

Questionnaire:

**Consultation on a draft  
Code of Practice  
on Employment**

Thank you for taking part in this formal consultation on our draft Code of Practice about employment.

In line with our statutory powers, the Equality and Human Rights Commission is producing statutory codes to cover all aspects of the new Equality Act. The purpose of the draft Code of Practice on employment is to explain the new statutory provisions on employment to ensure that the law is applied consistently by lower courts and tribunals, and to make the law accessible to a wider audience, such as those who have obligations and those who have rights or their representatives.

Please use this questionnaire to identify any sections where you think we have not accurately explained the new obligations and rights under the law. Once the consultation period has concluded we will use the completed questionnaires to inform the final drafting of the codes before they are laid before Parliament. We would be most grateful if you could complete this questionnaire. Please answer each question by ticking the relevant box and writing any comments in the boxes provided. We welcome both positive and negative comments. Please send written responses to:

Draft codes of practice consultation  
Equality and Human Rights Commission  
FREEPOST RRLL-GHUX-CTR  
Arndale House, Arndale Centre,  
Manchester M4 3AQ

Responses can also be sent electronically to:  
**[COPConsult@equalityhumanrights.com](mailto:COPConsult@equalityhumanrights.com)**

For further copies or copies in accessible formats, please see the back page. You can access the online questionnaire from our website at:  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

The closing date for this consultation is 2 April 2010.  
We must receive your comments on or before that date.

**Please fill in the name and address (or that of your organisation if relevant).**

Name

Name of organisation and position held (where relevant)

Address

Postcode

Responses will remain confidential unless respondents indicate by ticking this box  that they may be made available to the public on request. Please note that responses will not be attributed to individuals in any circumstances.

# Chapter 1: Section one – You and your organisation

The answers you give in this section will enable us to have a better understanding of who has responded to this consultation.

## Q1. Please indicate where you are based.

Please tick one box only

- |          |                                     |
|----------|-------------------------------------|
| England  | <input checked="" type="checkbox"/> |
| Scotland | <input type="checkbox"/>            |
| Wales    | <input checked="" type="checkbox"/> |

## Q2. In which capacity are you responding to this questionnaire?

Please tick all boxes that apply

- |   |                                     |
|---|-------------------------------------|
| a) For a central, devolved or local government body | <input type="checkbox"/>            |
| b) For a representative organisation                | <input checked="" type="checkbox"/> |
| i. Voluntary Organisation                           | <input type="checkbox"/>            |
| ii. Trade Union or Professional Association         | <input type="checkbox"/>            |
| iii. Other – please tick box and describe below     | <input checked="" type="checkbox"/> |

The Employment Lawyers Association ("ELA") is a non-political group of specialist employment lawyers (solicitors and barristers) acting for employers and employees throughout England, Scotland and Wales in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation. A list of members involved in this response is set out below:

Working Party Chair  
Joanne Owers – Fox Williams

Working Party Members  
Emma Bartlett – Speechly Bircham  
Jill Bell – Anderson Strathern  
Amy Bird – Cameron McKenna  
Marion Bloodworth - Lovells  
Lucinda Bromfield – Bevans  
Gemma Brown – Abbey Protection Group  
Paul Brown – Biggart Baillie  
Claire Darwin – Matrix Chambers  
Kitty Debenham – Simmons and Simmons  
Jonathan Ions – Barlow Lyde and Gilbert  
Caroline Loving – Finers Stephens Innocent  
Camilla Palmer- Leigh Day

- c) As an employer
- d) As an employee
- e) As a service provider
- f) As a service user
- g) As an adviser
- h) As an individual

**Q3. If you are responding on behalf of an organisation, how many people does it employ?**

- Up to 50
- 51 to 100
- 101 to 500
- 501 to 1,000
- 1,001 to 5,000
- 5,001 and over
- Don't know

## **Section 2 – Chapter evaluation**

This section of the questionnaire covers the individual chapters within the draft code.

**Chapter 1 – Introduction**

**Chapter 2 – Protected characteristics**

**Chapter 3 – Prohibited conduct**

**Chapter 4 – Beyond the checklist**

**Chapter 5 – Discrimination in the employment field**

**Chapter 6 – Recruitment**

**Chapter 7 – Positive action**

**Chapter 8 – Occupational requirements**

**Chapter 9 – During employment**

**Chapter 10 – Termination / end of employment**

**Chapter 11 – Discrimination in occupation**

**Chapter 12 – Enforcement**

**Chapter 13 – Appendix**

# **Chapter 1: Introduction**

**Q1. How much of Chapter 1 have you read?**

Please tick one box only

- |                   |                                     |
|-------------------|-------------------------------------|
| All or most of it | <input checked="" type="checkbox"/> |
| About half        | <input type="checkbox"/>            |
| Less than half    | <input type="checkbox"/>            |
| None of it        | <input type="checkbox"/>            |

If you have not read Chapter 1, please go to Chapter 2 of the questionnaire. All others please continue with Q2.

**Q2. Do you agree or disagree that this section clearly explains the relevant law?**

Please tick one box only

- |                            |                                     |
|----------------------------|-------------------------------------|
| Strongly agree             | <input type="checkbox"/>            |
| Tend to agree              | <input checked="" type="checkbox"/> |
| Neither agree nor disagree | <input type="checkbox"/>            |
| Tend to disagree           | <input type="checkbox"/>            |
| Strongly disagree          | <input type="checkbox"/>            |
| Don't know                 | <input type="checkbox"/>            |

**Q3. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

**Q4. To what extent do you agree or disagree that Chapter 2 explains the status of the code in relation to employment?**

Please tick one box only

- |                |                                     |
|----------------|-------------------------------------|
| Strongly agree | <input type="checkbox"/>            |
| Tend to agree  | <input checked="" type="checkbox"/> |



- Neither agree nor disagree
- Tend to disagree
- Strongly disagree
- Don't know

**Q5. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

**Q6. To what extent do you agree or disagree that this chapter explains the application of the code in relation to employment?**

Please tick one box only

- Strongly agree
- Tend to agree
- Neither agree nor disagree
- Tend to disagree
- Strongly disagree
- Don't know

**Q7. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

**Q8. To what extent do you agree or disagree that this chapter explains how to use the code?**

Please tick one box only

- Strongly agree
- Tend to agree
- Neither agree nor disagree

Tend to disagree  
Strongly disagree  
Don't know

**Q9. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

**Q10. Are there any other comments that you would like to make about Chapter 1?**

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

## **Chapter 2: Protected characteristics**

**Q1. How much of Chapter 2 have you read?**

Please tick one box only

All or most of it

**ELA WORKING PARTY ON EQUALITY BILL  
STATUTORY CODE OF PRACTICE  
CHAPTER 2**

PAGE	SECTION	COMMENTS
19	Bullet point 3	Suggest the following words are inserted after "because someone else": <b>with whom they are associated</b>
19	Last paragraph	Suggest this is re-written as follows (new words in bold):  "in other cases <b>however</b> it is necessary for the relevant protected characteristic to be a characteristic of the employee claiming discrimination. For example, <b>when deciding whether</b> indirect discrimination <b>has occurred</b> , an employment tribunal looks at whether a provision, a 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. <b>A claim of indirect discrimination could only therefore be made by someone with a protected characteristic who considers they have been disadvantaged by the employer's provision, criterion or practice.</b>
22	2.7	Suggest the words " <b>in the past</b> " are inserted after the words "have had a disability in order to make this very clear."  The reference to section 183 should be 188.
22	2.8	Suggest the first sentence is rewritten as follows:  "only people who <b>currently</b> have a disability, who have had a disability <b>in the past</b> or who are perceived to have ...
22	2.9	We felt that the sections following 2.9 were somewhat selective and disjointed. We would suggest that rather than trying to summarise disability discrimination in just a few paragraphs, it would be more sensible simply to refer to the appendix where it is dealt with in much more detail. We would suggest therefore deleting clauses 2.10 - 2.14.  The second bullet point is missing a full stop at the end.

	2.12	<p>If this clause is to remain (see above for our suggestion that it be removed) it would be helpful to include the wording in bold to ensure that it follows the Act precisely:</p> <p>...."but for those measures, the impairment would <b>be likely to</b> have a substantial ..."</p>
	2.19	<p>"Under the Equality Act...." everywhere else the Code is just referring to "the Act" - the reference should be made standard throughout.</p>
23	Whole section on gender reassignment	<p>As a general comment, we both found this section somewhat hard to understand and confusing in places. It would be helpful for some of the terminology to be explained, eg what is meant by transvestites, cross dressing, gender reassignment etc.</p> <p>We also felt that whilst it is important to offer employers and employees some explanation about gender reassignment, the section was perhaps a little long and detailed when compared with the other sections and given that it is thought that there are 5,000 people in the UK who feel that their birth gender is incorrect (according to the Women and Equality Unit guide of 2005).</p>
24	2.22	<p>The Code should make it clear whether the person has to "show that they have reached the definitive point" to the employer.</p> <p>For example, with the first bullet point, would they be protected if they had told someone outside work or do they have to have actually told their employer in order to obtain protection in relation to the workplace?</p> <p>Similarly, in relation to the last bullet point, further explanation is required here. How is someone's employer expected to know whether somebody has decided to attend counselling sessions outside of the office?</p> <p>How would an employer know whether a person is driven by their gender identity to cross dress (and is not a transvestite as referred to at 2.26?) Why would someone cross dress other than as a result of their gender identity?</p> <p>The first bullet is missing a full stop.</p>
25	2.23	<p>Query how relevant the example of gender variant children is given this code is related to employment.</p>

		Should this be removed?
25	2.24	Suggest the words: <b>"and manifests that proposal"</b> are added to the end of the first sentence so that it reads as follows:  "protection is provided from the moment when someone proposes to move along the pathway away from their birth sex <b>and manifests that proposal.</b> "
26	2.25	We suggest that this section needs to deal much more clearly with the issue of the employer's knowledge - as elsewhere in this part of the chapter. How would an employer know that somebody had withdrawn from a gender reassignment process?  Shouldn't the example relate to employment? How in these situations would the person be discriminated against if her employer did not know?
27	2.32	In relation to the last sentence, explaining that discrimination on the ground of marriage and civil partnership is only unlawful in relation to work, it may be sensible to add a sentence to explain why this is.  The detailed sections on association and perception (3.17 - 3.19) should make it clear that they do not apply to the ground of marriage and civil partnership.
28	Before the heading "Race"	Why is there no reference to the protected characteristic of pregnancy and maternity? and explanatory comments as for all other protected characteristics?
28	2.33	This section makes a reference to citizenship although this is not mentioned in clause 9(1) of the Act at all. Is it referred to elsewhere in the Act, eg in any interpretative provisions?
30	2.47	Is this section necessary? What does it add? We suggest that it could be deleted.
	2.51	This is perhaps too strong a statement - some would suggest that it only "arguably" "goes much further than simply a belief about adherence to a religion or its central articles of faith. Belief is subjective, and there is no requirement for a religious belief to be shared by others. The text should therefore be re-worded as follows:  ""Religious belief" <b>arguably</b> goes beyond beliefs about and adherence to a religion...."
34	Example box	The syntax of the last sentence is awkward. Suggest that the last sentence is reworded as follows:

		<b>"Unless the criterion can be justified</b> , this may be indirect discrimination against Muslim women and Sikh men who cover their hair."
34	2.57	The word "or" needs to be added before "sexual orientation".
34	2.58	There is an incomplete section reference here.
	2.59	It would be helpful to make it clear here (as per the original DTI guidance) that the definition does not include sexual practices or sexual conduct - just so that it is clear that this isn't included as a "manifestation".
35	2.60	It is not clear what is meant by this sentence:  "sexual orientation relates to how people feel as well as their actions".  In what way could this expose an employer to liability?
35	2.61	The wording in this section is awkward. Suggest that the words "it means" is removed from the first sentence.

12.2.10

- About half
- Less than half
- None of it

If you have not read Chapter 2, please go to Chapter 3 of the questionnaire. All others please continue with Q2.

**Q2. Do you agree or disagree that this section clearly explains the relevant law?**

Please tick one box only

- Strongly agree
- Tend to agree
- Neither agree nor disagree
- Tend to disagree
- Strongly disagree
- Don't know

**Q3. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

**Q4. Are the definitions you need to understand this section included?**

Please tick one box only

- Strongly agree
- Tend to agree
- Neither agree nor disagree
- Tend to disagree
- Strongly disagree

Don't know

**Q5. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

**Q6. Where examples illustrate the text, please tick the relevant box.**  
Please tick one box only

Too many examples

Too few examples

**Q7. Overall do you find the use of examples helpful / appropriate?**

Yes

No

**Q8. If your answer to Q7 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.**



**Q9. Are there any other comments that you would like to make about Chapter 2?**

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Please see attached.
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## Chapter 3: Prohibited conduct

**Q1. How much of Chapter 3 have you read?**

Please tick one box only

- |                   |                                     |
|-------------------|-------------------------------------|
| All or most of it | <input checked="" type="checkbox"/> |
| About half        | <input type="checkbox"/>            |
| Less than half    | <input type="checkbox"/>            |
| None of it        | <input type="checkbox"/>            |

If you have not read Chapter 3, please go to Chapter 4 of the questionnaire. All others please continue with Q2.

**Q2. Do you agree or disagree that this section clearly explains the relevant law?**

Please tick one box only

- |                            |                                     |
|----------------------------|-------------------------------------|
| Strongly agree             | <input type="checkbox"/>            |
| Tend to agree              | <input type="checkbox"/>            |
| Neither agree nor disagree | <input checked="" type="checkbox"/> |
| Tend to disagree           | <input type="checkbox"/>            |
| Strongly disagree          | <input type="checkbox"/>            |

Don't know

**Q3. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

Some of it is clear, some not so clear. It would be helpful in 3.73 to say that in some cases an employer may have to treat a pregnant woman more favourably to remove any disadvantage, eg in relation to pregnancy related sickness absence.

3.75 was rather confusing. It would be clearer to say there is a distinction between employees who are entitled to statutory maternity leave and other workers who are not; this is clear in 3.76.

More examples would be helpful. in 3.78 it is worth explaining that if a woman is not allowed to return to the same job and the reason is related to her maternity absence, that is discrimination even if the employer has complied with the ERA (ie shown that it is not reasonably practical to allow the woman to return to the same job but she has been offered a suitable alternative. This is a common problem and should be clarified.

3.79 is not very clear to those who do not understand what is meant by discrimination by association and this section could be simplified.

In 3.80 it is worth saying that there is no obligation on a woman job applicant or employee to inform her employer that she is pregnant until 15 weeks before the birth.

However, it should be pointed out that she will not be protected from discrimination if the employer successfully argues that it was not aware of her pregnancy, nor will she benefit from health and safety protection.

Example in 3.82 is a bit confusing . It would be simpler to use only the example of the locum being a better performer rather than going into whether the woman on leave had performance issues which may not have been serious enough to be raised.

3.85 is a bit misleading. But worth saying that where the SDA provides greater protection than the ERA, then it prevails. One example is the right to return after maternity leave.

3.89 Not sure why this states that in pregnancy and

maternity cases, indirect sex discrimination may apply - when it does not as stated by previous sentence.

**Q4. Are the definitions you need to understand this section included?**

Please tick one box only

- |                            |                                     |
|----------------------------|-------------------------------------|
| Strongly agree             | <input type="checkbox"/>            |
| Tend to agree              | <input type="checkbox"/>            |
| Neither agree nor disagree | <input type="checkbox"/>            |
| Tend to disagree           | <input checked="" type="checkbox"/> |
| Strongly disagree          | <input type="checkbox"/>            |
| Don't know                 | <input type="checkbox"/>            |

**Q5. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

The definition of indirect discrimination could be greatly simplified and edited down. The examples should make it clear that any potentially discriminatory PCP can be justified. For example, in the Hindu partners situation, it is possible that this would be justified; same applies to other examples. Not sure it is correct that a proposed policy would be covered as opposed to a policy which exists but may not apply to the complainant . I think it would be simpler to deal briefly with the question of adverse impact after the PCP and 'disadvantage' after that. Question of whether there is a disadvantage is quite simple in practice and could be made clearer

The section on 'Comparative approach' is confusing. It would be better to follow a step by step approach, giving examples along the way. The section on expert evidence in 3.99 is confusing

The example of the marketing company (3.100) could be simplified

In justification, costs and economic efficiency are relevant though costs alone may not be sufficient. However, I think 3.107 is slightly misleading.

**Q6. Where examples illustrate the text, please tick the relevant box.**  
Please tick one box only

Too many examples   
Too few examples

**Q7. Overall do you find the use of examples helpful / appropriate?**

Yes   
No

**Q8. If your answer to Q7 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.**

Make them shorter and simpler, eg 3.82, 3.100; 3.104 is an unlikely scenario I think.  
3.107 fitness test for cyclists may be justified and would not necessarily disadvantage older people (may depend on the age)  
Examples in 3.107 could be justified depending on the circumstances. If using social networking websites is not a big part of the job it is less likely to be justified.

**Q9. Are there any other comments that you would like to make about Chapter 3?**

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

**ELA WORKING PARTY ON EQUALITY BILL**  
**STATUTORY CODE OF PRACTICE**

**Chapter 3, Question 9**

Pages 36-38

- 3.5 The following sentence should be added after the last sentence in the Example: "If the less favourable treatment is because of her sex, it will constitute direct sex discrimination."
- 3.13 Example 1 - What is Roma? If it is meant to be a reference to a "gypsy" or a "traveller", this should be more explicit. If so, what is the protected characteristic, since we are not aware that gypsies are of a difference race, colour, nationality or ethnic origin than others. Is it the case that this might be discrimination on grounds of a belief" in the gypsy way of life?
- 3.13 Example 2 - This is potentially confusing because the relevant comparator test is someone without the same disability. Is it worth making that reference?
- 3.18 The following should be added to the last sentence in the Example: "..... because of age".
- 3.21 Is this not also sex discrimination because it is the employer's perception that she will start a family and therefore be absent on maternity leave or thereafter less engaged in the business that is a factor and the employer would not necessarily treat a recently married man the same? If so, is this worth highlighting?
- 3.29 Typo in last line of Example "ans" should be "means"
- 3.30 Can you give the example of when an occupational requirement would be acceptable?
- 3.34 Typo in third line of second Example "believe" should be "believes"
- 3.43 However, even if the nursing home does not employ black women, a claim of race discrimination will not succeed if the nursing home is able to rely on gender occupational requirement in this case.

Pages 58-69 - Disability

Slightly more explanation/examples of how employers would balance disabled employee's right to privacy in occupational health assessments against imputed knowledge of disability would be helpful. Employers are advised of the fact that they will be deemed to know of disability with internal Occupational Health Assessor, but what of employee's right/desire to keep it confidential?

Pages 69-86 - Pregnancy

3.76-3.86 is generally very clear and easy to understand.

Indirect discrimination, which is a complex area, could be simplified.

Pages 87-102 (Disability/Reasonable Adjustments)

- 3.114 Rather than the term "particular disability", we consider it would be more accurate to say "people who are not disabled".
- 3.139 Insert the words "do all they reasonably can" after the words "subject to considerations about confidentiality, employers must...". The EHRC may also wish to refer to the fact that an employer, in these circumstances, should take all reasonable steps to ensure that a disabled employee is not harassed on this or any other basis (see paragraph 3.153).

Pages 102-130 – (Comparators/Harassment/Victimisation)

- 3.160 In the last line of the Example, insert the word "harassment" between "prohibited" and "under".
- 3.162 In the third bullet point, decapitalise the words "Black" and "White".
- 3.168 In the second bullet point of Example 6, can an example of this be given.
- 3.187 In the paragraph after the Example, insert the words "and victimisation" after the "discrimination/harassment".
- 3.193 Is that accurate? We feel determination as to what steps are reasonable would be dependent on the merits of each case not whether any more reasonable steps could have been taken – that would be to test whether "all" reasonable steps had been taken.
- 3.195 In the third line, insert the word "even" after the word "employment". Also, insert "whether or not the principal condoned the acts" at the end of the last sentence after the words "principal's authority"
- 3.197 In relation to the second Example, the manager should however consider his obligation to prevent third party harassment.
- 3.208 More information about liability for a criminal offence under the Act would be helpful.

Please see attached.

## Chapter 4: Beyond the checklist

**Q1. How much of Chapter 4 have you read?**

Please tick one box only

- |                   |                                     |
|-------------------|-------------------------------------|
| All or most of it | <input checked="" type="checkbox"/> |
| About half        | <input type="checkbox"/>            |
| Less than half    | <input type="checkbox"/>            |
| None of it        | <input type="checkbox"/>            |

If you have not read Chapter 4, please go to Chapter 5 of the questionnaire. All others please continue with Q2.

**Q2. Do you agree or disagree that this section clearly explains the relevant law?**

Please tick one box only

- |                            |                                     |
|----------------------------|-------------------------------------|
| Strongly agree             | <input type="checkbox"/>            |
| Tend to agree              | <input type="checkbox"/>            |
| Neither agree nor disagree | <input type="checkbox"/>            |
| Tend to disagree           | <input checked="" type="checkbox"/> |
| Strongly disagree          | <input type="checkbox"/>            |
| Don't know                 | <input type="checkbox"/>            |

**Q3. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

**Q4. Are the definitions you need to understand this section included?**  
Please tick one box only

- |                            |                          |
|----------------------------|--------------------------|
| Strongly agree             | <input type="checkbox"/> |
| Tend to agree              | <input type="checkbox"/> |
| Neither agree nor disagree | <input type="checkbox"/> |
| Tend to disagree           | <input type="checkbox"/> |
| Strongly disagree          | <input type="checkbox"/> |
| Don't know                 | <input type="checkbox"/> |

**Q5. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

**Q6. Where examples illustrate the text, please tick the relevant box.**  
Please tick one box only

- |                   |                                     |
|-------------------|-------------------------------------|
| Too many examples | <input checked="" type="checkbox"/> |
| Too few examples  | <input type="checkbox"/>            |

**Q7. Overall do you find the use of examples helpful / appropriate?**

Yes



No

**Q8. If your answer to Q7 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.**

**Q9. Are there any other comments that you would like to make about Chapter 4?**

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

4.1 The comment that 'Employers are not required by law to have equality policies' is, of course, correct for those in the private sector. Employers in the public sector are subject to different statutory requirements including the equality duty. Given the devolution of public sector employers away from central government agencies (independent NHS trusts being an example) and potentially wide application of the equality duty, it would be prudent if the differences between public and private sector in terms of the equalities obligations were reinforced. It follows that it might be prudent for the Code to make it clear that public sector organisations are under differing obligations. This would also draw the opening paragraphs into line with the rest of the code where a distinction between private and public employers is evident (see Paragraph 4.32 and 4.33 as an example).

4.4. The Code, on a number of occasions, refers to the content and details of equalities policies changing as a result of the 'size, resources and needs of the employer'. There is no doubt that an equality policy of an employer with a thousand employees will differ from the equality policy of an employer with 25 employees. However, it is important to reinforce the message that the law makes no distinction on discrimination matters and a small employer is just as liable for discriminatory conduct as a large employer. Whilst the needs and requirements of a policy will vary from employer to employer, the fundamental requirement that

discrimination be avoided and where in existence eradicated, remains the same and should be stated here.

4.5 It is important to note that the mere existence of an equality policy will not be enough to minimise the risk of legal action being taken and being successful. As the Code makes clear in later passages, equality policies must be planned, reviewed, implemented and monitored. The Code should not give the impression that the existence of a policy, on its own, is enough to deflect discrimination claims.

4.8 See comments at [4.4]. Economic constraints should not be used to attempt to justify breaches of the equality obligations.

4.11. The three steps which are suggested for the implementation of any equality policy do not make reference to the inclusion of employee representatives or involving staff. The guidance does, at a later stage, reference the roles of Unions/employee representatives in terms of monitoring the policy.

4.13. In- House training could be included as a bullet point. In house training is specifically mentioned at 4.18 and so, in order to maintain consistency, it should be mentioned here.

4.39 The information which is likely to be collected under equalities policies is likely to fall within the definition of 'sensitive personal data'. There are differing requirements for the processing of sensitive personal data as opposed to ordinary personal data. If the data is sensitive personal data, readers of the Code should be referred to both Schedules 1 and 2 of the Data Protection Act for a review of the conditions precedent for the processing of such data. The Code, as it stands, only refers to Schedule 1 and this is potentially erroneous.

## **Chapter 5: Discrimination in the employment field**

**Q1. How much of Chapter 5 have you read?**

Please tick one box only

- |                   |                                     |
|-------------------|-------------------------------------|
| All or most of it | <input checked="" type="checkbox"/> |
| About half        | <input type="checkbox"/>            |
| Less than half    | <input type="checkbox"/>            |
| None of it        | <input type="checkbox"/>            |

If you have not read Chapter 5, please go to Chapter 6 of the questionnaire. All others please continue with Q2.

**Q2. Do you agree or disagree that this section clearly explains the relevant law?**

Please tick one box only

- |                            |                                     |
|----------------------------|-------------------------------------|
| Strongly agree             | <input type="checkbox"/>            |
| Tend to agree              | <input checked="" type="checkbox"/> |
| Neither agree nor disagree | <input type="checkbox"/>            |
| Tend to disagree           | <input type="checkbox"/>            |
| Strongly disagree          | <input type="checkbox"/>            |
| Don't know                 | <input type="checkbox"/>            |

**Q3. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

Although we tend to agree with the statement, there are some points which require clarification.

5.2(d) - This should refer to "a relevant member of the House of Lords staff" rather than "a relevant member of the House of Lords".

5.9 - We consider that the final two bullet points are unclear and these could be clarified further by e.g. stating in the penultimate point that direct discrimination does not apply if a person is unmarried or single.

5.23 - This paragraph appears to contain an exhaustive list of those individuals and organisations whose responsibilities

would otherwise fall outside the definition of employment. This is not the case as the Act refers to others such as a "responsible authority" in relation to police officers and a LLP (or proposed LLP) in relation to their members. It is not clear that this is a non-exhaustive list.

**Q4. Are the definitions you need to understand this section included?**  
Please tick one box only

- Strongly agree
- Tend to agree
- Neither agree nor disagree
- Tend to disagree
- Strongly disagree
- Don't know

**Q5. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

If the definitions are not included, there are references to chapters in which they they can be found.

**Q6. Where examples illustrate the text, please tick the relevant box.**  
Please tick one box only

- Too many examples
- Too few examples

**Q7. Overall do you find the use of examples helpful / appropriate?**

- Yes
- No

**Q8. If your answer to Q7 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.**

5.19 - In the example in this paragraph the final sentence states "The GP will have acted unlawfully even if the receptionist does not follow her instructions". This is incorrect and should read "The GP will have acted unlawfully even if the manager does not follow her instructions".

5.39 - The definition of "knowingly" is set out in the case of *Allaway v. Reilly and Another* [2007] IRLR 864 (EAT) in which The Honourable Lady Smith stated "it is enough that, on the evidence, the conclusion can be drawn that discrimination as the probable outcome was within the scope of his knowledge at the time. It would not need to be in the forefront of his mind nor would he need to have specifically addressed his mind to it". "Knowingly" is not the same as "intentionally" (or "recklessly") and we consider that the example is not sufficiently clear.

**Q9. Are there any other comments that you would like to make about Chapter 5?**

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

We have the following minor points in respect of this section:

5.1 - There should be a reference to clause 40 as well as clause 39 next to this paragraph.

5.2 - For consistency this paragraph should refer to clause 83(2) rather than 83.

5.7 - This clause refers to work and workers rather than employment and employees which is inconsistent.

5.24 - This clause refers to occupation health pension schemes rather than occupational pension schemes.

5.25 - There should be a reference to clause 53 as well as 57 as the paragraph also refers to "qualifications bodies".

5.28 & 5.41 - The reference to Chapter 10 should be to Chapter 11.

5.32 & 5.36 - The reference to Chapter 11 should be to Chapter 3.

5.34 - We have presumed that the reference to paragraph 6.26 is intended to refer to paragraph 5.26.

Please note that there are typing errors in the following paragraphs: 5.9 (1st and last bullet points), 5.17, 5.18(c), 5.23 (in the last sentence), 5.25, 5.28, 5.34, 5.36.

# Chapter 6: Recruitment

## Q1. How much of Chapter 6 have you read?

Please tick one box only

- |                   |                                     |
|-------------------|-------------------------------------|
| All or most of it | <input checked="" type="checkbox"/> |
| About half        | <input type="checkbox"/>            |
| Less than half    | <input type="checkbox"/>            |
| None of it        | <input type="checkbox"/>            |

If you have not read Chapter 6, please go to Chapter 7 of the questionnaire. All others please continue with Q2.

## Q2. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

- |                            |                                     |
|----------------------------|-------------------------------------|
| Strongly agree             | <input type="checkbox"/>            |
| Tend to agree              | <input checked="" type="checkbox"/> |
| Neither agree nor disagree | <input type="checkbox"/>            |
| Tend to disagree           | <input type="checkbox"/>            |
| Strongly disagree          | <input type="checkbox"/>            |
| Don't know                 | <input type="checkbox"/>            |

## Q3. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.

Introduction (Top of page 172): This should make it clear that work permit issues should come at the last stages of selection. It could also be amended to state that employers should not have a policy of not considering applicants who require work permits, which could be indirect race discrimination (See Osborne Clarke Services v Purohit [2009] UKEAT/0305/08).

Job Descriptions (6.1, penultimate bullet point): The words "unless they can be objectively justified" should be inserted at the end of the first sentence after the words "against women".

Deterred Applicants: Paragraphs 6.1 (penultimate bullet point) and 6.6 could be amended to refer to Clause 19 (2) ( c) of the Bill, which applies where a provision, criterion or practice "would put" a person at a disadvantage ( ie "deterred applicants").

Paragraph 6.3 references that job descriptions may be required to include reference to flexible working options being available. We would consider that this goes too far, and overstates the position. Rather, employers should at least consider whether it is appropriate to reference flexible working options in the job description.

Job Advertisements (Paragraph 6.10): Where a Genuine Occupational Requirement applies, it is good practice to state this on the Advertisement.

Selection tests and assessment centres (Paragraph 6.43): Candidates should be informed in advance if tests are to be used so that reasonable adjustments can be requested and arrangements made.

Employers should take care that criteria are not indirectly discriminatory. For example, if a criteria is willingness to work anti-social hours, this could indirectly discriminate against women who are more likely to have childcare responsibilities.

Medical checks (Paragraph 6.61): The Code should be amended to reflect the new Clause 60 in the Bill. It should make clear that prospective employers can ask applicants health questions for the prescribed reasons. However, if the employer makes a health related enquiry and then rejects the applicant before they are either (a) shortlisted after an assessment for the next recruitment stage, or (b) receive a job offer, if there is no interview or assessment process then the Employer will need to prove that it did not discriminate against the applicant.

Feedback (Paragraph 6.67): Feedback can be oral or written.



Any negative comments should relate to the candidate's failure to meet the requirements of the job description and / or person specification.

Where an employer fails to give feedback on request, this could give rise to an inference that there was a discriminatory reason for not appointing the candidate (See the case of Dattani v Chief Constable of West Mercia Police EAT/0385/04)

**Q4. Are the definitions you need to understand this section included?**  
Please tick one box only

- |                            |                                     |
|----------------------------|-------------------------------------|
| Strongly agree             | <input type="checkbox"/>            |
| Tend to agree              | <input checked="" type="checkbox"/> |
| Neither agree nor disagree | <input type="checkbox"/>            |
| Tend to disagree           | <input type="checkbox"/>            |
| Strongly disagree          | <input type="checkbox"/>            |
| Don't know                 | <input type="checkbox"/>            |

**Q5. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

**Q6. Where examples illustrate the text, please tick the relevant box.**  
Please tick one box only

- |                   |                                     |
|-------------------|-------------------------------------|
| Too many examples | <input type="checkbox"/>            |
| Too few examples  | <input checked="" type="checkbox"/> |

**Q7. Overall do you find the use of examples helpful / appropriate?**

Yes   
No

**Q8. If your answer to Q7 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.**

**Q9. Are there any other comments that you would like to make about Chapter 6?**

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

The paragraph numbers in the code need to be updated to reflect the amendments to the bill. For example, references to clause 107(2) should be changed to clause 110 (2).

## **Chapter 7: Positive action**

**Q1. How much of Chapter 7 have you read?**  
Please tick one box only

All or most of it   
About half

Less than half  
None of it

If you have not read Chapter 7, please go to Chapter 8 of the questionnaire. All others please continue with Q2.

**Q2. Do you agree or disagree that this section clearly explains the relevant law?**

Please tick one box only

Strongly agree  
Tend to agree  
Neither agree nor disagree  
Tend to disagree  
Strongly disagree  
Don't know

**Q3. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

- Distinction between positive action and discrimination (7.2) - ELA welcomes the fact that the Code seeks to make the distinction between the two clear, as this is a difference that can cause confusion. However, ELA suggests that slightly more detail is provided, particularly by way of examples. At the moment, the Code basically states that the difference is that employers can do one rather than the other if they meet certain conditions, and then sets out specific examples of what would amount to positive discrimination. This leaves employers to work out the distinction only by reference to the detail of the legislation and comparing what they are doing to the specific examples, rather than being guided by a general principle in addition. The Code could helpfully set out such a general principle (eg 'Positive discrimination is the act of providing someone with an advantage solely on the basis of a protected characteristic, regardless of merit, whereas positive action generally speaking means performing an assessment of merit and then opting to remedy a disadvantage by making the final selection by reference to a protected characteristic.')

- Combined discrimination (7.4 and others). The Bill and the Code refer only to people sharing 'a' protected characteristic. It

is therefore ELA's impression that positive action is not permitted in response to disadvantage experienced by groups as a result of combined protected characteristics. This is slightly surprising given the Government's finding that the most disadvantaged group in the labour market is Bangladeshi women. It would therefore be helpful if this was clarified.

- 'Disproportionately low' (7.11 and 7.14). The Bill allows positive action where participation by the group sharing the protected characteristic is disproportionately low. The Code does not make clear what this means ie participation in what activity is low compared to what area. Is it the proportion of the people with the protected characteristic locally, nationally, internationally, or wherever the employer usually recruits from? The latter would reflect existing legislation, and the former is suggested by the examples, but both of these would arguably undermine the ability of an employer (for instance based in a predominantly white area) to put the positive action measures to good use. In terms of the activity they participate in, it is not clear whether this is to be within the workforce as a whole (whether regional, national or international), in one establishment, in one division, or one team. Again, current legislation and the examples would suggest one establishment, but ELA considers this would be limiting for an employer and so it may not be the draftperson's intention. In any event, clarity is needed.
- 'Need' versus disadvantage/ low representation (7.16). The Code should make it clear that the specific provisions in relation to appointment/ recruitment do not, unlike the provisions of section 157, allow employers to take positive action in promotion/ recruitment to meet a 'need' of the group with the protected characteristic. This could prevent confusion for employers trying to reconcile 157 and 158.
- 'Proportionate' (7.16). The Code should make clear that proportionality is a requirement of section 158, not just section 157. ELA considers that this would focus the minds of employers when they are applying the provision.
- Stages of recruitment (7.16, 7.24). Additional clarity is required to show at what stage in the recruitment process positive action can be used and how. The Code states that positive action can be used at any point. However, given that it can only be used after objective assessments, in practice it is difficult to see how it could be used until post-interview (where interview is required) - as mentioned later, it may be helpful to have a

worked example showing its use at an earlier stage. Also, it is not clear whether it can be used more than once in the same recruitment process (eg after first round interviews/ assessments, and then again after second round interviews). In addition, ELA is concerned by the reference to the need to carry out an assessment of 'personal circumstances.' This is a loaded term in the context of discrimination legislation, and requires further explanation. Does it mean that employers will be permitted to ask questions that would otherwise be off limits other than in a monitoring questionnaire? Or does it mean that employers should seek to find out whether the disadvantage in question applies to the particular applicant? Or is it a veiled reference to the fact that in the case of some protected characteristics their presence cannot be established merely by looking at someone, and further enquiry may be needed? The term needs further explanation, otherwise there is a risk that employers will in good faith start asking the questions they have been discouraged from asking for years, and find themselves at the receiving end of direct discrimination claims. As 6.54 of the Code states, 'interviewers should not ask personal questions, which may be perceived to be intrusive and imply potential discrimination.' Moreover, the Code should make clear how employers are permitted to find out about 'hidden' protected characteristics without opening themselves up to claims of direct discrimination (eg a candidate in a final group claiming they weren't appointed because a monitoring form showed they were gay when really someone else was appointed because they were a Muslim). ELA suggests that this can be done by clearly documenting the process, and ensuring that someone not involved in the decision who is collating monitoring information is asked whether anyone has a particular, non-visible characteristic and if so who, rather than the panel poring over monitoring questionnaires/ asking ill-advised questions.

- What amounts to a 'policy' (7.24). ELA considers that employers may be concerned that if they consistently make use of positive action in good faith and within the framework of the legislation, they will be accused of having adopted a 'policy' of treating people with a certain characteristic more favourably, which is prohibited. It would be useful for the Code to contain guidance as to whether a repeated use of the positive action provisions in successive appointments would amount to a 'policy.' Please see further ELA's response to Q7 and Q8 of this

section.

- Overlap with public sector equality duty. ELA considers it would be helpful to include a short explanation of the interrelation of positive action with the public sector equality duty. It is easy to imagine public sector employers misinterpreting the provisions as meaning they have to exercise the option to use positive action in most if not all appointments (and then possibly falling foul of the restriction against adopting a 'policy' of doing so). At the moment, the only reference to the overlap is buried in the Guidance (at 10.3). ELA suggests that this is brought forward to the Code to make it clear to employers to whom the public sector equality duty applies, that the Code does not compel employers who are subject to it, to adopt positive action measures; merely that it is another option that is available to them.

**Q4. Are the definitions you need to understand this section included?**

Please tick one box only

- |                            |                                     |
|----------------------------|-------------------------------------|
| Strongly agree             | <input type="checkbox"/>            |
| Tend to agree              | <input type="checkbox"/>            |
| Neither agree nor disagree | <input type="checkbox"/>            |
| Tend to disagree           | <input checked="" type="checkbox"/> |
| Strongly disagree          | <input type="checkbox"/>            |
| Don't know                 | <input type="checkbox"/>            |

**Q5. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

'As qualified as' (7.20). The concept that an employer can treat a person, A, more favourably than another person, B, where A has a protected characteristic that B does not and where A is as qualified as B to be recruited/promoted has excited a lot of comment. As this is not defined in the Bill, ELA welcomes the additional light shed on this by the Code, but considers there could be further development of this definition and its application in practice. The first point which

could be clarified is in respect of what size of pool the provision may be used. The wording of the Code refers generally to positive action being used where 'two or more' candidates are viewed as being as qualified as each other. This gives the impression that the provision may be used where there is a pool of people eligible for promotion/recruitment, rather than just in a tie-break/tipping point situation between two people. However, 7.21 refers to 'both' candidates being as qualified and 7.22 includes the words 'where BOTH candidates satisfy the requirements of the role.' Similarly, in the House of Lords Committee (6th Sitting, 9 Feb 2010 Col 658), Baroness Royal of Blaisdon explained the Government's position as being that the provision may be used where an employer is faced with 'TWO candidates who are as qualified as each other'. It would be helpful if the Code clarified the position on this, as otherwise employers will face confusion when applying the provision. For instance, the Code could provide that 'The use of this provision is not restricted to a 'tie-break' between two candidates', as this appears to be the case.

Furthermore, the provisions at 7.22-3 are confusing. On the one hand, they refer to candidates satisfying the requirements of the role, and to a baseline set by an employer. On the other hand, they state that an employer cannot show a preference to someone who is clearly better qualified. In the speech mentioned above (at col 659), Baroness Royal explained that where one individual scores 95 per cent in an assessment, and another candidate scores 61, those candidates cannot be considered as qualified as each other, that it is 'immaterial' where the pass mark is set, that the 'clearly superior candidate must always be offered the job' and that the Government is 'confident that the clause as drafted achieves that effect.' ELA does not agree that this is necessarily the case. The reference to a baseline and a band of capabilities suggests that it is not always the 'superior' candidate that must be offered the job. Insisting on offering the job to the 'superior' candidate would be in strict accordance with the merit principle, but it would not go very far in removing disadvantage that may be caused for instance by a historic lower standard of education, when in fact somebody with a 60% assessment mark may be just as able to do a particular job as somebody with a 90% mark. It is easy to envisage an employer enthusiastic to embrace diversity, perhaps in pursuit of their equality duty, setting the baseline as low as it can be for someone still to be capable of performing a particular role. If however it is the intention that the 'superior' candidate must always get the job, this should be

made clear, so that employers do not fall foul of the provisions. It might be helpful to do this in conjunction with a worked example (perhaps involving a pool of candidates).

There is also some confusion amongst employers (and probably some practitioners) as to how two or more individuals can actually be 'as qualified' as each other. This confusion would probably be reduced by clarifying the above points, but it may also be helpful to include a practical example showing what might amount to two or more people being as qualified as each other.

**Q6. Where examples illustrate the text, please tick the relevant box.**

Please tick one box only

Too many examples

Too few examples

**Q7. Overall do you find the use of examples helpful / appropriate?**

Yes

No

**Q8. If your answer to Q7 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.**

ELA considers that the use of examples is helpful. However, in ELA's view there are currently insufficient examples, and the examples that are included do not address the most complex points. ELA considers that the following further examples would be useful:

- Showing a stage during recruitment, other than after final interview, where a preference under clause 158 may be exercised.

- Illustrating how the preference can be applied to a pool of



more than two people.

- Indicating how low the threshold for being qualified to carry out a job may be set and whether the 'superior' person must get the job (see our response to Q5 above).
- Showing how the provisions in clause 158 would apply to a situation of group disadvantage, as opposed to low participation. At the moment, all the examples for clause 158 relate to the latter, and so it is difficult to get a sense of how an employer would detect a disadvantage, what it would be, and how they could remedy it.
- Showing how an employer should go about assessing people's 'personal circumstances' as suggested by 7.17 (see answer to Question 3 for ELA's concerns about this) and how 'hidden' protected characteristics such as sexual orientation may be detected where an employer wishes to invoke the positive action provision in relation to that characteristic.
- Suggesting how two people may actually be as qualified as each other (or if this provision is changed to 'equally qualified' an example of that) - see ELA's response to Q5 above.

**Q9. Are there any other comments that you would like to make about Chapter 7?**

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

ELA considers it would be useful for the positive action provisions to be cross-referenced elsewhere in the Code. In particular, in Chapter 3 ('Prohibited Conduct'), within the heading 'When can direct discrimination be lawful' reference could be made to positive action, although explaining the distinction between this and discrimination. In addition, at Chapter 6 ('Recruitment'), no reference appears to be made to positive action, and in some places this silence may leave employers confused as to how to incorporate reference to positive action into their procedures. For instance, 6.9 ('Principles of good practice') provides that 'It should be made clear that all applications will be treated in the same way and on merit only.' Whilst ELA appreciates that positive action is intended to comply with the merit principle, strictly speaking it is not the case that applications will be dealt with only on merit. It would be useful for the Code to explain how employers trying to put best practice into effect should refer to the possible use of positive action provisions in their documentation. Further, at 6.37 (a) in relation to shortlisting, 6.41 (selection tests), 6.46 (interviews) no reference is made to positive action despite the fact that these are the stages at which presumably an employer would be using the provisions. At 6.29, a list of records that employers should keep regarding recruitment could also be amended to refer explicitly to any discussions regarding the use of positive action.

## Chapter 8: Occupational requirements

**Q1. How much of Chapter 8 have you read?**

Please tick one box only

- |                   |                                     |
|-------------------|-------------------------------------|
| All or most of it | <input checked="" type="checkbox"/> |
| About half        | <input type="checkbox"/>            |
| Less than half    | <input type="checkbox"/>            |
| None of it        | <input type="checkbox"/>            |

If you have not read Chapter 8, please go to Chapter 9 of the questionnaire. All others please continue with Q2.

**Q2. Do you agree or disagree that this section clearly explains the relevant law?**

Please tick one box only

- |                            |                                     |
|----------------------------|-------------------------------------|
| Strongly agree             | <input type="checkbox"/>            |
| Tend to agree              | <input type="checkbox"/>            |
| Neither agree nor disagree | <input type="checkbox"/>            |
| Tend to disagree           | <input checked="" type="checkbox"/> |
| Strongly disagree          | <input type="checkbox"/>            |
| Don't know                 | <input type="checkbox"/>            |

**Q3. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

Paragraph 8.3 (the third bullet point) states that '.....has reasonable grounds for believing, that B does not meet the requirement.' This differs from the text of the Act which states '...has reasonable grounds for not being satisfied that (B) meets (the requirement).....'

We will need to see how the courts interpret the Act, but it seems likely that reasonable grounds for not being satisfied will be a harder condition to fulfil than having reasonable grounds for belief. To avoid any confusion it may be sensible to use the words from the Act.

Paragraph 8.4 does not make it clear that the burden of proof for showing that an OR exists rests with the employer. It would be useful for employers to know this so that they can ensure their reasons for requiring an OR are clear, sufficient and well documented. It would be helpful for them to have this advice set out in this paragraph. It could also be useful to include it in paragraph 8.10.

Paragraph 8.5 (the third bullet point) includes the words 'or any other benefit, facility or service to B'. Paragraph 6(5) of Part 1, Schedule 9 of the Act ('Interpretation') suggests that these words should be omitted. This is consistent with paragraph 788 of the explanatory notes which does not mention 'benefit, facility or service'.

Paragraph 8.5 (fourth bullet point) does not include that dismissal or expulsion or termination of a worker's appointment cannot be on the grounds of sex. It is probably unnecessary to make any amendment on this point as it is unlikely to be relevant for employers. It is very unlikely that the situation would arise where someone would be unable to do a job they were currently doing because of an OR that they be the opposite sex. Presumably, where a worker is transsexual and has therefore changed sex this situation could be covered by the OR 'not to be a transsexual'.

The guidance on religious requirements and organised religions is a reasonable reflection of the Act but it is interesting to note that paragraphs 8.8 and 8.9 both use the wording of the Act '...has reasonable grounds for not being satisfied that the person meets it' unlike paragraph 8.5 (please see above). We would suggest that the wording in paragraph 8.5 is changed to be consistent with paragraphs 8.8, 8.9 and the wording of the Act.

The guidance in this area does not use the phrases 'non-conflict principal' or 'compliance principal' though it does explain the concepts. It might be useful if the phrases were used and explained as it is likely that they will be used by courts in exploring this area.

The guidance on Armed Forces and Employment Services is also a reasonable reflection of the Act. However, in paragraph 8.14 it could be useful to add a sentence to make it clear that employment services may be liable if they blindly follow their client's instructions to discriminate. The guidance could suggest that any employment service might want to ask further questions/investigate to ensure they are happy that there is a genuine OR.

Lastly, it would be helpful if the guidance made clear that an OR cannot be used to justify indirect discrimination or harassment.

**Q4. Are the definitions you need to understand this section included?**  
Please tick one box only

- |                            |                                     |
|----------------------------|-------------------------------------|
| Strongly agree             | <input type="checkbox"/>            |
| Tend to agree              | <input checked="" type="checkbox"/> |
| Neither agree nor disagree | <input type="checkbox"/>            |
| Tend to disagree           | <input type="checkbox"/>            |
| Strongly disagree          | <input type="checkbox"/>            |
| Don't know                 | <input type="checkbox"/>            |

**Q5. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

Arrangements' as used in paragraph 8.5 is not defined. Various types of arrangements are discussed elsewhere in the code but it might be useful to have a list of the sort of things that arrangements could cover.

Please see earlier for comments on 'non-conflict principal' and 'compliance principal'.

**Q6. Where examples illustrate the text, please tick the relevant box.**  
Please tick one box only

- |                   |                                     |
|-------------------|-------------------------------------|
| Too many examples | <input type="checkbox"/>            |
| Too few examples  | <input checked="" type="checkbox"/> |

**Q7. Overall do you find the use of examples helpful / appropriate?**

- |     |                                     |
|-----|-------------------------------------|
| Yes | <input checked="" type="checkbox"/> |
| No  | <input type="checkbox"/>            |

**Q8. If your answer to Q7 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.**

With regard to the example of the care home (paragraph 8.8) it might be helpful to say that where a job contained elements of both spiritual and administrative duties it would be necessary to look at the exact requirements of the role and to assess whether the role could be undertaken by someone who was not of the same religion.

**Q9. Are there any other comments that you would like to make about Chapter 8?**

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

The issue of ORs related to age (and other matters covered in Schedule 9) are not discussed in Chapter 8.

They are discussed elsewhere in the code (chapters 3, 6, 9 and 10).

However, age is likely to be a key issue for employers and it might be helpful for them to have a brief summary of the issues regarding age related ORs in Chapter 8. This is because an employer is unlikely to be reading the whole code at any one time and is more likely to be dipping into it for an answer to a particular question. It could be helpful for employers to have a summary of the latest guidance on ORs relating to age, particularly in the light of the ECJ cases of *Wolf v Stadt Frankfurt am Main* and *Petersen v Berufungsausschuss fuer Zahnaerzte fuer den Bezirk Westfalen-Lippe*. It would also be useful for there to be an age related example in the guidance.

The other main area of contention is likely to be ORs as they apply to religious organisations and/or organisations having an ethos based on religion or belief. The guidance does a good job of capturing the requirements of the Act and there is a suitable example given.

# Chapter 9: During employment

**Q1. How much of Chapter 9 have you read?**

Please tick one box only

- All or most of it
- About half
- Less than half
- None of it

If you have not read Chapter 9, please go to Chapter 10 of the questionnaire. All others please continue with Q2.

**Q2. Do you agree or disagree that this section clearly explains the relevant law?**

Please tick one box only

- Strongly agree
- Tend to agree
- Neither agree nor disagree
- Tend to disagree
- Strongly disagree
- Don't know

**Q3. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

Although we tend to agree certain areas require clarification otherwise they are potentially misleading.

1) Introduction: The first paragraph should read "Aside from legislation the employment relationship is governed by...".

2) Introduction: The reference to direct discrimination does not need to be made twice.

3) Paragraph 9.2: It is not a legal requirement for employers to provide details of overtime, bonuses, maternity, paternity and adoption leave procedures in the statement of terms although it is good practice to do so.

4) Paragraph 9.21: This should be amended to make clear that a request for flexible working may only be rejected if it falls within one or more of the specified grounds of refusal and not simply for clear business reasons.

**Q4. Are the definitions you need to understand this section included?**

Please tick one box only

- |                            |                                     |
|----------------------------|-------------------------------------|
| Strongly agree             | <input type="checkbox"/>            |
| Tend to agree              | <input checked="" type="checkbox"/> |
| Neither agree nor disagree | <input type="checkbox"/>            |
| Tend to disagree           | <input type="checkbox"/>            |
| Strongly disagree          | <input type="checkbox"/>            |
| Don't know                 | <input type="checkbox"/>            |

**Q5. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

1) Paragraphs 9.34-9.35: Reference to "attendance management action" should be amended to disciplinary action.

2) Paragraph 9.47: The definition of a dependant should include those living in the same household (other than employees, tenants, lodgers and boarders) and those who reasonably rely on the employee for assistance and provision of care.

3) In relation to Question 6 below - we cannot answer as the options are too restrictive.



**Q6. Where examples illustrate the text, please tick the relevant box.**  
Please tick one box only

Too many examples   
Too few examples

**Q7. Overall do you find the use of examples helpful / appropriate?**

Yes   
No

**Q8. If your answer to Q7 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.**

1) Paragraph 9.72: The example should conclude that this is reasonable provided non-Polish speaking employees are at no stage excluded from conversations relevant to them.

2) Paragraph 9.76: The first example should read "...consequently the employer may bring disciplinary proceedings against employee A...". The second example should be amended to read "...The Handbook should be revised to state..." and "...It would also be good practice for the employer to run a series of staff sessions...".

3) Paragraph 9.77: We do not agree that the values referred to reinforce "youth and late night working"

4) Paragraph 9.80: "Is" should be replaced by "could be" to reflect the employer's discretion

5) Paragraph 9.85: The use of the word "dietary problems" should be changed to dietary "requirements"

6) Paragraph 9.89: We have concerns over whether this is the best example to explain "out of office" activities. A better

alternative might be residential training or annual dinner.

7) Paragraph 9.96: Example 1 – we would suggest deletion of the wording “and children” as this confuses the point being made. We would suggest the following as an alternative: “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 where applicable, their children.”

8) Paragraph 9.103: The wording “during a KIT” should be added in.

9) Paragraph 9.151: We would suggest that this might be appropriate example in which to use someone who is bi-polar rather than someone who suffers from “depression”.

**Q9. Are there any other comments that you would like to make about Chapter 9?**

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

1) Paragraphs 9.62 and 9.154: Disciplinary and grievance procedures are dealt with in two different sections in the chapter, namely 9.62 and 9.154. We suggest that it would be clearer to cover this topic in one section.

2) Paragraph 9.78: We have concerns over the suggestion that such discussions should take place and that this might expose employers to criticism. We would suggest that it is for the employee to raise any issues concerning “protected characteristics” and for the employer to anticipate barriers and seek to remove them.

3) Paragraph 9.83 : Consideration might be given to providing links to other sources of assistance for employers considering such matters but who may need to know more

about various religions.

4) Paragraph 9.93 (c) : The wording should read “ the employer’s procedures to enable employee’s to raise grievances concerning complaints of harassment, bullying and any allegations of discrimination”

5) Paragraph 9.95: Add in the word “training” so it reads “induction training”

6) Paragraph 9.153 : This should be expanded to reflect the obligations of employers in the public sector across all 3 public sector duties.

7) Paragraph 9.155: We suggest that this paragraph should read “ should aim to highlight” rather than “could”. The final clause should read “to deal with the sensitivities that allegations of harassment bring”.

8) Paragraph 9.157: We suggest that wording in line 4 where it reads “should” should read “must”.

9) Paragraph 9. 160: We believe that reference to the Grievance and Disciplinary Procedure is unnecessary and may confuse readers. It will also mean that the Code will look dated very quickly

10) Paragraph 9.162: See comments on Paragraph 9.153 above.

## **Chapter 10: Termination / end of employment**

**Q1. How much of Chapter 10 have you read?**

Please tick one box only

- All or most of it
- About half
- Less than half
- None of it

If you have not read Chapter 10, please go to Chapter 11 of the questionnaire. All others please continue with Q2.

**Q2. Do you agree or disagree that this section clearly explains the relevant law?**

Please tick one box only

- Strongly agree
- Tend to agree
- Neither agree nor disagree
- Tend to disagree
- Strongly disagree
- Don't know

**Q3. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

**Q4. Are the definitions you need to understand this section included?**

Please tick one box only

- Strongly agree
- Tend to agree
- Neither agree nor disagree
- Tend to disagree
- Strongly disagree
- Don't know

**Q5. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

**Q6. Where examples illustrate the text, please tick the relevant box.**  
Please tick one box only

Too many examples   
Too few examples

**Q7. Overall do you find the use of examples helpful / appropriate?**

Yes   
No

**Q8. If your answer to Q7 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.**

**Q9. Are there any other comments that you would like to make about Chapter 10?**

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

10.17 Further advice could be provided on the positive obligation to offer pregnant employees alternative employment on redundancy in preference to other employees as opposed to the lack of a positive obligation not to select them for redundancy in the first place. An explanation and examples would be helpful.

## Chapter 11: Discrimination in occupation

**Q1. How much of Chapter 11 have you read?**

Please tick one box only

- |                   |                                     |
|-------------------|-------------------------------------|
| All or most of it | <input checked="" type="checkbox"/> |
| About half        | <input type="checkbox"/>            |
| Less than half    | <input type="checkbox"/>            |
| None of it        | <input type="checkbox"/>            |

If you have not read Chapter 11, please go to Chapter 12 of the questionnaire. All others please continue with Q2.

**Q2. Do you agree or disagree that this section clearly explains the relevant law?**

Please tick one box only

- |                            |                                     |
|----------------------------|-------------------------------------|
| Strongly agree             | <input type="checkbox"/>            |
| Tend to agree              | <input type="checkbox"/>            |
| Neither agree nor disagree | <input checked="" type="checkbox"/> |
| Tend to disagree           | <input type="checkbox"/>            |
| Strongly disagree          | <input type="checkbox"/>            |
| Don't know                 | <input type="checkbox"/>            |

**Q3. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

Chapter 11 appears to ignore the fact that the Equality Bill will not just protect those in possession of protected characteristics, but will also apply to some forms of “transferred” or “associative” discrimination (which do not require a complainant to possess a protected characteristic).

**Q4. Are the definitions you need to understand this section included?**  
Please tick one box only

- Strongly agree
- Tend to agree
- Neither agree nor disagree
- Tend to disagree
- Strongly disagree
- Don't know

**Q5. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

We are concerned that the terminology and definitions adopted in Chapter 11 are confusing, inconsistent and unnecessarily legalistic. For example:

11.1 – 11.15 deals with clause 41 of the Equality Bill regarding contract workers. The Code of Practice adopts the terminology “contract worker”, “principal” and “employer” that is used in clause 41.

- i. We consider the definitions at 11.3 and 11.4 are confusing. We would suggest that the Code of Practice explains that contract workers are not necessarily agency workers and other types of workers could fall within the definition, but that for the sake of simplicity throughout the Code the following terminology is adopted:
  - 1. In place of “principals” - end user or client of the employment agency [We note that “end-user” has in fact been used in some places eg at 11.6 but that in other places eg 11.3 it hasn't been. Further that the Code does not make it clear that “end-

- user” and “principal” have the same meaning].
2. Instead of a contract worker – agency worker
  3. Instead of “contract worker’s employer” (see 11.6) or just “employer” (see 11.7, 11.10) – employment agency
- ii. We also note that the expressions “employer” and “employed” have been used in different ways in Chapter 11 without any explanation.
1. eg at 11.4: “A contract worker is a person who is employed by another person” Also 11.12 “the reasonable adjustments the employer” will need to make”.
  2. Yet at 11.16, 11.26, 11.31 and 11.51 the references to employees or an employer are presumably to a standard employment relationship rather than to an employer of a contract worker.
- iii. We think the Code of Practice wrongly assumes that members of the public will understand what is meant by “tenant”, “pupil barrister” etc. We would suggest:
1. “pupil barrister” –an individual training to be a barrister.
  2. “pupillage” – is the period of traineeship undertaken by a pupil barrister
  3. “tenant” – an individual who has a permanent position in a set of chambers.
  4. “tenancy” is the possession of a permanent position in a set of chambers.
  5. “barrister’s clerk” is an individual who organises a barrister’s court diary and otherwise manages a barrister’s practice
  6. “Instructing a barrister” or “giving instructions” means the act of a solicitor requesting that the barrister undertake specific work, normally on a case. This is usually done via a barrister’s clerk.
- iv. We also think that the equivalent Scottish terminology (see 11.40 onwards) should be explained.

\*\*\*\*\*

In answer to Question 6 below, we believe neither apply



**Q6. Where examples illustrate the text, please tick the relevant box.**  
Please tick one box only

Too many examples   
Too few examples

**Q7. Overall do you find the use of examples helpful / appropriate?**

Yes   
No

**Q8. If your answer to Q7 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.**

We are concerned that the examples given in boxes throughout chapter 11 send out contradictory signals about what could amount to discrimination, and that many of the examples are crude and unrealistic.

For example:

a. 11.12 example of a blind temporary agency worker being provided with a specially adapted portable computer and keyboard by an employment agency. It is unlikely to be a reasonable adjustment to provide her with the computer and keyboard if, for example, she is only working for the employment agency for a few days or weeks. We think a more realistic example of a reasonable adjustment should be deployed. Likewise with 11.13 – a more realistic example is that the blind secretary has her own portable computer/keyboard, and that it would be a reasonable adjustment for an end-user to ensure that the software they use can be used with the portable computer/keyboard.

b. The wording chosen in the example boxes sends out contradictory messages about what would amount to discrimination. Some of the examples positively state that the acts set out “would be” discrimination/harassment etc (see 11.28, 11.29, 11.34) yet other examples state that it is “likely to” amount to discrimination/harassment (see 11.35 (NB if the repeated invitations are evidently unwarranted that this “would be” sexual harassment))

or “might be” racial harassment (see 11.37) (NB this is a clear example of harassment related to race!) or “is likely to be unlawful” 11.55. There is no obvious explanation as to why some examples have been categorised as discrimination and other have only been categorised as likely to be discrimination or unlawful.

c. Overall, we felt that many of the examples given were extremely crude. The examples ignored the fact that discrimination is often subtle and difficult to prove. We consider that the examples given of discrimination should reflect this, and would then be of more assistance to members of the public who are attempting to identify whether something is discriminatory. In particular, we were concerned about the following:

- i. 11.27. This seems to us to be a wholly unrealistic example. A more realistic example might be: A black candidate with better qualifications than the other applicants is not short-listed for partnership at an accountancy firm. The accountancy firm is unable to provide an explanation for the failure to short-list the black candidate. This is likely to be direct discrimination.
- ii. 11.34 This seems to us to be a wholly unrealistic example. It is extremely unlikely that any applicant would be informed or could easily ascertain that they had been rejected because of their gender reassignment.
- iii. 11.36 This seems to us to be an unrealistic example which doesn't reflect actual practice in a barrister's chambers. A more realistic example might be: A solicitor asks a barrister's clerk who is available to represent a client in court on a certain day. The solicitor informs the clerk that the lay client is a Christian. Two barristers are available on that day, one is Christian and one is Hindu. The clerk only puts forward the Christian barrister, and does not put forward the other barrister purely because he is a Hindu. This is likely to be direct discrimination by the clerk, and possibly also the solicitor. Likewise with 11.38, which should explain that the solicitors phone a barrister's clerk and specifically request a female barrister to represent their client in court. The solicitor chooses not to instruct a male barrister, even though one is available because it is a pregnancy discrimination case and the solicitor considers that a female barrister would be better placed to present the case. This is likely to amount to direct discrimination, and may also be in breach of the solicitor's professional obligations.
- iv. We also note that some of the examples are wrong in

law, such as the example at 11.29. Firstly, if there was to be such a requirement that parents were Christian in order for their children to have access to the child care scheme, then this is likely to be an instance of indirect discrimination within clause 19 of the Equality Bill rather than direct discrimination. Secondly, such a requirement may not be unlawful as the LLP may be able to justify it.

**Q9. Are there any other comments that you would like to make about Chapter 11?**

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

## Chapter 12: Enforcement

**Q1. How much of Chapter 12 have you read?**

Please tick one box only

- |                   |                                     |
|-------------------|-------------------------------------|
| All or most of it | <input checked="" type="checkbox"/> |
| About half        | <input type="checkbox"/>            |
| Less than half    | <input type="checkbox"/>            |
| None of it        | <input type="checkbox"/>            |

If you have not read Chapter 12, please go to the Appendix section.

**Q2. Do you agree or disagree that this section clearly explains the relevant law?**

Please tick one box only

- Strongly agree
- Tend to agree
- Neither agree nor disagree
- Tend to disagree
- Strongly disagree
- Don't know

**Q3. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

See below

**Q4. Are the definitions you need to understand this section included?**

Please tick one box only

- Strongly agree
- Tend to agree
- Neither agree nor disagree
- Tend to disagree
- Strongly disagree
- Don't know

**Q5. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

**Q6. Where examples illustrate the text, please tick the relevant box.**  
Please tick one box only

Too many examples   
Too few examples

**Q7. Overall do you find the use of examples helpful / appropriate?**

Yes   
No

**Q8. If your answer to Q7 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.**

**Q9. Are there any other comments that you would like to make about Chapter 12?**

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Page 332

Third para - It is perhaps misleading to suggest that "the time limit can be extended at the discretion of the Employment Tribunal". The wording at 12.2 and 12.3 is more appropriate.

Fourth para - Space needed in "ofa"

Page 334, Section 12.4 - "Although a single unlawful act of discrimination may, however, have...."  
The "however" isn't correct or necessary in this context.

Page 339, Section 12.11 - For clarity, it might be worth adding at the end "and whether the employer has discharged that burden".

Page 340

Section 12.14 - "There is a standard questionnaire which should be used....". "Should" should be changed to "can/may" as use of the standard questionnaire is completely optional. It could be misleading for employers as currently drafted as they may think that they can ignore anything not in the standard format. It could be removed from this paragraph entirely as it is corrected/contradicted by 12.17.

Section 12.15 - Perhaps this should be redrafted as "The questionnaire procedure...." again just to be clear that the same applies if the individual does not use the standard form

Section 12.16 - Questionnaires should be "Questions..." for the same reason as referred to in 12.14 and 12.15.

Page 341, Section 12.19 - The clarification in the second sentence "The questionnaire can be sent...." would be more useful if it followed after the explanation of time limits (ie after the second paragraph). Where it is, it breaks up the explanation of the difference in time limits depending on whether tribunal proceedings have been started.

Page 345

Section 12.30 - The words in brackets are not very clear. Clause 119(2) appears to refer to disputes about the effect of a non-discrimination rule in a work-related context, and therefore covers trustees, managers, employers and persons who can make appointments in relation to offices.

Clause 119(3) specifically related to disputes from the standpoint of the trustees and the members, within the context of the scheme itself. To the extent that the guidance has brought these two together in one paragraph, it does not read very easily. A suggestion would be to replace the wording in brackets with:

"(i.e. the trustees or managers, the employer, or a person who exercises functions in relation to the appointment and removal from office of a person who is or could become a member)" and insert the word "respective" before the words "in relation to a dispute" in the fourth line from the bottom.

Page 348

Section 12.37 - Given that "equality rule" is defined as a rule in a pension scheme and "equality clause" refers to a person's terms of work, the phrase "in breach of an equality clause in relation to membership of or rights under an occupational pension scheme", could be made more clear. For example insert "in a pension scheme" after the words "equality rule", and "in a person's terms of work" after "equality clause".

A very small additional point is that the guidance refers to claims to the "Employment Tribunal" (this is largely covered in clauses 126 and 127 which provide for both jurisdiction and referral from a court to the ET). Strictly speaking clause 132 of the Bill still refers to "a court or employment tribunal".

Section 12.38 - This paragraph actually covers clauses 132(4) to (8). The words "without further contribution by the member or any other members" should be added to the end, and paragraph 12.40 deleted as it is repetition and is already dealt with in 12.38.

Page 349, Section 12.41 - It might be helpful to add "scheme" before "member" in the last line.

## Chapter 13: Appendix

This Appendix is included to aid understanding about who is covered by the Act.

**Q1. Do you agree or disagree that this section clearly explains the relevant law?**

Please tick one box only

- |                            |                                     |
|----------------------------|-------------------------------------|
| Strongly agree             | <input type="checkbox"/>            |
| Tend to agree              | <input checked="" type="checkbox"/> |
| Neither agree nor disagree | <input type="checkbox"/>            |
| Tend to disagree           | <input type="checkbox"/>            |
| Strongly disagree          | <input type="checkbox"/>            |
| Don't know                 | <input type="checkbox"/>            |

**Q3. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**

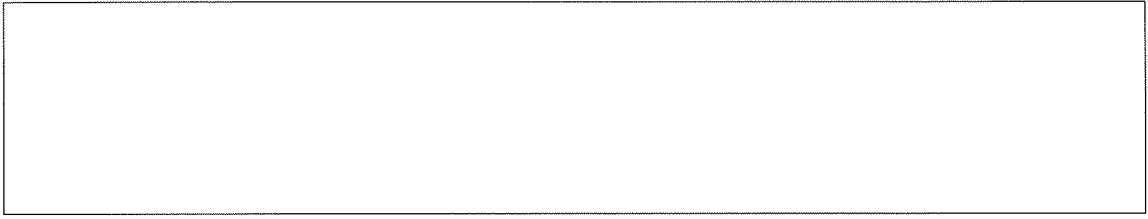
Page 352 - we do not understand the need to refer to activities carried out by "most men" or "most women" on a fairly regular and frequent basis.

**Q4. Are the definitions you need to understand this section included?**  
Please tick one box only

- |                            |                          |
|----------------------------|--------------------------|
| Strongly agree             | <input type="checkbox"/> |
| Tend to agree              | <input type="checkbox"/> |
| Neither agree nor disagree | <input type="checkbox"/> |
| Tend to disagree           | <input type="checkbox"/> |
| Strongly disagree          | <input type="checkbox"/> |
| Don't know                 | <input type="checkbox"/> |

**Q5. If you disagree, please tell us where it is unclear and / or how it could be improved? Please write in the box below.**





Thank you for completing the questionnaire.

# Contacts

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