schemes; hours of work; company cars; sick pay; and fringe benefits such as travel allowances. **Clause 77**

Further guidance on this prohibition in relation to sex can be found in the Equal Pay Code.

Performance related pay and bonuses

9.12 Where an employer operates a pay policy and/or bonus schemes with elements related to individual performance the employer must ensure that the policy and/or scheme does not unlawfully discriminate against an employee because of a protected characteristic. For example, where an employee's pay has a performance related element and the employee's disability affects their performance, employers should explore whether it is possible to make reasonable adjustments to overcome this before making any pay or benefit related decisions.

Example: A disabled man with arthritis works in telephone sales and is paid commission on the value of his sales. His impairment gets worse and he is advised to change his computer equipment. He takes some time to get used to the new equipment and as a consequence his sales fall. It is likely to be a reasonable adjustment for his employer to pay him his previous level of commission for the period he needs to get used to the new equipment.

Benefits

9.13 Employers are responsible for making sure that their rules and requirements on access to any benefits, facilities or services, such as private health care, permanent health insurance, pensions, season ticket loans or membership of a gym do not unlawfully discriminate because of any protected characteristic.

9.14 Where an employer arranges for another person to provide a service to a group of employees, the members of that group are to be treated as a section of the public for the purposes of their relationship with the service provider. If the service provider discriminates against members of that group, then Part 3 of the Act will apply (which relates to services and public functions). See the Code on Services and Public Functions for more information.

The employer will not be treated as a service provider, despite facilitating access to the service. But if the employer's conduct has an impact on the employees' access to these services , this will be governed by Part 5 of the Act (which relates to work).

Example: An employer arranges for an insurer to provide a group health insurance scheme to his employees. The insurer refuses to provide cover on the same terms to one of the employees because she is a transsexual. This would be treated as direct discrimination in the provision of services by the insurer against the employee in the same way as if the insurance was available to the general public. However, if it was the employer, rather than the insurer, who denied the transsexual employee access the group health insurance scheme, this would be covered by Part 5 of the Act (relating to work).

9.15 The Act provides a specific exception for service related benefits in respect of the protected characteristic of age. Further details are provided below at 9.110..

9.16 It is important to review benefits and benefit policies to ensure that they are inclusive and do not discriminate because of any protected characteristic. Benefits are discussed in more detail in Chapter [XX] below.

Working hours

9.17 Working hours are determined by agreement between the employer and the employee, subject to collective agreements and also to certain minimum rules in the Working Time Regulations 1998. For example, those Regulations provide maximum average working hours per week and for those who work at night and minimum rest breaks, daily and weekly rest periods and entitlement to annual leave.

9.18 Established working time agreements can be varied either simply by agreement between the employer and employee or following a flexible working request in accordance with the procedures in the Employment Rights Act 1996, Flexible Working (Procedural Requirements) Regulations 2002 and the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002.

9.19 Under these rules certain employees with carer responsibilities are entitled to request flexible working; that is, to request changes to hours of work, times of work and the location of work. In practice this might mean:

- part time working, term time working or home working;
- an adjustment to start and finish times; and
- adopting a particular shift pattern or extended hours on some days with time off on others.

9.20 The purpose of the right is to give employees the opportunity to adopt working arrangements that help them to balance their commitments at work with their need to care for a child or an adult.

9.21 Employers have a duty to consider a request for flexible working arrangements seriously and will be able to refuse it only where there is a clear business reason. Employers who do not consider the request seriously risk being taken to an Employment Tribunal and possibly having to pay compensation to the employee.

9.22 As a separate consideration from any statutory right to claim flexible working, certain working patterns may indirectly discriminate because of a protected characteristic. For example, a requirement to work full time hours may indirectly discriminate against women because of child care responsibilities or discriminate against disabled people with certain conditions (such as ME). A requirement to work on certain days may indirectly discriminate against those with particular religious beliefs.

9.23 It is good practice to keep a written record of any request for changes to working hours whether or not made under the statutory flexible working process, the reasons for the decision and whether or not the request is granted.

9.24 Although a flexible working request may legitimately be refused under the statutory flexible working process, such a refusal may still be indirectly discriminatory if the employer is unable to show that the requirement to work certain hours is a proportionate means of achieving a legitimate aim.

Example: An employee's contract states her hours of work are 9am – 3pm. The employee has asked if she can change these hours to 10am – 4pm to accommodate her child care responsibilities. Her employer refuses on the grounds that they would incur extra cost to provide staff cover in the mornings. The refusal will be unlawful discrimination unless the employer can show that it is based on a legitimate aim, such as ensuring there is sufficient staff cover before 10am, and that refusing the request is a proportionate means of achieving that aim. Given the impact of refusal on the employee, the employer should look at what other options are available to cover between 9-10am before refusing.

Employers should also be particularly mindful of their duty to make reasonable adjustments to working hours for disabled employees.

Example: An employee with a learning disability has a contract which says he will attend work during normal office hours (which are 9am to 5.30pm in this particular office). He wishes to adjust these hours because a friend is no longer available to accompany him to work during the rush hour. This is likely to be a reasonable adjustment for that employer to make.

Rest breaks

9.25 Minimum rest break periods are set out in the Working Time Regulations 1999. Some employers operate a policy on rest breaks and lunch breaks that is more generous than the provisions of those Regulations. Some disabled employees may need to take additional regular breaks as a reasonable adjustment. Employees with other protected characteristics may request additional breaks because of their protected characteristic(s). For example, an employee may request breaks to practice their religion or belief.

> **Example:** A woman has recently been diagnosed with diabetes. She finds that she gets extremely tired at different times during the working day as a consequence of her medication and her new dietary requirements. It is likely to be a reasonable adjustment to allow her extra paid rest breaks during the period that is needed to control the effects of her impairment.

9.26 In considering whether to implement additional breaks for the employee, employers should ensure that they do not discriminate against the employee making the request because of any protected characteristic.

9.27 It is good practice to keep a written record of the reasons for the decision, whether or not the request is granted.

9.28 In some circumstances an insistence by an employer that an employee works to a particular pattern, taking breaks at a particular time, might amount to indirect discrimination.

Absence

9.29 It is good practice for employers to have clear, reasonable procedures for dealing with absence from the workplace and ensure that all employees are aware of and adhere to the procedures. These procedures should include any requirements about informing the employer, providing certificates to explain the absence, the amount of sick pay that will be paid and what is likely to happen if absence levels exceed those which the employer can reasonably be expected to cover.

9.30 Some of these rules may be contractual terms and conditions but others will be non-contractual practices and procedures. To avoid discrimination or the perception of discrimination, employers must ensure consistency in the way in which absence is managed which is particularly important where the absence procedures contain discretionary elements such as when to stop sick pay or when to commence attendance management procedures.

9.31 Records of an employee's absence should be kept. More specifically, there is an obligation under the Statutory Sick Pay (General) Regulations 1982 to retain some sickness records for 3 years after the end of each tax year. The records should record the reason for absence and the length of time the employee has been absent. Particular care is needed to ensure that sensitive personal data in the form of medical information about employees is kept confidential and handled in accordance with the Data Protection Act 1998.

9.32 It is good practice where the information is sufficiently clear, to record absences related to an employee's disability or pregnancy separately from other sickness absences. It will often be appropriate to manage disability and pregnancy related absence differently from other types of absence, so recording the reason for the absence should assist that process. In order to assist an employer with the proper recording of sickness absence, employees should provide medical evidence of the reason for absence, if requested.

9.33 When taking attendance management action against an employee because of their attendance record, employers should ensure that they do not discriminate against the employee because of a protected characteristic.

9.34 Employers should consider whether as part of their procedures it is reasonable to disregard absences related to an employee's disability. Employers are not obliged to disregard all disability related absences automatically; but consideration should be given to whether it is reasonable to disregard some or all of the absences by way of an adjustment.

Example: A woman who is a wheelchair user needs certain modest physical alterations to the workplace to make it accessible. Her employer has not yet completed these adjustments. This makes it extremely difficult for her to perform her job competently and she has to take sickness absence because of the stress and anxiety which this causes. The employer considers taking attendance management action in accordance with its written procedures. It is likely to be a reasonable adjustment to disregard the current period of absence since it has been caused by the employer's failure to make the adjustment.

Example: A man who has recently developed a long term health condition has many short periods of absence during a 6 month period as he learns to manage this health condition. Ignoring these periods of disability- related absence may be a reasonable adjustment for the employer to make. Disciplining this man because of these periods of absence is likely to amount to discrimination arising from disability.

9.35 All pregnancy related absences should be disregarded for the purposes of attendance management action.

Example: A pregnant employee has been off sick with pregnancy complications since early in her pregnancy. Her employer has now dismissed her in accordance with the sickness policy which allows no more than 20 weeks' continuous absence. This policy is applied regardless of sex. Even if a man would be dismissed for a similar period of sickness absence the dismissal is unlawful, because the employer took into account the employee's pregnancy-related sickness absence in deciding to dismiss.

9.36 Sickness absence associated with a miscarriage should be treated in the same way as pregnancy related sickness.

Example: A pregnant employee suffered a miscarriage and as a result has taken a week off from work. Her employer is reviewing absenteeism and has counted this in with her regular sickness absence. As a result he has decided to take disciplinary action against her. This is unlawful - any sickness absence related to the miscarriage must be disregarded.

9.37 Employees may need to take time off work for medical treatment related to a protected characteristic. For example, treatment for gender re-assignment. [Further information on gender re-assignment can be found in Chapter [xxx] of the Code.] Employers should consider whether it is reasonable to disregard absences related to a protected characteristic for the purposes of their attendance management policy.

> **Example:** An employee is intending to undergo gender reassignment surgery in the near future and has informed their employer. This will mean that they will need to take some time off for medical appointments and also for surgery. The employer decides to record all these absences for the purposes of their attendance management policy. However, when another employee broke his leg skiing the employer decided to disregard his absences for the purposes of the attendance management policy because "it wasn't really sickness and won't happen again". This may well amount to discrimination because the employer is treating the transgender employee's absence less favourably than the other employee's absence due to their injury.

9.38 Employers should treat requests for time off for in vitro fertilisation (IVF) and fertility treatment sympathetically. Less favourable treatment of a woman because she is undergoing IVF is likely to be sex discrimination even though it would not amount to pregnancy discrimination until the point at which fertilised embryos were implanted within her. Employers may wish to establish procedures for allowing time off for IVF and fertility treatment. These may include procedures that allow women to notify designated members of staff on a confidential basis that they are undergoing treatment.

9.39 Employers operate different sick pay policies. Some, for example, offer full pay for up to six months' sickness absence with another six months' sickness absence paid at half pay. Other employers operate sick pay policies which pay full pay for a month with another month's sickness absence paid at half pay. Some employers pay sickness absence at statutory sick pay. Whatever policy an employer operates, it should be applied without discrimination to employees.

9.40 Employees who are absent for a disability or pregnancy related reason have no automatic right to be paid full pay for their period of absence and should be paid the contractual sick pay they would have received had they not been absent for a disability or pregnancy related reason. However, if the reason for absence is due to a delay whilst the employer implements a reasonable adjustment that would enable the employee to return to the workplace it would be a reasonable adjustment to pay the employee full pay.

Example: A woman who has lost her sight in one eye needs work documents to be enlarged. Her employer fails to make arrangements to provide her with enlarged copies and she has a number of absences from work because of eye-strain. She receives full sick pay for 100 days and the employer is considering reducing it to half-pay in line with its sickness policy. It is likely to be a reasonable adjustment to retain her on full pay as her absence is caused by the employer's failure to make the adjustment.

Time off for medical appointments

9.41 Many employers allow employees time off at full pay to attend medical or dental appointments. Employers may develop policies or contractual terms that encourage or oblige employees to arrange appointments at a time when it will cause minimum disruption to their duties, for example, at the start or end of the working period, or during a break or to make up the time later.

9.42 Employees who are pregnant or disabled may require time off to attend medical appointments.

9.43 Pregnant employees are entitled to paid time off for antenatal care. Antenatal care can include medical examinations, relaxation and parent craft classes.

> **Example:** A pregnant employee has booked time off to attend a medical check up related to her pregnancy. Her employer insists this time must be made up for through flexi-time arrangements or her pay will be reduced to reflect the time off. This is unlawful: a pregnant employee is under no obligation to make up time taken off for antenatal care appointments and an employer cannot unreasonably refuse paid time off to attend such classes.

9.44 Disabled employees may require time off to attend medical appointments or receive treatment related to their disability. Employers should accommodate such appointments so far as is reasonable. For example, if an employee needs to take a short period of time off each week over a period of several months it is likely to be reasonable to accommodate the time off.

However, if an employee needs to take several days off each week over an extended period of months it may not be reasonable to accommodate that time off. Whether or not is reasonable will depend on the employer's and the employee's circumstances.

Example: An employer allows an employee who has become disabled more time off during work than would be allowed to non-disabled employees to enable her to have rehabilitation training. This is likely to be a reasonable adjustment. A similar adjustment would be reasonable if a disability gets worse or if a disabled employee needs occasional but regular long-term treatment.

Maternity, paternity, adoption and parental leave

9.45 When dealing with employees who request or who take maternity, paternity, adoption or parental leave employers should ensure that they do not discriminate against the employee because of a protected characteristic.

Example: A woman has asked her employer for some parental leave as she and her civil partner adopted a child 2 years ago and she wants to be able to look after her child for part of the summer holidays. Other employees have been allowed to book parental leave and this woman has checked to make sure the time she has requested would not conflict with their leave. The policy on granting parental leave gives the Line Manager discretion to decide. The woman's Line Manager personally does not agree with same sex couples being allowed to adopt children and refuses her request because of this. This would amount to direct discrimination against her because of a protected characteristic – her sexual orientation.

9.46 Employers should note that there is other more detailed legislation dealing with maternity, paternity, adoption and parental leave and an employee's rights during such leave are set out in other statues and regulations beyond the scope of the Act. For example, the Employment Rights Act 1996, Maternity and Parental Leave etc Regulations 1999 (as amended), Paternity and Adoption Leave Regulations 2002 (as amended) and the Management of Health and Safety at Work Regulations 1999.

Emergency leave

9.47 Employees have a statutory right to take reasonable unpaid time off which is necessary to deal with immediate emergencies concerning dependants as set out in the Employment Rights Act 1996. Dependants include a spouse or civil partner, a child or a parent.

9.48 Where the employee does not have a statutory right to emergency time off, employers should try, where reasonably practicable, to be flexible when dealing with a request for emergency leave, for example due to child care commitments, family emergencies or bereavements.

9.49 In considering whether to allow the emergency leave, employers should ensure that they do not discriminate against the employee requesting it because of any protected characteristic.

> **Example:** Sophie receives a telephone call informing her that her partner Mary has been involved in an accident. Sophie is Mary's civil partner and has been recorded as next of kin on Mary's medical notes and is required at the hospital. Sophie's employer's emergency leave policy only allows emergency leave to be taken where a husband, wife child or parent is affected and refuses Sophie's request for leave. This policy discriminates against Sophie because of her sexual orientation.

9.50 It is good practice to keep a written record of the reasons for the decision, whether or not the request is granted.

9.51 If the emergency leave request is refused an employer must be able to show either that the statutory right did not apply or that the amount of time off requested was unreasonable.

Annual leave

9.52 The Working Time Regulations 1998 provide a minimum annual holiday entitlement.. Most employers allow for holiday to be taken in days rather than weeks so in those circumstances the minimum entitlement will need to be in proportion to the amount of time the employee works in a week. The maximum aggregate entitlement under the Regulations is 28 days annual leave. Employers are free to offer their employees more holiday than their minimum entitlement under the Regulations.

9.53 The Regulations contain a procedure for requesting annual leave. This may be replaced by an agreement between the employer and employee. In such cases where the procedure in the Regulations is replaced, employers should have clear, reasonable and consistent procedures for handling requests for annual leave and ensure that all employees are aware of and adhere to the procedures.

9.54 Many religions or beliefs have special periods of religious observance, festivals or holidays. Employers should be aware that some religious or belief occasions are aligned with lunar phases and therefore dates change from year to year and may not become clear until quite close to the actual day.

> **Example:** Employee C is Sikh. Last year Employee C was off on 1st and 2nd March to celebrate Hola Mohalla. This year Employee C has put in an annual leave request for 6th and 7th March to celebrate the same holiday. He has checked and found that no other staff in his department have requested leave on these dates. Employer A has refused the request but has said Employee C can take off the 1st and 2nd of March as he did last year. Because festivals in Sikhism are based on the lunar calendar the dates on which religious festivals fall differ year on year, therefore it could be indirect discrimination for Employer A to expect the employee to be off on the same days each year.

9.55 An employee may request annual leave for a religious occasion or to visit family overseas. Employers should sympathetically consider such a request and, if the employee has sufficient holiday entitlement in hand and where it is reasonable and practicable for the employee to be away from work, seek to accommodate the request.

9.56 It is good practice for employees to give as much notice as possible when requesting annual leave and in doing so should also consider the needs of the organisation and that there may be a number of their colleagues who would like leave at the same time.

9.57 If an employee's request for annual leave to observe a religious occasion or visit family overseas cannot be accommodated because of their colleagues' pre-booked annual leave, it would be good practice for the employer to seek to discuss the matter with those colleagues to see if a mutually acceptable compromise can be agreed.

Example: L has booked a week off work to take care of his children over the school half term holidays. M has recently become aware that the religious festival of Eid will fall in the same week and also wants three days off. He is not sure which three days he will need as the exact date of the festival is based on the lunar calendar.

A large employer may be able to make arrangements so that both posts are covered by other staff but a small employer may not be able to do so. Employers should discuss the matter with the employees affected in order to balance the needs of the business and those of other employees.

9.58 It is good practice to keep a written record of the reasons for the decision and any discussions that have taken place, whether or not the request is granted.

9.59 If a request for annual leave is refused an employer must be able to show that the refusal is either in accordance with the procedure in the Working Time Regulations 1998 or with the rules of the contract of employment if these have replaced the procedure in the Regulations.

9.60 Separately the refusal must not be because of protected characteristic. In addition, because a refusal to allow time off is an application of a provision, criterion or practice, the refusal may amount to indirect discrimination if it places the employee and persons sharing the employee's relevant protected characteristic at a disadvantage and the provision, criterion or practice is not a proportionate means of achieving a legitimate aim.

9.61 Employers who operate a holiday system whereby the organisation closes for specific periods when all employees must take their annual leave should consider whether such closures are justified as they may prevent individuals taking annual leave at times of specific religious significance to them. Such closures may be justified by business needs. However, it is good practice for such employers to consider how they might balance the needs of the business and those of their employees.

Discipline and grievance

9.62 Discipline and grievance procedures should not discriminate against an employee because of any protected characteristic.

9.63 Complaints of prohibited conduct because of a prohibited characteristic should be properly investigated. If the complaint is upheld, the employer should consider taking disciplinary action against the offender. If the complaint is not upheld, the employee should not be subject to any unjustified disciplinary action because of having raised the complaint. Further information on grievance procedures is set out at [DE6].

9.64 Employers should ensure that when conducting disciplinary and grievance procedures they do not discriminate against an employee because of a protected characteristic. For example, employers may need to make reasonable adjustments to such procedures to ensure that they do not put disabled employees at a substantial disadvantage or adapt such procedures to accommodate an employee at home on maternity leave. Further information on disciplinary procedures is set out at XX

Dress

9.65 An employer is entitled to introduce and enforce a dress code the aim of which is to ensure that employees dress in a professional and business like way or to meet health and safety requirements, provided these can be objectively justified.

9.66 Some organisations adopt dress codes which may indirectly put people of certain religions or beliefs at a disadvantage for example a restriction on head coverings could impact on Sikh men and Muslim women.

9.67 It is good practice for employers to consider carefully how a dress code may impact on different religious or belief groups. Employers should consider whether there may be exceptions which should be taken into account for example the exception for Sikh men wearing turbans on construction sites. Employers should also consult with any employee who may be affected by the introduction of a dress code to ascertain the impact and whether it might reasonably be possible to accommodate their religious attire. Reasonable adjustments to dress codes will need to be made to meet the needs of disabled staff.

Example: An employer wants to introduce a new dress code at work. The dress code would require employees with long hair to wear their hair tied back and male employees to be clean shaven. Although this dress code applies to all staff it disadvantages Sikh staff who have beards for religious reasons. This policy amounts to indirect discrimination.

9.68 Dress codes must operate in an even-handed manner in the context of contemporary standards of conventional dress.

Business attire

9.69 Where men are required to wear suits, it may be less favourable treatment to require women to wear skirts, if an equivalent level of smartness can be achieved by women wearing, for example, a trouser suit.

If employers wish to restrict the wearing of jewellery at work, they will need to objectively justify this.

Example: An employer's dress code insists that all staff wear suits to work and women may wear skirts or trousers. An employee at this firm has just undergone gender reassignment from male to female. The employer is refusing to allow this employee to wear a skirt and insists she must wear trousers. This is discrimination because of a protected characteristic as this employee is being treated differently than non transgender females.

Example: An employer's dress code states men must wear shirts and ties and women must "dress smartly". The code is not enforced as strictly against women as against men and a male employee has been suspended for a continued failure to comply with the rules by not wearing a tie despite women colleagues wearing t-shirts and no action being taken. It is not necessarily unlawful discrimination for a dress code to set out different requirements for men and women (e.g. that men have to wear a collar and tie). However, it will be unlawful sex discrimination if the dress code requires a different overall standard of dress for men and for women, e.g. requiring men to dress in a professional and businesslike way but allowing women to wear anything they want. It will also be unlawful discrimination if the dress code is applied more strictly to men than women.

Example: A bank has banned its employees from wearing any type of jewellery whilst at work. This is not for health and safety reasons but because the employer does not like body piercings. An employee has complained about this as she wears a Kara which is a slim bracelet some Sikhs feel is an integral part of their religion. The employer would be expected to make a reasonable exception to avoid a claim of indirect discrimination.

Language in the workplace

9.70 A language requirement for a job may be indirectly discriminatory unless it is necessary for the satisfactory performance of the job. For example, a requirement that an employee have an excellent grasp of English may be indirectly discriminatory because of race if an employee really only needs to have a good grasp of English. This requirement may also be indirectly discriminatory against certain disabled people, for example Deaf people whose first language is BSL. (See chapter 3 for more information on direct discrimination).

9.71 Under the Welsh Language Act 1993, public bodies providing services to the public in Wales must make their services available in Welsh as well as English. This means a wide range of posts in public bodies in Wales, and some in public bodies outside Wales, will need employees who can speak, write and read Welsh sufficiently well for the post in question. In some cases, this may make Welsh language skills an essential requirement for appointment; in others it may require the employee to agree to learn the language to the required level within a reasonable period of time after appointment. Employers in Wales are recommended to seek advice from the Welsh Language Board in relation to the use of Welsh in the workplace, as well as following the recommendations of this Code

Example: A local council in Wales requires all its newly recruited receptionists to speak Welsh or be willing to learn it within a year of being employed. This requirement would be lawful under the Act.

9.72 There is a clear business interest in having a common language in the workplace, to avoid misunderstandings, with all the risks these can entail, whether legal, financial or in relation to health and safety. It is also a matter of courtesy, conducive to good working relations, not to exclude employees from conversations that might concern them, when they are present. In the main, English is the language of business in Britain and is likely to be the preferred language of communication in most workplaces unless other languages are specifically required or are more practical in the workplace.

> **Example:** A construction company employs a high number of Polish workers on one of its sites. The project manager of the site is also Polish and finds it more practical to give instructions in Polish to those workers.

9.73 Employers should make sure that any rules, requirements, conditions, policies or practices involving the use of a particular language during or outside working hours, for example during work breaks, do not amount to unlawful discrimination against an employee. Employers should be able to justify these as being a proportionate means of achieving a legitimate end. Blanket rules, requirements or practices involving the use of a particular language are often unlikely to be justifiable. During working hours, most types of work allow for occasional casual conversation at the same time as, for example filing papers or at the coffee machine. An employer who prohibits employees from talking casually to each other in a language they do not share with all colleagues, or uses occasions when this happens to trigger disciplinary or capability procedures or impede progress, may be considered to be acting disproportionately.

9.74 It would be good practice for employers to consult employees, trade unions and other workplace representatives before drawing up any proposals on the use of language in the workplace.

9.75 Where the workforce includes employees who are not proficient in the language of the workplace, employers should consider taking reasonable steps to improve communication. These might include providing:

a) interpreting and translation facilities; for example, multilingual safety signs and notices, to make sure workers understand health and safety requirements;

b) training in language and communication skills; and

c) training for managers and supervisors on the various populations and cultures that make up Britain today.

The reasonableness of providing such facilities, signs and training will depend upon the size and administrative resources of the employer and the number of employees who are not proficient in the language of the workforce.

9.76 Employers should ensure that their policies cover the use of inappropriate or derogatory language in the workplace, which could amount to harassment if it is related to a protect characteristic and is sufficiently serious. Employees should be reminded that all employees have the right to be treated with dignity and respect in the work place. Policies should make it clear that employees should not make derogatory comments, jokes or use derogatory terms related to a protected characteristic. (See chapter 3 for more information on harassment)

Example: Employee A has made a number of disparaging remarks about Employee B who is pregnant, stating “women are only good for one thing - making babies”. The employer’s Single Equality Policy makes it clear that inappropriate and offensive language, comments and jokes related to a protected characteristic are unacceptable and amount to a disciplinary offence. The employer brings disciplinary proceedings against Employee A for making the comments as they amount to discrimination and/or harassment because of a protected characteristic – sex.

Example: An employer’s workforce is made up predominantly of young people. An older employee is referred to as ‘Grandpa’ and ‘Pops’ by other staff, which he finds humiliating. The employer's Staff Handbook has not been revised for a number of years. It covers disparaging remarks based on sex, race and disability but not age, religion or belief or sexual orientation. The Handbook is revised to state that disparaging remarks on any protected ground are unacceptable. The employer also runs a series of staff sessions to highlight the changes and warn employees that they will treat any use of inappropriate or disparaging language as a potential disciplinary matter.

Workplace Culture

9.77 Many employers like to refer to the 'culture' of their organisation particularly in marketing materials. For example, organisations sometimes refers to themselves as 'entrepreneurial' or 'innovative'. Such employers may wish to introduce contractual terms and policies that seek to reinforce what they see as positive aspects of their culture. However, it is equally important that in pursuing a corporate culture an employer does not consciously or subconsciously exclude people because of protected characteristics.

> **Example:** An employer drafts its mission statement and corporate values with a heavy emphasis on teamwork, innovation, energy, ability to adapt quickly to change and speed of response to client needs. In doing so it reinforces an apparently financially successful business culture which places a value on youth and late night working with a social element based around team sports and drinking. Consciously or unconsciously this creates an environment where older workers and those with carer responsibilities consistently score lower in appraisals and lose out in pay rises, bonuses and promotions.

Understanding an employee's needs

9.78 It is good practice for an employer to have a discussion with an employee either shortly before they commence employment or shortly after they have started to seek to understand if there are any particular needs that the employee has relating to a protected characteristic(s).

9.79 It is also good practice to repeat this exercise at annual appraisals or if there is a particular change in the employee's circumstances which comes to the employer's attention.

9.80 It is good practice to encourage disabled employees to discuss their disability with the employer so that any reasonable adjustments can be put in place.

> **Example:** An employee has symptomatic HIV and does not wish to tell his employer. His symptoms get worse and he finds it increasingly difficult to work the required number of hours in a week. At his annual appraisal he raises this with his line manager and tells her about his medical condition. As a result, a reasonable adjustment is made and his working hours are reduced to overcome the difficulty.

9.81 If an employee is undergoing gender reassignment, sensitive consultation with the employee will help an employer understand the employee's needs in the workplace and whether there are any reasonable and practical steps the employer can take or changes the employer can make to assist the employee in the workplace as they undergo their gender reassignment process. For further information on gender reassignment refer to Chapter [XX].

> **Example:** An employee will soon be undergoing gender reassignment treatment and wants to continue working throughout the transition process. Their employer has accepted this but has not talked the issue through with the employee, which has led to unresolved questions about which facilities the employee should use, their uniform and communications with other members of staff.
>
> To avoid these problems and identify where adjustments could be made the employer should

have arranged to discuss the situation sensitively with the employee. The discussion would cover setting a date for when different facilities and uniform would be used; the timescale of the treatment; any impact this may have on the employee's work and how the employee would like to address the issue of their transition with colleagues.

9.82 Consultation will also help an employer understand the requirements of an employee's religion or belief. This will help employers understand the religious observances of their employees avoiding embarrassment or difficulties for those practicing their religion or belief and their managers.

Example: Happy Workers is a large employer in a big city. They are aware that their employees come from varied backgrounds and don't want anyone to feel that they don't fit in or cannot comply with their religion or beliefs because of work. To make sure this doesn't happen, as part of their induction meeting new employees are asked about their religion and beliefs and if there is anything the company can do to help them, for example allowing flexible breaks to accommodate prayer times. Employees do not have to disclose anything about their religion or beliefs if they do not want to. All information provided is kept confidential.

Quiet rooms

9.83 Some religions or beliefs require their followers to pray at specific times during the day. Employees may therefore request access to an appropriate quiet place (or prayer room) to undertake their religious observance. Employers are not required to provide a quiet or prayer room.

9.84 However, if a quiet place is available and allowing its use for prayer does not cause problems for other employees or the business, employers should agree to the request. Employers should consult with employees to designate an area for all employees for the specific purpose of prayer or contemplation rather than just a general rest room. Such a room might also be welcomed by those for whom prayer is a religious obligation and also by those who, for example, have suffered a recent bereavement. If possible, employers should also provide separate storage facilities for ceremonial objects.

Food and fasting

9.85 Some religions or beliefs have specific dietary requirements. If employees bring food into the workplace they may need to store and heat food separately from other food. For example, Muslims will wish to ensure that their food is not in contact with pork or anything that has been in contact with pork, such as cloths or sponges. It is good practice for employers to consult their employees on such issues and find a mutually acceptable solution to dietary problems.

Example: A small firm has a Muslim employee and as a requirement of her religion her food cannot come into contact with pork or items that have come into contact with pork. The Manager proposes that one shelf of a fridge will be used for this employee's food and separate cupboard space will be allocated to store any items such as plates and cutlery for this employee. All food being brought into the workplace is to be stored in sealed containers.

Example: A big, multicultural firm has provided each kitchen area with a vegan space and a non-vegan space. Each space has a fridge, sink with cleaning cloths, microwave, separate utensils and crockery all of which are colour coded either green for the vegan spaces or red for the non-vegan spaces. Staff members are strongly encouraged to use the spaces appropriately in order to respect the beliefs of their vegan colleagues.

9.86 Some religions require extended periods of fasting. Employers may wish to consider how they can support employees through such a period. However, employers should take care to ensure that they do not place unreasonable extra burdens on other employees, which may cause conflict in the workplace and/or claims of discrimination.

Example: A teacher is fasting for Ramadan which is an integral part of her religion. To make the time easier for her the school, in consultation with the other teachers, have agreed a change in the dinnertime rota so during her fasting period she does not have to monitor the dining hall. This is a fair adjustment as it does not disproportionately burden any other members of staff.

Example: Employee A has been granted flexible working time during the winter months so that he can arrive at home one hour before dusk on the Jewish Sabbath. Employee B had previously asked for a similar provision as there was a temporary problem with his childcare arrangements (soon to be addressed when his child started nursery), but his request was refused.

This is potentially discriminatory and could lead to a claim by Employee B that he was treated less favourably than Employee A. The employer would have to prove that the refusal of flexible working hours to Employee B was reasonable and proportionate and did not discriminate against Employee B.

Washing and changing facilities

9.87 Some religions or beliefs do not allow employees to undress or shower in the company of others. If an employer requires its employees, for reasons of health and safety, to change their clothing and/or shower, it is good practice to explore how such needs can be met. Insistence upon same-sex communal shower and changing facilities could constitute indirect discrimination (or harassment) as it may disadvantage or offend employees of a particular religion or belief whose requirement for modesty extend to changing their clothing in the presence of others, even of the same sex.

Breastfeeding

9.88 Although there is no legal right for employees to take time off to breastfeed, employers should try and accommodate employees who wish to do so bearing in mind the following:

a) they have a duty of care to remove any hazards for breastfeeding employees; and

b) if an employee needs to breastfeed because her baby has a medical condition that is exacerbated by not breastfeeding, attempts should be made to try to accommodate the employee. This could include allowing the employee to express milk during working hours and providing a room (if reasonably possible) to do so, providing a fridge or a clearly marked separate section in a fridge (if reasonably possible) for expressed milk and reducing working hours to enable the employee to go home to breastfeed.

Outside the office

9.89 Employers are liable for unlawful discrimination in the course of employment. This includes discrimination taking place during working hours and on work premises. However, it is also likely to include discrimination occurring off work premises or outside normal working hours but where there nevertheless remains some connection with work. Employers should therefore take steps to ensure that discrimination does not occur because of a protected characteristic outside of the office, for example, at team building days, social events to which all employees are invited, business trips or client events. Such steps might include drafting disciplinary and equality policies that refer to behaviour outside the office, checking dietary

requirements to ensure that all employees are catered for and reminding employees to maintain the normal professional standards of behaviour.

Example: Z is 17 and works for a telesales company. On Friday nights the other staff in her team go to a local night club to socialise. During this time they mainly talk about work related issues. The team manager also attends and buys drinks for the member of the team who has achieved the most sales that week. Z cannot attend as the club has a strict over 18 policy only. Z feels excluded from team and undervalued.

The manager should consider work based meetings or team socialising in a venue which accommodates persons of Z's age.

Example: A number of colleagues regularly go for drinks after work on Fridays. A female employee has been subjected to a number of incidents of sexual harassment during these outings and has complained to her employer who denies responsibility, saying it's her own choice who she socialise with after work. This is not an acceptable response: an employer can be liable for incidents of sexual harassment at social gatherings of employees immediately after work or at organised social events such as a leaving party, because these are regarded as an extension of work.

Induction, training and development

Induction

9.90 Employers must not discriminate against employees in their induction procedures because of a protected characteristic.

9.91 Employers should consider whether any changes should be made to their induction procedures to ensure that there is no discrimination against any employee because of a protected characteristic. Changes may be made either to remove the discriminatory effect of a provision, criterion or practice or as reasonable adjustments for employees with disabilities.

Example: An employee with a learning disability may require more time, personal support or assistance in relation to the induction procedure. It is likely to be a reasonable adjustment to provide that time, support or assistance.

Example: A large employer's recruitment drive has resulted in a large number of workers from Latvia. To help these workers with their induction the employer has provided a Latvian translator for the induction sessions and has produced translations of the induction materials in Latvian as well. Translations of Health and Safety signs and Fire Exit signs have also been put up around the workplace. English language training is also offered.

Example: Employer X has an induction programme which is delivered through a computer based course. The employer also offers the induction in a written format for new employees over 60 who may have had less exposure to computer based learning in the past.

Example: An employer usually hands out written copies of all its policies by way of induction to new employees and gives them a morning to read them and to raise any questions with their line manager. A new employee has dyslexia and the employer arranges for her supervisor to spend a morning with her talking through the relevant policies. This is likely to be a reasonable adjustment.

9.92 Induction is a good opportunity for employers to make sure all new staff understand and are trained in the employer's equality policy and procedures.

9.93 It is good employment practice to use the induction process to familiarise new recruits with:

a) equality and diversity principles and employees' legal rights and responsibilities;

b) what is acceptable and unacceptable conduct in the workplace, in the light of the employer's equality policy;

c) the employer's procedures for bringing complaints of discrimination; and

d) the employer's policies regarding flexible working, maternity and family leave entitlements.

9.94 It is also recommended that employers keep a record of the equality and diversity training given to each employee as part of the induction procedures.

9.95 Employees responsible for induction will need to be trained on the employer's equality policy. .

Training and development

9.96 Opportunities for training and development should be made known to all employees, including those absent from the office for a disability related reason (unless it has been agreed that there will be limited contact with the employee) or on maternity, paternity, adoption or parental leave, and be available to everyone on a fair and equal basis. It is unlawful for employers to discriminate against, or harass, an employee because of a protected characteristic in the arrangements made for training and development opportunities.

Example: An employer has opened a new office overseas and is offering male managers and single female managers the chance of a six month secondment at the new office to assist in the initial set up. They have decided not to offer the opportunity to married female managers as they assume they would want to stay at home with their husbands and children – or, if they did want to go, they would miss their families and not perform as well as those targeted. This amounts to unlawful discrimination against married women.

Example: Employee A, who is on maternity leave, asked to be kept updated about training opportunities, so her knowledge would be up to date when she returns from leave. During A's maternity leave emails have been sent to everyone except her updating them on the latest training courses and asking for people to indicate which they would like to participate in. This is unlawful discrimination because of pregnancy and sex as all employees are entitled to be informed of training and development opportunities.

9.97 As explained in Chapter 7 employers are entitled to take positive action. Employers may therefore wish to consider providing training opportunities for employees with a particular protected characteristic where those employees are underrepresented in the workforce.

Clause 157

> **Example:** A national education provider wishes to recruit science teachers for its chain of private colleges. It notices that almost all of its teachers are recently qualified and under 40. It undertakes a recruitment drive to attract older teachers and recruits several teachers who are returning to teaching after having worked in industry for many years. It offers additional training to these teachers on current curriculum and teaching practices in order to update their skills.

9.98 It is advisable that training and development opportunities are tailored to an employee's job role. However, employers should review the training on offer to ensure that the opportunity is not limited by a potentially discriminatory factor, for example, pregnancy, length of service, full time working or religious festivals.

> **Example:** An employer offers team leading training for staff who wish to develop management skills. Staff must have been with the company for over seven years to apply for a place on this course. This could amount to indirect discrimination because of age as older staff are more likely to meet the criteria than younger staff.

9.99 Employers should consider adopting a training and development policy linked to the employer's business plan (if it has one) and based on regularly updated audits of employees' skills and training needs. The policy should describe the range of development opportunities open to all employees and any support they will receive.

9.100 Employers are advised to ensure that managers and supervisors responsible for selecting employees for training and other development opportunities are themselves trained to:

a) understand their legal responsibilities under the Act, and how the employer's equality policy applies to matters of training and development;

b) recognise employees' training needs, regardless of any protected characteristics;

c) encourage all employees to apply for training and other development opportunities, including employees who are absent on any form of leave, so that no employee is overlooked as a result of subjective judgements based on a protected characteristic;

d) monitor the take up of training and development opportunities, by reference to protected characteristics, and take steps to deal with any significant disparities in take up because of a protected characteristic;

e) regularly review the selection criteria for training and development opportunities, to make sure they are not potentially discriminatory because of any protected characteristic; and

f) advertise all training and development opportunities as widely as possible throughout the employer's organisation, for example, through notice boards, and intranet sites and internal bulletins or circulars.

9.101 In addition to using the induction process to make new employees familiar with their equality, flexible working, maternity and family leave policies, employers should provide refresher training for other employees, in particular those of a management grade.

9.102 Again, it is recommended that employers keep records of the equality and diversity training given to each employee.

9.103 Employees who have had time out for childcare may need additional training and support on their return to work. It is good practice for employers to liaise with the employee returning to work either before, for example during a keeping in touch day, or shortly after their return to work to consider whether any additional training is needed.

Example: Employee A has just returned to work following a period of statutory adoption leave. Before she returned to work she contacted her employer to ask about arranging a visit day and any training she may need to ensure her skills are up to date. Her employer said there was nothing to worry about and advised her to return on the set date. Now A has returned she has found that there are a number of new team members, a new database system and changes have been made to a number of policies. As a result of these changes A is struggling to settle back in to her role.

The employer should have kept A up to date with any major changes during her absence and arranged a 'keeping in touch day' to allow her to meet her new colleagues. Training on the new policies and database system should have been arranged for as soon as reasonably practical following A's return to ensure she was comfortable in her role and her work was in line with the new policies.

9.104 Employers should consider whether any changes are required in order to avoid any employee being put at a disadvantage in relation to training and development opportunities because of any protected characteristic. Changes may be made either to remove the discriminatory effect of a provision, criterion or practice or as reasonable adjustments for employees with disabilities.

Example: Instead of taking an informed decision, an employer wrongly assumes that a disabled person will be unwilling or unable to undertake demanding training or attend a residential training course. This is likely to amount to direct discrimination.

Example: An employer may need to alter the time or the location of the training for someone with a mobility problem, make training manuals, slides or other visual media accessible to a visually impaired employee (perhaps by providing Braille versions or having them read out), or ensure that an induction loop is available for someone with a hearing impairment.

Example: An employee with a hearing impairment is selected for a post as a engineer. He attends the induction course which consists of a video and discussion. The video is not subtitled and thus the employee cannot participate fully in the induction. This is likely to be unlawful.

Example: An employer refuses to allow a disabled employee to be coached for a theory examination relating to practical work which the employee is unable to do because of his disability. This is likely to be justified because the employee would never be suited for the area of work for which the coaching was designed, and a reasonable adjustment could not alter that position. However, if the disabled employee

required coaching to enable him to understand the requirements of the practical work because he would be managing staff carrying out the work, a decision not to provide coaching would be unlikely to be justified.

9.105 When delivering training courses, employers should also be mindful of:

a) the dates of courses, having regard to religious holidays, festivals or occasions;

b) the hours during which the course is delivered, for example employees with child care commitments may work part time hours;

c) any special dietary requirements, if food is to be provided;

d) inappropriate ice breakers such as games that cause personal embarrassment;

e) the content of the training being given;

f) training activities that use language or physical contact that might be inappropriate for employees with certain protected characteristics;

g) exercises that require the exchange of sensitive personal information, for example a gay or lesbian employee may not wish to disclose their sexual orientation and may not wish to reveal the name of their partner; and

h) related social activities to try to ensure that they do not exclude employees by choice of venue.

9.106 Employees have a responsibility to ensure that their managers and training departments are aware of their individual needs in good time so that there is an opportunity for them to be met.

9.107 It is also good practice for the employer to:

a) review the training and development needs of their employees regularly and update, if appropriate, their training and development programmes;

b) seek to ensure that training and development opportunities are allocated on a non discriminatory basis;

c) encourage all employees to apply for training and development opportunities, including employees who are absent on any form of leave;

d) seek, where possible, to offer training and development opportunities on a flexible basis, for example to accommodate those who work part-time, who have atypical working patterns or who need to take time off to observe a religious occasion or to attend a medical appointment;

e) monitor the take up of training and development opportunities, by reference to protected characteristics, and, take steps to deal with any significant disparities in take up because of a protected characteristic;

f) review regularly the selection criteria for training and development opportunities, to make sure they are not potentially discriminatory because of any protected characteristic; and

g) advertise all training and development opportunities as widely as possible throughout the employer's organisation, for example, through notice boards, and intranet sites and internal bulletins or circulars.

Appraisals

9.108 Appraisals form an important part of an employee's continuing training and development programme. When implementing the appraisal process employers should ensure that they do not discriminate against any employee because of a protected characteristic. For example, employees with long service and a high level of competency should still be given appraisals along with all other employees.

Example: In considering applications for promotion, account is taken of the previous three years' appraisal. D has worked in the same position for the last nine years. His manager does not carry out appraisals after five years of service, believing that employees should be adequately familiar with the job by then. This is discriminatory: appraisals look at considerations in addition to capability and in this case are used to assess suitability for promotion. It is likely that younger members of staff with less service will be better able to meet this selection criterion.

9.109 To ensure that unlawful discrimination does not take place, employers are recommended to:

a) measure performance by transparent, objective and justifiable criteria;

b) ensure that line managers and appraisers receive training and guidance on objective performance assessment and positive management styles; and

c) monitor performance assessment results to ensure that procedures are consistently operated and applied by managers. Any significant disparities in assessment marks that may be because of a protected characteristic should be investigated and steps taken to deal with possible causes.

Example: An employer should ensure that it does not treat a pregnant employee less favourably by marking her down on her appraisal where her performance has been adversely affected by pregnancy related sickness or difficulties in the office with morning sickness.

Benefits

General

9.110 Employers should ensure that their rules and requirements on any benefits do not unlawfully discriminate against any employee or group of employees with one or more protected characteristics.

9.111 Benefits might include canteens, meal vouchers, social clubs and other recreational activities, dedicated car parking spaces, discounts on products, bonuses, share options, hairdressing, clothes allowances, financial services, healthcare, medical assistance/insurance, transport to work, company car, education assistance, workplace nurseries, and rights to special leave. This is not an exhaustive list. Such benefits may be contractual or discretionary.

9.112 Employers must not deny employees access to or receipt of benefits because of any protected characteristic(s). Imposing an age restriction on access to benefits is only lawful if it is a proportionate means of achieving a legitimate aim. Additionally, employers must not impose conditions on accessing or receiving benefits which put, or would put, a group of employees with one or more particular protected characteristics at a disadvantage when compared with employees without that or those characteristic(s), unless that condition can be justified. See paragraphs XX to XX

Clauses 13(1); 19(1)–(2); 39(2)(b)

> **Example:** An employer offers free gym membership to all employees under 50 because they incorrectly assume that people over 50 would not be interested in going to the gym. This is direct discrimination because of age. It is unlikely that restricting gym membership on the basis of age could be objectively justified as a proportionate means of achieving a legitimate aim.

9.113 In addition, where a disabled employee is put at a substantial disadvantage in the way that a particular benefit is provided, an employer must take reasonable steps to adjust the way the benefit is provided in order to avoid that disadvantage.

> **Example:** An employer provides dedicated car parking spaces close to the workplace. A disabled employee finds it very difficult to get to and from the public car park further away. It is likely to be a reasonable adjustment for the employer to allocate one of the dedicated spaces to that employee.

9.114 Some benefits may continue after employment has ended. An employer's duties under the Act extend to its former employees in respect of such benefits.

> Example: Employer Z provides a workplace nursery. Parents who leave Z's employment are always offered the chance of keeping their nursery place until their child's fifth birthday – but this opportunity is not offered to a lesbian mother of a three-year old. This may be less favourable treatment because of sexual orientation.

9.115 The position set out above applies to all types of employment benefits. However, the Act does provide certain exceptions to the position above and these are explored in more detail below.

Exceptions

Service related benefits

9.116 The Act provides a specific exception for service related benefits in respect of the protected characteristic of age. In many cases, employers require a certain length of service before increasing or awarding a benefit, such as pay increments, holiday entitlement, access to company cars or financial advice. On the face of it, this practice could amount to indirect age discrimination because older employees are more likely to have completed the length of service than younger employees. However, any benefit earned by five years service or less does not have to be justified under the Act. **Sch 9, part 2, para 10(1)**

> **[Example –** For junior office staff, an employer operates a five point pay scale to reflect growing experience over the first five years of service. This would be lawful under the Act.

9.117 Length of service can be calculated by the employer in one of two ways: **Sch 9, part 2, para 10(3)**

- by the length of time that the employee has been working for the employer at or above a particular level; or
- by the length of time that employee has been working for the employer in total.

9.118 Length of service may include employment by a predecessor employer under the Transfer of Undertakings (Protection of Employment) Regulations 2006.

If an employer uses length of service of more than five years to award or increase a benefit, this will fall outside the above exception but may still be lawful if the employer reasonably believes that using length of service in this way fulfils a business need, for example by rewarding higher levels of experience, or by encouraging loyalty, or by increasing or maintaining the motivation of employees. This is a less onerous test for an employer to satisfy than the general test for objective justification for indirect discrimination (see chapter 3). However, an employer would still need evidence to support a reasonable belief that it 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 its employees and not be motivated simply by financial self-interest.

Example: Employer W offers one additional day holiday for every year worked up to a maximum of 4 years to reward loyalty and experience. Although this may mean younger staff having less holidays than older workers, W's approach is permitted by the Act.

W also provides free health insurance to all employees with over 5 years service and will have to justify this by showing that it actually fulfils a business need by rewarding experience, loyalty or increasing employee motivation.

9.119 This exemption does not apply to service related termination payments or any other benefits which are provided only by virtue of the employee ceasing to work.

Sch 9, part 2, para 10(7)

Enhanced redundancy benefits

9.120 The Act also provides a specific exception linked to statutory redundancy payments for employers who want to make redundancy payments that are more generous than the statutory scheme. The Act allows an employer to use one of the following methods, based on the formula in the statutory redundancy scheme, to enhance the amount of redundancy payment:

Sch 9, part 2, para 13(1)–(6)

- to remove the maximum amount on a week's pay so that an employee's actual weekly pay is used in the calculation;
- to raise the maximum amount on a week's pay so that a higher amount of pay is used on the calculation; and/or
- to multiply the appropriate amount for each year of employment set out in the statutory formula by a figure of more than one.

Having done this, the employer may again multiply the total by a figure of one or more.

Example: An employer operates a redundancy scheme which provides enhanced redundancy payments based on employees' actual weekly pay, instead of the (lower) maximum set out in the statutory redundancy scheme. This is lawful under the Act.

Example: Using the statutory redundancy scheme formula and the scheme's maximum weekly wage, another employer calculates every employee's redundancy entitlement, then applies a multiple of two to the total. This is also lawful under the Act.

9.121 The exception also allows an employer to make a redundancy payment to an employee who has taken voluntary redundancy, and an employee with less than two years continuous service. In such cases, where no statutory redundancy payment is required, an employer may make a payment equivalent to the statutory minimum payment, or if it so wishes an enhanced payment based on any of the above methods. **Sch 9, part 2, para 13(3) (b)–(c)**

9.122 A redundancy payment will fall outside this specific exception if an employer's calculation is not based on the statutory scheme, or the method of enhancement differs from those set out in paragraph [XX] above,. As the use of length of service could amount to indirect age discrimination, the employer must justify calculating the redundancy payment in this way, by showing that it is a proportionate means of achieving a legitimate aim. In this context, the aim might be to reward loyalty or to give larger financial payments to older employees because they may be more vulnerable in the job market. However, the employer must also show that means of achieving the aim is proportionate, by balancing the reasonable needs of the business against the discriminatory effects on the employees who do not stand to benefit. This would require an assessment of the degree of difference in the payment made to different groups of employees and whether that differential was reasonably necessary to achieve the stated aim.

Life assurance

9.123 Some employers provide life assurance cover for their employees. If an employee retires early due to ill health, the employer may continue to provide that life assurance cover for that employee. This exception allows an employer to stop providing cover when the employee reaches the age at which he would have retired had he not fallen ill. If there is no normal retirement age applicable to the employee's job, the employer can stop providing life assurance cover when the worker reaches 65.

Sch 9, Part 2, para 14

Child Care

9.124 The Act creates an exception for benefits which relate to the provision of child care and to which access is restricted to children of a particular age group. The exception applies not only to natural parents, but also to others with parental responsibility for a child.

Sch 9, part 2, para 15(1)–(2)

9.125 This exception extends to facilitating the provision of child care, including the payment for some or all of the cost of the child care, helping a parent to find a suitable person to provide child care, and enabling a parent to spend more time providing care for the child or otherwise assisting the parent with respect to the care that the parent provides for the child.

Sch 9, part 2, para 15(3)

Example: K lives with his wife and 7 year old step daughter L. L attends an after school club run by the local authority. K's employer provides child care vouchers towards the cost of the afterschool club. The first £55 of this is free from tax and national insurance contributions.

9.126 This exception covers benefits which relate to the provision of care for children aged under 17. **Sch 9, part 2, para 15(4)**

Benefits during maternity leave

9.127 There is a specific exception relating to non-contractual payments to women on maternity leave. This allows an employer to deny a women who is on maternity leave a non-contractual benefit relating to pay. **Sch 9, part 3, para 17(1) & (4)**

9.128 For the purposes of this exception, "pay" means any benefit that consists of the payment of money by way of wages or salary. **Sch 9, part 3, para 17(5)**

9.129 However, this exception does not apply to any maternity related pay (whether statutory or non-contractual), to which a women is entitled as a result of being pregnant or in respect of times when she is on maternity leave. Nor does it apply to any maternity related pay that is increase related, where the woman would have received the increase in pay had she not been on maternity leave. **Sch 9, part 3, para 17(2)(a), 17(6)**

Example: An employee is on maternity leave and is receiving contractual maternity pay which is worked out as a percentage of her salary. Her employer reviews staff pay annually and the review date falls while she is on maternity leave. All staff apart from the employee on maternity leave are awarded a 2% pay rise effective from the month following the review. This is unlawful discrimination - her contractual maternity pay should be recalculated so that it is based on her salary plus the 2% increase given to all her colleagues. Any other benefits linked to her salary rate should also be adjusted to take into account the pay rise she would have received had she not been on maternity leave when the

review took place.

9.130 This exception also does not apply to pay (including increases in pay) in respect of times when a woman is not on maternity leave or pay by way of a non-contractual bonus in respect of times when the women is on compulsory maternity leave (being the two week period after child birth). **Sch 9, part 3, para 17(2)(b)&(c)**

Benefits dependent on marital status

9.131 Benefits which are restricted on the basis of the marital status of an employee are lawful under the Act, provided employees in a civil partnership are afforded access to the same benefit. Employees who are not married or in a civil partnership can be excluded from such benefits. So, for example, an employer could allow an employee who is marrying additional time off before or after their wedding, provided this benefit is also made available to an employee about to register a civil partnership. **Sch 9, Part 3, Para 18(2)**

9.132 There is also a limited exception for married people only, where the employment benefit accrued before 5 December 2005 (the day on which section 1 of the Civil Partnership Act 2004 came into force) or where payment is in respect of periods of service before that date. **Sch 9, Part 3, Para 18(1)**

Cost considerations

9.133 If none of the above exceptions apply, and denying access to the benefit or offering the benefit on less favourable terms is, either:

- directly discriminatory because of the protected characteristic of age; or
- indirectly discriminatory because of one or more protected characteristics;

then an employer may still be able to justify the discrimination by showing that it is a proportionate means to achieve a legitimate aim.

9.134 Financial cost may be taken into account if there are other good reasons for denying access to a benefit. But cost alone is not sufficient to justify the discrimination.

> **Example:** An employer provides a company car to most of its sales staff, but not to those under 25 because of higher insurance costs. The employer will not be able to justify this policy by relying upon cost considerations alone.

Contributions to personal pension schemes

[The Act contains powers enabling exceptions to be introduced in respect of contributions to personal pension schemes or stakeholder pension schemes where the protected characteristic is age. It is possible that these exceptions will be based on those that previously applied under the Employment Equality (Age) Regulations 2006, which were repealed by the Act.]

Occupational pension schemes

9.135 Employers may provide benefits to their current and former employees and their dependants through occupational pension schemes. The schemes are legally separate from the employers and are administered by trustees. The benefits will be in the form of pensions and lump sums. Special provisions apply to such schemes because of their separate legal status and the nature of the benefits they provide.

9.136 An occupational pension scheme is treated as including a non-discrimination rule by which a responsible person must not discriminate against another person in carrying out any functions in relation to the scheme or harass or victimise another person in relation to the scheme. **Clause 58(1)–(2)**

9.137 A responsible person includes a trustee or manager of a scheme, the employer of members or potential members and a person who can make appointments to offices. **Clause 58(4)**

9.138 The provisions of an occupational pension scheme have effect subject to the non-discrimination rule. So if the rules of a scheme provide for a benefit which is less favourable for one member than another because of a protected characteristic, they must be read as if the less favourable provision did not apply. **Clause 58(3)**

9.139 There are a number of exceptions and limitations to the non-discrimination rule. The rule does not apply: **Clause 61(5), (8) & (10) & 63**

- to persons entitled to benefits awarded under a divorce settlement or on the ending of a civil partnership (although it does apply to the provision of information and the operation of the scheme's dispute resolution procedure in relation to such persons);
- practices, actions or decisions of trustees or managers or employers relating to age

which are of a description specified by order of a Minister of the Crown; and

- in so far as an equality rule applies (or would apply if it were not for the exceptions described in part 2 of Schedule 7)

9.140 [It is possible that the exceptions relating to age will be based on those that previously applied under the Employment Equality (Age) Regulations 2006, which were repealed by the Act.]

9.141 In addition to the requirement to comply with the non-discrimination rule, a responsible person in respect of an occupational pension scheme is under a duty to make reasonable adjustments in relation to any provision, criterion or practice in relation to the scheme which puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled. **Clause 61(11)**

Example: The rules of an employer's final salary scheme provide that the maximum pension receivable is based on the member's salary in the last year of work. An employee becomes disabled and has to reduce her working hours two years before she reaches the age at which she becomes entitled to the pension. She has worked full-time for twenty years prior to this. The scheme's rules put her at a disadvantage because her pension will only be calculated on her part-time salary as a result of her disability. The trustees decide to convert her part-time salary to its full-time equivalent and make a corresponding reduction in the period of her part-time employment which counts as pensionable so that her full-time earnings will be taken into account. This is likely to be a reasonable adjustment to make (and is, indeed, how many schemes calculate pension for periods of part-time employment to avoid unlawful discrimination against part-time employees).

9.142 The Act provides a mechanism for the trustees or managers of occupational pension schemes to make alterations to their schemes to ensure they reflect the non-discrimination rule. Most schemes will already contain a power of alteration. The mechanism in the Act applies if the power is not vested in the trustees or, if the power is vested in the trustees, the procedure for exercising it is liable to be unduly complex or protracted or involves the obtaining of consents which cannot be obtained or which can be obtained only with undue delay or difficulty.

Clauses 62(1)–(2)

9.143 Under this mechanism, the trustees or managers can make the necessary alterations by resolution and with effect from a period before the date of the resolution.

Clauses 62(3)–(4)

Promotion and transfer

9.144 Most of the issues and considerations that arise on recruitment arise again in respect of promoting or transferring existing employees to new roles. It is unlawful for employers to discriminate against, or harass employees in the way they make opportunities for promotion or transfer available or by refusing or deliberately failing to make them available.

9.145 It is recommended that all promotion and transfer opportunities, including development opportunities that could lead to permanent promotion, should be advertised widely throughout the organisation, and filled in line with the organisation's equal opportunities and recruitment policies and procedures. This would mean using the organisation's standard job application form (if it has one) to fill all promotion and development opportunities, and making sure that selection is based strictly on demonstrable merit.

9.146 Failure to inform employees of opportunities for promotion (or transfer) may be unlawful discrimination.

> **Example:** An employer who promotes a male worker to a post without advertising the vacancy internally may be acting unlawfully if there are female workers who are qualified for the post and would have applied if they had known about it.

9.147 Employers must also ensure that women on maternity leave are informed of any jobs that become available and must enable them to apply. Failure to do so is likely to be discrimination.

9.148 Employers should avoid by-passing their recruitment procedures, unless a temporary promotion is absolutely necessary. In this case, the promotion should last no longer than the time needed to fill the post permanently, and openly, through the organisation's recruitment procedures.

9.149 As with other aspects of employment, employers will be better placed to ensure that promotion and transfer arrangements do not discriminate against disabled people if they have established and implemented policies and practices to counter discrimination generally. These will help employers to check, for example, that qualifications required for promotion or transfer are justified for the job to be done, and to monitor other arrangements – such as systems for determining criteria for a particular job – so that they do not exclude disabled people who may have been unable to meet those criteria because of their disability but who would be capable of performing well in the job.

9.150 Opportunities for promotion and transfer should be made available to all employees regardless of age. That said, it is not unlawful to discriminate because of age if there is an objective justification for treating people differently.

> **Example:** It might be necessary to fix a maximum age for the promotion of employees. This maximum age might be justifiable as a proportionate means of achieving a legitimate aim if it reasonably reflects the training requirements of the post or the need for a reasonable period of employment before retirements.

9.151 Employers will find it helpful to build the following guidelines into their policies and procedures for promotion and career development:

- Where posts are advertised internally and externally, the same selection procedures and criteria should apply to both internal and external candidates. Discussions about candidates, particularly internal candidates, should not be based on rumours or unsubstantiated opinions.
- As far as possible, selection decisions based on performance assessments should be endorsed by the organisation's human resources department (if it has one).
- No stereotypical assumptions should be made about the suitability of employees for promotion or transfer.

Example: An employer makes an assumption that a woman might be unsuitable for promotion because she might want to start a family; or that a person who has depression will necessarily be unable to cope with the stress of the job. This is likely to amount to unlawful direct discrimination if these employees are excluded from promotion based on these stereotypical assumptions

- Information about all promotion and other development opportunities that could lead to permanent promotion, such as deputising and secondments, should be communicated to all staff.
- Restricting applications for promotion and other development opportunities to staff at a particular grade or level could indirectly discriminate against some groups.
- Monitoring records should be kept of who applied for different types of opportunity and who was appointed.

9.152 As part of their equal opportunities review of the recruitment process, employers should use the monitoring data on promotions to see if there are significant disparities between different groups of people sharing protected characteristics in the take-up of promotion and other development opportunities, success rates and length of time spent at a particular grade. If disparities are found, employers should investigate the possible causes in each case and take steps to remove any barriers.

9.153 [Certain public authorities are obliged to monitor, by reference to the racial groups to which they belong, the numbers of applicants for promotion.]

Disciplinary and Grievance Matters

9.154 All employers (irrespective of their size) should have minimum procedures in place for dealing with grievances, disciplinary hearings and appeals.

9.155 An employer may in addition wish to introduce a separate policy designed specifically to deal with harassment. Such a policy could aim to highlight and eradicate harassment whilst at the same time establish a grievance type procedure with safeguards to deal with the sensitivities that harassment often brings.

> **Example:** An employer's procedures might allow a grievance to be raised with a designated experienced manager rather than with a line manager (who may be the perpetrator of the harassment).

9.156 As with all policies and processes adopted by an employer, reasonable adjustments may be required where those policies and processes place a disabled employee at a substantial disadvantage.

9.157 Employers must not discriminate in the way they respond to grievances. Where a grievance involves allegations of discrimination or harassment it should be taken seriously and investigated promptly and not dismissed as 'over-sensitivity' on the part of an employee.

9.158 It is in the interests of employers to attempt, wherever possible, to resolve grievances as they arise, and before they become major problems. Grievance procedures can provide an open and fair way for complainants to make their concerns known, and for their grievances to be resolved quickly, without having to bring legal proceedings.

9.159 Employers must not discriminate in the way they invoke a disciplinary process. A disciplinary process is a formal measure and should be taken fairly and consistently, regardless of any protected characteristic. Where a disciplinary process involves allegations of discrimination or harassment the matter should be thoroughly investigated and the alleged perpetrator should be given a fair hearing.

9.160 The statutory minimum dismissal and disciplinary procedures and statutory minimum grievance procedures were repealed in April 2009. The most important practical consequence of this is that the time limit for raising a complaint of discrimination in the Employment Tribunal is no longer extended by the lodging of an internal appeal with the employer. Complaints of discrimination must be lodged with the Employment Tribunal within 3 months of the act complained of with any discretion to extend time being at the discretion of the Tribunal because of justice and equity. See Chapter 12 on enforcement.

9.161 If an investigation into a grievance or disciplinary matter finds evidence that the grievance was brought in bad faith, for example, to get another employee into trouble, the employer should take steps to make sure this does not happen again, either by recommending training or taking disciplinary action against the employee in question, as appropriate. However, employers must be careful not to punish someone for having made a complaint that proves to have been unfounded, but that was made in good faith, as that could amount to unlawful victimisation.

9.162 It is recommended that employers monitor the number of employees who have brought grievances or been subjected to disciplinary action [certain public authorities with at least 150 full-time staff have a legal duty to do this in respect of race], and the outcomes of each case. It will also be useful to be able to match the data with information about the employees' grades, their managers and the areas of the organisation where they work.

9.163 As part of their equal opportunities review, employers should use the monitoring data on grievances and disciplinary action to see if there are significant disparities between groups of people defined by protected characteristics, investigate the possible causes in each case, and take steps to deal with them.

Chapter 10
Termination/End of employment

Introduction

The employment relationship can come to an end in a variety of ways and for a variety of reasons. Generally, if the employee resigns there is unlikely to be an issue. However, if that resignation is prompted by discrimination the resignation is likely to be an acceptance by the employee of a fundamental breach of the employment contract by the employer, which is commonly known as 'constructive dismissal'. In such circumstances there are likely to be issues not only of discrimination but also of unfair dismissal if either the employee has at least the one year of continuous employment required to claim unfair dismissal or if one of the exceptions to that requirement applies.

Where the employer terminates the employment, different equality related issues will arise depending on the reason for that decision. For example, where the reason is retirement the relevant protected characteristic is likely to be age. Where the reason is redundancy the decision making process which leads to one employee being selected for redundancy over another could raise issues under all the protected characteristics depending on the nature and transparency of that process.

As with all stages of the employment relationship there may be a requirement to make reasonable adjustments for disabled employees. This might involve adjusting a redundancy scoring matrix to take account of a disability that affects output or time off or adjustments to the employer's normal disciplinary process to allow the employee to be accompanied by someone who is neither a colleague nor a trade union official.

What the Act says

10.1 The Act makes it unlawful for an employer to discriminate against or victimise an employee by dismissing him or her. Dismissal includes not only direct termination of employment by the employer (with or without notice) but also: **Clause 39(2)(c) & 39(4)(c)**

- termination of employment through the expiry of a fixed term contract (including expiry defined by reference to an event or circumstance) unless the contract is immediately renewed on the same terms; and **39(7) & (8)**
- constructive dismissal, which occurs where, because of the employer's conduct, the employee is entitled to treat the employment as having come to an immediate end (whether or not the employee gives notice).

No qualifying period of service is required for a victim of dismissal that amounts to discrimination or victimisation to challenge their treatment by bringing a claim in the Employment Tribunal.

Example: An employer believes that a black employee has arrived late for a probationary review meeting 3 months into his employment and subjects him to a torrent of racial abuse about his attitude to work. Regardless of whether or not the employee was late, the racial abuse is a fundamental breach of the implied term of mutual trust and confidence which is contained in every employment contract. The employee is entitled, if he wishes, to treat himself as having been constructively dismissed. He is not able to bring a claim for unfair dismissal as he has less than the required one year of continuous employment with the employer. He can however, bring a discrimination claim in respect of the constructive dismissal.

Fairness and discrimination

10.2 Whether or not a dismissal amounts to discrimination or victimisation is a different question from whether or not the dismissal was unreasonable or legally unfair. Not all unreasonable treatment is discriminatory. That said, unreasonable treatment may justify an Employment Tribunal drawing an inference of discrimination if the treatment has no other explanation. [see Chapter XX on burden of proof]

10.3 Unfair dismissal claims can generally only be brought by employees who have more than one year's continuous employment – but many categories of 'automatically unfair' dismissal have no minimum service requirement. For example, where the principal reason for dismissal is related to time off work for family reasons such as maternity or parental leave, there is no minimum qualifying service.

10.4 Provided that the employee had one year or more continuous employment at the date of termination, a dismissal that amounts to discrimination or victimisation will almost inevitably be an unfair dismissal as well. In such cases, a person can make a claim for unfair dismissal at the same time as a discrimination claim.

Example: An employee provides a witness statement in support of a colleague who has raised a grievance about homophobic bullying at work. The employer considers that the employee and his colleague are being overly sensitive and rejects the grievance and a subsequent appeal. A few months later the employer needs to make redundancies. It draws up a list of criteria for selecting which employees to make redundant. The list includes "performance" and "contribution to our values." The employee and his colleague score poorly against these criteria because the employer views

them as “difficult” and not “team players” as a result of the grievance. They are therefore made redundant. It is likely that their redundancies would amount to unlawful victimisation and also be unfair dismissals.

General approach

10.5 Employers should ensure that all managers are trained in the organisation’s equality policy, and made aware of how it might apply to situations where dismissal is a possibility. Those responsible for deciding whether or not an employee should be dismissed should understand the legal requirement not to discriminate.

10.6 Where a disabled person is dismissed or is selected for redundancy or for compulsory early retirement (including compulsory ill-health retirement), the employer must ensure that the disabled person is not being discriminated against. It may, in particular, be necessary for the employer to make reasonable adjustments.

Example: A disabled employee requires a limited amount of time off work from time to time to attend medical appointments related to the disability. The employer has an attendance management policy which results in potential warnings and ultimately dismissal if the employee’s absence exceeds 8 days in any 12 month period. A combination of the employee’s time off for disability related medical appointments and general time off for sickness results in the employee consistently exceeding the 8 day limit by a few days. The employee receives a series of warnings and is eventually dismissed. It is likely that it would have been a reasonable adjustment to have increased the limits in the attendance management policy to allow for a reasonable amount of additional disability related time off.

10.7 It is recommended that employers make sure the criteria they use for dismissal are not indirectly discriminatory, and that their procedures are fair and objective, and are followed consistently.

> **Example:** A length of service selection criterion when making redundancies can indirectly discriminate, for example (a) because of age – younger employees in the pool affected by the criterion may have shorter service (b) because of sex – female employees in the pool may have shorter service due to time out for raising children and (c) because of race – where an employer has only recently adopted policies that have had the effect of increasing the proportion of employees in the pool from ethnic minority backgrounds. In each case the employer may be called upon to show that any disadvantage created by the criterion is a proportionate means of achieving a legitimate aim. Taken alongside other criteria, length of service is likely to be objectively justifiable.

10.8 Dismissal for performance or conduct or any lesser sanction – such as demotion or compulsory transfer – is capable of being less favourable treatment because of a protected characteristic.

10.9 Care should be taken that an employee with a protected characteristic is not dismissed for performance or behaviour which would be overlooked or condoned in others who do not share the protected characteristic.

10.10 Employers should, in particular:

- follow their disciplinary procedure;
- make sure the decision to dismiss is not made by one individual, and as far as possible is made in discussion with the human resources department (if the employer has one);
- keep written records of all decisions to dismiss;

- monitor all dismissals [XX cross reference to monitoring section]; and
- conduct exit interviews, information from which could contribute to the monitoring process.

10.11 Certain public bodies with 150 or more full time staff must monitor, by reference to race, various matters including numbers of staff ceasing employment. This would include dismissals and resignations.

Capability

10.12 Where the dismissal of a disabled person is being considered for a reason relating to that person's ability to do the work, the employer should consider whether any reasonable adjustments need to be made to the performance management or dismissal process. If the performance issue in question is related to the employee's disability, the employer should consider whether a reasonable adjustment could be made to help improve the performance or to transfer the employee to a suitable alternative role.

Conduct

10.13 Where the dismissal of a disabled person is being considered for a reason relating to that person's conduct, the employer should consider whether any reasonable adjustments need to be made to the disciplinary or dismissal process. In addition, if the conduct in question is related to the employee's disability, that may be relevant in determining the sanction which it is appropriate to impose.

Redundancy

10.14 Where an employer is proposing dismissals because of redundancy it should, wherever possible, consult affected employees. If an employer is planning 20 or more redundancies, consultation is required with recognised trade unions or employee representatives about ways of avoiding the dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissals. It would also be good practice to consult about the criteria for selecting which employees should be made redundant.

10.15 It is recommended that employers adopt a selection matrix containing a number of separate selection criteria rather than just one selection criterion, to reduce the risk of any possible discriminatory impact.

10.16 Selection criteria should be objective and should not discriminate directly or indirectly. Many of the selection criteria used in redundancy situations carry a risk of discrimination. For example:

- One of the most established selection criteria is length of service, often referred to as “last in, first out”. This criterion may amount to indirect age discrimination against younger employees, who are likely to have fewer years of service than older colleagues. Indirect discrimination is only lawful if it is a proportionate means of achieving a legitimate aim [see para XX of Code]. Used as one criterion among many, ‘last in, first out’ is likely to be a proportionate means of achieving the legitimate aim of rewarding loyalty and creating a stable workforce.

Example: An employer wishing to make redundancies adopts a redundancy selection matrix. This includes the following criteria: (a) expertise / knowledge; (b) versatility / application of knowledge; (c) achievement of objectives; (d) self motivation; (e) wider personal contributions to team. Each employee in the pool of employees who are potentially redundant is scored against each criterion by two managers using a scoring system which allocates 1 to 4 points on a range of poor to excellent. There is also provision in the matrix for deducting points for episodes of unauthorised absence in the previous 2 years. Points are also added for length of service. Although length of service does have the potential to discriminate, in this redundancy selection process it is not obviously dominant or necessarily determinative of who will be selected for redundancy. In this context, length of service is likely to be a proportionate means of achieving the legitimate aim of rewarding loyalty and creating a stable workforce.

- When setting criteria for redundancy selection, employers should consider whether any proposed criterion would adversely impact upon a disabled employee. If so, it may be necessary for the employer to make reasonable adjustments.

Example: A call centre re-tenders for a large contract and has to reduce its price to secure the work in the face of low cost competition from overseas. In order to maintain its profit margin it needs to reduce the size of its workforce. The remaining employees still have to deal with the same volume of calls. The employer therefore decides that attendance records are a particularly important selection criterion for redundancy. This has the potential to disadvantage those employees with disabilities whorequire additional time off for medical treatment. In spite of the pressure on profit margins it is likely to be a reasonable adjustment to discount some disability-related sickness absence when assessing attendance as part of the redundancy selection exercise.

- Some employers use 'flexibility' as a selection criterion for redundancy (for example, willingness to re-locate or to work unpopular hours, or ability to carry out a wide variety of tasks). An employer should carefully consider how to apply this criterion to a disabled employee as it might be discriminatory. It might also be indirect discrimination because of sex where more women than men have childcare responsibilities.

10.17 Where alternative vacancies exist within the employer's organisation these should be offered to potentially redundant employees using criteria which do not unlawfully discriminate. However, where there is a potentially redundant female employee on ordinary or additional maternity leave, she is entitled to be offered any suitable available vacancy with the

employer, his successor or any associated employer. The offer must be of a new contract taking effect immediately on the ending of her previous contract and must be such that:

- the work is suitable and appropriate for her to do; and
- the capacity, place of employment and other terms and conditions are not substantially less favourable than under the previous contract.

Example: The North West regional HR team of a major high street retail company is based in Manchester. The company has another 9 regional HR teams and a head office HR team in London. The company decides to combine its head office and regional teams and create a "centre of excellence" in Manchester. A new organisation structure is drawn up which involves some head count reductions. The company intends that all employees should have the opportunity to apply for posts in the new structure. Those unsuccessful at interview will be made redundant. At the time this is implemented, one of the existing members of the North West regional HR team is on ordinary maternity leave. As such, she has a priority right to be offered a suitable available vacancy in the new organisation without having to go through the competitive interview process.

Retirement

What the Act says

10.18 Forcing someone to retire at a particular age is, on the face of it, age discriminatory. However, the Act provides an exception for retirement; an employer is allowed to retire an employee at or over the age of 65, provided the dismissal satisfies all the legal tests for retirement, and provided the correct procedures are followed.

Sch 9, part 2, para 8(1), 8(3)

10.19 This exception applies only to 'relevant workers'; that is: **Sch 9, part 2, para 8(2)**

- employees;
- those in Crown employment; and
- certain parliamentary staff.

10.20 The retirement exception does not apply to any other type of worker, for example a partner, office holder, contract worker or police constable. Forced retirement of these workers is unlawful discrimination unless it can be objectively justified. The circumstances where retirement may be objectively justified are explained further in paragraphs [XX] to [XX].

Default retirement age and normal retirement age

10.21 The Act provides a default retirement age of 65, which generally permits forced retirement at or over this age. It means that employers can lawfully operate a 'normal retirement age' of 65 or above – that is, one which is the same as, or higher than, the default retirement age. **Sch 9 Part 2 para 8(1)**

10.22 The 'normal retirement age' is the age at which employees in the same kind of position within an organisation are usually required to retire. It is not necessarily the same as the contractual retirement age, if in practice employees retire at a different age.

Example: Employer A has a contractual retirement age of 67, but regularly grants requests from employees to work beyond 67. However there is no consistency as to the age when employees then retire. In these circumstances the employer's contractual retirement age of 67 will be treated as the normal retirement age, as this is higher than the default age of 65.

Employer B also has a contractual retirement age of 67,but regularly grants requests to work until 70. In these circumstances, it is likely that 70 has become the normal retirement age.

10.23 Some employers do not operate any 'normal retirement age' for their employees. If this is the case, they can rely on the default retirement age which permits forced retirement at or over the age of 65.

Example: Employer C's employment contracts do not mention retirement and there is no fixed age at which employees retire. Employer C can rely on the default retirement age of 65 if it wishes to enforce a retirement.

10.24 Employers do not have to retire employees when they reach normal retirement age (or, if none applies, the default retirement age). Indeed, there may be many good business reasons why an employer might benefit from retaining older employees in employment.

Lawful retirement

10.25 For a forced retirement to be lawful, the employer must comply with the rules on the age for retirement and follow the procedures that are set out in legislation. A dismissal that does not comply with these requirements may be unlawful age discrimination and/or unfair dismissal.

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10.26 The dismissal will be lawful provided that:

- the employer has given the employee six to twelve months written notice of the intended date of retirement, and advised them of their right to request to continue working beyond the intended retirement date
- the employee will be aged 65 or over at the intended date of retirement
- if there is a normal retirement age above 65 for the position in question, the intended date of retirement is at or over this age
- if the employer proceeds with the retirement, they terminate the employee's contract on the intended date of retirement that was previously notified.

Example: An employer gives employee D seven months' notice in writing that it intends to retire him on his 66th birthday. However, as D's 66th birthday falls on a Saturday, the employer terminates D's contract of employment on the preceding Friday. Because D's contract has been terminated on a different date to the one notified, retirement cannot be the reason for D's dismissal; the dismissal is likely to be both unfair and an act of unlawful age discrimination.

10.27 An employer who fails to comply with the notification duty within the correct timeframe is liable to pay compensation for this failure. However, they might still be able to rely on the exception for retirement to escape liability for age discrimination. They would be expected to give the employee as much written notice as possible (and a minimum of 14 days) of the intended retirement date and of the right to request to continue to work. The employer would then have to comply with all other aspects of the statutory retirement procedure and show that the reason for dismissal is genuinely retirement.

Example: An employer does not hold accurate records for its employees and only becomes aware that an employee, F, is approaching her 65th birthday a month beforehand. The employer immediately issues F with written notice of intended retirement on her 65th birthday and advises her of her right to request to continue working. F employee does not submit a request to work beyond 65. Providing her dismissal is genuinely for retirement reasons, it may still be lawful,

Statutory retirement procedure

10.28 Paragraphs XX to XX above set out a summary of the statutory retirement procedure. More details can be found in Schedule 6 of the Employment Equality (Age) Regulations 2006. This covers:

- the duty of the employer to inform the employee of impending retirement and of the 'right to request' that they continue working;
- the employee's right to submit a written request to continue working indefinitely or for a stated period quoting Schedule 6, paragraph 5 of the Employment Equality (Age) Regulations 2006;
- the employer's duty to consider any request by holding a meeting and giving written notice of their decision;
- the employee's right of appeal against a refusal to allow the request;
- the employer's duty to consider any appeal by holding an appeal meeting and giving written notice of the decision on the appeal; and
- complaints to an Employment Tribunal if the procedures are not followed.

Which types of retirement must be objectively justified?

10.29 The following types of retirement do not fall within the statutory exception and would therefore be unlawful age discrimination unless they can be objectively justified:

- the retirement, at any age, of someone who is not a 'relevant worker' [see paragraph [XX]
- the retirement of a 'relevant worker' at a normal retirement age below 65.

Example: Partners in a law firm are required to retire from the partnership at 70. Partners are not defined in the Act as 'relevant workers' for these purposes and so the retirement age of 70 would have to be objectively justified for it to be lawful.

Example: An airline company has a normal retirement age for its cabin attendants of age 55. The cabin attendants are employees of the airline company and so are 'relevant workers'. The airline company would have to objectively justify the retirement age of 55 for it to be lawful.

10.30 Where there is no normal retirement age and an employee is forced to 'retire' before the age of 65, the reason for their dismissal cannot be retirement. It will be difficult for the employer to objectively justify the employee's dismissal; the dismissal is very likely to be unfair as well as being an act of unlawful age discrimination.

There are other circumstances where, due to a failure on the employer's part, dismissal of an employee over 65 will not qualify as retirement and is likely to be unfair dismissal:

- dismissal of an employee (even someone over 65) below the normal retirement age;
- termination of the employee's contract before the intended date of retirement.
- In certain cases a dismissal may qualify as a retirement but nonetheless be automatically unfair:
    - where the employer has given the employee less than 14 days' notice, or no notice at all, of the intended date of retirement,
    - where the 'duty to consider' procedure has not been followed

Example: An employer normally allows employees to continue working until age 70, but forces one employee to retire at age 65. That employee's dismissal will not qualify as retirement as the employee has been dismissed below the normal retirement age and the employee's dismissal is also likely to be unfair

Example: An employer gives an employee only a week's verbal notice that it intends to retire her on her 70th birthday, and does not tell her of her right to request that she continues working. Because this is a serious breach of the legal requirements, retirement is unlikely to qualify as the reason for dismissal. The dismissal is likely to be unfair, as well as an act of unlawful age discrimination.

Example: An employer who does not operate a normal retirement age forces an employee to retire at 67 on a month's notice. The employee puts in a request to continue working but his request is ignored. In this situation the reason for the employee's dismissal might be retirement, but the Tribunal would look at all of circumstances, including why the employer did not give more notice and also the fact that the employer has failed to hold a meeting to consider the employee's request to work beyond age 67.

Objective justification

10.31 As noted in paragraph XX above, the Act requires employers to objectively justify a normal retirement age below 65, and the forced retirement at any age of those who are not 'relevant workers'.

10.32 To objectively justify retirement in these circumstances, the employer must show that it is a proportionate means of achieving a legitimate aim. This concept is explained further in paragraph [XX] (Prohibited Conduct).

10.33 In this context, a legitimate aim might be to ensure that there are sufficient opportunities for promotion, thereby ensuring staff retention at more junior levels. It might also be to facilitate workforce planning, by providing a realistic long term expectation as to when vacancies will arise.

10.34 The second question is whether retiring someone at a particular age is a proportionate means of achieving that aim. In determining this question, a balance must be struck between the discriminatory effect of the person's retirement and the need to retire them, taking into account all the relevant facts. Retiring someone at a particular age is a form of direct discrimination and the discriminatory effect of such a measure will necessarily be greater when there is direct as opposed to indirect discrimination.

This will be a material factor which should be borne in mind when considering what is proportionate.

Example: Partners in a small law firm are required to retire from the partnership at 65. The firm prides itself on its collegiate culture and has structured its partnership agreement to promote collegiality. The aim of having a retirement age of 65 is to avoid the need to expel partners for performance management reasons. The firm believes that having one partner criticise the performance of another would destroy the collegiate environment. Whilst this may be a legitimate aim, it will not be enough to justify compulsory retirement at 65 unless there is evidence to support the assumption that the performance of partners reduces when they reach the age of 65.

Example: Another law firm has a retirement age of 65 for its partners. It has adopted this retirement age to facilitate workforce planning, and to provide sufficient opportunities for promotion to partnership for senior lawyers after a reasonable period, to discourage them from leaving the firm because their access to partnership is blocked. These reasons may provide objective justification for a compulsory retirement age of 65.

Unlawful acts after the employment relationship has ended

What the Act says

10.35 The Act says that an employer must not unlawfully discriminate against or harass a former employee if the discrimination or harassment arises out of the employment which has come to an end and is closely connected to it. This also applies when other relationships similar to employment come to an end, such as contract work, police officers, partners and office holders.

Clause s 107(1) & (2)

The expression “closely connected” is not defined but will be a matter of degree to be judged on a case by case basis.

> **Example:** A is an ex-employee appealing against dismissal. Her employer makes derogatory remarks about her Buddhist beliefs at the appeal hearing. This is likely to be unlawful discrimination because of religion and belief. Even though the dismissal appeal process occurred after the employment has ended, it is closely connected to A’s employment relationship with her ex-employer

10.36 It is also unlawful for an employer to victimise a former employee after the employment relationship has ended. **Clause 27**

> **Example:** Refusing to provide a reference for an employee because the employee brought an Employment Tribunal claim against the employer alleging unlawful discrimination, is very likely to be victimisation. [See XX in Chapter 4]

10.37 The Act also requires reasonable adjustments to be made for a disabled former employee after the employment relationship has ended, if the former employee continues to be at a substantial disadvantage in comparison to people who are not disabled. **Clause 107(4)**

> **Example:** A former employee with life-time membership of the works social club is no longer able to access the club because of a mobility impairment. Once the employer becomes aware of the problem, it will need to consider making reasonable adjustments.

Chapter 11
Discrimination in occupation

Introduction

As explained in Chapter XX, the Act covers a variety of work related relationships beyond employment. This Chapter explains the nature of these relationships and what protections and obligations the Act affords and imposes on the parties.

What does the Act say about contract workers and principals?

11.1 As with employees, the Act provides protection for contract workers. **Clause 41**

11.2 The Act prohibits unlawful discrimination, harassment or victimisation by a principal.

Who is a principal?

11.3 A principal is a person or organisation who makes work available for a contract worker. **Clauses 41(5)** **41(7)**

Who is a contract worker?

11.4 A contract worker is a person who is employed by another person, often an employment agency, who supplies them to do work for a principal under a contract to which the principal is a party. Therefore, for a person to qualify as a contract worker, they must not be an employee of the principal and they must be employed by another person. **Clauses 41(5)** **41(7)**

11.5 The contract does not have to be in writing. The worker must work wholly or partly for the principal, even if they also work for their employer. They do not need to be under the managerial power or control of the principal. Contract workers can include agency workers and employees who are seconded to work for another company or organisation. Self employed workers who are not supplied through employment businesses are not contract workers but may be covered by the Act (see [Employment Services] section and Chapter 6).

> **Example**: A nurse works for a private health care company which sometimes uses an employment business to deploy staff to work in the NHS. The employment business arranges for the nurse to work at an NHS Trust. In this case the 'principal' is the NHS Trust.

11.6 Usually, there is a contract directly between the principal and the contract worker's employer, but this is not always the case. Provided there is an unbroken chain of contracts between the individual and the end user of their services, that end user is a principal and the individual is therefore a contract worker.

Clause 41(5)(b)

> **Example:** A worker employed by a perfume concession based in a department store, where the store profited from any sales he made and imposed rules on the way he should behave, could be a contract worker. The concession would be his employer and the store would be the principal. However, this would not apply if the store simply offered floor space to the concession, the concession paid a fixed fee to the store for the right to sell its own goods in its own way and for its own profit, and concession staff in no way worked for the store.

How are contract workers protected?

11.7 Contract workers are protected to a similar extent to employees against discrimination, harassment or victimisation by a principal. **Clause 41**

Protected characteristics are defined and explained in Chapter [XX]. The same rules relating to discrimination, harassment and victimisation apply to a principal as to an employer (see [XX]).

11.8 A principal must not unlawfully discriminate against or victimise a contract worker: **Clauses 41(1) & 41(3)**

- in the terms on which the principal allows the contract worker to work;
- by not allowing the contract worker to do or continue to do the work;
- in the way the principal affords the contract worker access to benefits in relation to contract work, or by failing to afford the contract worker access to such benefits; or
- by subjecting the contract worker to any other detriment.

Example: A meat packing company regularly uses agency workers supplied by an employment business to supplement its own workforce during times of peak demand. The employment agency supplies the company with three agency workers, one of whom is gay. The owner of the company is homophobic and, on discovering one of the agency workers is gay, requires the agency to replace him with someone who is not gay. By not allowing the gay man to continue to work at the meat packing plant, the company will be liable for discrimination as a 'principal'.

11.9 It is also unlawful for a principal to harass a contract worker. **Clause 41(2)**

> **Example:** A housing management company provides outsourced housing management services to a local Council. Employee A, who is of African Caribbean origin, works for the housing management company, and is responsible for checking the quality of the work done by Council employees in the Council's property services division. A is subjected to racially derogatory comments by a Council employee. As he is doing work for the benefit of the Council, he will be treated as a contract worker and the Council will be the principal. The Council would be liable for these racist comments as the employer of the Council employee and principal to A.

How does the duty to make reasonable adjustments apply to disabled contract workers?

11.10 The duty to make reasonable adjustments applies to a principal in the same way as it applies to an employer. Therefore, in the case of a disabled contract worker, their employer and the principal to whom they are supplied may each be under a separate duty to make reasonable adjustments. **Clause 41(4)**

> **Example:** A travel agency hires a clerical worker from an employment business to fulfil a three month contract to file travel invoices during the busy summer holiday period. The contract worker is a wheelchair user, and is quite capable of doing the job if a few minor, temporary changes are made to the arrangement of furniture in the office. It is likely to be reasonable for the travel agency to make these adjustments.

Employer's Duty

11.11 A disabled contract worker's employer will have to make reasonable adjustments if the contract worker is substantially disadvantaged by a provision, criterion or practice applied by it, a physical feature of the premises occupied by it or the non-provision of an auxiliary aid (see Chapter [XX]) .

Sch 8, Part 2, paras 5 and 6

11.12 The Act says that where the contract worker is likely to be substantially disadvantaged by:

Sch 8, Part 2, para 5(3) to 5(5)

- a provision, criterion or practice applied by or on behalf of all or most of the principals to whom the contract worker might be supplied;
- a physical feature of the premises occupied by each of the principals to whom the contract worker might be supplied; or

Para 5(5)(a)

- the non-provision of or failure to provide an auxiliary aid by all or most of the principals to whom the contract worker might be supplied.

The contract worker's employer will have to make reasonable adjustments on each occasion it supplies the contract worker to the principal to do contract work. The reasonable adjustments the employer will need to make in such circumstances are the same as those it would have been required to make had the contract worker been substantially disadvantaged by a provision, criterion or practice applied by the employer; a physical feature of the premises occupied by the employer; or the employer's non-provision of or failure to provide an auxiliary aid.

Example: A blind secretary is employed by an employment business which supplies her to other organisations for secretarial work. Her impaired ability to access standard computer equipment places her at a substantial disadvantage at the offices of all or most of the principals to whom she might be supplied. The employment business provides her with a specially adapted portable computer and keyboard.

Para 5(2)

Principal's Duty

11.13 A principal has the same duties to make reasonable adjustments as a disabled contract worker's employer, but does not have to make any adjustment which the employer should make. So, in effect, the principal is responsible for any additional reasonable adjustments which are necessary solely because of its own provision, criterion or practice, the physical feature of the premises it occupies or to avoid the non-provision of or failure to provide an auxiliary aid.

Sch 8, Part 2, para 6(2)

Example: In the preceding example, a bank which hired the blind secretary may have to make reasonable changes which are necessary to ensure that the computer provided by the employment business is compatible with the system which the bank is already using.

11.14 In deciding whether any, and if so, what, adjustments would be reasonable for a principal to make, the period for which the disabled contract worker will work for the principal is important. It might not be reasonable for a principal to have to make certain adjustments if the worker will be with the principal for only a short time.

> **Example:** An employment business enters into a contract with a firm of accountants to provide an assistant for two weeks to cover an unexpected absence. The employment business proposes a name. The person concerned finds it difficult, because of his disability, to travel during the rush hour and would like his working hours to be modified accordingly. It might not be reasonable for the firm to have to agree, given the short time in which to negotiate and implement the new hours.

11.15 It would be reasonable for a principal and the employer of a contract worker to co-operate with each other with regard to any steps taken by the other to assist the contract worker. It is good practice for the principal and the employer to discuss what adjustments should be made, and who should make them.

> **Example:** The bank and the employment business in the preceding Examples would need to co-operate with each other so that, for example, the employment business allows the bank to make any necessary adaptations to the equipment which the employment business provided to ensure its compatibility with the bank's existing systems.

The position of police officers

11.16 Not all police officers are regarded as 'employees' in law. However, people holding the office of constable in a police force and police cadets are treated as employees for the purposes of the Act.

Clauses 42(1) & 42(2)

11.17 "Holding the office of constable" has a special meaning which does not only apply to the rank of police constable. This term includes police officers who hold the rank of police constable and above. Therefore, police sergeants and inspectors are people who "hold the office of constable." Special constables also hold this office. However, a police community support officer does not hold the office of constable and neither do people who are employed or appointed to perform similar tasks to police officers who hold the rank of constable and above. [Police Community Support Officers are employees of the Police Authority (see s.38 Police Reform Act 2002).]

11.18 Police cadets are people appointed to undergo training with a view to becoming police constables.

11.19 Police officers and police cadets have the same rights as employees under the Act and therefore have the same protection against discrimination, harassment and victimisation (see [XX]). People who apply to become police constables have the same protection as applicants for positions of employment (see [XX]).

11.20 For the purposes of the Act, the employer of a person in a police force who holds the office of constable or a police cadet is the chief officer of the police force in question or 'responsible authority' - depending on who has committed the act in question that relates to the person who holds the office of constable or police cadet, or their appointment. The chief officer of the police force will most likely be the chief constable. A 'responsible authority' will most likely be the police authority that maintains the police force in question.

Clause 43(2) & (3)

11.21 A constable serving with the Civil Nuclear Constabulary is treated as an employee of the Civil Nuclear Authority.

Clause 42(3)

11.22 A constable seconded to the Serious Organised Crime Agency (SOCA) or Scottish Police Services Authority (SPSA) is treated as employed by SOCA or SPSA. **Clause 42(5)**

11.23 A constable at the Scottish Crime and Drugs Enforcement Agency (SCDEA) is treated as employed by the Director General of SCDEA. **Clause 42(6)**

What does the Act say about partnerships and limited liability partnerships?

11.24 The Act gives a partner in a firm of partners (partnership) or a person seeking to become a partner rights against the partnership or proposed partnership which are broadly similar to those of an employee or job applicant against an employer. See Chapter [XX] paragraph [XX] on job applicants. **Clause 44**

11.25 The Act also gives a member of a limited liability partnership (LLP) or a person seeking to become a member of a LLP or proposed LLP similar rights against that LLP to those of an employee or job applicant against an employer. **Clause 45**

How are partners in a partnership, prospective partners, members of a LLP and prospective members protected?

11.26 Partners in partnerships and members of LLPs are protected against unlawful discrimination, harassment or victimisation by the respective partnership or LLP. The principles relating to discrimination, harassment and victimisation that apply to an employer (see [XX]) also apply to a partnership, proposed partnership, LLP and proposed LLP.

Prospective partners or members

11.27 Where a person is seeking to become a partner in a partnership or a member of an LLP, it is also unlawful for a partnership, proposed partnership, LLP or proposed LLP to discriminate against or victimise that person:

Clause 44(1)

44(5)

45(1)

45(5)

- in the arrangements the partnership or LLP makes to determine who should be offered the position of partner or member;
- in the terms on which it offers the person a position as partner or member; or
- by not offering the person a position as partner or member.

Example: An accountancy firm refuses to accept an application for partnership from a black candidate, who is qualified to join, because he is of African origin. This would be direct discrimination.

11.28 It is also unlawful for a partnership, proposed partnership, LLP or proposed LLP to subject a person seeking to become a partner or member to harassment.

Clauses 44(4)

45(4)

Example: A lesbian candidate for partnership is subjected to homophobic banter during her partnership interview. The banter is offensive and degrading of her sexual orientation and creates an offensive and degrading environment for her at interview. This would amount to harassment.

Partners and members

11.29 A partnership or LLP must not unlawfully discriminate against or victimise a partner or member:

Clauses 44(2) 44(6) 45(2) 45(6)

- in the terms of partnership or membership;
- in the way it affords (or by not affording) the person who is a partner or member access to opportunities for promotion, transfer or training or for receiving any other benefits, facility or service;
- by expelling the person who is a partner or member; or
- by subjecting the person who is a partner or member to any other detriment.

Example: An LLP refuses a Muslim member access to its child care scheme because all the other children who attend the scheme have Christian parents. This would amount to direct discrimination.

11.30 It is also unlawful for a partnership or LLP to subject a partner or member to harassment. See Chapter 4 for further information.

Clauses 44(3) 45(3)

How does the duty to make reasonable adjustments apply in respect of partners, prospective partners, members and prospective members?

11.31 The duty to make reasonable adjustments in respect of partners and members applies to a partnership, proposed partnership, LLP and proposed LLP in the same way as it applies to an employer [see XX]. **Clauses 44(7) & 45(7)**

11.32 Where a partnership, proposed partnership, LLP or proposed LLP is required to make adjustments in respect of a disabled partner, disabled prospective partner, disabled member or disabled prospective member, the cost of doing so will be borne by that partnership, proposed partnership, LLP or proposed LLP. Provided that the disabled person is, or becomes, a partner or member, they may be required (because partners or members share the costs of the partnership or LLP) to make a reasonable contribution towards this expense. In assessing the reasonableness of any such contribution (or level of such contribution), particular regard should be had to the proportion in which the disabled partner or member is entitled to share in the partnership's or LLP's profits, the cost of the reasonable contribution and the size and administrative resources of the partnership, proposed partnership, LLP or proposed LLP. **Sch 8, Part 2, paras 7 & 8**

> **Example:** A disabled person who uses a wheelchair as a result of a mobility impairment joins a firm of architects as a partner, receiving 20% of the firm's profits. He is asked to pay 20% towards the cost of a lift which must be installed so that he can work on the premises. This is likely to be reasonable.

What does the Act say about barristers?

11.33 In England and Wales, barristers who are tenants and pupil barristers (including persons who apply for pupillage) have rights which are broadly similar to the rights of employees under the Act. Tenants include barristers who are permitted to work in chambers, door tenants and squatters (barristers who are permitted to practise from a set of chambers, but who are not tenants).

How are people who are seeking to become pupils or tenants protected?

11.34 A barrister or a barrister's clerk (this includes any person who carries out the function of a barrister's clerk), in relation to any offer of a pupillage or tenancy, must not unlawfully discriminate against or victimise a person:

Clauses 47(1)

47(4)

- in the arrangements which are made to determine to whom a pupillage or tenancy should be offered;
- in respect of any terms on which it is offered; or
- by not offering it to them.

Example: A male to female transsexual's application for a pupillage is rejected by a barristers' chambers because of her gender reassignment. This would be direct discrimination.

11.35 A barrister or barrister's clerk must not subject a person who has applied for pupillage or tenancy to harassment.

Example: A male barrister pesters a female applicant for pupillage with repeated invitations to dinner and suggests that her application for

pupillage would be viewed more favourably by the barristers' chambers if she accepted his invitation to dinner. This is likely amount to sexual harassment.

How are pupils and tenants protected?

11.36 A barrister or barrister's clerk must not unlawfully discriminate against or victimise a pupil or tenant:

Clauses 47(2)

47(5)

a) in respect of the terms of their pupillage or tenancy;

b) in the opportunities for training, or gaining experience, which are afforded or denied to them;

c) in the benefits, facilities or services which are afforded or denied to them;

- by terminating their pupillage;
- by subjecting them to pressure to leave their chambers; or
- by subjecting them to any other detriment (for example, by terminating their tenancy).

Thus, a barrister or barrister's clerk must not unlawfully discriminate against or victimise a pupil or tenant at another chambers.

Example: A clerk gives instructions to a Christian barrister in his chambers in preference to a Hindu barrister because he fears that the Hindu barrister's religion would prevent him representing a Christian client properly. This would be direct discrimination.

11.37 A barrister or barrister's clerk must also not subject a pupil or tenant to unlawful harassment if the act of harassment relates to a pupillage or tenancy. This covers harassment of a pupil or tenant at a different chambers. **Clause 47(3)**

> **Example:** Barrister A is of African origin. In the lead up to a trial, Barrister B, who is from different chambers and represents the other party in the case, telephones Barrister A and suggests that she has not properly understood the case because she is unfamiliar with British cultural norms. The purpose of Barrister B's telephone call is to intimidate Barrister A shortly before the matter in goes to trial. This might amount to harassment related to race.

Instructing a barrister

11.38 A person (for example, an instructing solicitor, firm of solicitors or client) in relation to instructing a barrister must not unlawfully: **Clause 47(6)**

a) discriminate against that barrister by subjecting them to a detriment;

b) subject that barrister to harassment; or

c) victimise that barrister

This includes the giving, withholding or termination of instructions.

> **Example:** A firm of solicitors acting for an employer in a pregnancy discrimination case chooses not to instruct a male barrister from a chambers because it considers that the case would be better presented by a female barrister. This would amount to direct discrimination.

How does the duty to make reasonable adjustments apply to barristers and barristers' clerks?

11.39 The duty to make reasonable adjustments for disabled persons seeking to become pupils or tenants, and disabled pupils and tenants applies to barristers and barristers' clerks in the same way as it applies to an employer (see [XX]). **Clause 47(7)**

> **Example:** Barristers' clerks at a set of chambers routinely leave messages for barristers on scraps of paper. This practice is likely to disadvantage visually impaired members of chambers and may need to be altered for individual disabled tenants and pupils.

What does the Act say about advocates?

11.40 In Scotland, devils, members of a stable and persons seeking to become devils or members of a stable have exactly the same rights and protections as those applying to pupils, tenants and persons seeking to become pupils or tenants. An advocate or an advocate's clerk therefore has the same obligations as a barrister or barrister's clerk as set out in paragraphs [XX]. An advocate is also given the same protection as set out in paragraphs [XX. and XX.]. **Clause 48**

What does the Act say about office-holders?

11.41 Where an office-holder does not have the protection of other provisions of the Act, the Act makes in unlawful to discriminate against, harass or victimise an office-holder. This is explained in more detail below. **Sch 6**

What is an office?

11.42 An office is a position:

a) which owes its existence to a constituent instrument, such as a charter, statute, declaration of trust, contract (other than a contract of personal service) or instrument of some other kind;

b) which can be recognised as existing, whether it is occupied or vacant, independent of any person;

c) to which a person can be appointed, which the person can vacate and to which a successor can be appointed; and

d) which need not be capable of permanent or prolonged or indefinite existence, but cannot be limited to the tenure of one person.

11.43 Offices can be personal or public and include, but are not limited to, the positions of directors, non executive directors, company secretaries, positions on the board of non-departmental public bodies, judicial positions and positions held by some ministers of religion.

Clauses 49(1) & 50(1)

11.44 The Act states that an office is not treated as a personal or public office in circumstances where the office-holder is protected by other provisions of the Act or where the office-holder holds a political office. Further details of the excluded offices are set out in Schedule 6 of the Act.

Sch. 6

Who are office-holders?

11.45 Office-holders are people who hold an office. The office can be a personal office or a public office.

11.46 Personal office-holders are people who perform a function personally at a time and place specified by another person and who, in return, are entitled to payment (other than expenses or compensation for loss of income whilst discharging the office). **Clauses 49(2), 49(10) & 49(11)**

11.47 Public office-holders are persons who are appointed by, on the recommendation of, or with the approval of, a member of the executive branch of Government, such as a Government Minister, or people who are appointed on the recommendation of, or subject to the approval of either the Houses of Parliament, the National Assembly for Wales, of the Scottish Parliament. Public office-holders also perform a function personally at a time and place specified by another person. However, in contrast to personal office-holders, public office-holders are not automatically entitled to payment for performing that function. **Clause 50(2)**

11.48 An office-holder can be appointed by one person, while a different person is responsible for and exercises control over the office-holder in relation to other matters, such as the provision of facilities to the office-holder or giving instructions to the office-holder about the performance of their office. Each such person can potentially discriminate against, harass or victimise the office-holder.

11.49 Holders of any political office listed in Schedule 6 paragraph 2 of the Act are not office-holders for the purposes of the Act. **Sch.6 para.2**

What is the difference between an office-holder and an employee?

11.50 Whilst an office-holder may also be an employee, it is important to note that office-holders do not hold their position as an employee. An office-holder's functions, rights and duties are defined by the office they hold, not by a contract of employment.

What protection do office-holders have?

11.51 If the office-holder is protected by other provisions of the Act, for example because they are an employee, then they will be protected by those provisions. **Sch. 6**

11.52 However, where an office-holder does not have the protection of other provisions of the Act, they have the following protections: **Sch. 6**

11.53 It is unlawful for the person with the power to appoint an office-holder to unlawfully discriminate against or victimise a person: **Clauses 49(3), 49(5), 50(3) & 50(5)**

a) in the arrangements which are made to determine who should be offered the appointment;

b) in the terms on which the appointment is offered; or

c) by refusing to offer the person the appointment.

11.54 There is an exception in relation to discrimination because of sex or pregnancy and maternity. The terms on which an appointment is offered relating to pay cannot be discrimination because of sex or pregnancy and maternity unless: **Clauses 49(12) & 50(12)**

a) they breach the implied sex or maternity equality clauses or rules, which are explained in more detail in the Equal Pay Code; or

b) if that is not the case, it would be directly discriminatory because of sex or pregnancy and maternity discrimination.

11.55 It is also unlawful for: **Clauses 51(1), 51(3) & 51(5)**

a) a body, established by a member of the executive or under statute, with the power to make a recommendation for or give approval

to an appointment to a public office that is a position that is appointed by a member of the executive; or

b) a person with the power to make a recommendation for or give approval to an appointment to a public office;

c) to discriminate against or victimise a person because of one or more protected characteristics:

i. in the arrangements which are made to determine who should be recommended or approved for the appointment;

ii. by not recommending the person for the appointment;

iii. by making a negative recommendation in respect of that person; or

iv. by not approving the person for the appointment.

Example: It would be direct discrimination for the Government Minister responsible for approving the appointment of members of the BBC Trust to refuse to approve the appointment of a person because they are undergoing gender reassignment.

Example: A deaf woman who communicates using British Sign Language applies for appointment as a member of a public body. Without interviewing her, the public body making the appointments writes to her saying that she would not be suitable as good communication skills are a requirement. This is likely to be unlawful.

11.56 A person with the power to appoint, recommend or approve an office-holder and the person with the power in relation to other matters (which may be the same person) must also not unlawfully harass the person being considered for the position.

Clauses 49(4), 49(7), 50(4), 50(8) & 51(2)

11.57 The Act also says that it is unlawful for the person with the power to appoint an office-holder and the person with the power in relation to other matters (which may be the same person) to discriminate against or victimise a person who has been appointed to such an office:

Clauses 49(6), 49(8), 50(6) & 50(9)

a) in the terms of the appointment;

b) in the opportunities which are afforded (or refused) for promotion, a transfer, training or receiving any other benefit;

c) by terminating the appointment; or

d) by subjecting the person to any other detriment.

Terminating an appointment includes termination:

a) by the expiry of a period (for example, by reference to an event);

b) by the person where they are entitled to terminate without notice because of the conduct of the person who has power to terminate the appointment.

It does not count as a termination if the appointment is renewed on the same terms immediately after the termination.

11.58 The Act also requires the person with the power to appoint, recommend or approve an office-holder and the person with the power in relation to other matters (which may be the same person) to make reasonable adjustments for disabled people holding relevant offices, or seeking such appointments.

Clauses 49(9), 50(11) & 51(4)

> **Example:** A selection process is carried out to appoint the chair of a public health body. The best candidate is found to be a disabled person with a progressive condition who is not able to work full-time because of her disability. Whoever makes or recommends the appointment should consider whether it would be a reasonable adjustment to appoint the disabled person on a job-share or part-time basis.

Exceptions

11.59 The protections in paragraphs [DiO6XX to [DiO6XX not apply where the office-holder is appointed on the recommendation of, or subject to the approval of, either the Houses of Parliament, the National Assembly for Wales, of the Scottish Parliament.

Clause 50

11.60 However, where either the Houses of Parliament, the National Assembly for Wales, of the Scottish Parliament have delegated the power in relation to a matter to a person, it is unlawful for that person to harass the office-holder. Such person must also not unlawfully discriminate against or victimise the office-holder:

Clauses 50(7), 50(10) & 50(11)

a) in relation to the terms of the appointment;

b) in relation to the opportunities which are afforded (or refused) for promotion, a transfer, training or receiving any other benefit; or

c) by subjecting the person to any other detriment (other than by terminating the appointment).

The duty to make reasonable adjustments also applies to that person.

What does the Act say about employment services?

What the Act says

11.61 A person must not unlawfully discriminate against, harass or victimise a person when providing employment services. It also places a duty on providers of employment services to make reasonable adjustments.

What are employment services?

11.62 For the purposes of [Part 5/the Act], 'employment services' includes: **Clauses 56(2)(a) –(c)**

- vocational guidance or training services. This includes training for employment, work experience and careers advice. It also includes services relating to facilities for training; **56(6)** **56(8)**
- services for finding people employment, such as those provided by recruitment agencies and headhunters. It also includes the services provided by Jobcentre Plus and other schemes that assist people to find work; and **56(2)(d)**
- services for supplying employers with people to do work, such as those provided by employment businesses. **56(2)(e)**

11.63 It does not, however, apply to training and guidance for pupils of a school or students of an educational institution to which the body responsible for that school or educational institution has power to afford access. **Clauses 56(4)** **56(5)**

11.64 Many people who receive employment services (or who seek the provision of such services) are engaged in, or seeking, contract work. This is particularly true of people who look for work by using the service of employment businesses. The Act gives rights to contract workers not only in relation to the provision of employment services, but also in relation to the contract work itself. What the Act says about contract workers is explained further in paragraphs [XX] to [XX].

What is unlawful under the Act?

11.65 Where a person or body is concerned with the provision of employment services, the Act says that it is unlawful for it to discriminate against someone with one or more protected characteristics: **Clause 55(1)(a)**

- in the arrangements that it makes for selecting people to whom it provides, or offers to provide, the service;
- in the terms on which it offers to provide the service to that person; **55(1)(b)**
- by not offering to provide the service to that person. **55(1)(c)**

11.66 It is also unlawful, in relation to the provision of an employment service, for such person or body to discriminate against someone with one or more protected characteristics: **Clause 55(2)**

- as to the terms upon which it provides the service to that person;
- by not providing the service to that person, for example by refusing to allow that person to register with them because of their protected characteristic(s);
- by terminating the provision of the service to that person; and
- by subjecting that person to a detriment.

11.67 A person or body concerned with the provision of employment services must not subject someone to unlawful harassment if that person is someone to whom such services are being provided, or who has requested the provision of such services. What is meant by harassment is explained further in paragraphs [XX] to [XX].

Clause 55(3)

11.68 A person or body concerned with the provision of employment services must also not unlawfully victimise a person in the any of the ways listed in paragraphs [XX] to [XX] above. What is meant by victimisation is also explained further in paragraphs [XX] to [XX].

Clause 55(4)

55(5)

11.69 The duty to make reasonable adjustments in respect of disabled people also applies to those concerned with the provision of employment services, except in relation to the provision of a vocational service. What is meant by the duty to make reasonable adjustments is explained further in paragraphs [XX] to [XX].

11.70 Those concerned with the provision of vocational services are subject to slightly different obligations which are explained further in [a separate Code].

What does the Act say about local authority members?

What does the Act say

11.71 Local authority members carrying out their official duties are protected against unlawful discrimination, harassment and victimisation.

What is a local authority?

11.72 "Local authority" means any of the twelve types of body listed in the Act. The government can change the list by making an order to that effect.

Clause 59(2)

Who is a local authority member?

11.73 "Member" will usually mean an elected member but in the case of parish councils may mean a person who has been appointed as a member.

11.74 In relation to the Greater London Authority "members" means the Mayor of London and those elected to the London Assembly. **Clause 59(5)**

What is official business?

11.75 Official business is anything undertaken by a local authority member as a member of: **Clause 59(4)**

a) the local authority;

b) a body to which the local authority member is appointed by their authority or by a group of local authorities, for example a planning committee; or

c) any other public body.

What is prohibited?

11.76 A local authority must not unlawfully discriminate against, victimise or harass a local authority member while they undertake official business: **Clauses 58(1) & 58(3)**

a) in the opportunities which are afforded (or refused) for training or receiving any other benefit; or

b) by subjecting the local authority member to any other detriment.

11.77 A local authority member will not have been subjected to a detriment simply because they are not elected, appointed or nominated to an office, committee, sub-committee or body of the local authority. **58(4) & 58(5)**

11.78 It is also unlawful for a local authority to harass a local authority member while they undertake official business. **Clause 58(2)**

11.79 Local authorities are also under a duty to make reasonable adjustments in respect of members of the local authority. **Clause 58(6)**

> **Example**: A local authority does not equip meeting rooms with hearing loops. As a result a member who has a hearing impairment is unable to take full part in Council business. If a hearing loop were considered to be a reasonable adjustment the local authority would have failed to comply with its duty to make reasonable adjustments.

Chapter 12
Enforcement

Introduction

Effective legislation requires the backing of an accessible, efficient and effective enforcement framework. This is available through the Employment Tribunal service.

Employees who believe that they may have been the victims of discrimination can make use of the questionnaire procedure. Whilst it is not mandatory for the employer, or any other person subject to the complaint, to respond to a questionnaire, a Tribunal may draw inferences of discrimination from any failure to respond or from evasive answers. The answers to the questionnaire will help the employee to decide whether or not to pursue the matter further.

If employees do wish to pursue the matter to an Employment Tribunal they must act quickly. Generally, a claim must be brought within 3 months of the act about which the employee wishes to complain. The time limit can be extended at the discretion of the Employment Tribunal.

The Employment Tribunal system remains free with a low risk ofa costs order against those who bring genuine complaints and conduct their cases appropriately. Parties are able to represent themselves or have others represent their cases for them.

This Chapter explains the burden of proof that applies in discrimination cases and also the remedies that an Employment Tribunal may impose where it finds that discrimination has occurred. These include financial compensation and recommendations.

Time limits for unlawful discrimination, harassment and victimisation claims relating to work

12.1 The Act says that a person who believes that someone has unlawfully discriminated against them (which includes victimisation or failing to make a reasonable adjustment) or has subjected them to harassment, in relation to or in connection with their work, may make an application to an Employment Tribunal. **Clause 119**

It is not just employees who may present claims relating to their work. Workers, agency staff, apprentices and partners in businesses may be able to present claims. Please see section 6.2 on Who Has Rights Under the Act.

12.2 The application must normally be made within 3 months of the date when the incident complained about occurred. There are some circumstances when time can be extended by the Employment Tribunal where it is just and equitable to do so. **Clause 122(1)**

Members of the armed forces

12.3 Members of the armed forces must make a "service complaint" about the matter before the Employment Tribunal can hear the claim. Members of the armed forces cannot withdraw a service complaint if they wish the Employment Tribunal to hear their claim and must either have their service complaint referred to the Defence Council or apply to have it referred themselves. **Clause 120**

122(2)

Any application to an Employment Tribunal by a member of the armed forces who complies with these requirements must be made within 6 months of the date when the incident complained about occurred, whether or not their service complaint has been determined. There are some circumstances when time can be extended by the Employment Tribunal where it is just and equitable to do so.

Civilians working for the armed forces are not governed by these rules and may make an application to an Employment Tribunal on the same basis as other people.

Repeated or continuing discrimination

12.4 If the unlawful discrimination continues over a period of time (for example, repeated acts of harassment) the time limit starts with the last act of discrimination. Although a single unlawful act of discrimination may, however, have continuing consequences, this will not extend the time limit.

Clause 122(3)

Example: Following a disagreement the Chair of the Local Authority Planning Committee subjects S, a lesbian local authority member, to inappropriate comments about her sexual orientation whilst carrying out her official duties as a Planning Committee member. Over the following months the Chair occasionally acts in a hostile and aggressive manner towards S and makes further inappropriate comments based on her sexual orientation. S is protected under the Act whilst carrying out official duties on the Planning Committee. The course of conduct S has been subjected to may be a continuing act. However, the time limit for bringing a claim runs from the date of the last act of harassment i.e. the last time she was harassed because of sexual orientation by the Committee Chair.

Example: After developing polycystic ovarian syndrome, an accountant gains weight around her waist. She experiences discomfort sitting on the standard office chairs and requests a modified chair to sit on. The accountancy firm commissions a specialist assessment which recommends a chair built to specific dimensions to help alleviate her discomfort - but her line manager forgets to order the chair. The accountant continues to sit on the standard office chair for a further 10 months before complaining again. She is considering bringing an Employment Tribunal claim for the firm's failure to make reasonable adjustments. The time limit for bringing a claim will start to run from the end of the period in which a reasonable employer ought to have provided the chair

12.5 If the unlawful act is a failure to do something, time runs from the date a decision was made.

12.6 There may not be evidence of deciding to fail to do a thing. "Deciding" to fail to do a thing can mean a person acting inconsistently with doing that thing. Equally no action during a reasonable period in which it would be expected an employer would act could be "deciding" to fail.

Example: A hospital incorporates a Christian chapel for the use of employees as well as others. A group of employees of another faith ask if a separate store room, which is surplus to requirements, can be converted for non-Christians to use for prayer and contemplation. The hospital managers agree but some weeks later they convert the store-room into a hospitality room for VIP visitors; nothing is said about the prayer room. No specific decision has been made not to create the prayer room but the decision to use the store room for hospitality is inconsistent with using it as a prayer room.

Example: A wheelchair-user asks their employer to install a ramp to enable the employee more easily to get over the kerb between the car park and the office entrance. The employer indicates that it will do so but no work at all is carried out. After a period in which it would have been reasonable for the employer to commission the work, even though the employer has not made a positive decision not to install a ramp it may be treated as having made that decision.

Time limits for breach of equality clause / breach of equality of terms claims

12.7 The Act says that a person who believes that someone has not been given equal terms [cross reference to Equal Pay Code] may make an application to an Employment Tribunal. **Clause 126-129**

It is not just employees who can make an application to an Employment Tribunal; trustees or managers of an occupational pension scheme can make an application on behalf of one of their members. Employers or those responsible for paying workers can also apply to the Tribunal for a declaration of the rights of that worker as well as the worker him or herself.

12.8 These applications must normally be made within 6 months of the end of the person's employment or appointment as opposed to their leaving the particular post about which the claim is being made, provided the person remains in the same employment. Where an employer issues a person with a new contract (for example, as part of a restructure process), the 6 months time limit will start to run from the end of the old contract. On the same basis, where an employee transfers to a new employer under the Transfer of Undertakings (Protection of Employment) Regulations 2006, the 6 months time limit will start to run from the date of the transfer.

Members of the armed forces have 9 months to make their applications to the Employment Tribunal provided that they raise a service complaint as mentioned at paragraph XX.

Where the fact of the inequality as to terms was deliberately concealed and the victim of the inequality could not reasonably have been expected to discover the inequality, the time starts to run from the date the worker actually discovered or could reasonably have discovered the inequality.

Where the worker is incapacitated, the time starts to run from the end of the incapacity. To benefit from this extension the worker's incapacity must have lasted six months from the date of the end of the employment or appointment or six months from the date from which the inequality of terms was actually discovered or could reasonably have been discovered.

Burden of Proof

12.9 A person alleging they have been a victim of unlawful discrimination, harassment, victimisation (including instructing, causing or aiding another to discriminate, harass or victimise) or a failure to make reasonable adjustments, must prove facts from which an Employment Tribunal could decide or draw an inference that another did treat them in such a manner. If such facts are not proved, a claim will fail. An Employment Tribunal will make findings as to the basic facts and determine whether those facts are sufficient to justify an inference of unlawful discrimination, harassment, victimisation or a failure to make reasonable adjustments. An Employment Tribunal can look at circumstantial evidence (which may include events before and after the alleged unlawful act) to help establish the basic facts.

Clause 135

135(2)

Example An advertising firm selects a 47 year old executive for redundancy. He believes he has been selected because of his age, and alleges age discrimination. He compares himself to a 39 year old executive in the same team who was not selected for redundancy. The older executive argues that the firm treated him less favourably because of his age by applying the scoring matrix more harshly to him than his younger colleague. The firm says that, using objective redundancy selection criteria, it gave the younger executive a higher score than his older colleague. It is not sufficient for the older executive to merely prove the difference in age; this difference just indicates the possibility of age discrimination. The older executive must prove facts from which a Tribunal could conclude, in the absence of an adequate explanation, that the firm treated him less favourably because of his age.

12.10 If a person has proved facts from which an Employment Tribunal could conclude that there has been an act of unlawful discrimination, harassment or victimisation, the burden of proof shifts to the employer. To successfully defend a claim, the employer will have to prove, on the balance of probabilities, that it did not unlawfully discriminate, harass, victimise or fail to make reasonable adjustments. If the employer's explanation is inadequate or unsatisfactory, the Employment Tribunal must find that unlawful discrimination, harassment or victimisation has occurred.

Clause 135(2)

Example: A man of Chinese ethnic origin applies for a promotion at work but is not given an interview for the job. He brings a case for race discrimination before the Tribunal and is able to provide evidence that a number of white colleagues were given interviews despite having less experience and fewer qualifications. This is enough to raise an inference that his employer has discriminated against him because of his ethnic origin. It is then up to his employer to prove that she has not discriminated against him in the promotion process.

Example: An employer advertises three vacancies, all requiring similar skills, qualifications and experience. One of the applicants is a trade union official already working for the employer, who has helped a number of people make complaints of unlawful sex discrimination. Five applicants are called for interview. The trade union official is at least as skilled, well qualified and experienced as the other applicants but is not called for interview. The Tribunal is likely to treat the burden of proof as having been shifted to the employer, who will have to show that it has not victimised the trade union official because of her protected acts.

12.11 An Employment Tribunal will hear all of the evidence from the person bringing a claim and the employer before deciding whether the burden of proof has shifted to the employer.

12.12 Where the basic facts are not in dispute, an Employment Tribunal may simply consider whether the employer is able to prove, on the balance of probabilities, that it did not unlawfully discriminate, harass, victimise or fail to make reasonable adjustments.

> **Example:** A Jewish pupil barrister complains that he has not been allowed to take annual leave to celebrate Jewish religious holidays and is able to compare himself to a Hindu pupil barrister who has been allowed to take annual leave to celebrate Hindu religious holidays. In such a case, there is strong evidence of less favourable treatment. If these facts are not in dispute, a tribunal may proceed directly to consideration of whether the Chambers has shown that the treatment was not, in fact, an act of religious discrimination.

12.13 The above rules on burden of proof do not apply to proceedings following a breach of the Act which gives rise to a criminal offence. **Clause 135(5)**

Obtaining information

12.14 A person who has a complaint under the Act may request relevant information from the person who is the subject of the complaint. There is a standard questionnaire which should be used to present such request for information.

12.15 The questionnaire is a way for employees to obtain information when they believe they have been subjected to unlawful conduct, but do not have sufficient information to be sure. For example, a lesbian employee may suspect that she has been denied a promotion because of her sexual orientation. By using a questionnaire she can request information from her employer about their decision not to promote her which could support her suspicion or resolve her concerns.

12.16 Questionnaires and the responses to them may be admissible in evidence in tribunal proceedings provided certain time limits are met. A Tribunal may draw inferences from failures to respond or evasive responses to questionnaires. As such, questionnaires are an effective way of obtaining information which a person might otherwise be reluctant to provide.

12.17 A specimen form for the questionnaire is available. There is, however, no requirement to use the specimen forms.

12.18 There are strict time-limits for serving a questionnaire. The questionnaire must be received by the employer within the relevant time-limit.

12.19 The time-limit for serving a questionnaire depends on whether or not a case has been started by lodging a Tribunal claim. The questionnaire can be sent to the employer before the Tribunal claim is commenced, or at the same time, or afterwards.

If a claim has not been brought in the Tribunal the employer must receive the questionnaire within three months of the act of unlawful discrimination, harassment or victimisation. Where Tribunal proceedings have already been commenced, the questionnaire must be received by the employer within 28 days of the claim being submitted in relation to disability discrimination (including a failure to make reasonable adjustments) or 21 days in all other cases.

Employers should respond as quickly as possible and in any event within 8 weeks.

Remedies for unlawful discrimination, harassment and victimisation claims relating to work

12.20 Sometimes the parties (the person making the claim and the person against whom they are claiming) can come to an agreement about what should happen. This can happen at any time and is usually called "settling" the case.

Where a claim to an Employment Tribunal is not settled, and the claim is upheld at a full hearing, the Tribunal may:

Clause 123

a) Make a declaration as to the rights of the person bringing the claim and any other party who unlawfully discriminated against, harassed or victimised the person. Such a

declaration will relate to the proceedings brought.

b) Order the party who unlawfully discriminated, harassed or victimised the claimant to pay compensation to the claimant;

c) Make an appropriate recommendation.

Declarations of unlawful discrimination, harassment or victimisation

12.21 A declaration may be made even if the Tribunal decides not to award any compensation or make a recommendation. A declaration is not itself a recommendation.

Compensation for unlawful discrimination, harassment or victimisation

12.22 Compensation can be awarded for injury to feelings whether or not other compensation is awarded. There is no maximum on the amount of compensation the Tribunal can award for unlawful discrimination, harassment or victimisation.

Where indirect discrimination is unintentional a Tribunal can only make an order for compensation if it first considers whether a declaration or recommendation would be more appropriate.

Employment tribunals have wide powers to order compensation, following a finding of unlawful discrimination. Awards of compensation may include:

a) past loss of earnings or other financial loss;

b) future loss of earnings which may include stigma or “career damage” losses for bringing a claim;

c) personal injury (physical or psychological) caused by the discrimination or harassment;

d) an award for injury to feelings if not already recompensed as part of any award for personal injury;

e) in exceptional circumstances, where the claimant has been particularly badly treated, a further award of aggravated damages; and

f) punitive or exemplary damages in the very limited cases of either oppressive, arbitrary or unconstitutional action by servants of the government or where the employer's actions are calculated to make a profit greater than the compensation payable to the victim of unlawful discrimination, harassment or victimisation

12.23 Any compensation sought must be based on the actual loss of the person who has been unlawfully discriminated against, victimised or harassed. The aim is, so far as possible by an award of money, to put the person in the position they would have occupied if they had not suffered the unlawful discrimination, victimisation or harassment.

12.24 Compensation must be directly attributable to the act of unlawful discrimination, victimisation or harassment. This may be straightforward where the loss is, for example, related to an unlawfully discriminatory dismissal. However, subsequent losses, including personal injury, may be difficult to assess.

12.25 A person who leaves or loses their job as a result of unlawful discrimination, victimisation or harassment is expected to take reasonable steps to mitigate their loss, for example by looking for new work or applying for state benefits. Failure to take reasonable steps to mitigate loss may reduce compensation awarded by a Tribunal.

Recommendations on unlawful discrimination, harassment or victimisation

12.26 An Employment Tribunal can make an appropriate recommendation requiring the employer within a specified period to take specific steps to reduce the negative impact of the discrimination, harassment or victimisation on the complainant or the wider workforce. Recommendations could include taking steps to implement a harassment policy more effectively; providing equal opportunities training for staff involved in promotion procedures; and introducing more transparent selection criteria in recruitment, transfer or promotion processes.

Clause 123(3)

Tribunal recommendations most often focus on processes (such as adoption of an equality policy).

The making of recommendations is a matter for the Tribunal's discretion: the claimant has no right to have a Tribunal recommend a course of action or process even if the Tribunal declares that a person was unlawfully discriminated against, harassed or victimised.

12.27 If a party fails to comply with an Employment Tribunal recommendation relating to the claimant the tribunal may:

Clause 123(7)

- Increase the amount of compensation to be paid; or
- Order that party to pay compensation if it did not make such an order earlier.

A failure to comply with a recommendation could also be adduced in evidence in any later cases against the same organisation. Employees wishing to find out whether any Tribunal has ever made a recommendation to their employer can ask their employer by way of the questionnaire procedure described at paragraph XXX.

12.28 Recommendations cannot be made where the effect of the recommendation would have, or potentially have, an adverse impact on national security. **Clause 124**

Additional powers in relation to occupational pension schemes

12.29 Employment Tribunals have a number of further powers in relation to claims relating to occupational pension schemes. The employer is automatically treated as a party in relation to such claims and is entitled to appear and be heard. **Clause 119(5)**

12.30 On the application of a responsible person (i.e. the trustees or managers, the employer or a person who can make appointments to offices), an Employment Tribunal can make a declaration as to the rights of that person and a worker or member in relation to a dispute about the effect of a scheme's non-discrimination rule. **Clause 119(2) & (3)**

12.31 If an Employment Tribunal finds that there has been unlawful discrimination in relation to the terms on which persons become members of an occupational pension scheme or the terms on which members are treated it may declare that the person bringing the claim has a right to be admitted to the scheme or a right to membership without discrimination. **Clause 125**

The Employment Tribunal's order may also set out the terms of admission or membership for that person.

The order may apply to a period before it is made.

12.32 However, an Employment Tribunal may not make an order for compensation unless it is for injured feelings or for a failure by the recipient of an appropriate recommendation to comply with the recommendation.

Remedies for breach of an equality clause or rule

12.33 If an employee or office-holder (see Chapter X paragraph x for the meaning of "office-holder") complains about a breach of an equality clause (in their terms of employment or appointment) or an equality rule (in the rules of a pension scheme), they can take their complaint to an Employment Tribunal for a decision.

Clauses 126 and 131

If the Employment Tribunal decides that there has been a breach of an equality clause or rule, it can:

- Make a declaration as to the rights of the person bringing the claim and the obligations of any other party in connection with the equality clause or rule. Such a declaration will relate to the proceedings brought.
- Order the party who breached the equality clause to pay arrears of pay or damages to that person.

Any increase in pay following a declaration is permanent. It is not affected if, for example, the comparator's own pay is reduced or if he or she leaves employment.

An employer, or a person who is responsible for the remuneration of an office-holder, may also apply to the Employment Tribunal for a declaration about their rights and the rights of an employee or office-holder where they are in dispute about the effect of an equality clause or rule.

The trustees or managers of an occupational pension scheme can also apply to the Employment Tribunal for a declaration as to their rights and the rights of a scheme member where there is a dispute about the effect of an equality rule.

A court which is hearing a case in which there is a dispute about an equality clause or equality rule may refer that dispute (or direct a party to the proceedings before it to refer the dispute) to an Employment Tribunal.

Arrears of pay or damages for breach of an equality clause

12.34 A Tribunal can order the payment of arrears in pay where the breach of the equality clause is salary, wages or other contractual cash payment. A Tribunal can order damages where the breach of the equality clause is non-contractual payments.

12.35 A Tribunal cannot make an award for injury to feelings for breach of an equality clause or term.

12.36 In England and Wales, the Tribunal can award arrears of pay or damages going back not longer than 6 years. This is extended where either or both of the following apply:

Clause 131(4) & (5)

a) the employee has been incapacitated; and/or

b) the party who breached the equality clause concealed that fact and the employee did not and could not reasonably have discovered the breach.

In Scotland, the Tribunal can award arrears of pay or damages going back not longer than 5 years. This is extended to 20 years where the employee had a relevant incapacity or there was a fraud or error.

Remedies in Pension Cases

Declaration

12.37 Where a claim to a Tribunal is upheld which relates to a breach of an equality rule or a breach of an equality clause in relation to membership of or rights under an occupational pension scheme, then a Tribunal may make a declaration as to the rights of the parties concerned. But the Tribunal cannot order arrears of benefits or damages or any other amount to be paid to the complainant unless he/she is a pensioner in the scheme.

Clauses 132(1) – (3)

12.38 Where the breach relates to a term on which a person can become a member of the scheme, the Tribunal can declare that the person be treated as admitted to the scheme from a date specified by the Tribunal, provided that the date cannot be before 8 April 1976. Where the breach relates to a term on which members are treated, the Tribunal can declare that the person be treated as entitled, in respect of a specified period, to the rights under the scheme that would have accrued if the breach had not occurred, provided that the period must fall on or after 17 May 1990. In this latter case an employer must provide such resources to the scheme as are necessary to secure those rights.

Clauses 132(4) – (7)

12.39 So a Tribunal could declare that a person who has been stopped from joining an occupational pension scheme in breach of an equality rule should be admitted from 8 April 1976, but the scheme would have been able to continue to provide different benefits for men and women until 17 May 1990.

12.40 Where a Tribunal makes a declaration in respect of the terms on which a member of a scheme must be treated, the employer must provide such resources to the scheme as are necessary to secure the member's rights without further contribution by the member or any other members.

Clauses 132(8)

Arrears of benefits or damages

12.41 If the claim which is upheld by the Tribunal relates to the terms on which a pensioner under an occupational pension scheme is treated, then the Tribunal also has power to make an award of arrears of benefits or damages or of any other amount. Arrears of benefits and damages can only be awarded by the Tribunal for the same periods set out in paragraph XX.

Clauses 133

If the Tribunal makes such an award, the employer must provide sufficient resources to the scheme as are necessary to secure the amount of the award without further contribution from the pensioner or any other member.

Appendix

The meaning of disability

This Appendix is included to aid understanding about who is covered by the Act. Government Guidance is also available **[reference]**

When is a person disabled?

A person has a disability if he has a physical or mental impairment, which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

What about people who have recovered from a disability?

People who have had a disability within the definition are protected from discrimination even if they have since recovered (though those with past disabilities are not covered in relation to Part 12 (transport) and section 188 (improvements to let dwelling houses).

What does ‘impairment’ cover?

It covers physical or mental impairments. This includes sensory impairments, such as those affecting sight or hearing.

Are all mental impairments covered?

The term ‘mental impairment’ is intended to cover a wide range of impairments relating to mental functioning, including what are often known as

learning disabilities.

What if a person has no medical diagnosis?

There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment not the cause.

What is a ‘substantial’ adverse effect?

A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; because of a loss of energy and motivation.

An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how he or she carries out those activities. For example: where an impairment causes pain or fatigue in performing normal day-to-day activities the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.

What is a ‘long-term’ effect?

A long-term effect of an impairment is one:

- which has lasted at least 12 months; or

- where the total period for which it lasts is likely to be at least 12 months; or
- which is likely to last for the rest of the life of the person affected.

Effects which are not long term would therefore include loss of mobility due to a broken limb which is likely to heal within 12 months, and the effects of temporary infections, from which a person would be likely to recover within 12 months.

What if the effects come and go over a period of time?

If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated a continuing if it is likely to recur; that is, if it might well recur.

What are 'normal day-to-day activities'?

They are activities which are carried out by most men or most women on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialized way but is also affected in normal day-to-day activities would be covered by this part of the definition.

Day to day activities thus include activities such as walking, driving, using public transport, cooking, eating, lifting and carrying every day objects, typing, writing (and taking exams) continence, talking and hearing reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one's self. They also encompass the activities which are relevant to professional life.

What about treatment?

Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment).

In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (i.e. the impairment has been cured).

Does this include people who wear spectacles?

No. The sole exception to the rule about ignoring the effects of treatment is the wearing of spectacles or contact lenses. In this case, the effect while the person is wearing spectacles or contact lenses should be considered.

Are people who have disfigurements covered?

People with severe disfigurements are covered by the Act. They do not need to demonstrate that the impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities.

Are there any other people who are automatically treated as disabled under the Act?

Anyone who has HIV, cancer or multiple sclerosis is automatically treated as disabled under the Act.

In addition, people who are registered as blind or partially sighted, or who are certified as being blind or partially sighted by a consultant ophthalmologist, are automatically treated under the Act as being disabled. People who are not registered or certified as blind or partially sighted will be covered by the Act if they can

establish that they meet the Act's definition of disability.

What about people who know their condition is going to get worse over time?

Progressive conditions are conditions which are likely to change and develop over time. Where a person has a progressive condition he will be covered by the Act from the moment the condition leads to an impairment which has some effect on ability to carry out normal day-to-day activities, even though not a substantial effect, if that impairment might well have a substantial adverse effect on such ability in the future.

Are people with genetic conditions covered?

If a genetic condition has no effect on the ability to carry out normal day-to-day activities, the person is not covered. Diagnosis does not in itself bring someone within the definition. If the condition is progressive, then the rule about progressive conditions applies.

Territorial Scope

What does the Act say?

The provisions in the Act relating to employment forms part of the law of England, Scotland and Wales (Great Britain).

The Act leaves it to Employment Tribunals to determine whether its provisions apply to the circumstances being considered.

Clauses 81, 82

Where an employee works on an offshore installation, for example a lighthouse, oil rig, gas rig or a renewable energy installation, ship or hovercraft, the Act provides that Parliament may make provisions extending the protections of the Act to them.

Prohibited conduct in Great Britain

Will the Employment Tribunals have jurisdiction if the employee is working in Great Britain at the time of the alleged prohibited conduct?

Yes.

What if the employer is an overseas organisation and the alleged prohibited conduct takes place in Great Britain?

The fact that the employer is an overseas organisation will not make any difference. If the alleged prohibited conduct takes place whilst the employee is working in Great Britain the Employment Tribunals will have jurisdiction.

Prohibited conduct outside Great Britain

What if the employee is employed by a British organisation but is working for a short period of time overseas at the time of the alleged prohibited conduct?

If the employee is working for a short period of time overseas, for example on a business trip, a training course or is spending a few weeks overseas setting up an overseas base, the Employment Tribunals will have jurisdiction.

What if the employee is employed by a British organisation, but is required to spend considerable amounts of time working overseas and is overseas at the time of the alleged prohibited conduct?

Many employees such as international management consultants or those who work in the aviation industry are required to spend considerable periods of time overseas, often discharging their duties in different countries. In these circumstances, the Employment Tribunals will consider the entire employment relationship to determine whether or not they have jurisdiction.

What if the employee is employed by an overseas organisation, spends most of their time working in Great Britain, but is overseas at the time of the alleged prohibited conduct?

If the employer has a place of business in Great Britain and the employee is based in Great Britain but is working for a short period of time overseas, for example on a business trip, a training course or is spending a few weeks overseas setting up an overseas base, the Employment Tribunals will have jurisdiction.

If the employer does not have a place of business in Great Britain the Employment Tribunals will not have jurisdiction.

What if the employer is an overseas organisation, the employee is based in Great Britain but is required to spend considerable amounts of time working overseas and is overseas at the time of the alleged prohibited conduct?

If the employer has a place of business in Great Britain the Employment Tribunals will consider the entire employment relationship to determine whether or not they have jurisdiction.

If the employer does not have a place of business in Great Britain the Employment Tribunals will not have jurisdiction.

What if the employer is a British organisation but the employee works and is based abroad?

The employee will only have the protection of the Act if the employer is a British organisation based in Great Britain and the employee:

- is working overseas but within what can be regarded as an extra-territorial British political or social enclave, for example a British military base;
- is posted abroad for the purposes of a business carried on in Great Britain, for example a foreign correspondent of a British newspaper;
- is posted abroad as a representative of a business carried on in Great Britain; or
- has strong connections with Great Britain and British employment law.

If the employer is a British organisation based outside the European Union the Employment Tribunals will not have jurisdiction.

What if the employer is an overseas organisation and the employee works and is based abroad?

If the employer has a place of business in Great Britain the employee will only have the protection of the Act if the employee is:

- posted abroad for the purposes of a business carried on in Great Britain;
- posted abroad as a representative of a business carried on in Great Britain; or
- has strong connections with Great Britain and British employment law.

If the employer does not have a place of business in Great Britain the Employment Tribunals will not have jurisdiction.

What about prospective employees?

If a prospective employee wishes to bring a claim under the Act the Employment Tribunal will consider the issue of jurisdiction with reference to where it was contemplated the employee would work.

Constructing the comparator

Does the comparator have to be a person in the UK?

No. If there is a real comparator in another country the employee can compare themselves to that person. If there is not a real comparator the Employment Tribunal may construct a hypothetical comparator.

Monitoring – additional information

What to monitor?

It is recommended that employers consider monitoring the list of areas below. This list is not exhaustive and an employer, depending on its size and resources, may wish to consider monitoring additional areas.

Recruitment

- Sources of applications for employment
- Applicants for employment
- Those who are successful or unsuccessful in the shortlisting process
- Those who are successful or unsuccessful at test/assessment stage
- Those who are successful or unsuccessful at interview

During employment

- Employees in post
- Employees in post by type of job, location and grade
- Applicants for training
- Employees who receive training
- Applicants for promotion and transfer and success rates for each
- Time spent at a particular grade/level
- Employees who benefit or suffer detriment as a result of performance assessment procedures

- Employees involved in grievance procedures
- Employees who are the subject of disciplinary procedures

Termination of employment

- Employees who cease employment
- Dismissals for gross misconduct
- Dismissals for persistent misconduct
- Dismissals for poor performance
- Dismissals for sickness
- Redundancies
- Retirement
- Resignation
- Termination for other reasons

Considering categories

It is recommended that employers ask job applicants and employees to select the group(s) they want to be associated with from a list of categories.

The [2001/2011] census provides comprehensive data about the population in England, Scotland and Wales. This is supplemented by the Labour Force Survey and other survey statistics produced by the Office for National Statistics. Employers can therefore use categories which are compatible with the categories contained in these sources, for consistency.

Set out below are some of the issues to consider when monitoring particular protected characteristics. Please see the Non Statutory Guidance for further information.

Age

Monitoring age may not initially appear as controversial as some of the other [protected characteristics/strands].

The following age bands might provide a useful starting point for employers monitoring the age of job applicants and employees:

- 16-17
- 18-21
- 22-30
- 31-40
- 41-50
- 51-60
- 61-65
- 66-70
- 71+

Disability

Disclosing information about disabilities can be a particularly sensitive issue. Monitoring will be more effective if job applicants and employees feel comfortable about disclosing information about their disabilities. This is more likely to be the case if employers explain the purpose of monitoring and job applicants and employees believe that the employer genuinely values disabled employees and is using the information gathered to create positive change.

Example: Through monitoring of candidates at the recruitment stage a company becomes aware that, although several disabled people applied for a post, none was short-listed for interview. On the basis of this information it reviews the essential requirements for the post.

Some employers choose to monitor by broad type of disability to understand the barriers faced by people with different types of impairment.

Example: A large employer notices through monitoring that the organisation has been successful at retaining most groups of disabled people, but not people with mental health problems. It acts on this information by contacting a specialist organisation for advice about good practice in retaining people with mental health problems.

Race

When employers gather data in relation to race, a decision should be made as to which ethnic categories to use.

It is recommended that employers use the ethnic categories that were used in the [2001] census (or categories that match them very closely). If different categories are used, it may make it difficult to use the census data or other national surveys, such as the annual Labour Force Survey, as a benchmark. [See section [XX] below for further discussion about benchmarks.]

Subgroups are intended to provide greater choice to encourage people to respond. Sticking to broad headings may otherwise hide important differences between subgroups and the level of detail will provide employers with greater flexibility when analysing the data.

Employers may wish to add extra categories to the recommended subcategories of ethnic categories.

However, this should be considered carefully.

Employers should be aware that the way people classify themselves can change over time. It may therefore become necessary to change categories.

Religion and belief

Monitoring religion and belief may help employers understand their employees' needs (for example, if they request leave for festivals) and ensure that staff turnover does not reflect a disproportionate number of people from specific religion or beliefs.

Sex

As well as the male and female categories, employers should consider whether to monitor for part-time working and for staff with caring responsibilities, including child-care, elder-care or care for a spouse or another family member. Both groups are predominantly women at a national level and are likely to be so for many employers as well.

Sexual orientation

Sexual orientation [and sexuality] may be considered to be a private issue. However, it is relevant in the workplace, particularly where discrimination and the application of equality policies, and other policies, are concerned.

The way in which the question is asked is very important, particularly if employers are to ensure that the monitoring process does not create a further barrier.

The recommended way to ask job applicants and employees about their sexual orientation is outlined below [and in the equal opportunities form in Appendix [XX]]:

What is your sexual orientation?

Bisexual ■

Gay man ■

Gay woman/lesbian ■

Heterosexual/straight ■

Other ■

Prefer not to say ■

Some employers, as an alternative, provide one option ("gay/lesbian") rather than the two options above, and then cross reference the results of their data on gender in order to examine differences in experiences between gay men and gay woman.

It also acknowledges that some women identify themselves as gay rather than as lesbians. The option of "other" provides an opportunity for staff to identify their sexual orientation in another way if the categories are not suitable.

Employers should note that transsexual or transgender status should not fall within the section on sexual orientation. It should instead have a section on its own (please see section [XX] below).

5 In some monitoring exercises, for example, staff satisfaction surveys, it may be appropriate to ask a further question about how open an employee is about their sexual orientation:

If you are lesbian, gay or bisexual, are you open about your sexual orientation:

	Yes	Partially	No
At home	■	■	■
With colleagues	■	■	■
With your manager	■	■	■
At work generally	■	■	■

The results from the above question may indicate wider organisational issues which need to be addressed.

Transgender status

Monitoring numbers of [transgender/transsexual] staff is a very sensitive area and opinion continues to be divided on this issue. Whilst there is a need to protect an individual's right to privacy, without gathering some form of evidence, it may be difficult to monitor the impact of policies and procedures on trans people or employment patterns such as recruitment, training, promotion or leaving rates.

Because many trans people have had negative experiences in the workplace, many may be reluctant to disclose or may not trust their employers fully. [If possible, it is recommended that monitoring is conducted through a neutral organisation under a guarantee of anonymity.]

[If this is not possible,] monitoring should take place within an employer's usual monitoring arrangements and privacy, confidentiality and anonymity will be paramount. For example, diversity statistics should not be linked to IT-based personnel records that indicate grade or job title, as the small number of transsexual employees in an organisation may be identified by these or other variables, compromising confidentiality.

Employers should note that it is important to recognise that transsexual people will usually identify as men or women, as well as transsexual people. In light of this, it is not appropriate to offer a choice between identifying as male, female or transsexual.