



## EQUALITY BILL 2016

### EXPLANATORY NOTES

*These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, Hon. Chris Thomas MHK*

#### INTRODUCTION

1. These explanatory notes relate to the Equality Bill 2016 as brought from the Legislative Council and reprinted for introduction into the House of Keys. They have been prepared by the Cabinet Office and Department of Economic Development (DED) in order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the House of Keys.
2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.
3. A draft of the Equality Bill, which was closely based on the Equality Act 2010 (of Parliament)<sup>1</sup>, was published for an extended period of consultation in August 2014. The responses to that consultation were reviewed and a detailed response was subsequently published with the approval of the Council of Ministers in October 2015<sup>2</sup>.
4. Although a number of changes were made to the Bill in line with the proposals set out in the consultation response document, the Equality Bill 2016 continues to be based on the Equality Act 2010<sup>3</sup> with some Isle of Man adaptations. In finalising the Bill for introduction into the Legislative Council a number of other drafting issues were also addressed.
5. The concept of people being treated equally and prohibiting discrimination may be simple but in practice to provide as much certainty and clarity as possible both the primary legislation and the secondary legislation, as well as codes of practice and guidance made under it, need to be comprehensive.
6. A short Bill which lacked detail would leave interpretation entirely open to a court/tribunal. This would not be helpful to employers or employees; providers of goods and services or recipients of those goods and services; or Government in the performance of public functions; or those affected by those functions. It is for this reason that the Bill is quite lengthy and it is very detailed.
7. In addition, within a general prohibition on discrimination there are often going to be circumstances where exceptions are required. For instance, taking discrimination on

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2010/15/contents>. As it currently stands following a number of amendments that have been made since its enactment.

<sup>2</sup> <https://www.gov.im/ConsultationDetail.gov?id=454>

<sup>3</sup> As such these Explanatory Notes have in large part been adapted from the Explanatory Notes for the Equality Act 2010.

the grounds of age as an example, it would not be desirable or sensible for schools to be unable to differentiate between pupils of different ages in exams or sporting activities; nor would it be sensible for a nursing home to be unable to offer places only to elderly persons. A substantial proportion of the Bill concerns areas where the general principle that people should not be discriminated against because of their age, race, sex, sexual orientation, etc. necessarily needs to be limited to a degree that is reasonably justifiable.

8. The Bill will in due course repeal and replace the [Disability Discrimination Act 2006](#) along with the [Employment \(Sex Discrimination\) Act 2000](#), [Race Relations Act 2004](#), [Breastfeeding Act 2011](#) and other provisions of Manx primary legislation which will be superseded by the Bill. This means that the overall increase to the Manx statute book will be significantly less than it would at first sight appear; and for the first time almost all of the Island's legislation relating to equality and discrimination will be contained in one coherent Act and secondary legislation made under that Act.
9. Schedule 21 of the Bill makes various amendments to the Island's employment law. Some amendments are purely consequential to changes made by the Equality Bill to the employment law framework. But, in addition, the Bill makes a number of amendments to existing employment law which are, generally, not connected to the main equality provisions in the Bill. These amendments were proposed by DED and they concern some potential cost saving measures and some issues that have emerged since the [Employment Act 2006](#), which was the last major piece of employment law in the Island, came into operation. Since the Equality Bill deals in large part with rights and obligations relating to employment, it was considered that it was both opportune and appropriate to include these amendments in a Schedule to the Bill.
10. The most important of the employment law proposals were set out in the consultation document and the response to the consultation. The latter document also detailed a number of additional amendments which had either been suggested by consultees or identified as desirable by DED. The updated Schedule not only implemented the principal proposals but also made corrections and amendments of a technical nature or which had a very limited application and removed some anomalies and repealed some redundant provisions.
11. After the drafting of the Government response to consultation document some further desirable amendments to employment law, including to the new [Control of Employment Act 2014](#), were identified by DED and these were included in Schedule 21 to the Bill as introduced into the Legislative Council. The following table sets out the most important of those amendments.

Change to the Bill	Reason for change
<p><b>Control of Employment Act 2014 (CEA) - Creation of a new Isle of Man worker category</b></p> <p>Section 4 of the CEA [Isle of Man workers] is amended to create a new category of Isle of Man worker for the purposes of the Control of Employment Act 2014. Under new subsection 8A a person is an Isle of Man worker if he or she is the grandchild of a person who — (a) was born in the Island, and (b) was ordinarily resident in the Island for an unbroken period of at least 5 years immediately following the birth.</p>	<p>DED considers that it is desirable to facilitate the ability of grandchildren of persons who were born and lived on the Island, to live and work on the Island. The proposal is also consistent with the Government's aim of increasing the working population of the Island.</p>

<p><b>Control of Employment Act 2014 (CEA) – extension of spouse etc. permits to non EEA workers</b></p> <p>Under section 9 of the CEA [spouse / civil partner permits] where a CEA work permit holder or exempt person is engaged in permanent, regular full-time employment, “the primary employment”, his or her spouse or civil partner is, upon application, entitled to a work permit, often referred to as “a spouse/civil partner permit”. A spouse/civil partner permit is granted for a year at a time, beginning with the date on which it is granted or renewed. CEA s. 9(1)(b) is amended to extend the right to a spouse / civil partner permit to spouses and civil partners of persons from outside the European Economic Area (EEA) who are working in the Isle of Man under the Points Based System. Such persons would remain subject to Immigration controls and conditions while, in addition, the Department may prescribe exceptions to the general rule. It is estimated there are less than 300 workers from outside the EEA who are working in the Island though many of these will not be married or in a civil partnership.</p>	<p>The intention is to make the Isle of Man more attractive to the workers that the Island needs and to increase the size of the working population.</p>
<p><b><u>Redundancy Payments Act 1990 (RPA) - Transfer of a business</u></b></p> <p>The intention of the amendments to section 11 of the RPA [Transfer of business] was to clarify the intended meaning of the section and, in particular, that a transfer of a business from one person to another for the purposes of which a person is employed may apply regardless of whether the business which is being transferred has been carried on by the person’s employer. In particular it was intended to confirm that a service transfer provision, (i.e. when an organisation engages a contractor to provide a service on its behalf changes the contractor or brings the service back in-house) falls within the scope of section 11.<sup>4</sup> This would mean that where there was a changeover of contractor and an employee of the old contractor was employed by the new contractor on the same terms and conditions he or she</p>	<p>Following a paper to the Chief Officer Group submitted by DHSC, “Employment issues relating to the externalisation of services”, a cross Departmental working party was established in August 2015 to look at issues relating to the externalisation of Government services.</p> <p>The intention of the proposed change is to remove an obstacle to outsourcing, in the situation where Government contracts out a service and subsequently awards a contract to an alternative contractor. At present:</p> <ul style="list-style-type: none"> <li>employees of the first contractor may be entitled to a redundancy payment even though they may be re-employed by the second contractor on the same terms and</li> </ul>

<sup>4</sup> Subsequent to the passage of the Bill through the Legislative Council, additional work was undertaken on this issue and further legal advice was received. While the amendments included in the Bill probably do cover all the likely cases of outsourcing or insourcing, DED has been advised that to put the matter beyond doubt a new section 11A which deals specifically with service provision changes should be inserted into RPA and some consequential amendments should be made. Consequently it is planned to bring forward some additional amendments when the Bill is in the House of Keys.

<p>would not be entitled to a redundancy payment.<sup>5</sup> It is to be noted that the employee would retain continuous employment (for employment rights purposes) with the first contractor under Schedule 5, paragraph 8(2) of the <a href="#">Employment Act 2006</a> which was also amended to be in harmony with the changes to RPA.</p>	<p>conditions; and</p> <ul style="list-style-type: none"> <li>• Government may underwrite any such redundancy costs.</li> </ul> <p>It should be noted that where the terms and conditions offered by a new contractor are less favourable than those of the old contractor employees would still be entitled to claim a redundancy payment.</p>
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12. A number of minor amendments and corrections were made to the Bill during its passage of the Legislative Council but there were no significant changes to the Bill in that Branch.

**NOTE:**

- Since the Equality Bill completed its passage of the Legislative Council, officers have continued to review the Bill. As a result it has been found that some further Government amendments to the Bill during its passage of the House of Keys will be necessary. Some of these amendments are additional corrections and clarifications; others will be required to take account of the passing of the Marriage and Civil Partnership (Amendment) Act 2016 which has made provision for same sex marriage and opposite sex civil partnerships. Some additional amendments to schedule 21 are also proposed. A paper with further information about each of these amendments will be published separately.

**STRUCTURE OF THE BILL**

13. The Bill is divided into 14 Parts and 24 Schedules. The structure of the Bill is as follows:

<b>PART</b>	<b>SUMMARY</b>
<a href="#">Part 1</a>	Introductory provisions relating to the short title, commencement, general interpretation and further interpretation in respect of maternity leave.
<a href="#">Part 2</a> and <a href="#">Schedule 1</a>	<p>Establishes the key concepts on which the Bill is based including:</p> <ul style="list-style-type: none"> <li>• the characteristics which are protected (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation);</li> <li>• the definitions of direct discrimination (including because of a combination of two relevant protected characteristics), discrimination arising from disability, indirect discrimination, harassment and victimisation.</li> </ul> <p>These key concepts are then applied in the subsequent Parts of the Bill.</p>
<a href="#">Part 3</a> , <a href="#">Schedule 2</a> , <a href="#">Schedule 3</a>	Makes it unlawful to discriminate against, harass or victimise a person when providing a service (which includes the provision of goods or facilities) or when exercising a public function.
<a href="#">Part 4</a> , <a href="#">Schedule 4</a> , <a href="#">Schedule 5</a>	Makes it unlawful to discriminate against, harass or victimise a person when disposing of (for example, by selling or letting) or managing premises.

<sup>5</sup> See further at footnote 24 on page 113.

PART	SUMMARY
<a href="#">Part 5</a> , <a href="#">Schedule 6</a> , <a href="#">Schedule 7</a> , <a href="#">Schedule 8</a> , <a href="#">Schedule 9</a>	<p>Makes it unlawful to discriminate against, harass or victimise a person at work or in the provision of employment services. Also contains provisions relating to equal pay between men and women; and pregnancy and maternity pay.</p> <p>It also contains provisions restricting the circumstances in which potential employees can be asked questions about disability or health.</p>
<a href="#">Part 6</a> , <a href="#">Schedule 10</a> <a href="#">Schedule 11</a> <a href="#">Schedule 12</a> <a href="#">Schedule 13</a>	<p>Makes it unlawful for education bodies to discriminate against, harass or victimise a school pupil or student or applicant for a place.</p>
<a href="#">Part 7</a> , <a href="#">Schedule 14</a> <a href="#">Schedule 15</a>	<p>Makes it unlawful for associations (for example, private clubs and political organisations) to discriminate against, harass or victimise members, associates or guests.</p>
<a href="#">Part 8</a>	<p>Prohibits other forms of conduct, including discriminating against or harassing of an ex-employee or ex-pupil, for example: instructing a third party to discriminate against another; or helping someone discriminate against another. Also determines the liability of employers and principals in relation to the conduct of their employees or agents.</p>
<a href="#">Part 9</a> , <a href="#">Schedule 16</a> <a href="#">Schedule 17</a>	<p>Deals with enforcement of the Bill's provisions through the proposed Employment and Equality Tribunal and related matters.</p>
<a href="#">Part 10</a>	<p>Makes terms in contracts, collective agreements or rules of undertakings unenforceable or void if they result in unlawful discrimination, harassment or victimisation.</p>
<a href="#">Part 11</a>	<p>Establishes a general duty on public authorities to have due regard, when carrying out their functions, to the need to:</p> <ul style="list-style-type: none"> <li>• eliminate unlawful discrimination, harassment or victimisation;</li> <li>• advance equality of opportunity; and</li> <li>• foster good relations between persons who share a protected characteristic and those who do not.</li> </ul> <p>Also contains provisions which enable an employer or service provider or other organisation to take positive action to overcome or minimise a disadvantage arising from people possessing particular protected characteristics.</p>
<a href="#">Part 12</a> , <a href="#">Schedule 18</a>	<p>Deals with consent to make reasonable adjustments to premises and improvements to let dwelling houses.</p>
<a href="#">Part 13</a> , <a href="#">Schedule 19</a> <a href="#">Schedule 20</a>	<p>Establishes exceptions to the prohibitions in the earlier parts of the Bill in relation to a range of conduct, including action required by an enactment; protection of women; educational appointments; national security; the provision of benefits by charities and sporting competitions.</p>

PART	SUMMARY
<a href="#">Part 14</a> , <a href="#">Schedule 21</a> <a href="#">Schedule 22</a> <a href="#">Schedule 23</a> <a href="#">Schedule 24</a>	Contains miscellaneous and closing provisions including powers to make codes of practice; an enabling power for the Council of Ministers to be able to take steps to promote the legislation; the effect of the Bill in respect of Manx ships and seafarers; the Bill's application to the Crown; information society services; power to make future amendments to harmonise with UK equality legislation. This Part also introduces the Schedules containing consequential amendments, additional employment law amendments and repeals; and the Tynwald procedure for subordinate legislation.

## EUROPEAN CONVENTION ON HUMAN RIGHTS

14. In the opinion of the Member moving the Bill, the provisions of the Equality Bill 2016 are compatible with the Convention rights.

## FINANCIAL IMPLICATIONS

15. The Bill potentially has financial implications, both costs and benefits, for employers and service providers. An outline assessment of the impact of the financial implications of the Bill has been prepared by the Cabinet Office with the assistance of the Department of Economic Development and it is attached as Appendix 1 to these Notes.
16. The expectation is that the Bill will be cost-neutral or of overall financial benefit to Government in the longer term. However, the Bill does carry with it the prospect of some additional expenditure by Government in the shorter term. In particular, it is expected that extra resource will be initially required to assist businesses, third sector organisations and the Departments, Boards and Offices of Government with their understanding of the provisions of this legislation; and to lead on the implementation of the resulting Act in coordination with relevant persons and bodies.
17. Any cost to businesses and third sector organisations is not at present quantifiable as it will depend on largely unpredictable circumstances arising in the future. For example: whether or not an employer will need to consider making any reasonable adjustments for a disabled employee or worker, and the cost of any such adjustment; or whether or not a member of the public will decide to take a case to the Employment and Equality Tribunal for an alleged breach of the requirements not to discriminate in the provision of goods and services (noting that discrimination in this area on the grounds of disability and race is prohibited under existing legislation).
18. Furthermore, following the Resolution of Tynwald in July 2015, the [Disability Discrimination Act 2006](#) is coming into operation in advance of the Equality Bill. This means that the potential costs to businesses, third sector organisations and Government in respect of reasonable adjustments for disabled persons in the provision of the goods and services and performing public functions cannot be attributed to this Bill.

## COMMENTARY ON CLAUSES

### PART 1 - INTRODUCTORY

#### Clause 1: Short title and Clause 2: Commencement

19. Clause 1 gives the short title the Act will have if the Bill is passed and Clause 2 provides that it will come into operation on a day or days appointed by the Council of Ministers.

#### Clause 3: Interpretation

20. This clause provides for the general interpretation of terms and concepts used in the Bill.

#### Clause 4: References to maternity leave, etc

21. This is a further interpretation clause which explains what is meant by the different types of maternity leave which are referred to in the Bill.

### PART 2: EQUALITY: KEY CONCEPTS

#### Division 1: Protected characteristics

##### Subdivision 1 – Discrimination

#### Clause 5: The protected characteristics

22. This clause lists the characteristics that are protected by subsequent provisions of the Bill. Subject to certain exceptions set out in the Bill, discrimination against a person because he or she has one (or certain combinations of two) of the protected characteristics will be unlawful. The protected characteristics, which are the same as those set out in section 4 of the UK 2010 Act, are as follows:
- (a) age;
  - (b) disability;
  - (c) gender reassignment;
  - (d) marriage and civil partnership;
  - (e) pregnancy and maternity;
  - (f) race;
  - (g) religion or belief;
  - (h) sex;
  - (i) sexual orientation.
23. It should be noted that there is some protection against discrimination on certain of these grounds in existing statutes. The Bill will consolidate and replace all of the existing provisions with a single consistent legal framework.
24. There is no protection against discrimination on the grounds of age or gender assignment<sup>6</sup> in existing Isle of Man law.
25. As regards disability, the [Disability Discrimination Act 2006](#) (DDA) will provide protection against discrimination on the ground of disability in respect of the provision

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<sup>6</sup> However, by virtue of the Gender Recognition Act 2009 (of Tynwald), if a person has been issued with a Gender Recognition Certificate by the Gender Recognition Panel established under the Gender Recognition Act 2004 (of Parliament) that person will be recognised in the law of the Island as having their acquired gender. They will be able to apply to the Central Registry for a replacement birth certificate showing their new name and gender.

of goods and services (but not employment). The DDA is not yet fully in force and it is not due to be fully in force until 1 January 2020. Although the Equality Bill will in due course repeal and replace the DDA, it not intended that any obligations in respect of reasonable adjustments in the provision of goods and services to disabled persons will be introduced by the Bill any sooner than the timetable that has been established for the DDA.

26. Under the [Race Relations Act 2004](#) discrimination on the grounds of race is prohibited in the provision of goods and services.
27. The [Employment \(Sex Discrimination\) Act 2000](#) provides protection against discrimination on the grounds of sex, marriage and civil partnership but such protection is limited to employment only.
28. The [Employment Act 2006](#) provides limited protection against discrimination on the grounds of an employee's race, religious belief etc, and his or her sexual orientation but such protection is limited to employment and, within the employment sphere, it is further limited to the protection of employees against being unfairly dismissed on any of these grounds. So, for example, such protection does not currently apply to agency workers (who are not employees) and nor does it apply at the recruitment stage.

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

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

#### **Examples**

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

#### **Clause 7: Disability**

30. This clause establishes who is to be considered as having the protected characteristic of disability and so is a disabled person for the purposes of the Bill. With Schedule 1 and regulations that can be made under that Schedule, it also establishes what constitutes a disability. In general terms under this clause a person is considered to have a disability if he or she has a physical or mental impairment which has substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
31. Where people have the same disability, they share the protected characteristic of disability.
32. The clause provides for a relevant Department, which would normally be the Department of Health and Social Care (DHSC), to publish statutory guidance to help those who need to decide whether a person has a disability for the purposes of the Bill.

#### **Examples:**

- A man works in a warehouse, loading and unloading heavy stock. He develops a long-term heart condition and no longer has the ability to lift or move heavy items of stock at work. Lifting and moving such heavy items is not a normal day-to-day activity. However, he is also unable to lift, carry or move moderately heavy everyday

objects such as chairs, at work or around the home. This is an adverse effect on a normal day-to-day activity. He is likely to be considered a disabled person for the purposes of the Bill.

- A young woman has developed colitis, an inflammatory bowel disease. The condition is a chronic one which is subject to periods of remissions and flare-ups. During a flare-up she experiences severe abdominal pain and bouts of diarrhoea. This makes it very difficult for her to travel or go to work. This has a substantial adverse effect on her ability to carry out normal day-to-day activities. She is likely to be considered a disabled person for the purposes of the Bill.

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

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

#### **Examples**

- A person who was born physically male decides to spend the rest of his life living as a woman. He declares his intention to his manager at work, who makes appropriate arrangements, and she then starts life at work and home as a woman. After discussion with her doctor and a Gender Identity Clinic, she starts hormone treatment and after several years she goes through gender reassignment surgery. She would have the protected characteristic of gender reassignment for the purposes of the Bill.
- A person who was born physically female decides to spend the rest of her life as a man. He starts and continues to live as a man. He decides not to seek medical advice as he successfully 'passes' as a man without the need for any medical intervention. He would have the protected characteristic of gender reassignment for the purposes of the Bill.

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

35. This clause defines the protected characteristic of marriage and civil partnership. People who are not married or civil partners do not have this characteristic.
36. The clause also explains that people who have or share the common characteristics of being married or of being a civil partner can be described as being in a marriage or civil partnership. A married man and a woman in a civil partnership both share the protected characteristic of marriage and civil partnership.

#### **Examples**

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

### **Clause 10: Race**

37. This clause defines the protected characteristic of race. For the purposes of the Bill, “race” includes a person’s colour, nationality, ethnic or national origins and caste.
38. The clause explains that people who have or share characteristics of colour, nationality, ethnic or national origins, or caste can be described as belonging to a particular racial group. A racial group can be made up of two or more different racial groups.
39. The term “caste” denotes a hereditary, endogamous (marrying within the group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity. It is generally (but not exclusively) associated with South Asia, particularly India, and its diaspora. It can encompass the four classes (varnas) of Hindu tradition (the Brahmin, Kshatriya, Vaishya and Shudra communities); the thousands of regional Hindu, Sikh, Christian, Muslim or other religious groups known as jatis; and groups amongst South Asian Muslims called biradaris. Some jatis regarded as below the varna hierarchy (once termed “untouchable”) are known as Dalit.

#### **Examples**

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

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

40. This clause defines the protected characteristic of religion or religious or philosophical belief, which is stated to include for this purpose a lack of religion or belief. It is a broad definition in line with the right to freedom of thought, conscience and religion guaranteed by Article 9 of the European Convention on Human Rights. The main limitation for the purposes of Article 9 is that the religion must have a clear structure and belief system. Denominations or sects within a religion can be considered to be a religion or belief, such as Protestants and Catholics within Christianity.
41. The criteria for determining what is a “philosophical belief” are that it must be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible with human dignity and not in conflict with the fundamental rights of others. So, for example, a cult involved in illegal activities would not satisfy these criteria. The clause provides that people who are of the same religion or belief share the protected characteristic of religion or belief. Depending on the context, this could mean people who, for example, share the characteristic of being Protestant or people who share the characteristic of being Christian.

#### **Examples**

- The Baha’i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism are all religions for the purposes of this provision.

- Beliefs such as humanism and atheism would be beliefs for the purposes of this provision but adherence to a particular football team would not be.

### **Clause 12: Sex**

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

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

43. This clause defines the protected characteristic of sexual orientation as being a person's sexual orientation towards:
- people of the same sex as him or her (in other words the person is a gay man or a lesbian);
  - people of the opposite sex from him or her (the person is heterosexual);
  - people of both sexes (the person is bisexual).
44. It also explains that references to people sharing a sexual orientation mean that they are of the same sexual orientation.

### **Examples**

- A man who experiences sexual attraction towards both men and women is "bisexual" in terms of sexual orientation even if he has only had relationships with women.
- A man and a woman who are both attracted only to people of the opposite sex from them share a sexual orientation (i.e. heterosexual).
- A man who is attracted only to other men is a gay man. A woman who is attracted only to other women is a lesbian. A gay man and a lesbian share a sexual orientation (i.e. homosexual).

## **Division 2: Prohibited conduct**

### Subdivision 1 - Discrimination

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

45. This clause defines direct discrimination for the purposes of the Bill. Direct discrimination occurs where the reason for a person being treated less favourably than another is a protected characteristic listed in clause 5. This definition is broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example, is disabled), or because the victim is wrongly thought to have it (for example, a particular religious belief).
46. If the reason for the difference in treatment is marriage or civil partnership, only less favourable treatment because of the victim's status amounts to discrimination. It must be the victim, rather than anybody else, who is married or a civil partner.
47. The clause also provides that:
- for age, different treatment that is justified as "a proportionate means of meeting a legitimate aim" is not direct discrimination;
  - in relation to disability, it is not discrimination to treat a disabled person more favourably than a person who is not disabled – this is because making a reasonable adjustment for disabled person (see clause 21) may involve such treatment;

- racial segregation is always discriminatory;
- in non-work cases, treating a woman less favourably because she is breastfeeding a baby who is more than six months old amounts to direct sex discrimination (up to the age of six months less favourable treatment of a woman who is breastfeeding would amount to discrimination on the grounds of pregnancy and maternity – see clause 18); and
- men cannot claim privileges for women connected with pregnancy or childbirth.

### Examples

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

### Clause 15: Combined discrimination: dual characteristics

48. This clause provides for the discrimination prohibited by the Bill to include direct discrimination because of a combination of two protected characteristics ("dual discrimination"). The protected characteristics which may be combined are age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.
49. For a claim to be successful, the complainant must show that the less favourable treatment was because of the combination of characteristics, as compared with how a person who does not share that combination is, or would be, treated. A dual discrimination claim will not succeed where an exception or justification applies to the treatment in respect of either of the relevant protected characteristics – for example, where an occupational requirement in Schedule 9 (Work: exceptions) renders direct discrimination lawful.
50. The clause allows those who have experienced less favourable treatment because of a combination of two relevant protected characteristics to bring a direct discrimination claim, such as where the single-strand approach may not succeed.
51. The complainant does not have to show that a claim of direct discrimination in respect of each of the protected characteristics would have been successful if brought separately. A complainant is not prevented from bringing direct discrimination claims because of individual protected characteristics and a dual discrimination claim.

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

#### Examples

- A black woman has been passed over for promotion to work on reception because her employer thinks black women do not perform well in customer service roles. Because the employer can point to a white woman of equivalent qualifications and experience who has been appointed to the role in question, as well as a black man of equivalent qualifications and experience in a similar role, the woman may need to be able to compare her treatment because of race and sex combined to demonstrate that she has been subjected to less favourable treatment because of her employer's prejudice against black women.
- A female television presenter believes she is getting less work because she is an older woman. She may struggle to win a sex discrimination claim because her employer could point to numerous other female TV presenters. She may also struggle to win an age discrimination claim as her employer could point to a number of older (male) TV presenters. However, she may be able to establish less favourable treatment by comparing herself to older male TV presenters.

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

53. This clause provides that it is discrimination to treat a disabled person unfavourably not only directly because of the person's disability itself but because of something arising from, or in consequence of, his or her disability – such as the need to take a period of disability-related absence. It is, however, possible to justify treatment that would otherwise be unlawful if it can be shown to be a proportionate means of achieving a legitimate aim.
54. The clause also provides that for this type of discrimination to occur, the employer or other person must know, or be reasonably expected to know, that the disabled person has a disability.
55. This clause is aimed at establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment.

#### Example

- An employee with a visual impairment is dismissed because he cannot do as much work as a non-disabled colleague. The dismissal is not directly because of the employee's disability so a claim of direct discrimination on the grounds of disability could fail. The employee could though claim discrimination arising from disability if the reason he cannot do as much work is because of his disability. However, if discrimination arising from disability is found to have taken place, the dismissal may still be lawful if the employer can show that it was a proportionate means of achieving a legitimate aim.

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

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

they are treated less favourably than they would be treated for absence for reasons other than sickness or injury and it is unreasonable to treat them less favourably.

#### Example

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

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

57. This clause defines what it means to discriminate against a woman because of her pregnancy or maternity, as distinct from her sex, in specified situations outside work. It protects a woman from discrimination because of her current or a previous pregnancy. It also protects her from maternity discrimination, which includes treating her unfavourably because she is breastfeeding, for 26 weeks after giving birth and provides that pregnancy or maternity discrimination as defined cannot be treated as sex discrimination (however, discrimination against a woman because she is breastfeeding a baby who is older than 26 weeks would constitute direct sex discrimination).

#### Examples

- A café owner must not ask a woman to leave their café because she is breastfeeding her baby. (As a result of this the [Breastfeeding Act 2011](#) can be repealed as being redundant.)
- A school must not prevent a pupil from taking an exam because she is pregnant.

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

58. This clause defines what it means to discriminate in the workplace because of a woman's pregnancy or pregnancy-related illness, or because she takes or tries to take maternity leave. The period during which protection from these types of discrimination is provided is the period of the pregnancy and any statutory maternity leave to which she is entitled or if she has no such entitlement the period of 2 weeks beginning with the end of the pregnancy. During this period, these types of discrimination cannot be treated as sex discrimination.

#### Examples

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

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

59. This clause defines indirect discrimination for the purposes of the Bill. Indirect discrimination occurs when a policy which applies in the same way to everybody has an effect which particularly disadvantages people with a relevant protected characteristic. Where a particular group is disadvantaged in this way, a person in that group is indirectly discriminated against if he or she is put at that disadvantage, unless the person applying the policy can justify it.

60. Indirect discrimination can also occur when a policy would put a person at a disadvantage if it were applied. This means, for example, that where a person is deterred from doing something, such as applying for a job or taking up an offer of

service, because a policy which would be applied would result in his or her disadvantage, this may also be indirect discrimination.

61. Indirect discrimination applies to all the protected characteristics, apart from pregnancy and maternity.

#### Examples

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

#### Subdivision 2 – Reasonable Adjustments for Disabled Persons

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

62. This clause defines what is meant by the duty to make reasonable adjustments for disabled persons for the purposes of the Bill; and it lists the Parts of the Bill which impose the duty and the related Applicable Schedules to the Bill which stipulate how the duty applies in relation to each Part. The duty comprises three requirements which apply where a disabled person is placed at a substantial disadvantage compared to non-disabled people:
- the first requirement covers changing the way things are done (such as changing a practice or procedure);
  - the second requirement covers making changes to the built environment (such as providing access to a building);
  - the third requirement covers providing auxiliary aids and services (such as providing special computer software or providing a different service).
63. The clause confirms that where the first or third requirements involve the way in which information is provided, a reasonable step includes providing that information in an accessible format.
64. Under the second requirement, taking steps to avoid the disadvantage will include removing, altering or providing a reasonable means of avoiding the physical feature, but only where it would be reasonable to do so.
65. The clause also makes clear that, except where the Bill states otherwise, it is not reasonable for a person bound by the duty to pass on the costs of complying with the duty to an individual disabled person.
66. The clause contains only one threshold for the reasonable adjustment duty to apply — a “substantial disadvantage” to disabled persons compared to non-disabled persons.

## Examples

- A utility company knows that significant numbers of its customers have sight impairments and will have difficulty reading invoices and other customer communications in standard print, so it must consider how to make its communications more accessible. As a result, it might provide communications in large print to customers who require it.
- A bank is obliged to consider reasonable adjustments for a newly recruited financial adviser who is a wheelchair user and who would have difficulty negotiating her way around the customer area. In consultation with the new adviser and existing staff, the bank rearranges the layout of furniture in the customer area and installs a new desk. These changes result in the new adviser being able to work alongside her colleagues.
- The organiser of a large public conference knows that hearing-impaired delegates are likely to attend. She must therefore consider how to make the conference accessible to them. Having asked delegates what adjustments they need, she decides to engage a speech-to-text typist and operate an induction loop to make sure that the hearing-impaired delegates are not substantially disadvantaged.

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

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

## Examples

- An employee develops carpal tunnel syndrome which makes it difficult for him to use a standard keyboard. The employer refuses to provide a modified keyboard or voice-activated software that would overcome the disadvantage. This could be an unlawful failure to make a reasonable adjustment and constitute discrimination.
- A private club has a policy of refusing entry to male members not wearing a collar and tie for evening events. A member with psoriasis (a severe skin condition which can make the wearing of a collar and tie extremely painful) could bring a discrimination claim if the club refused to consider waiving this policy for him.
- A visually-impaired prospective tenant asks a letting agent to provide a copy of a tenancy agreement in large print. The agent refuses even though the document is held on computer and could easily be printed in a larger font. This is likely to be an unlawful failure to make a reasonable adjustment which would constitute discrimination.

### **Clause 23: Regulations**

68. This section provides a power for the Council of Ministers and relevant Departments to make regulations about a range of issues relating to the reasonable adjustment duty, such as the circumstances in which a particular step will be regarded as reasonable. This power also allows amendment of the Applicable Schedules referred to in clause 21.

## Example

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

### Subdivision 3: Discrimination: Supplemental

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

69. This clause provides that like must be compared with like in cases of direct, dual or indirect discrimination. The treatment of the complainant must be compared with that of an actual or a hypothetical person — the comparator — who does not share the same protected characteristic as the complainant (or, in the case of dual discrimination, either of the protected characteristics in the combination) but who is (or is assumed to be) in not materially different circumstances from the complainant. In cases of direct or dual discrimination, those circumstances can include their respective abilities where the complainant is a disabled person.
70. The clause also enables a civil partner who is treated less favourably than a married person in similar circumstances to bring a claim for sexual orientation discrimination.

#### Examples

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

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

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

#### Example

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

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

72. This clause sets out what is meant by references to the types of discrimination covered by the Bill.

### Subdivision 4: Other Prohibited Conduct

#### **Clause 27: Harassment**

73. This clause defines what is meant by harassment for the purposes of the Bill. There are three types of harassment:
- The first type involves unwanted conduct which is related to a relevant protected characteristic and has the purpose or effect of creating an intimidating, hostile,

degrading, humiliating or offensive environment for the complainant or of violating the complainant's dignity.

- The second type is sexual harassment – which is unwanted conduct of a sexual nature where this has the same purpose or effect as the first type of harassment.
- The third type is treating someone less favourably because he or she has either submitted to or rejected sexual harassment, or harassment related to sex or gender reassignment.

74. In determining the effect of the unwanted conduct it will still be required to balance competing rights on the facts of a particular case. For example, this could include balancing the rights of freedom of expression (as set out in Article 10 of the European Convention on Human Rights) and of academic freedom against the right not to be offended in deciding whether a person has been harassed.

#### Examples

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

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

75. This clause defines what conduct amounts to victimisation under the Bill. Victimisation takes place where one person treats another badly because the other person has, in good faith, brought proceedings under the Bill concerning a protected characteristic, given evidence in connection with such proceedings, or made an allegation that someone has broken the law on equality. A person is not protected from victimisation where he or she maliciously makes or supports an untrue complaint. Only an individual can bring a claim for victimisation.

#### Examples

- A woman makes a complaint of sex discrimination against her employer. As a result, she is denied promotion. The denial of promotion would amount to victimisation.
- An employer threatens to dismiss a staff member because he thinks she intends to support a colleague's sexual harassment claim. This threat could amount to victimisation.
- A man with a grudge against his employer knowingly gives false evidence in a colleague's discrimination claim against the employer. He is subsequently dismissed for supporting the claim. His dismissal would not amount to victimisation because of his untrue and malicious evidence.

## PART 3 – SERVICES AND PUBLIC FUNCTIONS

### Clause 29: Application of this Part

76. This clause provides that this Part of the Bill does not apply to the protected characteristic of marriage and civil partnership or the protected characteristic of age so far as it relates to persons under the age of 18.
77. It also states that, if an act of discrimination, harassment or victimisation is made unlawful by other Parts of the Bill covering premises, work or education, then those provisions, rather than the provisions covering services and public functions, apply. Similarly, if the act in question results in a breach of an equality clause in a person's terms of work or a non-discrimination rule in an occupational pension scheme, this Part will not apply.

#### Examples

- It would be lawful for a package holiday operator to only offer holidays to persons aged 18 and over.
- It would be lawful for a dating website to only offer its services to people who are single.

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

78. This clause makes it unlawful to discriminate against or harass a person because of a protected characteristic, or victimise someone when providing services (which includes goods and facilities). The person is protected both when requesting a service and during the course of being provided with a service.
79. It also makes it unlawful to discriminate against, harass or victimise a person when exercising a public function which does not involve the provision of a service. Examples of such public functions include law enforcement and revenue raising and collection. Public functions which involve the provision of a service, for example medical treatment on the NHS, are covered by the provisions dealing with services.
80. The clause also imposes the duty to make reasonable adjustments for disabled persons set out in clause 21 in relation to providing services and exercising public functions. A person is considered to have discriminated against a disabled person if he or she fails to comply with the duty to make reasonable adjustments.
81. The prohibitions in this clause apply, in relation to race or religion or belief, to any actions taken in connection with the grant of entry clearance to enter the Isle of Man, even if the act in question takes place outside the Island.

#### Examples

- A man and two female friends plan a night out at a local night club. At the entrance the man is charged £10 entry; the two women are charged £5 each. The owner explains the night club is trying to attract more women and has decided to charge them half the entrance fee. This would be direct sex discrimination.
- A company which organises outdoor activity holidays requires protective headwear to be worn for certain activities, such as white water rafting and rock climbing. This requirement could be indirectly discriminatory against Sikhs unless the policy can be justified, for example on health and safety grounds.
- A man who suffers from long-standing and serious health problems, including partial paralysis and a severe sight impairment, is imprisoned. On his imprisonment, the

man is not allocated an adapted cell, despite being assessed as requiring one within 24 hours of arriving at prison. Instead, he is allocated a standard cell. This may be discrimination resulting from a failure to make reasonable adjustments to take account of a person's disability.

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

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

82. This clause explains what is meant by the term "provision of a service" in the Bill and it confirms that a reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function.
83. This clause also explains that refusing to provide or not providing a service includes providing a person with a service of different quality, or in a different way (for example, in a hostile or less courteous way) or on less favourable terms than the service would normally be provided.
84. This clause provides that where an employer arranges for another person to provide a service to a closed group of employees, then the members of that closed group are to be treated as a section of the public for the purposes of their relationship with the service-provider. This means that if the service-provider discriminates against members of that group, the prohibitions in this Part apply. However, the employer is not to be treated as a service-provider, despite facilitating access to the service. Instead, his or her conduct in respect of his or her employees is to be governed by the provisions in Part 5 (work).
85. Further details of how the reasonable adjustments duty applies in relation to providing services and exercising public functions are contained in Schedule 2 and the exceptions which apply to this Part of the Bill are contained in Schedule 3.

### **Examples**

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

## PART 4 – PREMISES

### Clause 32: Application of this Part

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

#### Examples

- It would be lawful for a housing association to only allow its properties to be bought or rented by persons over the age of 50.
- This Part does not apply to accommodation provided for TT Homestay but it does apply to hotels and B&B accommodation.

### Section 33: Disposals, etc.

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

#### Examples

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

### Clause 34: Permission for disposal

90. This clause makes it unlawful for a person whose permission is needed to dispose of premises (for example, to sell, let or sublet a property) to discriminate against or victimise someone else by withholding that permission. It also makes it unlawful for such a person to harass someone who seeks that permission, or someone to whom the property would be sold or let if the permission were given.
91. This clause does not apply where permission to dispose of premises is refused by a court in the context of legal proceedings.

#### Example

- A disabled tenant seeks permission from his landlord to sublet a room within his flat to help him pay his rent. The landlord would normally allow subletting but he tells the

tenant that he cannot because he is disabled. This is direct discrimination in permission for disposing of premises.

### **Clause 35: Management**

92. This clause makes it unlawful for a person who manages premises to discriminate against or victimise someone who occupies the property in the way he or she allows the person to use a benefit or facility associated with the property, by evicting the person or by otherwise treating the person unfavourably. It also makes it unlawful for a person who manages a property to harass a person who occupies or applies to occupy it.

#### **Examples**

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

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

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

#### **Example**

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

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

94. This clause explains certain references that are used in Part 4 of the Bill and it introduces Schedule 4, which makes further provision about reasonable adjustments in respect of premises, and Schedule 5, which deals with certain exceptions to the requirements of this Part.

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

**Clause 38: Employees and applicants**

95. This clause makes it unlawful for an employer to discriminate against or victimise employees and applicants for work. It applies where the employer is making arrangements to fill a job, and in respect of anything done in the course of a person's employment. In respect of discrimination because of sex or pregnancy and maternity, a term of an offer of employment which relates to pay is treated as discriminatory where, if accepted, it would give rise to an equality clause (see clauses 57, 64 and 65 of the Bill) or if an equality clause does not apply, where the term constitutes direct or dual discrimination.
96. It also imposes the reasonable adjustments duty set out in clause 21 on employers in respect of disabled employees and applicants for employment.

**Examples**

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

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

97. This clause makes it unlawful for an employer to harass employees and people applying for employment (see clause 27 concerning harassment).

**Clause 40: Contract workers**

98. Contract workers are parties to a tri-partite arrangement. The first party is the person who has work which needs doing. He or she is known as the 'principal'. The principal enters into a contract with a second party who is obliged to supply workers to perform the work. These workers are known as 'contract workers' in relation to the principal.
99. This clause makes it unlawful for the principal to discriminate against, harass or victimise contract workers. Contract workers are separately protected from discrimination by their own employer (for example, the agency for which they work and which places them with the principal) under clause 38. This clause also imposes a duty on the principal to make reasonable adjustments for disabled contract workers (in addition to the duty on the contract worker's employer).

**Examples**

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

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

#### Subdivision 2 – Police officers

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

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

##### Example

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

#### Subdivision 3 – Partners

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

101. This clause makes it unlawful for firms (and those intending to set up a firm) to discriminate against, harass or victimise their partners, or people seeking to be partners in the firm. Activities covered by these provisions could include the offering of partnerships or giving existing partners access to opportunities such as training and/or transfers to other branches of the firm. It imposes on firms and people setting up firms a duty to make reasonable adjustments for disabled partners and prospective partners.
102. In the case of limited partnerships, these prohibitions only apply in relation to those partners who are involved with the operation of the firm (general partners).
103. Because partners are mainly governed by their partnership agreements, rather than by employment contracts, separate provisions are needed to provide protection from discrimination, harassment and victimisation for partners in ordinary and limited partnerships. In its application to a limited partnership, within the meaning of section 47 of the Partnership Act 1909, “partner” means a general partner within the meaning of that section.

##### Examples

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

#### Subdivision 4 — Office-holders

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

104. Office holders may not be employees or have the rights of employees (such as the right to complain of unfair dismissal). In some cases their rights and duties are defined by the office they hold rather than any contract, while in others they may be both employees and office holders (as in the case of company directors). For this reason office holders are a special case which needs to be dealt with separately within the Bill.

Clause 43 makes provision in respect of appointments to personal offices while clauses 44 and 45 make provision in respect of appointments to public offices.

105. Clause 43 makes it unlawful to discriminate against, harass or victimise people who are, or who wish to become, personal office-holders. These provisions apply in so far as other work provisions do not — this means that where office-holders are also employees, they will be protected by the provisions dealing with employment in respect of their employment relationship. In respect of sex or pregnancy and maternity discrimination, a term of an offer of an appointment to office which relates to pay is treated as discriminatory where, if accepted, it would give rise to an equality clause (see clauses 57, 64 and 65) or, if that is not the case, where the term of the offer constitutes direct or dual discrimination.
106. Personal office-holders are people who perform a function personally at a time and place specified by another person and who, in return, are entitled to payment (other than expenses or compensation for lost income).
107. An office-holder can be appointed by one person and then an entirely different person can be responsible for other matters, for example: for providing facilities for the office-holder to perform his or her functions. Because of this, the clause prohibits both the person who makes the appointment and any relevant person from discriminating against, victimising or harassing the office-holder. The relevant person is the person who is responsible for the act complained of in each case.
108. This clause places a duty to make reasonable adjustments on a person who makes the appointment and any relevant person in relation to the needs of disabled people who seek or hold personal offices.

#### Examples

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

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

109. This clause makes it unlawful to discriminate against, harass or victimise people who are or wish to become public office-holders. Like the personal office holder provisions above, these provisions apply in so far as other work provisions do not. This means that where public office holders are also employees, they will be protected by the provisions dealing with employment in respect of their employment relationship. In respect of sex or pregnancy and maternity discrimination, a term of an offer of an appointment to office which relates to pay is treated as discriminatory where, if accepted, it would give rise to an equality clause (see clauses 57, 64 and 65) or if that is not the case where the offer of the term constitutes direct or dual discrimination.
110. Public office-holders are people appointed by, on the recommendation of, or with the approval of, the Governor, the Governor in Council, the Council of Ministers, the Chief Minister, the Appointments Commission, Tynwald or a Branch of Tynwald.
111. A public office-holder can be appointed by one person and then an entirely different person can be responsible for other matters, for example for providing facilities for the office-holder to perform his or her functions. Because of this, the clause prohibits both the person with the power to make the appointment and any relevant person from

discriminating against, victimising or harassing the officeholder. The relevant person is the person who is responsible for the act complained of in each case (but does not include Tynwald, the House of Keys or the Legislative Council).

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

#### Example

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

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

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

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

#### Example

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

#### **Clause 46: Subdivision 4: interpretation and exceptions**

115. This clause explains the meaning of various terms, such as “relevant person”, used in clauses 43, 44 and 45. It provides that ‘appointment’ does not include election, so elected offices are not personal or public offices for the purpose of these clauses.
116. It also stipulates that termination of an appointment includes the expiration of the appointment period or where unreasonable conduct of the relevant person causes the office-holder to terminate the appointment. But it does not count as termination if after expiry of the appointment the person’s appointment is immediately renewed on the same terms.
117. The clause provides that Schedule 6 sets out which offices are excluded from being public offices for the purposes of the Bill.

#### Subdivision 5 - Qualifications

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

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

justified. It also imposes a duty on qualifications bodies to make reasonable adjustments for disabled people.

119. This clause defines what a relevant qualification is and which bodies are not covered by the term “qualifications body”. For this Part of the Bill it means a body that confer an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession (see also Division 3 of Part 6 of the Bill concerning educational qualifications and bodies). It also confirms that conferring a relevant qualification includes renewing or extending such a qualification.

#### Examples

- A body which confers diplomas certifying that people are qualified electricians refuses to confer the qualification on a man simply because he is Jewish. This would be direct discrimination.
- An organisation which maintains a register of professional tradespeople refuses to include a person’s details on the register because her name does not sound English. This would be direct discrimination.

### Subdivision 6 — Employment services

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

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

#### Examples

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

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

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

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

#### Examples

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

#### Subdivision 7 — Local authorities

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

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

#### Example

- A local authority does not equip meeting rooms with hearing loops for a member who has a hearing impairment, which would enable her to take full part in the business for which she has been elected. If it would be reasonable for the authority to make such an adjustment but it has not done so this would be discrimination.

#### Subdivision 8 — Recruitment

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

124. Except in the situations specified in this clause, an employer must not ask about a job applicant's health until that person has been either offered a job (on a conditional or unconditional basis) or has been included in a pool of successful candidates to be offered a job when a suitable position arises. The specified situations where health-related enquiries can be made are for the purposes of:
- finding out whether a job applicant would be able to participate in an assessment to test his or her suitability for the work;
  - making reasonable adjustments to enable a disabled person to participate in the recruitment process;
  - finding out whether a job applicant would be able to undertake a function that is intrinsic to the job, with reasonable adjustments in place as required;
  - monitoring diversity in applications for jobs;
  - supporting positive action in employment for disabled people; and
  - enabling an employer to identify suitable candidates for a job where there is an occupational requirement for the person to be disabled.
125. The clause also allows questions to be asked where they are needed in the context of national security vetting.
126. Where an employer makes a health or disability-related enquiry which falls outside the specified situations, he or she would be acting unlawfully. Proceedings may be instituted against the employer by the Attorney General who would, for example, be

able to conduct an investigation if there was evidence that a large employer was routinely asking prohibited questions when recruiting.

127. Where the employer asks a question not allowed by this clause and rejects the applicant, if the applicant then makes a claim to the Employment and Equality Tribunal for direct disability discrimination, it will be for the employer to show that it had not discriminated against the candidate.
128. As well as applying to recruitment to employment, the section also applies to the other areas covered by Part 5 of the Bill, such as contract work, business partnerships and office-holders.
129. This provision will limit the making of inappropriate enquiries and therefore help to tackle the disincentive effect that an employer making such enquiries can have on some disabled people making applications for work.

#### Examples

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

## DIVISION 2 – OCCUPATIONAL PENSION SCHEMES

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

130. This clause requires every occupational pension scheme to have a non-discrimination rule read into it. The rule prohibits “a responsible person” from discriminating against, harassing or victimising a member or a person who could become a member of the scheme.
131. A responsible person is a scheme trustee or manager, an employer, and the person responsible for appointing a person to a public office, where the office-holder can be a scheme member.
132. The rule will not apply to pension rights built up or benefits payable for periods of service before the commencement of this provision.
133. Where there has been a breach of a non-discrimination rule, proceedings may be brought against the person responsible for the breach under Part 9 of the Bill.
134. It would not be a breach of a non-discrimination rule if an employer or the trustees or managers maintain certain practices or make decisions in relation to age that are specified by an order made by the Treasury. The Treasury is obliged to consult with such persons as it considers appropriate before making any such order.
135. The non-discrimination rule does not apply where an equality rule (see clause 58, 59 and 66) operates or would operate, but for the exceptions in Part 2 of Schedule 7.

#### Example

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

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

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

- they lack powers to alter the rules for that purpose, or
- procedures for altering the rules, including obtaining consent, are unduly complex or would take too long.

#### Example

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

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

137. This clause applies to clauses 52, 108 (Tribunal jurisdiction), 113 (remedies: occupational pension schemes) and paragraph 16 of Schedule 8, in their application to communications, to a disabled person who is:

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

### DIVISION 3 – EQUALITY OF TERMS

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

#### Subdivision 1 – Sex equality

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

139. This clause explains that this Subdivision applies to employees and office-holders where one person's work is equal to the work of another.

140. This clause should be read together with clause 70 (comparators). Clause 55(2) is intended to ensure that a comparator need not be someone who is employed at the

same time as the person making a claim under these provisions, but could be a predecessor in the job<sup>7</sup>.

#### Examples

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

#### Clause 56: Equal work

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

- like work,
- work rated as equivalent, or
- work of equal value,

to a comparator's work.

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

143. Existing legislation<sup>8</sup> already covers the situations where a person is doing like work or work rated as equivalent but the situation where work is of equal value to a comparator's work is new.

#### Examples

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

#### Clause 57: Sex equality clause

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

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

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<sup>7</sup> There is UK case law in this area, i.e. *Macarthy's Ltd v Smith* (C 129/79; [1981] 1 All ER 111; [1980] ECR 1275)

<sup>8</sup> Part 1 of the Employment (Sex Discrimination) Act 2000

146. Subsection (3) is intended to ensure that the provisions relating to equality of terms at work and the provisions governing pension schemes in clauses 58 and 59 operate effectively together so that action can be taken against an employer as it could against a trustee, to ensure, for example that a defence that operates in relation to one, will operate in relation to the other.
147. Where a job evaluation study has rated the work of an employee and comparator as equivalent, the equality clause will give the employee the benefit of all of the comparator's terms, including those which have not been determined by the rating of the work.

#### Example

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

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

148. This clause requires that every occupational pension scheme is to have a sex equality rule read into it.
149. The rule requires that men and women are treated equally to comparable members of the opposite sex in relation both to the terms on which they are permitted to join the scheme, and to the terms on which they are treated once they have become scheme members.
150. The rule, insofar as it applies to the terms on which a person is treated once he or she has become a member of the scheme, does not apply to pensionable service before 6 April 2006<sup>9</sup>.
151. Where there has been a breach of a term modified by a sex equality rule, proceedings may be brought against the person responsible for the breach under Part 9 (enforcement) of the Bill.

#### Example

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

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

152. This clause gives trustees and managers of an occupational pension scheme the power, by resolution, to alter scheme rules to conform to the sex equality rule in clause 58. They may use the power if:
- they lack the power to alter rules; or
  - procedures for altering rules, including obtaining consent from another person (for example the employer), are unduly complex or would take too long.

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<sup>9</sup> This is the date on which the Pension Schemes Legislation (Application) Order 2006 (SD 15/06), which applied with modifications the Occupational Pension Schemes (Equal Treatment) (Amendment) Regulations 2005 (SI 2005/1923) to the Island, came into operation.

153. It should be noted that because of the effect of clause 58(9), where the operation of an equality rule relates to the terms on which a person becomes a member of the scheme, any alteration made relying on this clause may only have effect from 6 April 2006<sup>10</sup>.

#### Example

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

#### Clause 60: Defence of material factor

154. Generally, if the work of a worker and a comparator of the opposite sex is equal but their terms are not, the sex equality clause takes effect. Clause 60 provides that neither a sex equality clause nor a sex equality rule will apply if the employer can show that the difference in terms is due to a material factor which is relevant and significant and does not directly or indirectly discriminate against the worker because of their sex.
155. If there is evidence that the factor which explains the difference in terms is not directly discriminatory but would have an adverse impact on people of their sex (that is, it may be indirectly discriminatory), the employer must show that it is a proportionate means of meeting a legitimate aim or the sex equality clause will apply. For these purposes, the long-term objective of reducing pay inequality will always count as a legitimate aim.
156. Subsection (4) deals with the application of the material factor defence to occupational pension schemes.
157. The clause also allows DED to make regulations setting out what constitutes (or does not constitute) a proportionate means of achieving a legitimate aim for the purposes of this clause. This is an additional and potentially significant provision which does not appear in the Equality Act 2010.

#### Examples

- An employer introduces a bonus payment to encourage staff doing the same work to work a new night shift to maximise production. Only a small number of female staff can work at night and the bonus payments go almost entirely to male employees. Despite the disparate effect on the female employees, the employer's aim is legitimate and the payment of a bonus to night workers is a proportionate way of achieving it.
- A firm of accountants structures employees' pay on the basis of success in building relationships with clients (including at after-hours client functions). Because of domestic responsibilities, fewer women than men can maintain regular client contact and women's pay is much lower. The employer is unable to show the way it rewards client relationship building is proportionate, taking into account the disadvantage to women employees.
- The establishment of a new pay structure means that from a certain date new employees will be paid less than existing employees. This is likely to result in a person being paid less than colleagues of the opposite sex who are engaged in equal work. As the aim of the new pay structure is the protection of jobs and not to

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<sup>10</sup> See previous footnote.

discriminate on the basis of sex it is likely to be a proportionate means of achieving a legitimate aim. Although UK case law would be persuasive in the Island DED will be able to make regulations, to provide certainly as to the position.

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

158. This clause ensures that the sex discrimination provisions of the Bill do not apply where an equality clause or rule operates (or would operate in the absence of a defence of material factor or the exceptions set out in Part 2 of Schedule 7).
159. The sex discrimination provisions prohibit sex discrimination in relation to non-contractual pay and benefits such as promotion, transfer and training and in relation to offers of employment or appointment.
160. The equality of terms provisions operate only in relation to the terms of a contract of employment and the terms of appointment to a personal or public office.

#### **Example**

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

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

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

#### **Example**

- An employer tells a female employee "I would pay you more if you were a man" or tells a black female employee "I would pay you more if you were a white man". In the absence of any male comparator the woman cannot bring a claim for breach of an equality clause but she can bring a claim of direct sex discrimination or dual discrimination (combining sex and race) against the employer.

## **Subdivision 2 — pregnancy and maternity equality**

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

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

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

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

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

**Clause 65: Maternity equality clause: pay**

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

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

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

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

**Examples**

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

**Clause 66: Maternity equality rule**

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

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

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

171. The provisions of the clause apply only to women on unpaid ordinary maternity leave where the expected week of confinement began on or after 30 September 2007<sup>11</sup>.
172. When a woman is on unpaid additional maternity leave the provisions of the clause do not apply to the accrual of scheme rights and will only apply for other purposes where the expected week of childbirth begins on or after a date specified by order made by DED (being a date not earlier than the date on which this paragraph comes into operation)<sup>12</sup>.
173. Where there has been a breach of a term modified by a maternity equality rule, proceedings may be brought against the person responsible for the breach under Part 9 (enforcement) of the Bill.

#### Examples

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

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

174. This clause provides that the pregnancy and maternity discrimination provisions of the Bill do not apply where a maternity clause or rule operates.
175. The maternity discrimination provisions prohibit discrimination in relation to non-contractual pay and benefits such as promotion, transfer and training and in relation to offers of employment or appointment.
176. The maternity equality clause provisions operate only in relation to terms of a contract of employment and the terms of appointment to a personal or public office and do so by including an equality clause to modify terms governing maternity-related pay.
177. This provision explains the relationship between the two sets of provisions and is intended to ensure that they provide seamless protection against pregnancy and maternity-related inequality.

#### Example

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

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<sup>11</sup> Under regulation 3 of the [Maternity Leave Regulations 2007](#) (SD 76/07) the maternity rights under those Regulations had effect only in relation to employees whose expected week of childbirth began on or after this date.

<sup>12</sup> Under the equivalent provision, (section 75) of the UK's Equality Act 2010, this applies from 5 October 2008. Women whose expected week of childbirth was on or after this date were entitled to the same non-pay benefits during additional maternity as they were entitled during ordinary maternity leave from this date. The change was necessary as a result of a ruling of the UK High Court that the existing legislation did not properly transpose the EU's Equal Treatment Directive. See the [Sex Discrimination Act 1975 \(Amendment\) Regulations 2008](#) (SI 2008/656). Such a change has not yet been made in the Island but, although the EU Directive may not be binding on the Island, given the established position in the UK and as part of the process of updating the Island's equality and employment legislation it will be considered by the DED.

**Clause 68: Discussions about pay**

178. This clause is designed to make unenforceable any terms of employment or appointment that prevent or restrict people from disclosing or seeking to disclose their pay to others, or terms that seek to prevent people from asking colleagues about their pay, where the purpose of any disclosure is to find out whether there is a connection between any difference in pay and a protected characteristic. Any action taken against an employee by the employer as a result of conduct protected by this clause is treated as victimisation within the meaning of clause 28, as applied in the clauses listed in the table in subsection (5) of this clause.
179. Generally, discussions about pay would take place between colleagues, but this clause makes it clear that protection extends more widely so as to include, for example, disclosures made to a trade union official or anyone else, provided that it is made with a view to finding out whether any pay differences may be connected with a protected characteristic.
180. The clause is intended to ensure that there is greater transparency and dialogue within workplaces about pay. However, for the avoidance of doubt, it may be noted that there is no requirement on an employee to discuss their pay with colleagues if they do not wish to do so.

**Examples**

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

**Clause 69: Gender pay gap information**

181. This clause enables DED to make regulations requiring private and voluntary sector employers with at least 250 employees to publish information about the differences in pay between their male and female employees. The regulations may specify, among other things, the form and timing of the publication, which will be no more frequently than annually. The regulations may also specify penalties for non-compliance. DED may by order amend the number of employees which an employer has for this provision to apply. An employer who does not comply with the publication requirements could face civil enforcement procedures or be liable for a criminal offence, punishable by a fine of up to £5,000.
182. The Government considers that it would preferable for larger employers to voluntarily publish information on what they pay their male and female employees, so that their gender pay gap (the size of the difference between men and women's pay expressed as a percentage) is in the public domain. As such, this provision is included in the Bill as a contingency power in case its use is considered to be necessary or appropriate in the future.

## Subdivision 4 —supplementary

### **Clause 70: Comparators**

183. This clause sets out the circumstances in which employees and others can be used as comparators for the purposes of Division 3 of Part 5 the Bill. A person who claims the benefit of a sex equality clause or sex equality rule must be able to show that his or her work is equal to that of the chosen comparator.
184. If two persons share the same employer and work at the same establishment, each may be a comparator for the other.
185. If two persons work at different establishments but share the same employer and common terms and conditions of employment apply, each may be a comparator for the other.
186. A person can also be a comparator for another in either of the above circumstances if one is employed by a company associated with the other's employer. Subsection (9) defines when employers are taken to be associated.
187. A comparator can include the person's predecessor in the same job.
188. A person holding a personal or public office may be a comparator for another person holding a personal or public office if the same person is responsible for paying both of them.
189. A person holding the office of constable is treated for Division 3 of Part 5 of the Bill as holding a personal office for the purpose of determining who can be that person's comparator.
190. The clause also defines when a member of Tynwald staff may be taken to be another's comparator.

### **Example**

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

### **Clause 71: Interpretation and exceptions**

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

### **Clause 72: Offshore work**

192. This clause contains a power for DED to make an Order in relation to work on board offshore installations. The power may be used to apply Part 5 (with or without modifications) to those working on such installations.
193. This clause will enable protection to be extended to workers on offshore installations, such as oil and gas rigs and renewable energy installations (generally wind farms).

### **Clause 73: International pension arrangements**

194. This clause disapplies Part 5 of the Bill in relation to a personal or occupational pension scheme approved under section 50B of the [Income Tax Act 1970](#), which relates to

international pension schemes administered from the Island but in respect of persons outside the Island.

#### **Clause 74: Interpretation and exceptions**

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

### **PART 6: EDUCATION**

#### Division 1: Schools

#### **Clause 75: Application of this Division**

196. This clause provides that this Division of the Bill does not apply to the protected characteristic of age.

##### Examples

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

#### **Clause 76: Pupils: admission and treatment, etc**

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

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

##### Examples

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

#### **Clause 77: Victimisation of pupils, their siblings and parents for giving false evidence or information or making false allegations**

199. This clause protects children in schools from being victimised as a result of a protected act (such as making or supporting a complaint of discrimination) done by their parent

or sibling. The aim is to prevent parents being discouraged from raising an issue of discrimination with a school because of worry that their child may suffer retaliation as a result.

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

#### Examples

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

#### **Clause 78: Disabled pupils: accessibility**

201. This clause introduces Schedule 10 which requires the DEC and schools to prepare and implement accessibility strategies and plans. The aim of these strategies and plans is to increase disabled pupils' access to the curriculum and improve the environment and the provision of information. More detail is provided in the notes to that Schedule.

#### **Clause 79: Interpretation and exceptions**

202. This clause explains what is meant by terms used in this Division, such as "school" and "pupil". It also makes it clear that the prohibitions in the Division do not apply to anything done in relation to the content of the school curriculum. This ensures that the Bill does not inhibit the ability of schools to include a full range of issues, ideas and materials in their syllabus and to expose pupils to thoughts and ideas of all kinds. The way in which the curriculum is taught is, however, covered by the reference to education in clause 76(2)(a), so as to ensure issues are taught in a way which does not subject pupils to discrimination. This clause also gives effect to Schedule 11 which provides some exceptions to the provisions in this Division.

#### Examples

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

### DIVISION 2: FURTHER AND HIGHER EDUCATION

#### **Clause 80: Students: admission and treatment, etc**

203. This clause makes it unlawful for the University College Isle of Man (currently referred to in the Bill by its old name of Isle of Man College) or a university to discriminate against, harass or victimise a student or someone who wants to become a student in relation to the arrangements it makes in deciding whom to admit, the terms on which a person is admitted and the way a person is treated when admitted.

204. Subsection (4) of the clause specifically makes it unlawful to discriminate when considering conferring qualifications on disabled people who are enrolled at the institution.
205. The clause also imposes on the responsible body of such an institution the duty to make reasonable adjustments for disabled students and prospective students.

#### Examples

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

#### **Clause 81: Further and higher education courses**

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

#### Example

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

#### **Clause 82: Recreational or training facilities**

207. This clause makes it unlawful for the responsible body in relation to the provision of any recreational or training facilities to discriminate against, harass or victimise a person in terms of deciding who should be provided with any facilities and the terms on which the facilities are provided. It also imposes on them the duty to make reasonable adjustments when offering such facilities and services to disabled people.
208. The clause does not apply to the protected characteristic of age, so far as relating to persons who have not attained the age of 18.

#### Examples

- The Department runs a summer camp for children from local schools but it refuses an application from a child on the ground that the child is disabled or a Muslim. This would be direct discrimination.
- The Department only allows local children who are aged 13 or older to attend the summer camp. This would be lawful.

#### **Clause 83: Interpretation and exceptions**

209. This clause explains what is meant by terms used in this Division, such as “student” and “university”. It also makes it clear that the prohibitions in the Division do not apply to anything done in relation to the content of the curriculum. This ensures that the Bill does not inhibit the ability of institutions in the higher and further education sectors to

include a full range of issues, ideas and materials in their syllabus and to expose students to thoughts and ideas of all kinds. The way in which the curriculum is taught is, however, covered by the reference to education in clause 80(3)(a), so as to ensure issues are taught in a way which does not subject students to discrimination or harassment. It also gives effect to Schedule 12 which provides exceptions to the provisions in this Division.

#### Examples

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

### DIVISION 3 – GENERAL QUALIFICATIONS BODIES

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

210. This clause provides that this Division of the Bill does not apply to the protected characteristic of marriage or civil partnership status.

#### **Clause 85: Qualifications bodies**

211. This clause makes it unlawful for a qualifications body to discriminate against, harass or victimise a person in the arrangements it makes for deciding on whom to confer qualifications, and the terms on which those qualifications are conferred.

212. It also places a duty on qualifications bodies to make reasonable adjustments for disabled people. The clause also includes a power for DEC to designate an “appropriate regulator”, which may then specify matters which are not subject to the reasonable adjustments duty. For example, it could be specified that the requirement to achieve a particular mark to gain a particular qualification is not subject to reasonable adjustments. The appropriate regulator may also specify which reasonable adjustments should not be made. For example, it may be appropriate to allow additional time to complete the exam or to provide a reader, but not to give an exemption from part of an exam. In doing so, the appropriate regulator must have regard to the need to minimise the extent to which disabled persons are disadvantaged, and the need to protect the integrity of, and maintain public confidence in, the qualification. It is important that the disabled candidate knows that his or her qualification will be as highly regarded as other people’s qualifications, and will not be regarded as inferior because reasonable adjustments have been made. Before specifying any such matter, the regulator must consult anyone it thinks appropriate and it must publish the specified matters.

#### Examples

- A qualifications body refuses to allow a girl to undertake an International General Certificate of Secondary Education (IGCSE) in woodwork because of her sex. This would be direct discrimination.
- A visually impaired candidate is granted a modified paper (enlarged font) by a qualifications body in order that she can read her English IGCSE exam.

#### **Section 86: Interpretation**

213. This clause explains what is meant by terms used in clause 85. It defines a qualifications body as an authority or body which awards a qualification, and sets out

what it is not. The Council of Ministers may prescribe what is covered by the term 'relevant qualification' and also exclude an authority or body from being covered by the term 'qualifications body'.

#### DIVISION 4: MISCELLANEOUS

##### **Clause 87: Reasonable adjustments**

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

##### **Clause 88: Educational charities**

215. This clause provides that trust deeds or other instruments concerning educational charities which restrict available benefits to a single sex may be modified by the Attorney General after an application from DEC, the trustees or the governing body if it is considered that the modification would assist with the advancement of education without sex discrimination. A modification cannot be made within 25 years of the trust being created without the consent of the donor, or the donor's or testator's personal representatives. The Attorney General must publish particulars of the proposal and invite representations before making the order.

216. This provision might be used if a trust provided for an educational benefit to only be provided to male (or female) pupils but it was considered appropriate at some point in the future for all pupils to be able to benefit.

#### **PART 7: ASSOCIATIONS**

217. An "association" for the purposes of the Bill is defined in clause 93. An "association" is a group of persons —

- (a) which has at least 25 members, and
- (b) admission to membership of which is regulated by the association's rules and involves a process of selection.

##### **Clause 89: Application of this Part**

218. This clause provides that this Part of the Bill does not apply to the protected characteristic of marriage or civil partnership (i.e. it would not be unlawful for an association to only have single people (or married couples/civil partners) as members, etc).

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

##### **Clause 90: Members and associates**

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

to a benefit or deprive him or her of membership or rights as an associate respectively because of a protected characteristic covered by this Part.

#### Examples

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

#### **Clause 91: Guests**

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

#### Example

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

#### **Clause 92: Sections 90 and 91: further provision**

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

#### **Clause 93: Interpretation and exceptions**

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

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

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

#### Examples

- Associations include: private members' golf clubs and gentlemen's clubs where applicants for membership are required to make a personal application, be sponsored by other members and go through some kind of selection process.
- Membership would cover full membership, associate membership, temporary membership and day membership.

- Casinos, nightclubs and gyms, where payment of the requisite “membership” fee is all that is required to secure admittance are not associations for the purposes of this Part. These are covered instead by the provisions in Part 3 concerning services provided to the public.
- A book club run by a group of friends which has no formal rules governing admittance or whose membership is less than 25 is not an association for the purposes of this Part.

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

### **Clause 94: Relationships that have ended**

226. This clause makes it unlawful to discriminate against or harass someone after a relationship covered by the Bill has ended. It covers any former relationship in which the Bill prohibits one person from discriminating against or harassing another, such as in employment, or in the provision of goods, facilities and services. It is designed to ensure that treatment of the kind made unlawful by the Bill that results from, and is closely linked to, the existence of a relationship is still unlawful even though the relationship no longer exists.
227. This provision applies to conduct which takes place after the Bill is commenced, whether or not the relationship in question ended before that date.
228. The clause also requires reasonable adjustments to be made for disabled people even after a relationship has ended, if they continue to be at a substantial disadvantage in comparison with people without a disability. A person will be considered to have discriminated against a disabled person if he or she fails to comply with the duty to make reasonable adjustments.
229. A breach of this clause triggers the same enforcement procedures as if the treatment had occurred during the relationship. However, if the treatment which is being challenged constitutes victimisation, it will be dealt with under the victimisation provisions and not under this clause.

### **Examples**

- A school or employer refuses to give a reference to an ex-pupil or ex-employee because of his or her religion or belief. This would be direct discrimination.
- A builder or plumber addresses abusive and hostile remarks to a previous customer because of her sex after their business relationship has ended. This would be harassment. It would not be harassment for the purposes of the Bill, however, where the reason for the treatment was not the customer’s sex but, for example, a dispute over payment.
- A disabled former employee’s benefits include life-time use of the company’s in-house gym facilities. The employer or owner of the premises must make reasonable adjustments to enable the former employee to continue using the facilities even after she has retired.

### **Clause 95: Liability of employers and principals<sup>13</sup>**

230. This clause makes employers and principals liable for acts of discrimination, harassment and victimisation carried out by their employees in the course of

<sup>13</sup> A ‘principal’ is one who authorises another (an agent) to create legal relations between the principal and third parties. See also the notes to clause 40.

employment or by their agents acting under their authority. It does not matter whether or not the employer or principal knows about or approves of those acts.

231. However, employers who can show that they took all reasonable steps to prevent their employees from acting unlawfully will not be held liable. Employers and principals cannot be held liable for any criminal offences under the Bill that are committed by their employees or agents.
232. This clause is designed to ensure that employers and principals are made responsible for the acts of those over whom they have control. The clause works together with the provisions on “Liability of employees and agents” (clause 96), “Instructing, causing or inducing contraventions” (clause 97), and “Aiding contraventions” (clause 98) to ensure that both the person carrying out an unlawful act and any person on whose behalf he or she was acting can be held to account where appropriate.

#### Examples

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

#### **Clause 96: Liability of employees and agents**

233. This clause makes an employee personally liable for unlawful acts committed in the course of employment where, because of clause 95, the employer is also liable – or would be but for the defence of having taken all reasonable steps to prevent the employee from doing the relevant thing.
234. An agent would be personally liable under this clause for any unlawful acts committed under a principal's authority. However, an employee or agent will not be liable if he or she has been told by the employer or principal that the act is lawful and he or she reasonably believes this to be true.
235. Subsections (4) and (5) make it an offence, punishable by a fine of up to £5,000, if an employer or principal knowingly or recklessly makes a false statement about the lawfulness of doing something under the Bill.
236. This clause does not apply to discriminatory acts done by an employee or agent because of disability in relation to schools, because claims for disability discrimination in schools cannot be enforced against individuals.

#### Examples

- A factory worker racially harasses her colleague. The factory owner would be liable for the worker's actions, but is able to show that he took all reasonable steps to stop the harassment. The colleague can still bring a claim against the factory worker at the Employment and Equality Tribunal.

- A principal instructs an agent to sell products on her behalf. The agent discriminates against a disabled customer. Both the principal and the agent are liable, but the Tribunal is able to determine that evidence provided by the principal indicates the authority given to the agent did not extend to carrying out an authorised act in a discriminatory manner. The disabled customer can still bring a claim against the agent.

### **Clause 97: Instructing, causing or inducing contraventions**

237. This clause makes it unlawful for a person to instruct, cause or induce someone to discriminate against, harass or victimise another person, or to attempt to do so. It provides a remedy for both the recipient of the instruction and the intended victim, whether or not the instruction is carried out, provided the recipient or intended victim suffers a detriment as a result.
238. However, the clause only applies where the person giving the instruction is in a relationship with the recipient of the instruction in which discrimination, harassment or victimisation is prohibited.
239. The Attorney General is given statutory powers to enforce this clause (see clause 126). Equally, both the recipient of the instruction and the intended victim can bring individual claims for breach of this section against the person giving the instructions, so long as they have suffered a detriment as a result. A claim brought by the recipient of the instruction will be dealt with by the Employment and Equality Tribunal as a direct claim for discrimination, harassment or victimisation against the person giving the instruction would be. A claim brought by the intended victim against the person giving the instruction will be dealt with in the same forum as a claim for discrimination, harassment or victimisation against the person carrying out the instruction would be.

### **Example**

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

### **Clause 98: Aiding contraventions**

240. This clause makes it unlawful for a person to help someone carry out an act which he or she knows is unlawful under the Bill. However, the act is not unlawful if the person giving assistance has been told that it is lawful and he or she reasonably believes this to be true. It makes it an offence, punishable by a fine of up to £5,000, knowingly or recklessly to make a false statement about the lawfulness of doing something under the Bill.
241. For the purposes of enforcement, breaches of the prohibition on aiding contraventions are dealt with under the same procedures in the Bill as the contraventions themselves.
242. The clause ensures that a person who helps another to do something which he or she knows to be prohibited by the Act is liable in his or her own right. Taken together with the provisions on "Liability of employers and principals" (clause 95), "Liability of employees and agents" (clause 96), and "Instructing, causing or inducing contraventions" (clause 97) this clause is designed to ensure that both the person carrying out an unlawful act and any person on whose behalf or with whose help he or she was acting can be held to account where appropriate.

## Example

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

## PART 9: ENFORCEMENT

243. This Part deals with the methods of enforcement of the rights conferred and prohibitions imposed by the Bill.

### DIVISION 1 - INTRODUCTORY

#### Clause 99: Proceedings

244. Clause 99 makes it clear that, with certain exceptions, proceedings under the Bill may only be instituted in accordance with Part 9. The specified exceptions are as follows:

- criminal proceedings;
- proceedings on a petition of doleance;
- proceedings under the Immigration Acts (of Parliament) or, if the Special Immigration Appeals Commission Act 1997 (of Parliament) is applied to the Island by an Order in Council, immigration appeals to which that Act applies.

### DIVISION 2: THE TRIBUNAL

245. Division 2 deals with the new **Employment and Equality Tribunal** and confers jurisdiction on it in relation to almost all of the proceedings under the Bill in addition to the existing jurisdiction of the Employment Tribunal. Whereas the Employment Tribunal deals only with employment cases the jurisdiction of the Employment and Equality Tribunal is wider so that in addition to employment cases it can also deal with cases involving claims of discrimination in the provision of goods and services. This is different to the position in the UK where claims of discrimination other than employment must be taken to the courts. It is considered that in a small jurisdiction such as the Isle of Man, avoiding the need for cases to be taken to the courts will provide a timelier and lower cost route for complainants seeking redress.

246. Division 2 is broken down into 4 Subdivisions which are as follows:

- Subdivision 1 deals with the constitution of the Tribunal.
- Subdivision 2 sets out the jurisdiction of the Tribunal in relation to goods and services.
- Subdivision 3 sets out the jurisdiction of the Tribunal in relation to work and employment related services.
- Subdivision 4 sets out the jurisdiction of the Tribunal in relation to equality of contractual terms.

#### Subdivision 1: Constituting the Tribunal

#### Clause 100: Definitions relating to the Tribunal, and proceedings before it

247. This clause defines "relevant officer" and other expressions.

### **Clause 101: The Tribunal: constitution, functions and transition**

248. Clause 101 establishes the Employment and Equality Tribunal, confers functions upon it and makes consequential amendments and repeals to Part 12 of the [Employment Act 2006](#) [Resolution of disputes relating to employment] and makes transitional provision. It also gives effect to Schedule 16 which makes further provision in respect of the Tribunal. As the Tribunal's jurisdiction will be wider than that of the existing Employment Tribunal, the Schedule provides for the making of rules, in relation to matters which are not employment-related, of the same kind as might be made in relation to the High Court in proceedings in tort or doleance.
249. The change from the Employment Tribunal to the Employment and Equality Tribunal is made by substituting a new section 156 "The Employment and Equality Tribunal" in the Employment Act 2006 in place of the present section entitled "The Employment Tribunal". (All other related provisions from Part 12 of the 2006 Act, including Schedule 3 of that Act [The Employment Tribunal] are repealed and re-enacted with modifications in this Bill).

### **Clause 102: Conciliation**

250. Clause 102 re-enacts section 157 of the Employment Act 2006 [Conciliation] with amendments. This clause requires "a relevant officer" (defined in clause 100) to seek to resolve a complaint or potential complaint to the Tribunal by conciliation. A "relevant officer" means in relation to proceedings with an employment element an industrial relations officer; in relation to proceedings under section 105 (education cases), a person appointed by DEC to conciliate in proceedings under that clause; and in relation to proceedings under any other provision of the Act, an officer of the Office of Fair Trading.
251. In cases with an employment element where the employment has ceased, an industrial relations officer is to seek to get the complainant reinstated or re-engaged, or, if the complainant does not want his or her job back, to seek to negotiate compensation.
252. A relevant officer is to consider using alternative procedures for dispute resolution (e.g. mediation or arbitration), where appropriate, rather than Tribunal proceedings.
253. Anything communicated to a relevant officer in the course of conciliation under this clause is not admissible in evidence before the Tribunal, unless the party which communicated the information consents.

#### Subdivision 2: Jurisdiction in relation to good and services

### **Clause 103: Jurisdiction of the Tribunal in relation to goods and services**

254. Clause 103 sets out the jurisdiction of the Tribunal in non-work cases, i.e. those under the provisions of the Bill other than Part 5. These are, with some exceptions, claims related to the provision of services, the exercise of public functions, disposal and management of premises, education, associations and contraventions of clause 94 [Relationships that have ended], clause 97 [Instructing, causing or inducing discrimination] and clause 98 [Aiding contraventions]. Power is conferred on the Tribunal to do anything which the High Court can do in civil proceedings.

#### Examples

- A woman has joined a golf club but because she is a woman she is allowed to play golf only on Tuesday afternoons and is not allowed access to the club bar. She could bring a discrimination claim to the Tribunal.

- A gay man applies for residential housing in a local authority area, but is told that he can choose from only three housing blocks because all homosexual people are housed together. He could bring a discrimination claim to the Tribunal.

#### **Clause 104: Immigration cases**

255. Clause 104 sets out which claims under the Bill are outside the jurisdiction of the Tribunal because they are being dealt with under immigration legislation. These are claims in relation to decisions on whether a person may enter or remain in the Island and claims where the question of whether there has been a breach of Part 3 of the Bill (which deals with services and public functions) has either been raised in immigration proceedings and rejected, or could be raised on appeal.

#### **Clause 105: Education cases**

256. Clause 105 gives effect to Schedule 17 which deals with the procedure where there is a discrimination claim relating to a school (see Division 1 of Part 6 of the Bill). Although the case can still be taken to the Tribunal, the Department of Education and Children must make arrangements to try to resolve the issue without reference to the Tribunal.

#### **Clause 106: Time limits**

257. Clause 106 prescribes the time limits applicable in non-work cases under the Bill. A person must bring a claim under the Bill to which clause 103 relates (non-work cases) to the Tribunal within six months of the alleged unlawful act taking place. If a person wants to make a claim after that period it is at the Tribunal's discretion whether it grants permission to allow this. The test applied by the Tribunal in deciding whether to hear a claim that is out of time is what is "just and equitable" in the circumstances.
258. The six month period will only begin, in a claim involving a decision of an immigration body, when that body has ruled that there is a breach of Part 3 of the Bill (which deals with services and public functions) and that ruling can no longer be appealed.
259. Where the conduct in respect of which a claim under the Bill might arise continues over a period of time, the time limit starts to run at the end of that period. Where it consists of a failure to do something, the time limit starts to run when the person decides not to do the thing in question. In the absence of evidence to the contrary, this is either when the person does something which conflicts with doing the act in question; or at the end of the time when it would have been reasonable for them to do the thing.

#### **Clause 107: Remedies**

260. Clause 107 deals with remedies in non-work cases. The clause confers powers on the Tribunal when hearing claims relating to non-work cases under the Bill to grant any remedy that the High Court could grant in proceedings in tort or in a claim for petition of dolence. The main remedies available are damages (including compensation for injuries to feelings), an injunction and a declaration.
261. In cases based on indirect discrimination, if the respondent proves that he or she did not intend to treat the complainant unfavourably then the award of damages cannot be considered until the Tribunal has looked at the other remedies available to it.
262. The Tribunal cannot grant some remedies, such as an injunction, if doing so would prejudice a criminal investigation or proceedings.

### Subdivision 3 – Jurisdiction in relation to work and employment related services

#### **Clause 108: Jurisdiction of the Tribunal in work cases**

263. Clause 108 deals with the Tribunal's jurisdiction in proceedings in respect of rights and obligations under those provisions of the Bill which are concerned with work-related matters (i.e. Part 5 of the Bill and some other provisions).
264. Also, under clause 52 an occupational pension scheme must be taken to include a non-discrimination rule. The Tribunal has jurisdiction to determine an application made by a responsible person (as defined in clause 52(4)) for a declaration about his or her rights and those of a worker or member or prospective member of the scheme in relation to a dispute about the effect of such a rule.
265. The Tribunal is also given jurisdiction to determine a question that relates to a non-discrimination rule and which is referred to it by the High Court.

#### **Clause 109: Remedies for breach of provisions of the relevant enactments**

266. Clause 109 re-enacts part of section 156 of the [Employment Act 2006](#) to provide remedies to employees and workers whose rights have been infringed under that Act and other employment legislation ("the relevant enactments"). The rights conferred are enforceable only by complaint to the Employment and Equality Tribunal (and not, for example, by court action). The rights in question are set out in the clause and the Department of Economic Development is given a power to specify other provisions by order. Such an order requires Tynwald approval. The clause also makes provision for complaints to be made in accordance with procedural rules under Schedule 16 to the Bill.

NOTE: "the relevant enactments" is defined in clause 3 of the Bill as meaning:

- (a) the [Redundancy Payments Act 1990](#);
- (b) the [Shops Act 2000](#);
- (c) the [Minimum Wage Act 2001](#);
- (d) the [Employment Act 2006](#); and
- (e) any statutory document made, or having effect, under any of those Acts.

#### **Clause 110: References by Court to Tribunal etc**

267. Clause 110 requires the High Court to either strike out a claim or counter-claim relating to a non-discrimination rule or to refer the claim to the Tribunal. Where a claim is referred to the Tribunal, the Tribunal must, for the purposes of establishing whether it should be accepted, ascertain whether the claim was submitted within the appropriate time limit. For this purpose the date the claim was submitted to the High Court is the appropriate date. Although in England certain cases may be determined by either the civil courts or employment tribunals in the Island all proceedings will be dealt with by the Employment and Equality Tribunal.

#### **Clause 111: Time limits**

268. Clause 111 deals with time limits for bringing a work case under the Bill to the Tribunal. A person must bring a claim within three months of the alleged conduct taking place. If a person wants to make a claim after that period it is at the Tribunal's discretion whether permission is granted to allow them to do so. The test applied by the Tribunal is what is "just and equitable" in the circumstances.

269. Where the conduct in respect of which a claim under the Bill might arise continues over a period of time, the time limit starts to run at the end of that period. Where it consists of a failure to do something, the time limit starts to run when the person decides not to do the thing in question. In the absence of evidence to the contrary, this is either when the person does something which conflicts with doing the act in question; or at the end of the time when it would have been reasonable for them to have done the thing.
270. The clause does not apply for equality of terms cases, time limits for which are set out in clause 118.

### **Clause 112: Remedies: general**

271. Clause 112 sets out the remedies available to the Tribunal in work related cases under the Bill. The remedies under this clause do not apply to a breach of an equality clause or an equality rule, which is dealt with in Subdivision 4.
272. The Tribunal can make a declaration regarding the rights of the complainant and/or the respondent; order compensation to be paid, including damages for injury to feelings; and make an appropriate recommendation.
273. Where the Tribunal makes a recommendation it does not only have to be aimed at reducing the negative impact on the individual complainant(s) of the respondent's actions which gave rise to the successful claim; it can also be aimed at reducing that impact on the wider workforce. Any recommendation must state that the respondent should take specific action within a specified period of time.
274. In a case of indirect discrimination where the respondent proves that there was no intention to treat the complainant unfavourably, the Tribunal cannot award compensation be paid to a complainant unless it has first considered making either a declaration or recommendation.
275. The maximum compensation which may be awarded is the maximum amount which can be awarded under the sum of the amounts provided for subsections (1) and (2) of section 144 of the [Employment Act 2006](#). Section 144(1) sets out the maximum compensatory award (currently £56,000) and section 144(2) sets out the maximum injury to feelings award (currently £5,000). However, the Tribunal is not bound to limit an individual component of an award to either of these amounts, i.e. as long as an award does not exceed the overall maximum (currently £61,000) it could be divided as the Tribunal saw fit<sup>14</sup>.
276. The Tribunal has the power in any case where a recommendation made for the benefit of the individual complainant is not complied with, to award compensation or increase any award already made.

### **Example**

- The Tribunal could recommend that the respondent:
  - introduces an equal opportunities policy;
  - ensures its harassment policy is more effectively implemented;

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<sup>14</sup> The limit does not apply to certain cases of unfair dismissal under the Employment Act 2006 – for example, if an employee was dismissed for flagging up health and safety issues. The majority of awards are very significantly below the maximum amount.

- set up a review panel to deal with equal opportunities and harassment/grievance procedures;
- re-train staff; or
- make public the selection criteria used for transfer or promotion of staff.

### **Clause 113 Remedies: occupational pension schemes**

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

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

### **Clause 114: Remedies: supplemental**

279. Clause 114 enables DED to exercise a remedy under Part 5 of the Bill or any of the employment statutes on behalf of an employee or worker if the employee or worker gives his or her consent. This provision could be used, for example, to allow the Department to progress a claim but the person who was the subject of the alleged infringement was not in a position to pursue the claim.

280. The clause also restricts the Tribunal from making more than one financial award where there are, for example, overlapping employment rights.

### **Example**

- a worker who alleged dismissal for a health and safety reason brings a case under both section 115 of the [Employment Act 2006](#) (dismissal for a health and safety reason) and section 119 of that Act (dismissal for assertion of a statutory right); the Tribunal would consider whether the complainant had a case under either or both of the provisions but if it found in favour of the complainant that person would only be entitled to a single award.

### **Clause 115: Recoupment of benefit**

281. This clause re-enacts section 158 of the Employment Act 2006. It enables the Treasury to make regulations so that, where an award or agreed payment is made to an employee who has received jobseeker's allowance or income support, all or part of the award or payment is to be paid to the Treasury so as to recoup all or part of the benefit paid.

282. The clause lists the kinds of payments to which the clause refers such as payments by employers to employees under Part 3 of the Employment Act 2006 (e.g. for unlawful deductions from wages).

283. The clause empowers the Treasury to make regulations under which it may recover any jobseeker's allowance or income support paid to the employee up to a figure prescribed by the regulations; the Tribunal must order payment of any such amount to the Treasury instead of to the employee; the Tribunal is to order payment of only the

balance to the employee, and the Treasury may recover that amount from the employer if unpaid.

284. There is a provision to prevent double recovery: the Treasury may not recover from the employee under social security legislation any amount which it has recovered under this clause.
285. Any amount recovered by the Treasury under this clause is to be paid into the fund out of which the relevant benefit was paid.
286. Terms used in this clause are defined at the end of the clause.

#### Subdivision 4 – equality of terms

287. Subdivision 4 sets out the jurisdiction of the Tribunal in relation to cases concerning equality of contractual terms.

#### **Clause 116: Jurisdiction – equality of terms**

288. Clause 116 sets out the types of cases relating to equality of terms which the Tribunal has jurisdiction to hear. The Tribunal may hear and decide claims involving equality in the rules of occupational pension schemes and claims relating to an equality clause, including claims relating to pregnancy and maternity equality.
289. A responsible person (such as an employer, or a pension scheme trustee or manager) can also ask the Tribunal for a declaration of each party's rights in relation to a dispute or claim about an equality clause or rule.

#### **Clause 117: References by Court to Tribunal**

290. Clause 117 is similar to clause 110. As in that clause the High Court will be required to either strike out a claim or counter-claim relating to a non-discrimination rule or to refer the claim to the Tribunal. Where a claim is referred to the Tribunal, the Tribunal must, for the purposes of ascertaining whether the claim should be accepted, establish whether the claim was submitted within the appropriate time limit. For this purpose the date claim was submitted to the High Court is the appropriate date.

#### **Clause 118: Time limits**

291. Clause 118 prescribes the time limits for the purposes of Subdivision 4. A person who wishes to bring a claim for breach of an equality clause or rule or to apply for a declaration about the effect of such a clause or rule must normally do so within six months of the end of the employment contract. In certain circumstances though, this clause gives a complainant more time to make a claim.
292. Time limits provide certainty by requiring claims to be brought within specified periods and also take into account factors which may affect a complainant's ability to assert his or her claim. As different time limits apply to nonstandard cases, this clause specifies the limits for such cases.
293. In a *standard case*, the time limit would start at the end of the contract of employment.
294. In a *stable work case*, proceedings are taken to relate to a period during which there was a stable working relationship between the worker and the responsible person and the time limit only begins to run when the stable working relationship ends. A stable

employment relationship is where there are successive contracts and/or periods of employment with the same employer.

295. In a *concealment case*, the employer deliberately conceals relevant information from the worker. The time limit starts to run when the employee discovers, or could reasonably have been expected to discover, the information.
296. In an *incapacity case* (for example, where a person has a health problem which prevents him or her from starting the case within the normal time limit) the time limit starts to run on the day on which the worker ceases to have the incapacity.

#### Examples:

- A woman's employment ends due to mental health problems which result in her temporary loss of capacity to make decisions for herself. She could make a claim for breach of an equality clause to the Tribunal but is not well enough to do so. The six month time limit will start when she recovers sufficiently to make a claim.
- A woman suspects that her male colleagues who do the same work are better paid. Her employer reassures her that she and her colleagues get the same salary but he deliberately does not tell her that the men also receive performance bonuses under their contracts which she does not receive. Her male colleagues refuse to discuss their pay with her. The woman only discovers the discrepancy between her pay and the men's when one of the men tells her a year after she ceases employment. Within six months she makes an equal pay claim to the Tribunal based on the value of the bonus payments she would have received if her contract had provided for them. Although the woman's claim is made more than six months after her employment ends, she shows that her employer deliberately misled her into believing that her pay was the same as the men's. She had no way of discovering the truth earlier. Her claim can proceed as a concealment case.

#### **Clause 119: Assessment of whether work is of equal value**

297. Where the Tribunal has to decide if the work of a complainant and comparator are of equal value, this clause gives it the power to require an independent expert ("a qualified person") to prepare a report on the matter.
298. Unless the Tribunal withdraws its request for a report (in which case it can ask the expert to give it any documents or other information the expert has to help it make a decision) it must wait for the expert's report before deciding whether the work is of equal value.
299. If there has been a job evaluation study in relation to the work involved and the study finds that the complainant's work is not of equal value to the work of the comparator, the Tribunal is required to come to the same decision unless it has a good reason to suspect that the study is discriminatory or unreliable.
300. Under this clause the Manx Industrial Relations Service has the role of entering into arrangements with a qualified person for the provision of reports, documents and information to assist the Tribunal in deciding whether jobs are of equal value.

#### Example

- A woman claims that her job is of equal value to that of a male comparator (i.e. the jobs may be different but they have equivalent levels of responsibility, skills required, etc.). The employer produces a job evaluation study to the Tribunal in which the woman's job is rated below her male comparator's job. The employer asks the

Tribunal to dismiss the woman's claim but the woman is able to show that the study is unreliable because it is out of date and does not take account of changes in the jobs resulting from new technology. The Tribunal can disregard the study's conclusion and can proceed to decide if the work of the complainant and the work of the comparator are of equal value.

### **Clause 120: Remedies in non-pensions cases**

301. Under clause 120, if a claim for breach of an equality clause (other than in relation to a pension scheme) succeeds, the Tribunal can make a declaration clarifying what the rights of the parties to the claim are.
302. The Tribunal can also order the employer to pay the complainant arrears of pay or damages. The period used for calculating arrears depends on the type of case. The basic period is two years from the date a claim is made. Special provision is made for claims involving concealment and/or incapacity (as defined in clause 123).

#### **Example**

- A woman successfully establishes that her work is the same as her male comparator's and that in addition to a discrepancy between her pay and that of the comparator, she has been denied access to the benefit of a company car. The complainant is entitled to claim the difference in pay going back up to two years from the date of the claim. She is also entitled to monetary compensation for not having had the use of a company car.

### **Clause 121: Remedies in pensions cases**

303. Clause 121 allows the Tribunal to declare that in cases where an equality rule or equality clause has been breached:

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

but the date cannot be earlier than 6 April 2006<sup>15</sup>.

304. However, the clause prevents the Tribunal from ordering an award of compensation to the complainant.

### **Clause 122: Remedies in claims for arrears brought by pensioner members**

305. Clause 122 allows the Tribunal to require compensation to be paid to a pensioner member for a breach of an equality clause or rule in relation to an occupational pension scheme; and it sets out the period for which arrears may be awarded for different types of cases. In a standard case, the period is two years before the date when a claim is made. Special provision is made for claims involving concealment and/or incapacity (as defined in clause 123).

### **Clause 123: Remedies: supplementary**

306. This clause defines terms used in clauses 120 to 122.

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<sup>15</sup> This is the date on which the [Pension Schemes Legislation \(Application\) Order 2006](#) (SD 15/06), which applied with modifications the Occupational Pension Schemes (Equal Treatment) (Amendment) Regulations 2005 (SI 2005/1923) to the Island, came into operation.

## DIVISION 3 — APPEALS

307. Division 3, which comprises clause 124, deals with appeals from decisions of the Tribunal.

### **Clause 124: Appeals**

308. Clause 124 re-enacts section 160 of the [Employment Act 2006](#) (Appeals) and expands it to encompass appeals under the Equality Bill, including in respect of goods and services. The clause provides for an appeal to the High Court against a decision of the Tribunal under the Bill or any of the employment law statutes.

309. However, a person aggrieved by a decision of the Tribunal in any proceedings under the Bill or under employment legislation may only appeal to the High Court on a question of law (e.g. that the Tribunal has incorrectly interpreted the legislation).

310. On an appeal, the High Court is empowered to exercise any power of the Tribunal (e.g. to make an award), or to send the case back to the Tribunal for it to determine in accordance with the Court's decision on the point of law.

311. Any decision of the High Court is enforceable in the same way as a corresponding decision of the Tribunal (e.g. by execution under clause 127 or by regulations under clause 115 as to recoupment of benefit).

312. The provisions of this Bill regarding interest will apply to an award made by the High Court under clause 130 (interest on sums awarded).

## DIVISION 4 — MISCELLANEOUS

### **Clause 125: Action taken to safeguard national security**

313. Clause 125 makes provision about the application of the Bill and certain complaints under the [Employment Act 2006](#) in the context of action taken to safeguard national security. If it is shown that the action complained of was taken for the purpose of safeguarding national security the Tribunal must dismiss the complaint.

### **Clause 126: Enforcement of sections 97 or 98**

314. Clause 126 re-enacts, with wider application, section 41 of the [Employment \(Sex Discrimination\) Act 2000](#). It gives the Attorney General powers to apply to the High Court for an injunction if it appears to him or her that a person has committed an unlawful act under clause 97 (instructing, causing or inducing discrimination) or clause 98 (aiding contraventions of the Bill) and that, unless the person is restrained, he or she is likely to do further acts which by virtue of that section are unlawful.

### **Clause 127: Enforcement of awards etc of Tribunal**

315. Clause 127 re-enacts clause 159 of the [Employment Act 2006](#). The clause enables the Tribunal to grant execution to enforce an award made by it as though the decision, order or award were an order of the High Court.

### **Clause 128: Burden of proof**

316. Clause 128 provides that, in any claim where a person alleges discrimination, harassment or victimisation under the Bill, the burden of proving his or her case starts with the complainant. Once the complainant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the

Bill. The exception to this rule is if the proceedings relate to a criminal offence under this Bill.

#### Example

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

#### **Clause 129: Previous findings**

317. Clause 129 provides that if a person has brought a case under any of the previous legislation (which this Bill replaces) listed in this clause and a finding by the Employment Tribunal or the High Court had been finalised, the issues decided in that case cannot be reopened and litigated again under the provisions in this Bill.

#### **Clause 130: Interest on sums awarded**

318. Clause 130 enables the Council of Ministers to make an order (subject to Tynwald approval) enabling the Tribunal to add interest payments pursuant to a decision of the Tribunal. The order making powers are extensive; an order can set out how the Tribunal should calculate how much interest should be paid and provide that different cases may be treated differently.

#### NOTE 1:

- Employment tribunals in the UK have the power to award interest on arrears of pay awards (which may amount to up to six years' arrears – unlike the standard two years' arrears that currently apply in respect of "like work" or "work rated as equivalent" cases under Part 1 of the [Employment \(Sex Discrimination\) Act 2000 and](#) will apply under this Bill). This can form a significant part of the overall award that an employer is required to pay. At present in the Island, the Employment Tribunal does not have the power to include this type of interest to pay arrears in successful "like work" or "work rated as equivalent" cases and it is not envisaged that this will change under the Bill when equal pay for work of equal value cases are added to the circumstances under which the new Employment and Equality Tribunal may award pay arrears. There is no current intention of following the UK provision in this area but the power is required for other reasons, such as in the case of failure to comply with an order of the Tribunal to pay an award within a specified period.

#### NOTE 2:

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

#### Example:

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

#### **Clause 131: Equal pay audits**

319. Clause 131 enables the Department of Economic Development to make regulations requiring the Tribunal to order an employer to carry out an equal pay audit where the employer has been found to have breached equal pay law or to have discriminated on the ground of sex in respect of non-contractual pay such as discretionary bonuses.
320. Regulations made under this power will be subject to the approval of Tynwald. The clause specifies that the regulations may set out the content of pay audits and also the circumstances to be specified in regulations in which a pay audit cannot be ordered by the Tribunal.
321. The first Regulations made under this section must provide that the Tribunal cannot order an employer to pay a penalty exceeding £5,000 for failure to comply with an equal pay audit order. The first Regulations must also include an exemption for certain types of new or small businesses.

#### NOTE:

- The equivalent provision in the UK was inserted into the Equality Act 2010 by the Enterprise and Regulatory Reform Act 2013. Following consultation on this issue, the UK's regulations<sup>16</sup> came into force on 1 October 2014.

#### **Clause 132: Restriction of frivolous or vexatious proceedings**

322. Clause 132 allows the Attorney General to apply to the Tribunal for a restriction of proceedings order where a person is considered to have brought vexatious proceedings before the Tribunal (for example, where a person has made repeated claims to the Tribunal that are entirely without merit).
323. When issued, such an order would prevent the person against whom it is made from instituting or continuing proceedings without leave of the Tribunal. The Tribunal must give the person the opportunity of appearing before the Tribunal before deciding whether an order should be made.

#### **Clause 133: Interpretation etc**

324. Clause 133 sets out how certain concepts and terms are to be interpreted for the purposes of Part 9 of the Bill, including what is meant by a person lacking capacity and what constitutes a criminal matter.

## **PART 10 — CONTRACTS, ETC**

### **DIVISION 1— CONTRACTS AND OTHER AGREEMENTS**

#### **Clause 134: Unenforceable terms**

325. This clause makes terms of contracts which discriminate against a person or which would otherwise lead to conduct prohibited by the Bill unenforceable in that respect.

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<sup>16</sup> <http://www.legislation.gov.uk/uksi/2014/2559/contents/made>

But a person who would have been disadvantaged by any such term will still be able to rely on it so as to obtain any benefit to which it entitles him.

326. For disability alone, this section also applies to terms of non-contractual agreements relating to the provision of employment services (within clause 48(8)(a) to (e)) or group insurance arrangements for employees. These terms are referred to in the section as “relevant non-contractual terms”.
327. This clause does not apply to a term of contract modified by an equality clause under Part 5, Division 3 [equality of terms] – because once the term is modified it is no longer discriminatory. Nor, as a result of clause 139(2) [an interpretative provision], does it deal with contractual terms which may breach the public sector equality duty (Part 11, Division 1).

#### Example

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

#### **Clause 135: Removal or modification of unenforceable terms**

328. This clause allows the Employment and Equality Tribunal to make an order to modify or remove a contractual (or relevant non-contractual) term which is made unenforceable under clause 134, when asked to do so by a person who has an interest in the contract (which includes anyone affected by it). The Tribunal may also decide that the term is to be treated as having been removed or modified during the period prior to the making of the order.
329. The Tribunal must first ensure that anyone who would be affected has been told of the proceedings and given an opportunity to make his or her views known.

#### Example

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

#### **Clause 136: Contracting out**

330. Under this clause, contractual and relevant non-contractual terms which try to exclude or limit the operation of any provision in the Bill (including those dealing with equality of terms) or a provision of secondary legislation made under the Bill are unenforceable by the person in whose favour the term operates. The clause does not apply to:
- a contract which settles a complaint within clause 108 (jurisdiction of the Tribunal — work cases) if the contract is made with the assistance of an industrial relations officer;

- a contract which settles a claim under section 105 (education cases) with the assistance of a person appointed by DEC to conciliate in proceedings under that section; or
- a contract which settles a claim within clause 103 (jurisdiction of the Tribunal in relation to goods and services) if the contract is made with the assistance of an officer of OFT.

#### Examples

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

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

#### **Clause 137: Void and unenforceable terms**

331. This clause deals with collective agreements (which are defined in section 173 of the [Employment Act 2006](#)). It also deals with “rules of an undertaking” which is defined in clause 139. This is a rule made by an employer, qualifications body or trade organisation (each of which is defined in Part 5).
332. Any term of a collective agreement is rendered void to the extent that it discriminates against a person or would otherwise lead to conduct prohibited by the Bill. Terms of collective agreements are made void rather than unenforceable because making them unenforceable would be of no help to those affected, since such agreements are unenforceable in any case unless incorporated into a contract. The discriminatory term is therefore made void, leaving the interested parties to renegotiate.
333. A rule of an undertaking which discriminates against a person or would otherwise lead to conduct prohibited by the Bill is made unenforceable.

#### Examples

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

#### **Clause 138: Declaration in respect of void term, etc**

334. This clause enables the Tribunal to declare a term of a collective agreement void, or a rule of an undertaking unenforceable, as set out in clause 137, when a person thinks that it might in the future have the effect of discriminating against him or her. Because collective agreements apply to many people in many (possibly varying) situations, it is not appropriate for the Tribunal to modify such agreements; so they are made void,

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

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

#### Example

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

### DIVISION 3 - SUPPLEMENTARY

#### **Clause 139: Interpretation**

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

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

#### DIVISION 1: PUBLIC SECTOR EQUALITY DUTY

#### **Clause 140: Duty to promote equality**

337. This clause imposes a duty, known as the public sector equality duty, on public authorities. Under this duty public authorities must have due regard to three specified matters when exercising their functions. The three matters are:
- eliminating conduct that is prohibited by the Bill, including breaches of non-discrimination rules in occupational pension schemes and equality clauses or rules which are read, respectively into a person's terms of work and into occupational pension schemes;
  - advancing equality of opportunity between people who share a protected characteristic and people who do not share it; and
  - fostering good relations between people who share a protected characteristic and people who do not share it.
338. The second and third matters apply to the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
339. As well as imposing a duty on the list of public authorities set out in subsection (9), the clause also imposes the duty on a person who is not a public authority but who exercises public functions. Such a person must have due regard to the list of specified matters when exercising their public functions.
340. Subsections (3), (4) and (5) expand on what it means to have due regard to the need to advance equality of opportunity and foster good relations. In particular, subsection

(4) makes clear that having due regard to the need to advance equality of opportunity between disabled people and non-disabled people includes consideration of the need to take steps to take account of disabled people's disabilities.

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

**NOTE:**

A public sector equality duty already applies in relation to the provision of goods and services for the protected characteristic of race under the Race Relations Act 2004.

**Examples**

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

**Clause 141: Exceptions from duty to promote equality**

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

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

344. Subsection (2) disapplies the duty in relation to immigration functions in respect of race (in so far as it relates to nationality and ethnic or national origin, but not colour), religion or belief and age.

345. Subsection (3) disapplies the duty in respect of judicial functions or functions exercised on behalf of, or on the instructions of, a person exercising judicial functions. A judicial

function includes judicial functions which are carried out by persons other than a court or tribunal.

346. Subsection (4) disapplies the duty in respect of a person's functions under the Control of Employment Act 2014.
347. Subsection (5) contains definitions and under subsection (6) the Council of Ministers can (by order subject to Tynwald approval) amend the clause, other than in relation to judicial functions, to provide for more (or fewer) exceptions.

#### Examples

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

#### Clause 142: Enforcement

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

#### Example

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

### DIVISION 2 — POSITIVE ACTION

#### Clause 143: Positive action: general

349. This clause provides that the Bill does not prohibit the use of positive action measures to alleviate disadvantage experienced by people who share a protected characteristic, reduce their under-representation in relation to particular activities, and meet their particular needs. It will, for example, allow measures to be targeted to particular groups, including training to enable them to gain employment, or health services to address their needs. Any such measures must be a proportionate way of achieving the relevant aim.
350. The extent to which it is proportionate to take positive action measures which may result in people not having the relevant characteristic being treated less favourably will depend, among other things, on the seriousness of the relevant disadvantage, the extremity of need or under-representation, and the availability of other means of countering those issues.

351. To provide greater legal certainty about what action is proportionate in particular circumstances, the clause contains a power to make regulations setting out action which is not permitted under it.
352. If positive action measures are taken in recruitment or promotion under clause 144(3) those provisions will apply rather than this clause.
353. This clause does not allow any action to be taken that would be prohibited by other legislation.

#### Examples

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

#### **Clause 144: Positive action: recruitment and promotion**

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

#### Examples

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

## PART 12 – DISABILITY: MISCELLANEOUS

### Clause 145: Reasonable adjustments

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

### Clause 146: Improvements to let dwelling houses

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

#### Examples

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

## PART 13: GENERAL EXCEPTIONS

### Clause 147: Statutory provisions

359. This clause gives effect to Schedule 19, which allows differential treatment which would otherwise be made unlawful by specific parts of the Bill, where such treatment is required by law. It also allows differential treatment of pregnant women for their own protection, and allows people of particular religions or beliefs to be appointed to specified educational posts. It also allows rules about Crown employment to provide for differential treatment on the basis of nationality. See the notes on Schedule 19 for further information.

### Clause 148: National security

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

#### Example

- Denying people of a particular nationality access to sensitive information is not unlawful racial discrimination under the Bill if this is proportionate.

### Clause 149: Charities

361. This clause allows charities to provide benefits only to people who share the same protected characteristic (for example sex, sexual orientation or disability), if this is in

line with their charitable instrument and if it is objectively justified or to prevent or compensate for disadvantage. However, it is unlawful for a charity to limit its beneficiaries by reference to a person's colour — and if a charitable instrument requires such a restriction it must be discounted.

362. Charities must not restrict benefits consisting of employment, contract work or vocational training to people who share a protected characteristic, except that the clause does allow people to provide, and a Department to agree, arrangements for supported employment only for people with the same disability, or disabilities of a description to be set out in regulations.
363. The clause also allows certain charities to make acceptance of a religion or belief a condition of membership, and to refuse members access to benefits if they do not accept a religion or belief where membership itself is not subject to such a condition, but this exception only applies if the requirement existed prior to the Bill being introduced into the Legislative Council. It also allows single-sex activities for the purpose of promoting or supporting a charity (such as women-only fun-runs), and it allows the High Court or the Attorney General to exercise their functions in a charity's interests, taking account of what is said in its charitable instrument, without contravening the Bill.

#### Examples

- It is lawful for the Women's Institute to provide educational opportunities only to women.
- It is lawful for the RNIB to employ, or provide special facilities for, visually impaired people in preference to other disabled people.
- A charitable instrument which provides for funding to benefit black disabled members of a community must be read as providing benefits to all disabled members of that community regardless of the colour of their skin.
- It is lawful for the Scout Association to require children joining the Scouts to promise to do their best to do their duty to God.
- Race for Life, a women-only event which raises money for Cancer Research UK, is lawful.

#### **Clause 150: Control of Employment**

364. This clause provides that anything which is required or authorised to be done under the [Control of Employment Act 2014](#) does not contravene the provisions of the Bill. The exemption ensures that the Bill does not conflict with the Island's work permit system.

#### **Clause 151: Sport**

365. This clause allows separate sporting competitions to continue to be organised for men and women where physical strength, stamina or physique are major factors in determining success or failure, and in which one sex is generally at a disadvantage in comparison with the other. Provision is also made so that age-banded competitive sporting activity is not unlawful and for the participation of transsexual people to be restricted in competitions if this is necessary to uphold fair or safe competition, but not otherwise.
366. In addition, this clause allows the selection arrangements of national sports teams, regional or local clubs or related associations to continue. It also protects "closed" competitions where participation is limited to people who meet a requirement relating to nationality, place of birth or residence.

## Examples

- It would be lawful to have men and women, but not necessarily younger boys and girls, compete in separate 100 metre races.
- It would be lawful to require participants in a parish tennis championship to have been born in that parish or to have lived there for a minimum period prior to the event.

### **Clause 152: General**

367. This clause gives effect to Schedule 20, which contains a number of general exceptions to the prohibitions against discrimination and harassment. The areas covered by that Schedule are: acts authorised by statute or the Government; organisations relating to religion or belief; communal accommodation; and training provided to people who are not resident in the European Economic Area. See the notes on Schedule 20 for further information.

### **Clause 153: Age**

368. This clause enables the Council of Ministers to make orders setting out exceptions to the prohibition on discriminating against people because of age, except in relation to work and further and higher education. These exceptions can relate to particular conduct or practices, or things done for particular purposes, or things done under particular arrangements, as set out in any order made under this power. Orders can provide for the Council of Ministers or a Department to issue guidance, for consultation about the guidance, and for the imposition of requirements that refer to the guidance. Any order made under this power requires the approval of Tynwald for it to come into operation.

## Examples

- Appropriate age-based treatment may include the following:
- concessionary travel for older and young people;
- disease prevention programmes such as cancer screening targeted at people in particular age groups on the basis of clinical evidence;
- age differences in the calculation of annuities and insurance programmes which are reasonable and based on adequate evidence of the underlying difference in risk;
- holidays for particular age groups.

## NOTE:

Relevant amendments made by the UK using the equivalent power (section 197) in the Equality Act 2010 have been largely incorporated into the Bill. However, the power is retained in case further exceptions are required in the future.

## **PART 14 – CLOSING PROVISIONS AND MISCELLANEOUS**

### **Clause 154: Codes of practice**

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

370. Before issuing a code under this clause the Council of Ministers must publish the proposals and consult such persons as the Council thinks appropriate. In practice, where the subject matter of a code of practice relates to an area within the responsibility of a particular Department, that Department would normally lead on the preparation of the draft code and the consultation required before seeking final approval for the code from Council.
371. In determining any question arising in proceedings under the Bill, the Tribunal (or the High Court in some limited circumstances) must have regard to the content of any code of practice insofar as it appears to the Tribunal or Court to be relevant to the question.

#### **Clause 155: Codes of practice: supplemental**

372. This clause confirms that the Council of Ministers may revise a code issued under clause 154; and that a reference in that clause to the issue of a code includes a reference to the revision of a code.
373. The clause provides that, although failure to comply with a provision of a code does not of itself make a person liable to criminal or civil proceedings, a code is admissible in evidence in criminal or civil proceedings and must be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant.
374. The Council of Ministers may by order (subject to Tynwald approval) amend clause 154 to vary the range of matters on which codes of practice under that clause can be made.

#### **Clause 156: Promoting equality**

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

#### **Example**

- If the Council of Ministers considered that it would be beneficial for the Government to enter into an arrangement with a local charity which assists people with a particular learning disability to understand the rights of those persons under the Bill this clause would ensure that there was a power to do so.

#### **Clause 157: Manx ships, aircraft and hovercraft and those employed aboard them**

376. This clause provides that the provisions of the Bill only apply to Manx aircraft, ships and hovercraft and persons who are employed on such aircraft and vessels to the extent set out in any Order made by the Department of Economic Development with the approval of Tynwald. In other words, the Bill will not apply, for example, to aircraft which are registered with the Isle of Man Aircraft Registry unless the DED makes an order to that effect, and then only to the extent set out in that order.

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

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

## Example

- The Public Services Commission as an employer must not discriminate against an employee because of race; just as any other employer is prohibited from doing so under the Bill.

### **Clause 159: Tynwald Equality Consultative Council**

378. This clause provides that the current Tynwald Advisory Council for Disabilities will continue to exist but its name is changed to the Tynwald Equality Consultative Council (TECC) to reflect a remit that is expanded to cover all of the protected characteristics.
379. The TECC is to consist of 7 members, 2 of whom are Members of Tynwald appointed by the Council of Ministers with the approval of Tynwald and 5 of whom are not members of Tynwald, to be appointed by the Appointments Commission, subject to the approval of Tynwald, as persons with experience or knowledge of disability or other protected characteristics. One of the Tynwald Members is to be appointed by the TECC as its Chairperson and one of the other 6 members is to be elected as Deputy Chairperson.
380. The TECC may give to the Council of Ministers, any Department, or Statutory Board advice on matters relating to the new Act and may recommend changes in legislation to a Department or Statutory Board.
381. When the clause comes into operation members of the Tynwald Advisory Committee for Disabilities will become members of the TECC, but in making subsequent appointments to the TECC the Appointments Commission must try to include among the TECC's members persons with experience of protected characteristics other than disability.

### **Clause 160: Information society services**

382. This clause is an enabling power to allow the Council of Ministers by order to make such provision about equality of treatment in respect of protected characteristics and related matters in connection with the provision of information society services as it considers appropriate. Such an order could not be made without prior consultation with the Communications Commission and any other such persons as the Council of Ministers considered appropriate and the order would require Tynwald approval to have effect.
383. "Information society service" is defined as having the same meaning as in the relevant European Union legislation.

### **Clause 161: Employment legislation amended**

384. This clause gives effect to Schedule 21 which contains a number of amendments to the Island's employment legislation, many of which are not directly related to discrimination and equality. Since the Bill deals in large part with rights and obligations relating to employment, it is considered that it is both opportune and appropriate to include these amendments in the Bill.
385. The amendments contained in Schedule 21 are described in detail in the notes on that Schedule.

### **Clause 162: Harmonisation with UK Equality Act 2010**

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

387. The clause is broadly based on section 203 of the UK 2010 Act which enables a Minister of the Crown by order to amend that Act (and the Equality Act 2006), to ensure consistency across the legislation where changes which are required by EU law would otherwise result in inconsistent provision.
388. EU law generally has direct effect in the UK and the European Communities Act 1972 allows a Minister by regulations or order to give effect to a right or obligation arising out of an EU law provision.
389. However, where provisions of the UK 2010 Act (and equality law of the UK more generally) deal with a particular type of discrimination, they may partly fall within the scope of EU law (and so be capable of amendment using the powers in the UK's 1972 Act) and partly outside the scope of EU law (and so not amendable by the UK's 1972 Act). This arises, for example, in respect of discrimination on the grounds of race, where most of the law concerning nationality is UK domestic legislation rather than EU law, but some provisions are covered by EU law.
390. In these cases the UK's 1972 Act would not allow amendment of all relevant parts of the legislation, because the change required in respect of, for example, nationality would not be consequential on or arising out of an EU obligation. In order to retain the unitary approach to its discrimination law it was necessary for the UK to have a power so that in appropriate cases amendments could also be made to those areas of the UK 2010 Act unaffected by new EU law obligations.
391. Although EU law in matters such as equality is not directly applicable to the Isle of Man, the Council of Ministers can, if it is considered to be appropriate, with the approval of Tynwald, apply and implement EU legislation in the Island using the powers in the [European Communities \(Isle of Man\) Act 1973](#). This power is capable of amending existing legislation to take account of EU law but, as in the UK, it could only amend the Bill to the extent covered by the EU legislation.
392. In a case where future EU law required changes to the UK's equality legislation and the UK considered that the powers under section 203 of its 2010 Act were also required so as to maintain a consistent approach in that Act, the Council of Ministers could use the power in this clause (subject to Tynwald approval) to mirror the changes made under section 203 of the UK 2010 Act.

#### **Clause 163: Exercise of powers to make subordinate legislation**

393. This clause sets out different ways that the powers to make subordinate legislation can be used (see clause 164 for the Tynwald procedure that applies).

#### **Clause 164: Subordinate legislation**

394. This clause sets out the Tynwald procedure that applies for all subordinate legislation which may be made under the Bill. In the majority of cases Tynwald approval is required before the subordinate legislation can come into operation. The exceptions are: appointed day orders to bring the Bill into operation; orders to bring guidance about disability into operation; orders designating schools as having a religious character (e.g. St Mary's); and rules made under the Bill (e.g. Tribunal Rules, where the negative resolution will apply in line with the procedure for rules of court).

### **Clause 165: Consequential and minor amendments**

395. This clause introduces Schedule 22 which contains amendments to other enactments that are consequential or on the provisions of the Bill or are minor changes supplementary to the Bill.

### **Clause 166: Repeals**

396. This clause gives effect to Schedule 23 which sets out the repeals of other enactments which are no longer required.

### **Clause 167: Glossary**

397. This clause introduces Schedule 24 which specifies the places where certain words and expressions used in this Bill are defined or otherwise explained.

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

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

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

### **Example**

- A man with severe depression finds even the simplest of tasks or decisions difficult, for example getting up in the morning and getting washed and dressed. He is also forgetful and struggles to plan ahead. Together, these amount to a “substantial adverse effect” on his ability to carry out normal day-to-day activities. The man has experienced a number of separate periods of this depression over a period of two years, which have been diagnosed as part of an underlying mental health condition. The impairment is therefore considered to be “long-term” and he is a disabled person for the purposes of the Bill.

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

400. This Schedule explains how the duty to make reasonable adjustments in clause 21 applies to a service provider or person exercising a public function where a disabled person is placed at a substantial disadvantage. It includes definitions of “substantial disadvantage” and “physical features” and stipulates that the duty does not require fundamental changes to the nature of the service. As the duty is owed to disabled persons generally, it is an anticipatory duty which means service providers and people exercising public functions must anticipate the needs of disabled people and make appropriate reasonable adjustments.

401. This Schedule also explains how the duty to make reasonable adjustments in clause 21 applies to operators of transport vehicles. It specifies that the duty applies in different ways to different types of vehicle. It provides that a transport service provider is not required to make adjustments to the physical features of vehicles or to whether

vehicles are provided, except in specified circumstances. It provides a power for the DOI to make regulations to allow further amendments to be made to this paragraph in the future.

#### Examples

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

### **SCHEDULE 3 SERVICES AND PUBLIC FUNCTIONS: EXCEPTIONS**

402. This Schedule sets out exceptions to the prohibitions against discrimination set out in clause 30 of the Bill in respect of providing services or exercising a public function.

#### **Part 1: Constitutional matters** (paragraphs 1-3)

403. Part 1 of this Schedule provides that the prohibitions do not apply to:

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

#### Examples

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

#### **Part 2: Schools** (paragraphs 4-9)

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

405. The reason for the provision in paragraph 4 is to prevent the DEC being bound to provide schools for pupils of different faiths, or no faith, or for particular age groups, in every catchment area. It means that the DEC would not be prevented from

establishing single-sex schools (though it has no current intention to do so) but if it did it would have to provide sufficient places for boys and girls in the separate schools.

#### Example

- Parents of secondary age children will not be able to claim that it is age discrimination if their children have to travel further than younger ones to reach their school.

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

#### Examples

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

407. Paragraph 6 provides an exception for the DEC and governing bodies of schools from the provisions requiring reasonable adjustments in Part 3 of the Bill, in respect of its activities in relation to school education, from the requirement to alter physical features of premises when making reasonable adjustments for disabled people. (However, there is a requirement to produce accessibility strategies under Schedule 10.)

408. Paragraph 7 provides an exception from the prohibition on religious or belief related discrimination in Part 3 of the Bill (to the extent that it is not excepted elsewhere), in relation to the exercise of functions in a number of areas that relate to faith and non-faith educational institutions. In relation to all schools the areas are the curriculum, collective worship, school transport and the establishment, alteration and closure of schools; and in relation to schools which have a religious character the exception also applies to admission of pupils and the responsible body of such a school. A school has a religious character if, and only if, it has been specified as such by the DEC in an order which has been laid before Tynwald.

409. Paragraph 8 provides an exception from clause 30, so far as relating to religious or belief-related discrimination, in respect of the functions of DEC or a governing body of a maintained school in respect of the employment of reserved teachers within the meaning of section 7 (Teachers of religious education in maintained schools) of the [Education Act 2001](#).

#### Examples

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

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

### Part 3: Health and care

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

#### Examples

- If there is evidence that people who have been sexually active in a particular country are more likely to be infected with HIV, the operator of the blood service can refuse to accept donations of blood or blood components from people who have been sexually active there, even if that disproportionately affects members of a particular nationality and so might otherwise be unlawful indirect discrimination because of race.
- If there is evidence that women who have recently given birth are likely to suffer detrimental effects from giving blood or blood components, then a blood service can refuse to accept donations from them. This would not be unlawful direct discrimination because of maternity.

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

#### Examples

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

413. Paragraph 12 is designed to ensure that people who provide foster care, or other similar forms of care, in their own home are not subject to the requirements of clause 30 in respect of the provision of services while providing that care. It applies irrespective of whether or not the person is paid for providing the care service.

#### Examples

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

## Part 4: Immigration

414. Paragraph 13 provides for an exception in respect of age discrimination in relation to things done by a relevant person relating to immigration.
415. Paragraph 14 provides an exception from the prohibition on discriminating against a person when providing a service or exercising a public function because he or she has a disability, in relation to certain immigration decisions, including making a decision not to allow someone to enter the country or a decision not to allow him or her to remain in the country. However, this exception only applies where the decision is necessary for the public good.
416. Paragraph 15 provides an exception from the prohibition on discriminating against a person in the provision of services or the exercise of a public function because of his or her ethnic or national origins or nationality, in relation to the exercise of immigration functions.

### Example

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

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

### Examples

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

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

## Part 5: Insurance and other Financial Services

419. Paragraph 18 provides an exception to clause 30 (provision of services, etc) for group insurance schemes and group personal pensions ("group schemes"). As group schemes are offered to employees as part of the employment relationship:

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

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

#### Example

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

421. Paragraph 19 creates an exception in respect of age discrimination for things done in connection with the provision of a financial service. But this is subject to a proviso that, where the financial service provider conducts an assessment of risk for the purposes of providing the service, that assessment of risk must, so far as it involves a consideration of their customer's age, be done by reference to information which is relevant to the assessment of the risk and from a source on which it is reasonable to rely. Under this paragraph, "financial services" includes a service—

- (a) falling within the Regulated Activities Order 2011<sup>17</sup>; or
- (b) in the nature of insurance or a personal pension.

422. Paragraph 20 provides an exception from the prohibition on discriminating against disabled people in the provision of services connected with insurance business (as defined in section 54 of the [Insurance Act 2008](#)) where the decision in question is based on relevant and reliable information. It enables insurance providers to offer different premiums and benefits to disabled people where it is reasonable to do so. The reason for this exception is because it is recognised that insurers may need to distinguish between people on the basis of the risks against which they are insuring.

#### Examples

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

423. Paragraph 21 provides an exception so that insurers will not be discriminating unlawfully if they continue to apply terms of insurance policies entered into before the

<sup>17</sup> SD 884/11 (<http://www.tynwald.org.im/links/tls/SD/SD2011/2011-SD-0884.pdf>) as amended by SD 0373/2013 (<http://www.tynwald.org.im/links/tls/SD/2013/2013-SD-0373.pdf>) and SD 2016/0188 (<http://www.tynwald.org.im/links/tls/SD/2016a/2016-SD-0188.pdf>)

date on which this paragraph comes into force. Where pre-existing policies are renewed, or have their terms reviewed, on or after the date this paragraph comes into force, the exception no longer applies to them.

#### Examples

- An existing life insurance policy which was taken out in 2004, and has not been subsequently renewed or reviewed, continues to be lawful and does not have to be altered to comply with current relevant discrimination law.
- A company has a death in service benefit insurance policy for its employees which has been in place for many years and whose terms have not been reviewed. It benefits from the exception unless and until the policy is reviewed or renewed.

### Part 6: Marriage

424. Paragraph 22 contains exceptions from the general prohibition of gender reassignment discrimination in section 29 of the Act for the religious solemnisation of marriages.
425. By virtue of the [Gender Recognition Act 2009 \(of Tynwald\)](#), an Isle of Man resident with a full Gender Recognition Certificate issued by the Gender Recognition Panel established by the [Gender Recognition Act 2004 \(of Parliament\)](#) is able to marry someone of the opposite gender to his or her acquired gender. The Marriage Act 1949 imposes an obligation on a clergyman in the Church of England to marry anyone residing in his or her parish, or who fits other stated connection criteria. However, section 5A of that Act contains an exception where the clergyman reasonably believes that one of the couple's gender has been acquired under the Gender Recognition Act.

#### Example

- A clergyman in the Church of England advises an engaged couple that he will not solemnise their marriage as he reasonably believes that one of the couple has acquired his or her gender under the Gender Recognition Act 2009. This would not be unlawful discrimination because of gender reassignment.
426. Paragraph 23 provides that if an Act of Tynwald makes it lawful for persons of the same sex to be married the Council of Ministers can (by order subject to Tynwald approval) make consequential amendments to the Bill or other legislation as a result of that Act of Tynwald.

#### Note

- As the Marriage and Civil Partnership (Amendment) Act 2016 has been passed and brought into operation it is intended that paragraph 23 of Schedule 3 will be amended during the passage of the Bill in the House of Keys to take account of the passing of that Act.

### Part 7: Separate, single and concessionary services, etc

427. Paragraph 24 contains exceptions to the general prohibition of sex discrimination to allow the provision of separate services for men and women in certain cases. A provider can deliver separate services for men and women where providing a combined service would not be as effective. A service provider can also deliver separate services for men and women in different ways or to a different extent where providing a combined service would not be as effective and it would not be reasonably practicable to provide the service otherwise than as a separate service provided

differently for each sex. In each case such provision has to be justified. The exceptions cover all services, whether privately or publicly provided.

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

#### Example

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

429. Paragraph 25 contains exceptions to the general prohibition of sex discrimination to allow the provision of single-sex services. Single sex services are permitted where:
- only people of one sex require it;
  - there is joint provision for both sexes but that is not sufficient on its own;
  - if the service were provided for men and women jointly, it would not be as effective and it is not reasonably practicable to provide separate services for each sex;
  - they are provided in a hospital or other place where users need special attention (or in parts of such an establishment);
  - they may be used by more than one person and a woman might object to the presence of a man (or vice versa); or
  - they may involve physical contact between a user and someone else and that other person may reasonably object if the user is of the opposite sex.

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

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

#### Examples

The exceptions would allow:

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

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

#### Example

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

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

#### Example

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

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

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

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

#### Examples

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

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

- concessions and preferential treatment (such as discounts) offered by traders and service providers by reference to age;

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

### **Part 8: Television, radio and on-line broadcasting and distribution**

438. Paragraph 33 makes it clear that claims for discrimination, harassment and victimisation cannot be brought in relation to broadcasting and distribution of content, as defined in the [Communications Act 2003 \(of Parliament\)](#)<sup>18</sup>. This would include, for example, editorial decisions on the content of a television programme or the distribution of online content.
439. This paragraph does not, however, extend to the provision of an electronic communications network, service or associated facility, which are also defined in the Communications Act 2003. This will ensure that the act of sending signals is not excluded by the exception in sub-paragraph (1), only the content of what is broadcast.
440. This provision is intended to safeguard the editorial independence of broadcasters when broadcasting or distributing content, whether on television, radio or on-line.

#### **Examples**

- An aggrieved person is not entitled to bring a claim for discrimination against a broadcaster in relation to an editorial decision about: what programmes to commission; on what day a specific programme should be shown; or who should appear in a particular programme.
- An aggrieved person is, however, entitled to bring a claim for discrimination against a broadcaster in relation to a decision to refuse to send a signal to his house purely on the basis that he has a particular protected characteristic.

### **Part 9: Transport**

441. Paragraph 34 applies the exceptions listed in paragraphs 35 and 36 in relation to disability, thereby stipulating the extent to which providers of transport services are bound by the disability provisions of the Act.
442. Paragraph 35(1) provides an exception to the prohibition of discrimination, so far as it relates to disability, in respect of the provision of services in connection with air transport. Paragraph 35(2) ensures that there is no duplication where there would otherwise be an overlap between the disability provisions of the Bill and Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air ("[EC Regulation 1107/2006](#)").

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<sup>18</sup> Provisions of this Act were extended to the Island by The Communications (Isle of Man) Order 2003 (SI 2003/3198) <http://www.legislation.gov.uk/uksi/2003/3198/contents/made>, to which relevant amendments were made by The Broadcasting and Communications (Isle of Man) Order 2004 (SI 2004/309) <http://www.legislation.gov.uk/uksi/2004/309/contents/made> and The Broadcasting and Communications (Isle of Man) Order 2004 (SI 2004/1115) <http://www.legislation.gov.uk/uksi/2004/1115/contents/made>

#### NOTE:

Regulation (EC) No.1107/2006 does not currently apply to the Island. It applies directly to the United Kingdom but under the Island's Protocol 3 relationship with the European Union it does not apply directly as part of the law of the Island. Article 1 of the EU Regulation sets out its scope and purpose:

- "1. This Regulation establishes rules for the protection of and provision of assistance to disabled persons and persons with reduced mobility travelling by air, both to protect them against discrimination and to ensure that they receive assistance.
2. The provisions of this Regulation shall apply to disabled persons and persons with reduced mobility, using or intending to use commercial passenger air services on departure from, on transit through, or on arrival at an airport, when the airport is situated in the territory of a Member State to which the Treaty applies.
3. Articles 3 (Prevention of refusal of carriage), 4 (Derogations, special conditions and information) and 10 (Assistance by air carriers) shall also apply to passengers departing from an airport situated in a third country to an airport situated in the territory of a Member State to which the Treaty applies, if the operating carrier is a Community air carrier...".

It can be seen that this EU Regulation applies to all disabled persons travelling to the Island from an airport in an EU Member State. Certain provisions also apply to disabled persons departing from the Island's airport if they are travelling with a carrier that is based in an EU Member State. However, it has been agreed that EU Regulation 1107/2006 should be applied to the Island before the Bill is brought into operation. Despite the UK's decision to leave the EU it is still considered that the requirements under this EU are appropriate to implement.

#### Examples

- An airline is required to make reasonable adjustments to its booking services to ensure that they are accessible to disabled people. It is not required to make any structural adjustments to the cabin environment inside an aircraft by reason of the derogation in Article 4(1)(a) of Regulation 1107/2006.
- An airport operator charges a disabled person for wheelchair assistance to board an aircraft. This would be a breach of Regulation 1107/2006, so section 30 of the Bill would not apply. However, if the same airport operator fails to make adjustments to allow disabled people to access car parks at the airport, this would fall within the scope of the Bill.

443. Paragraph 36 provides an exception from clause 30 for all services of transporting people by road, except those listed. The definitions of the vehicles listed are contained in paragraph 3 of Schedule 2.

### **Part 10: Supplementary**

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

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

445. Schedule 4 explains how the duty to make reasonable adjustments in clause 21 applies to a controller of "let" premises or of premises "to let" where a disabled tenant (or prospective tenant) or the disabled person legally occupying the property is placed at a

substantial disadvantage, in order that the disabled person can enjoy the premises or make use of them. It stipulates that the duty does not require the removal or alteration of a physical feature, and makes clear what are not “physical features” for these purposes. The duty only applies if a request for an adjustment is made by or on behalf of a disabled person.

446. This Schedule also explains how the duty to make reasonable adjustments in clause 21 applies in relation to “common parts” of premises – for example, an entrance hall in a block of flats. These provisions relate specifically to physical features and set out the process that must be followed by the person responsible for the common parts (for example, the landlord) if a disabled tenant or someone on his or her behalf requests an adjustment. This includes consultation with other people who may be affected by a requested adjustment; such consultation must be carried out within a reasonable period of the request being made. If the responsible person decides to make an adjustment to avoid the disadvantage to the disabled person, a written agreement must be entered into between them setting out their rights and responsibilities.
447. The Schedule also makes it unlawful for a landlord or other responsible person to victimise a disabled tenant because costs have been incurred in making a reasonable adjustment.
448. Regulations made under paragraph 8 of this Schedule can make further provision for a number of matters such as the circumstances in which premises are to be treated as let, or as not let, to a person; who is to be treated as being, or as not being, a person by whom premises are let; and who is to be treated as being, or as not being, a manager of premises.

#### Examples

- A landlord has a normal practice of notifying all tenants of any rent arrears in writing with a follow-up visit if the arrears are not reduced. A learning disabled person explains to the landlord that he cannot read standard English so would not be aware that he was in arrears. He asks to be notified of any arrears in person or by telephone. The landlord arranges to visit or telephone the learning-disabled person to explain when he has any arrears of rent. This personal contact may be a reasonable adjustment for the landlord to make.
- A landlord is asked by a disabled tenant to install a ramp to give her easier access to the communal entrance door. The landlord must consult all people he thinks would be affected by the ramp and, if he believes that it is reasonable to provide it, he must enter into a written agreement with the disabled person setting out matters such as responsibility for payment for the ramp. The landlord can insist the tenant pays for the cost of making the alteration.

### **SCHEDULE 5 PREMISES: EXCEPTIONS**

449. Schedule 5 sets out limited exceptions to the requirements in relation to premises which are contained in Part 4 of the Bill.
450. The first exception applies where a person who owns and lives in a property disposes of all or part of it privately (for example by selling, letting or subletting) without using the services of an estate agent, or publishing an advertisement. This exception does

not apply in respect of the protected characteristic of race when an owner-occupier is privately disposing of a property.

451. In addition, when an owner-occupier is privately disposing of a property, a person whose permission is required for the disposal of premises usually must not discriminate against another on the grounds of one of the protected characteristics by not giving permission for the disposal of the premises; but a person may withhold their permission if the reason for doing so relates to the protected characteristics of religion or belief or sexual orientation. The terms “estate agent” and “owner-occupier” for the purpose of this exception are defined.
452. Paragraph 2 of this Schedule provides an exception so that a controller of leasehold premises is not subject to the duty to make reasonable adjustments for disabled persons if:
- when the premises have been let, the premises are (or have been) the controller’s main or only home and he or she has not used the services of a manager since letting the premises (paragraph 2(1));
  - when the premises are to let, they are the controller’s main or only home and he or she has not used the service of an estate agent for letting purposes (paragraph 2(3)).
453. The further exception applies to the disposal, management or occupation of part of small premises. It applies where a person engaging in the conduct in question, or a relative of that person, lives in another part of the premises and the premises include facilities shared with other people who are not part of their household. This exception does not apply to race discrimination when disposing of or giving permission for the disposal of premises, or in the management of premises.
454. The small premises exception also exempts a controller of premises or a person responsible in relation to common parts (as defined in clause 36) from the duty to make reasonable adjustments where the premises are small, where that person or a relative of that person lives in one part of the premises and residents who are not members of that person’s household live in another part of the premises. The definitions of “small premises” and “relative” in paragraph 3 apply.
455. Paragraph 5 contains a power for DEFA to amend this Schedule by order (subject to the approval of Tynwald) after consulting DOI.

#### Examples

- A homeowner makes it known that she is preparing to sell her flat privately. A work colleague expresses an interest in buying it but she refuses to sell it to him because he is black. That refusal would not be covered by this exception and so would be unlawful.
- A homeowner makes it known socially that he wants to sell his house privately. Various prospective buyers come forward and the homeowner opts to sell it to a fellow Christian. The other prospective buyers cannot claim that they were discriminated against because the homeowner’s actions were covered by this exception.
- A single woman owns a large house and lives on the top floor, although the bathroom and toilet facilities are on the first floor. The ground floor is unoccupied and she decides to take in a lodger, sharing the bathroom and toilet facilities. Various

prospective tenants apply but she chooses only to let the ground floor to another woman. This would be permissible under this exception.

- A Jewish family owns a large house but only lives in part of it. They decide to let out an unoccupied floor but any new tenant will have to share the kitchen and cooking facilities. The family choose only to let the unoccupied floor to practising Jews as they are concerned that otherwise their facilities for keeping their food kosher may be compromised. This would be permissible under this exception.

## **SCHEDULE 6 OFFICE-HOLDERS: EXCLUDED OFFICES**

456. This Schedule provides that an office or post is not treated as a personal or public office in the Bill in circumstances where the office-holder is protected by one of the other forms of protection given in Part 5 of the Bill — employment, contract work and employment services (as they relate to work experience).
457. It also provides that political offices and any dignity or honour conferred by the Crown are not personal or public offices for the purposes of the Bill.
458. The conferral of honours and dignities is treated as a public function for the purposes of the Bill. Public bodies' activities in relation to honours and dignities will also be subject to the public sector equality duty.

## **SCHEDULE 7 EQUALITY OF TERMS: EXCEPTIONS**

### **Part 1: Terms of work**

459. Part 1 of this Schedule sets out exceptions to the operation of a sex equality clause or a maternity equality clause. It provides that such clauses will not have effect on any terms of employment, appointment or service that are governed by laws regulating employment of women. A few of these remain, mainly for health and safety purposes.
460. A sex equality clause will also have no effect on terms giving special treatment to women in connection with pregnancy or childbirth.

### **Part 2 — Occupational Pension Schemes**

461. Part 2 of this Schedule sets out certain circumstances where a sex equality rule does not have effect in relation to occupational pension schemes. It allows payments of different amounts for comparable men and women, in prescribed circumstances, if the difference is only because of differences in retirement benefits to which men and women are entitled. It permits payment of different amounts where those differences result from the application of prescribed actuarial factors to the calculation of the employer's contributions to an occupational pension scheme. It also permits payment of different amounts where actuarial factors are applied to the determination of certain prescribed benefits.
462. It also contains a regulation-making power for the Treasury (with the approval of Tynwald) to vary or add to these circumstances. The regulations may make provision for past periods, but not for pensionable service before 6 April 2006 (the date on which

certain new provisions in respect of pension equality came into operation in the Island<sup>19</sup>).

## **SCHEDULE 8 WORK: REASONABLE ADJUSTMENTS**

463. This Schedule explains how the duty to make reasonable adjustments for disabled people in clause 21 applies to an employer or other persons under Part 5 of the Bill. It sets out the three requirements of the duty which apply where an “interested” disabled employee or job applicant is placed at a substantial disadvantage compared with non-disabled employees or applicants. As the duty is owed to an “interested” disabled employee or job applicant, it is not an anticipatory duty which means that an employer is not required to anticipate the needs of potential disabled employees or job applicants or make reasonable adjustments in advance of their having an actual disabled employee or job applicant.
464. The tables in this Schedule set out who is an interested disabled person in relation to different categories of “relevant matters” and the circumstances in which the duty applies in each case. These tables capture how the duty applies in a number of areas related to work, for example to qualifications bodies and to trade organisations; and there is a regulation-making power to enable further detail to be set out about how the duty applies to local authorities in respect of disabled members.
465. The Schedule also sets out the circumstances in which lack of knowledge of the person’s disability or that a disabled person is, or may be, an applicant for a job means that the duty does not apply.

### **Examples**

- An employer provides specially adapted furniture for a new employee with restricted movement in his upper limbs. This is likely to be a reasonable adjustment for the employer to make.
- A large employer is recruiting for posts which routinely attract a high number of applications. He arranges for large-print application forms to be available on request for any visually impaired people applying for a job. This is likely to be a reasonable adjustment for the employer to make.

## **SCHEDULE 9 WORK: EXCEPTIONS**

### **Part 1: Occupational requirements**

466. Part 1 of this Schedule concerns occupational requirements for particular kinds of work.
467. Paragraph 1 provides a general exception to what would otherwise be unlawful direct discrimination in relation to work. The exception applies where being of a particular sex, race, disability, religion or belief, sexual orientation or age — or not being a

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<sup>19</sup> This is the date on which the [Pension Schemes Legislation \(Application\) Order 2006](#) (SD 15/06), which applied with modifications the Occupational Pension Schemes (Equal Treatment) (Amendment) Regulations 2005 (SI 2005/1923) to the Island, came into operation.

transsexual person, married or a civil partner — is a requirement for the work, and the person to whom it is applied does not meet the requirement (or, except in the case of sex, does not meet it to the reasonable satisfaction of the person who applied it). The requirement must be crucial to the post, and not merely one of several important factors. It also must not be a sham or pretext. In addition, applying the requirement must be a proportionate means of achieving a legitimate aim.

468. The exception can be used by employers, principals (as defined in clause 40) in relation to contract work, partners, members of limited liability partnerships and those with the power to appoint or remove office-holders, or to recommend an appointment to a public office.
469. The burden of showing that the exception applies rests on those seeking to rely on it.

#### Examples

- The need for authenticity or realism might require someone of a particular race, sex or age for acting roles (for example, a black man to play the part of Othello) or modelling jobs.
- Considerations of privacy or decency might require a public changing room or lavatory attendant to be of the same sex as those using the facilities.
- An organisation for deaf people might legitimately employ a deaf person who uses British Sign Language (BSL) to work as a counsellor to other deaf people whose first or preferred language is BSL.
- Unemployed Muslim women might not take advantage of the services of an outreach worker to help them find employment if they were provided by a man.
- A counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress.

470. Paragraph 2 provides a specific exception which applies to employment for the purposes of an organised religion. This is intended to cover a very narrow range of employment: ministers of religion and a small number of lay posts, including those that exist to promote and represent religion. Where employment is for the purposes of an organised religion, this paragraph allows the employer to apply a requirement to be of a particular sex or not to be a transsexual person, or to make a requirement related to the employee's marriage or civil partnership status or sexual orientation, but only if —
- appointing a person who meets the requirement in question is a proportionate way of complying with the doctrines of the religion; or
  - because of the nature or context of the employment, employing a person who meets the requirement is a proportionate way of avoiding conflict with a significant number of the religion's followers' strongly held religious convictions.
471. As with the exception under paragraph 1, the requirement must be crucial to the post and not merely one of several important factors. It also must not be a sham or pretext. Applying the requirement must be a proportionate way of meeting either of the two criteria described in the bullet points above.
472. The requirement can also be applied by a qualifications body in relation to a relevant qualification (within the meaning of clause 47), if the qualification is for employment for the purposes of an organised religion and either of the criteria described above is met.

## Examples

- This exception would apply to a requirement that a Catholic priest be a man and unmarried.
- This exception is unlikely to permit a requirement that a church youth worker who primarily organises sporting activities is celibate if he is gay, but it may apply if the youth worker mainly teaches Bible classes.
- This exception would not apply to a requirement that a church accountant must not be married if he is gay.

473. Paragraph 3 allows an employer with an ethos based on religion or belief to discriminate in relation to work by applying a requirement to be of a particular religion or belief, but only if, having regard to that ethos:

- being of that religion or belief is a requirement for the work (this requirement must not be a sham or pretext); and
- applying the requirement is a proportionate means of achieving a legitimate aim.

474. It is for an employer to show that it has an ethos based on religion or belief by reference to such evidence as the organisation's founding constitution.

## Example

- A religious organisation may wish to restrict applicants for the post of head of its organisation to those people that adhere to that faith. This is because to represent the views of that organisation accurately it is felt that the person in charge of that organisation must have an in-depth understanding of the religion's doctrines. This type of discrimination could be lawful. However, other posts that do not require this kind of in-depth understanding, such as administrative posts, should be open to all people regardless of their religion or belief.

475. Paragraph 4 makes it lawful for an employment service-provider to restrict a service to people with a particular protected characteristic if the treatment relates to work for which having that characteristic is an occupational requirement, or to training for such work. The service-provider can rely on the exception by showing that he or she reasonably relied on a statement from a person who could offer the work in question that having the particular characteristic was an occupational requirement. It is, however, a criminal offence for such a person to make a statement of that kind which they know to be false or misleading.

## Example

- The provider of a Catholic theological training course required exclusively for those training to be Catholic priests may limit access to the course to Catholics who are not married because the training relates to work the offer of which can be limited to Catholics who are not married by virtue of an occupational requirement.

476. Paragraph 5 defines "work" for the purposes of Part 1 of this Schedule and provides that the exceptions in this Part are available in respect of direct discrimination in recruitment, access to promotion, transfer or training, or (except in the case of sex discrimination) dismissal only. None of these exceptions can be used to justify indirect discrimination or harassment.

## Part 2: Exceptions relating to age

477. Paragraph 6 simply defines the term “age contravention” for the purposes of Part 2 of Schedule 9.
478. Paragraph 7 ensures that an employer does not have to justify paying, or providing fewer benefits to, a worker with less service than a comparator, should such a practice constitute indirect discrimination because of age. The employer can rely on the exception as an absolute defence where the benefit in question was awarded in relation to service of five years or less.
479. If the length of service exceeds five years, the exception applies only if it reasonably appears to an employer that the way in which he or she uses length of service to award benefits will fulfil a business need of his or her undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of the workers).
480. Sub-paragraph (6) contains provisions which ensure that in calculating an employee’s length of service previous service is taken into account where that is the result of the operation of Schedule 5 to the [Employment Act 2006](#) or, if that does not apply, under an enactment pursuant to which the person’s employment was transferred to the employer.
481. Sub-paragraph (7) defines what a benefit is and expressly rules out benefits provided only by virtue of a person’s ceasing to work.
482. This paragraph enables employers to continue to engage in employment planning, in the sense of being able to attract, retain and reward experienced staff through service-related benefits. This exception cannot be used to justify the level of payments when a worker leaves as service-related termination payments are not a reward for experience from which the employer can benefit. Therefore, redundancy payments are dealt with separately.

### Examples

- An employer’s pay system includes an annual move up a pay spine, or a requirement that a certain amount of time must elapse before an employee is entitled to be a member of an employee benefits scheme. Provided that the pay spine or time it takes to get the benefit is no longer than five years or, if longer can be justified, the exception will apply.
- An employer’s terms and conditions relating to annual leave entitlement provide that employees are entitled to an additional five days’ leave after ten years of service. Such an entitlement needs to be justified as reasonably fulfilling a business need.

483. Paragraph 8 allows employers to base their pay structures on the [Minimum Wage Act 2001](#) and regulations made under that Act. This will allow employers to continue to use the young workers’ rates of the minimum wage without the threat of legal challenge on the grounds of age discrimination.

NOTE: from 1 January 2016, the hourly minimum wage rates are:

- aged 21 years and over - £7.00
- aged 18 years and over - £6.65

- aged 18 or over, receiving training accredited by the Department of Economic Development, and within the first 6 months of employment with his or her employer - £6.65
- over compulsory school age but not 18 - £5.40

484. Paragraph 9 deals with apprentices. It enables an employer to pay an apprentice who is not entitled to the single hourly rate minimum wage less than an apprentice who is entitled to that rate of the minimum wage.

**NOTE:**

A worker who—

- (a) has not attained the age of 25,
- (b) is employed under a contract of apprenticeship (or is to be treated as employed under a contract of apprenticeship), and
- (c) is within the first 12 months after the commencement of that employment or has not attained the age of 19,

does not qualify for the minimum wage in respect of work done for his employer under that contract.

485. Paragraph 10 permits an employer to provide a qualifying employee with a redundancy payment of an amount less than that of a redundancy payment which the employer gives to another qualifying employee, if each amount is calculated on the same basis.

486. Paragraph 11 provides an exception for employers who provide insurance or related financial services to or in respect of employees for a period ending with whichever is the greater of the age of 65 and the state pensionable age. Conversely, employers may also offer insurance or related financial services only to employees who have not yet attained the greater of the age of 65 and the state pensionable age.

487. The “state pensionable age” is defined as meaning the pensionable age determined in accordance with the rules in paragraph 1 of Schedule 4 to the Pensions Act 1995 (of Parliament), as that Act has effect in the Island.

488. Life assurance cover, for example, is usually provided in respect of people below the state pension age. Such cover might not be provided in respect of older people because, as the probability of death increases, it becomes more and more expensive to provide. If employers were no longer able to impose — or had to objectively justify — a “cut off” for the provision of such cover to those who have retired early, there is a risk they would “level down”: in other words, they would cease to offer it to anyone. This exception is intended to avoid that happening.

**Example**

- An employer who has no normal retirement age provides life assurance cover for an employee who has retired early due to ill health. If the employer then ceases to provide such cover when the employee reaches the state pensionable age, this is lawful.

489. Paragraph 12 creates an exception from the prohibition of age discrimination in employment and certain other work relationships for benefits which relate to the provision of child care, and to which access is restricted to children of a particular age group. The exception applies not only to natural parents, but also to others with parental responsibility for a child. The exception covers benefits which relate to the provision of care for children who are less than 18 years old.

490. The European Court of Justice in its ruling *Coleman v Attridge Law and another* found that it could potentially be direct discrimination for an employer to treat an employee less favourably because of the age of an employee's child. There is, therefore, a potential impact on the provision of facilities, such as child care, where access is limited by reference to the child's age. Although EU case law in this area does not have effect in the Island such a ruling could be noted if the Island's Tribunal was required to consider the issue. The exception allows employers to continue to offer employees child care facilities based on the age of a child without being open to a challenge of direct discrimination from other employees.

#### Examples

- An employer may provide a crèche for employees' children aged two and under; or a holiday club open only to employees' children aged between 5 and 9. In each of these cases, the exception allows an employer to discriminate against employees because of their association with a child who does not fall within the specified age groups.
- The exception does not apply to employee benefits which do not have a close relationship with the provision of child care. For example, if an employer offers luncheon vouchers, gym membership or a company car only to those employees with children of a particular age group, the exception does not apply as none of these benefits involves child care.
- Neither does the exception apply to benefits conferred as a result of the employee's employment, but applying directly to the child, where child care is not involved. For example, an employer may offer private healthcare to employees' children up to a certain age, or use of the employer's services (e.g. free train tickets if the employer is a train company) by such children.

491. Paragraph 13 gives the Treasury the power by order to specify practices, actions or decisions relating to age in respect of employer contributions to personal pension schemes that an employer can use without breaching a non-discrimination rule. Before making such an order the Treasury must consult the Isle of Man Financial Services Authority and other such persons as it considers appropriate. The order would also be subject to Tynwald approval.

### **Part 3: Other exceptions**

492. Paragraph 14 sets out an exception to the prohibitions on pregnancy and maternity discrimination by employers which allows an employer not to offer an applicant or provide an employee who is on maternity leave the benefits of the non-contractual terms and conditions of her employment. It also explains what is and is not covered by this exception.

#### Examples

- An employer would not have to pay a woman on maternity leave a discretionary bonus if the only condition of eligibility for the bonus was that the employee must be in active employment at the time of payment.
- If a discretionary bonus amounted to retrospective payment for time worked over a specific period (such as the past year) during which a woman took maternity leave, the employer must include any part of the period the woman spent on compulsory maternity leave when calculating the bonus.

493. Paragraph 15 concerns a specific exception to the prohibition of discrimination because of sexual orientation in the field of work. The exception concerns the provision of benefits by reference to marital status in respect of periods of service before 6 April 2011 (the day on which section 1 of the [Civil Partnership Act 2011](#) came into operation for the purpose of civil partnership ceremonies). It also concerns benefits restricted to married persons and civil partners.

#### Examples

- An example of an employment benefit provided by reference to marital status is an occupational pension scheme which pays benefits to an employee's spouse on the death of the employee, but does not similarly compensate an unmarried employee's partner.
- A scheme which pays out only to surviving married and civil partners could be indirectly discriminatory because it might disadvantage gay couples, but it is permitted by the exception.
- A scheme which pays out to surviving married partners must also pay out to surviving civil partners in respect of any employee service since 6 April. Provided the scheme does that, the exception allows it, even though it may (directly or indirectly) discriminate by paying out only to married partners for service before that date.

494. Paragraph 16 provides that an employer who provides services to the public at large is not liable for claims of discrimination or victimisation by an employee under Part 5 of the Bill [work] in relation to those services. Rather, where individuals are discriminated against in relation to those services, they can make a claim to the Tribunal under Part 3 of the Bill [services etc.]. If on the other hand the service differs from that provided to other employees, is provided under the terms and conditions of employment, or the service is to do with training, the individual can bring a claim to the Tribunal for breach of the provisions in Part 5. These provisions are also applicable to services provided by principals, firms, and relevant persons (in respect of personal or public office-holders).

#### Examples

- If an employee of a car hire company is denied the hire of one of its cars (on the same terms available to the general public) because he is black, the employee should make a claim under the "services" section of the Bill at the Tribunal.
- If the same employee's employment contract provides that he is allowed to hire the company's cars at a discount (which members of the public would not get), but the employee is refused the discount when he goes to hire one of the firm's cars because he is a Muslim, then the employee would be able to make a discrimination claim under clause 38 (employees and applicants).

495. Paragraph 17 applies where annuities, life assurance policies, accident insurance policies or similar matters which involve the assessment of risk are provided in the field of employment. It allows for employers to provide for payment of premiums or benefits that differ for men and women, persons who are or are not married or in a civil partnership, pregnancy or maternity or gender reassignment, if this is by reference to reliable actuarial or other data and it is reasonable in all the circumstances.

#### Example

- An employer makes access to a group insurance policy available as a result of being employed by it. The employer, not the insurer, is responsible for ensuring that the provision of benefits under the policy complies with this Bill — see paragraph 18 of

Part 6 of Schedule 3 [services arranged by employer]. In providing access to these group policies the employer may take advantage of this exception.

## **SCHEDULE 10 DISABLED PUPILS: ACCESSIBILITY**

496. This Schedule provides for accessibility arrangements for disabled pupils in schools.
497. The DEC must prepare an accessibility strategy for provided and maintained schools which will increase disabled pupils' access to the school curriculum, improve the physical environment for such pupils and improve the provision of information to them. The strategy must be implemented by the DEC after taking account of pupils' disabilities and preferences expressed by them and their parents. It should be reviewed regularly, and revised if necessary.
498. Schools must develop written accessibility plans which will increase the access of disabled pupils to the school curriculum, improve the physical environment for such pupils and improve the provision of information to them. Plans must be implemented by schools after taking account of disabled pupils' disabilities and preferences expressed by them and their parents. Plans should be reviewed regularly, and revised if needed.

### **Example**

- A school discusses with its disabled pupils their needs and requirements in order to help it develop a written accessibility plan. The plan includes a strategy to improve the physical environment of the school by installing ramps in appropriate places and putting in hearing loops.

## **SCHEDULE 11 SCHOOLS: EXCEPTIONS**

### **Part 1: Religious or belief-related discrimination**

499. Part 1 of this Schedule makes some exceptions to the prohibition on discrimination because of religion or belief in relation to schools with a religious character, and to acts of worship or other religious observance in any school.
500. Paragraph 1 allows schools which have been specified in an order made by the DEC under paragraph 6 of Schedule 3 as having a religious character to discriminate because of religion or belief in relation to access to any benefit, facility or service. It means that these schools may conduct themselves in a way which is compatible with their religious character. It does not allow faith schools to discriminate because of any other of the protected characteristics, such as sex, race or sexual orientation. Nor does it allow them to discriminate because of religion in other respects, such as by excluding a pupil or subjecting him or her to any other detriment.

### **Examples**

- A Roman Catholic school which organises visits for pupils to sites of particular interest to its own faith, such as a Catholic cathedral, is not discriminating unlawfully by not arranging trips to sites of significance to the faiths of other pupils.

- A school with a religious character would be acting unlawfully if it sought to penalise or exclude a pupil because he or she had renounced the faith of the school or joined a different religion or denomination.

501. Paragraph 2 disapplies the prohibition on religious discrimination from anything done in relation to acts of worship or other religious observance organised by or on behalf of a school, whether or not it is part of the curriculum. This exception applies to any school, not just schools with a religious character, and reflects the need to avoid any conflict with the existing legislative framework in respect of religious education and worship in schools, which is generally required to be of a broadly Christian nature. While parents can remove their children from religious education and worship, schools are under no obligation to provide opportunities for separate worship for different religions and beliefs represented among their pupils.

#### Examples

- Under the [Education Act 2001](#), a provided school or maintained school must allow Jewish, Hindu or Muslim parents to withdraw their children from daily assemblies which include an element of worship of a mainly Christian character, but a school will not be discriminating unlawfully against those children by not providing alternative assemblies including Jewish, Hindu or Islamic worship.
- Schools are free to organise or to participate in ceremonies celebrating any faith, such as Christmas, Diwali, Chanukah or Eid, without being subject to claims of religious discrimination against children of other religions or of none.

502. Paragraph 3 provides a power for the Council of Ministers to add to, amend or repeal these religious discrimination exceptions. This is to allow the Council of Ministers, if it considers it appropriate to do so, to review the working of these provisions once they have been in effect for a sufficient period and make any changes which appear to be necessary in the light of that experience, using secondary legislation (subject to the approval of Tynwald).

### **Part 2: Disability discrimination**

503. Paragraph 4 provides that schools will not be discriminating against disabled children when applying a permitted form of selection. Permitted forms of selection are the selective admission arrangements operated by the DEC, for example in respect of children with special educational needs and selection by independent schools by ability and aptitude.

#### Example

- The parents of a disabled pupil cannot claim disability discrimination against a particular school if that pupil fails to meet any educational entry requirements set by the school.

## **SCHEDULE 12 FURTHER AND HIGHER EDUCATION – EXCEPTIONS**

504. Paragraph 1 enables a higher or further education institution to treat persons differently based on a protected characteristic in relation to providing training which would only fit them for work which, under the exceptions in Schedule 9, can lawfully be restricted to people of a particular race, sex, religion, sexual orientation or age, or

who are not transgendered or who are not married or in a civil partnership and for which they would therefore be ineligible.

#### Example

- A Catholic theological college could refuse to admit a woman to a training course which was designed only to prepare candidates for the Catholic priesthood. However, a Church of England college could not confine training for the priesthood to men since women may also become Anglican priests.

505. Paragraph 2 confers on the DEC a power to designate an institution if the Department is satisfied that the institution has a religious ethos. If an institution is designated it may admit students who share the relevant religion or belief in preference to those who do not, but only in relation to admissions to courses which do not constitute vocational training.

#### NOTE:

It is understood that there are currently no further or higher education institutions with a religious ethos in the Island.

506. Under paragraph 3 a higher or further education institution which confines any benefit, facility or service – such as access to residential accommodation – to married people and civil partners will not be discriminating because of sexual orientation against people who are unmarried or not in a civil partnership.

507. Paragraph 4 allows the DEC to continue to apply age related criteria for providing financial support to students.

508. Paragraph 5 provides that a higher or further education institution is permitted to provide, or make arrangements for, or facilitate, care for the children of students which is restricted to children of a particular age group. This includes all kinds of assistance with child care including paying for or subsidising it, or enabling parents to spend more time caring for the child.

509. The exception makes it clear that where child care for students' children who are aged 16 or under is concerned, it is not unlawful for this to be based on the age of the child.

#### Example

- If a college provides a crèche for the pre-school children of students this will not be unlawful discrimination associated with age against a student who is the parent of an older child. The college will not have to demonstrate that the provision and the age limits are objectively justified.

### **SCHEDULE 13 EDUCATION – REASONABLE ADJUSTMENTS**

510. This Schedule provides for reasonable adjustments to be made by educational bodies in relation to disabled people.

511. Paragraph 1 is introductory.

512. Paragraph 2, which relates to admissions, the provision of education and access to benefits, facilities and services, requires schools to comply with requirements to:

- ensure that any provisions, criteria or practices do not place disabled pupils at a substantial disadvantage in comparison with non-disabled pupils; and
  - provide any reasonable auxiliary aids which might help remove any such disadvantage.
513. Paragraph 3 requires higher or further education institutions in relation to admissions, education, access to benefits, facilities and services, and the conferring of qualifications to comply with requirements in clause 21 (duty to make reasonable adjustments) to take reasonable steps to:
- ensure that any provisions, criteria or practices do not place disabled students at a substantial disadvantage in comparison with non-disabled students;
  - take reasonable steps to change physical features which place disabled students at a disadvantage;
  - provide any reasonable auxiliary aids which might help remove any substantial disadvantage.
514. Paragraph 4 defines who is an “interested disabled person”, in relation to the conferment of qualifications. It also sets out that a provision, criterion or practice does not include an application of a competence standard, which is also defined.
515. Paragraph 5 requires responsible bodies which provide higher education or further education to take reasonable steps to ensure that any provisions, criteria or practices do not place disabled people at a substantial disadvantage, and to provide any reasonable auxiliary aids to help remove any disadvantage in relation to enrolling people on courses of further or higher education, and to services provided once enrolled. Where DEC is providing such services the governing body of the school does not need to take reasonable steps to change physical features which place disabled students at a disadvantage.
516. Paragraph 6 requires responsible bodies which provide recreation or training facilities to make reasonable adjustments for disabled users of those facilities.
517. Paragraph 7 establishes that when a responsible body is deciding whether it is reasonable to have to take a step for the purpose of complying with the first, second or third requirement of the duty to make reasonable adjustments it must have regard to relevant provisions of any code of practice issued under clause 154.
518. Paragraph 8 requires that, when making any reasonable adjustment for a particular person, an educational institution needs to consider any request made by that person to keep the nature and existence of that person’s disability confidential.
519. Paragraph 9 sets out how the duty to make reasonable adjustments applies to an educational qualifications body.

**SCHEDULE 14**  
**ASSOCIATIONS – REASONABLE ADJUSTMENTS**

520. This Schedule explains how the duty to make reasonable adjustments under clause 21 applies to associations.
521. Paragraph 1 is introductory.

522. Paragraph 2 explains that the duty applies in respect of disabled members and guests including prospective members and guests, and that the association must comply with all three reasonable adjustment requirements (as set out in clause 21). It describes the types of adjustments an association must make, stipulates what the duty does not require and provides further information on the meaning of “physical features”. It is an anticipatory duty which means associations must anticipate the needs of disabled members and guests including prospective members and guests and make appropriate reasonable adjustments.
523. Under Part 7 of the Bill an “association” is an association of persons which has at least 25 members, admission to membership of which is regulated by the association’s rules and involves a process of selection.

#### Examples

- A private club with 35 members usually holds its annual dinner upstairs in a local restaurant. However, as there is no lift, the room is not accessible to two new disabled members who have severe difficulty in climbing stairs. Under the duty the club would need to consider changing the venue to a downstairs room to accommodate the new members. This is likely to be a reasonable adjustment for the club to make.
- A club has members who cannot read standard print. Under the duty it would need to think about providing information in large print or in audio format for them. These are likely to be reasonable adjustments for the club to make.

### **SCHEDULE 15 ASSOCIATIONS – EXCEPTIONS**

524. Schedule 15 contains exceptions from the provisions concerning associations in Part 7 of the Bill.
525. Paragraph 1 allows an association whose main purpose is to bring together people who share a particular characteristic (such as a particular nationality, sexual orientation or a particular disability) to continue to restrict membership to such people, and impose similar restrictions on those who can exercise the rights of an associate, or who can be invited as guests.
526. It is, however, unlawful for an association to restrict its membership to people of a particular colour.

#### Example

- A club for deaf people can restrict membership to people who are deaf and would not need to admit people with other disabilities, such as a blind person.

527. Paragraph 2 provides for exceptions from age discrimination in respect of concessions and in relation to various forms of special treatment by associations by reference to age.

#### Example

- A society which offers a reduced annual membership fee to members who are over the age of 65 is not unlawfully discriminating on the grounds of age.

528. Paragraph 3 is designed to ensure that it is not unlawful for an association to treat a pregnant woman differently in the terms on which she is admitted as a member or is given access to benefits as a member if the association reasonably believes that to do otherwise would create a risk to her health or safety and the association would take similar measures in respect of persons with other physical conditions. Equivalent provision is made in respect of associates and guests.

#### Example

- A private members' gym may wish to restrict access to squash courts after a certain point in the pregnancy (for example, after 36 weeks).

## **SCHEDULE 16 THE TRIBUNAL**

529. Schedule 16 provides for the constitution, jurisdiction and procedures of the Employment and Equality Tribunal which is established under clause 101 of the Bill. The new Tribunal replaces the Employment Tribunal. Whereas the Employment Tribunal deals only with work cases the jurisdiction of the Employment and Equality Tribunal is expanded so that it can hear all cases involving claims of discrimination in the provision of goods and services as well as employment.

### **PART 1 CONSTITUTION OF THE TRIBUNAL**

530. Paragraph 1 deals with the appointment of the members of the Tribunal by the Appointments Commission.

531. Subparagraph (1) provides for the continued appointment by the Appointments Commission of a chairman, a panel of deputy chairpersons, and panels of "employers'-side" members and "employees'-side" members, in accordance with the Tribunals Act 2006. A new panel, "the general panel" consisting of persons appointed by the Appointments Commission is also established.

532. Under subparagraph (2), subparagraph (1) is subject to the transitional provisions set out in clause 101(6) of the Bill.

533. Paragraph 2 provides for the Tribunal to consist of the chairperson and, in the case of a complaint with an employment element, one person chosen from the employer panel and one person chosen from the employee panel. In the case of any other complaint, the Tribunal is to consist of the chairman and two persons selected from any of the panels constituted under paragraph 1.

534. If the chairperson of the Tribunal is absent or unable to act, his or her place is to be taken, and any of his or her functions may be exercised, by a deputy chairperson who is available to act.

535. This paragraph also provides for the place of one of the other members of the Tribunal to be taken by another member of the same panel as that from which that member was chosen if the original member is absent or unable to act.

536. Where the Tribunal has begun to hear any complaint or other matter, it may not, without the consent of the parties, continue to do so unless it comprises at least 2 of

the members who began to hear the matter, one of whom must be the chairperson or deputy chairperson.

## **PART 2 – PROCEEDINGS BEFORE THE TRIBUNAL**

537. Part 2 of the Schedule deals with procedural provisions and it consists of three Divisions:

- Division 1 concerns general matters relating to Tribunal proceedings.
- Division 2 concerns Tribunal provisions which are related to goods and services.
- Division 3 concerns Tribunal provisions which are related to employment.

### **Division 1: General**

538. Paragraph 3 deals with interpretation for the purposes Part 2 of the Schedule.

539. Paragraph 4 provides the Council of Ministers with rule making powers for the Tribunal. The Council of Ministers is obliged to consult the Deemsters before making Rules.

### **Division 2: cases under this Bill which do not relate to employment**

540. Paragraph 5 specifies that Division 2 is to apply for the purposes of proceedings before the Tribunal in which it has jurisdiction by virtue of section 103 of the Bill [Jurisdiction of the Tribunal in relation to goods and services].

541. Paragraph 6 establishes that Tribunal rules can make any provision which might be made, in respect of cases before the Court in tort or dolence under section 25 of the [High Court Act 1991](#).

### **Division 3: employment-related cases**

542. Paragraph 7 specifies that Division 3 of this Schedule is to apply for the purposes of proceedings before the Tribunal in which it has jurisdiction by virtue of clause 108 of the Bill [jurisdiction of the Tribunal in work cases], clause 109 [Remedies for breach of provisions of the relevant enactments] and clause 116 [Jurisdiction – equality of terms].

543. Paragraph 8 states that Tribunal rules may include provision for requiring a fee to be paid on the making of a complaint, and providing for it to be refunded in specified circumstances. DED consulted on this matter and considers that a system of modest fees may be desirable.

544. Paragraph 9 states that Tribunal rules may make provision treating the Department of Economic Development or the Treasury as a party to any proceedings before the Tribunal, and entitling either Department to appear and to be heard.

545. Paragraph 10 states that Tribunal rules may make provision for requiring persons to attend to give evidence and produce documents etc and to enable the Tribunal to order such discovery or inspection of documents as might be ordered by the High Court.

546. Paragraph 11 states that rules may provide for the determination of any matter before the Tribunal by a hearing on a preliminary point (thus possibly saving the need for a full hearing).

547. Paragraph 12 states that rules may prescribe the procedure to be followed on any complaint before the Tribunal, and specify the persons entitled to appear and to be heard on behalf of parties to such proceedings. The paragraph also enables the Tribunal to review its decisions, and revoke or vary its orders and awards, in such circumstances as may be determined in accordance with the rules.
548. Paragraph 13 provides for the rules to include provision for sending certain documents to specified Departments or persons.
549. Paragraph 14 provides for rules to include provision for costs, for paying a complainant's fees in specified circumstances and for the taxation of any costs.
550. Paragraph 15 provides for rules to include provision as to the registration of complaints, decisions, awards etc. The Tribunal may restrict publication of such information in appropriate cases.
551. Paragraph 16 requires the rules to make special provision in connection with a case of unfair dismissal connected to an employee's pregnancy.
552. Paragraph 17 provides for rules to allow the chairperson of the Tribunal to sit alone to hear and determine specified types of employment cases. It should be noted that the list of cases is more extensive than in the [Employment Act 2006](#). The Council of Ministers may amend the list by order. Such an order would require the approval of Tynwald.
553. Paragraph 18 allows for the rules to provide for the appointment of one or more assessors for the purposes of any proceedings before the Tribunal, if the proceedings are brought under an enactment which provides for such an appointment. An example of such an assessor is the independent expert who may be called upon to prepare a report in work of equal value proceedings.
554. Paragraph 19 allows for the rules to authorise the Tribunal to require persons to provide information etc. to a person required to prepare a report for the purposes of section 119(2) of the Bill [assessment of whether work is of equal value].
555. Paragraph 20 allows for the rules to make provision for pre-hearing reviews (a preliminary consideration of matters) including requirement for payment of a deposit by a party in certain circumstances.
556. Paragraph 21 allows for the rules to make provision about the postponement of Tribunal hearings and to limit the number of permissible hearings.
557. Paragraph 22 allows for the rules to make provision about the determination of Tribunal hearings without any hearing in specified circumstances. However, this is subject to either:
- (a) all the parties consenting to determining proceedings without a hearing; or
  - (b) the respondent presenting no response or not contesting the case.
558. Paragraph 23 allows for the rules to make provision about the determination of Tribunal hearings without hearing both parties (for example in the case where the proceedings are uncontested).

559. Paragraph 24 allows for the rules to make special provision in respect of a complaint of detriment or dismissal arising out industrial action.
560. Paragraph 25 makes provision for the rules in respect of cases which may touch on national security and, in particular, enables the Tribunal to sit in private if the Chief Minister considers it to be expedient in the interests of national security.
561. Paragraph 26 makes additional provision for cases which may touch on national security and makes it an offence to publish prohibited information.
562. Paragraph 27 provides for the Chief Minister to direct that, despite any employment rights conferred by the Bill, information may not be disclosed in the interests of national security.
563. Paragraph 28 enables the Tribunal to sit in private if restricted information or any other confidential matter is to be disclosed.
564. Paragraph 29 excludes the application of the [Arbitration Act 1976](#) to any proceedings before the Tribunal.

### **PART 3 — MISCELLANEOUS**

565. Paragraph 30 makes further provision about conciliation which is additional to that in clause 157.
566. Paragraph 31 deals with offences for failing to comply with paragraph 10 [provision of documents etc. to the Tribunal] or paragraph 15 [failing to comply with a prohibition on publishing restricted information etc.]. The maximum penalty which may be imposed is £5,000 on summary conviction.
567. Paragraph 32 enables a person to appear in person or to be represented by any other person before the Tribunal.
568. Paragraph 33 enables the Council of Ministers, with the approval of the Treasury, to arrange for the payment of allowances to witnesses before the Tribunal.

### **SCHEDULE 17 EDUCATION CASES – ENFORCEMENT**

569. This Schedule contains special provision for dealing with complaints of discrimination under Division 1 of Part 6 of the Bill (education cases in schools). That Division applies to the admission and treatment of pupils, victimisation due to the conduct of the child's parents, and also accessibility for disabled pupils.
570. Paragraph 2 of the Schedule sets the time limit for bringing proceedings. This is normally 6 months unless the dispute has been referred to resolution under paragraph 4 in which case the period is extended by 3 months. However, if the Tribunal considers it is appropriate to do so cases may be heard by it out of time.
571. Under paragraph 3 if the Tribunal decides that a contravention of the requirements of Division 1 of Part 6 of the Bill occurred it may order as it thinks fit. This power may be exercised with a view to eliminating or reducing the adverse effect on the person of

any matter to which the claim relates but it does not include power to order the payment of compensation.

572. Paragraph 4 requires the DEC to make such arrangements as it considers appropriate with a view to avoiding or resolving disagreements between responsible bodies and children attending (or wishing to attend) a school. These arrangements must provide for the appointment of independent persons with the function of facilitating the avoidance or resolution of such disagreements. The arrangements for dispute resolution must be made known to all relevant persons, including pupils and their parents. However, use of these arrangements is not obligatory and they do not prevent any person making a claim to the Tribunal.

#### Examples

- A school pupil is not allowed to join other children in the playground at break-times because of his wheelchair and his parents believe he is being discriminated against because of his disability. The parents and the school seek to resolve the dispute with the assistance of an independent person and as a result of these discussions the school agrees to make arrangements for the pupil to join his peers at break time. However, if a mutually acceptable resolution could not be reached the parents could still make a claim to the Tribunal.
- A pupil is refused admission to a school and her parents believe that it is because of her disability. They are able to bring a claim against the school to the Tribunal. The Tribunal rules that the school did unlawfully discriminate on the grounds of disability and it makes an order for the school to admit the pupil.

### **SCHEDULE 18 REASONABLE ADJUSTMENTS: SUPPLEMENTARY**

573. The provisions in this Schedule apply to earlier Schedules in the Bill dealing with reasonable adjustments for disabled persons where a person providing services or carrying out public functions, an employer, an education provider, or an association is required to consider reasonable adjustments to premises which it rents and it would require consent from the landlord for the adjustments to be made. It sets out what steps it is reasonable for a person to take in discharging a duty to make reasonable adjustments in a case where a binding agreement requires that consent must be obtained from a third party before that person may proceed to make the adjustment to let premises or the common parts of let premises.
574. Where a person wishes to make an adjustment in order to fulfil a duty to make reasonable adjustments but is unable to do so, the Schedule enables the adjustment to be made by deeming the tenancy to include certain provisions. For example, the tenancy may have effect as if a tenant was able to make alterations with the consent of the landlord.
575. Where a landlord has refused consent to an alteration or gives consent subject to a condition, the person requesting the consent (or a disabled person who has an interest in the alteration being made) can refer the refusal (or the conditional consent) to the Tribunal.
576. The Schedule also provides for a landlord to be joined as a party to proceedings where a disabled person is bringing an action under the reasonable adjustment duty.

577. The Schedule provides a power to make regulations about matters such as when a landlord is taken to have refused consent, when such refusal is unreasonable and when it is reasonable. Words and phrases used in the Schedule are interpreted consistently with the parts of the Bill to which it cross-refers.

#### Examples

- An insurance company works from a rented two storey building and has plans to install a stair lift to make the building more accessible to employees with mobility impairments. The terms of the lease preclude alterations to the staircase. The company writes to the landlord for permission to make the alteration. The landlord consults the superior landlord who agrees to waive this condition of the lease thereby allowing the installation of the chair lift to proceed. However, as a condition of consent, the landlord requires that the chair lift is removed on surrender of the lease.
- A disabled tenant asks to have automated doors put in at the entrance of her block of flats. Her landlord would like to agree but is unable to do so as he is a tenant of a superior landlord who does not agree to the alteration. The tenant's remedy is to bring an action against her landlord in the Tribunal where she can ask that the superior landlord is brought in as an additional party to the case. The Tribunal can order the alteration to be made and order the superior landlord to pay compensation but only if it finds he has acted unreasonably in refusing his consent.

### **SCHEDULE 19 STATUTORY PROVISIONS**

578. Paragraph 1 of this Schedule provides exceptions from several Parts of the Bill, in relation to the protected characteristics of age, disability, religion or belief, sex and sexual orientation, for things done in accordance with what is, or may in future be, required because of some other law.

#### Examples

- An employer can lawfully dismiss a disabled employee if health and safety regulations leave him with no other choice.
- An employer can lawfully refuse to employ someone to drive a heavy goods vehicle who is not old enough to hold a HGV licence.

579. Paragraph 2 allows differential treatment based on sex or pregnancy and maternity at work which is required to comply with laws protecting women who are pregnant, who have recently given birth or against risks specific to women.

#### Examples

- A care home cannot lawfully dismiss, but can lawfully suspend, a night-shift worker because she is pregnant and her GP has certified that she must not work nights.
- It may be lawful for a road haulier to refuse to allow a woman lorry driver to transport chemicals that could harm women of child-bearing age.

580. Paragraph 3 provides an exception from the provisions on religious discrimination for certain posts in schools or institutions of further or higher education where their governing instrument requires the head teacher or principal to be of a particular religious order. There is an order-making power conferred on the DEC to withdraw the exception either in relation to a particular institution or a class of institutions.

581. Paragraph 4 allows restrictions on the employment of foreign nationals in employment in the service of the Crown; employment by any other prescribed public body; and holding a public office (within the meaning of clause 44).

## **SCHEDULE 20 GENERAL EXCEPTIONS**

582. Paragraph 1 allows direct nationality discrimination and indirect race discrimination on the basis of residency requirements where the discrimination is required by law or requirements of the Government (the Executive).

### **Examples**

- The points-based system can discriminate on the basis of nationality in determining whether migrants from outside the European Economic Area and Switzerland should be given entry clearance for the Isle of Man.
- DHSC can charge some people who are not ordinarily resident in the Island for hospital treatment they receive in the Island.

583. Paragraph 2 provides an exception for religious or belief organisations with regard to the provisions in the Bill relating to services and public functions, premises and associations. The types of organisation that can use this exception are those that exist to:

- practice, advance or teach a religion or belief;
- allow people of a religion or belief to participate in any activity or receive any benefit related to that religion or belief;
- promote good relations between people of different religions or beliefs.

584. Organisations whose main purpose is commercial cannot use this exception.

585. The exception allows a religious or belief organisation (or a person acting on its behalf) to impose restrictions on membership of the organisation; participation in its activities; the use of any goods, facilities or services that it provides; and the use of its premises. However, any restriction can only be imposed by reference to a person's religion or belief or sexual orientation.

586. In relation to religion or belief, the exception can only apply where a restriction is necessary to comply with the purpose of the organisation or to avoid causing offence to members of the religion or belief whom the organisation represents.

587. In relation to sexual orientation, the exception can only apply where it is necessary to comply with the doctrine of the organisation or in order to avoid conflict with the strongly held convictions of members of the religion or belief that the organisation represents. However, if an organisation contracts with a public body to carry out an activity on that body's behalf then it cannot discriminate because of sexual orientation in relation to that activity.

588. The exception also enables ministers of religion to restrict participation in the activities that they carry out in the performance of their functions as a minister and access to any goods, facilities or services they provide in the course of performing those functions.

## Examples

- A Church refuses to let out its hall for a Gay Pride celebration as it considers that doing so would conflict with the strongly held religious convictions of a significant number of its followers. This would not be unlawful sexual orientation discrimination.
- A religious organisation which has a contract with DHSC to provide meals to elderly and other vulnerable people within the community on behalf of the Department cannot discriminate because of sexual orientation.

589. Paragraph 3 provides an exception to the general prohibition of sex and gender reassignment discrimination. It allows communal accommodation to be restricted to one sex only, as long as the accommodation is managed as fairly as possible for both men and women. It sets out factors which must be considered when restricting communal accommodation to one sex only, and provides that discriminatory treatment of transsexual people must be objectively justified.
590. Communal accommodation is defined as residential accommodation which includes shared sleeping accommodation which should only be used by members of one sex for privacy reasons. Where such accommodation is refused in the field of work, or a benefit linked to such accommodation is refused, alternative arrangements must be made where reasonable so as to compensate the person concerned.

## Examples

- A hostel only accepts male guests. It is not unlawful for it to refuse to accept female guests because the majority of the bedrooms are shared and there is only one communal bathroom.
- At a worksite the only available sleeping accommodation is communal accommodation occupied by men. A woman employee who wishes to attend a training course at the worksite is refused permission because of the men-only accommodation. Her employer must make alternative arrangements to compensate her where reasonable, for example by arranging alternative accommodation or an alternative course.

591. Paragraph 4 allows less favourable treatment because of a person's nationality in relation to training and associated benefits that are intended for people who do not live in an EEA state, as long as the training provider believes that the person will not subsequently use the skills obtained in the British Islands. This means that an EEA resident cannot claim to have been discriminated against in relation to this type of activity.
592. Employment or contract work can be covered by this exception where its sole or main purpose is the provision of training in skills.
593. The main purpose of this provision is to enable people from developing countries to acquire vital skills in the Island which may not be available in their country of residence.

## Example

- It would not be unlawful for a company specialising in sustainable irrigation to offer a training scheme in the Isle of Man for people from Mozambique, who then return home to put the skills learned into practice, to refuse to offer the same training to a person who lives in the Island.

**SCHEDULE 21**  
**EMPLOYMENT LEGISLATION – MISCELLANEOUS AMENDMENTS**

**General Comments on Schedule 21**

594. Schedule 21 makes various amendments to the Island's employment legislation. Part 1 of the Schedule amends the [Employment Act 2006](#), the principal statute which contains individual employment rights. Part 2 amends other employment statutes, including the [Control of Employment Act 2014](#).
595. Some amendments are consequential on changes made by the Equality Bill to the employment law framework (for example, replacement of references to the "Employment Tribunal" established under the Employment Act 2006 with references to the "Employment and Equality Tribunal" to be established under the Equality Bill).
596. In addition, the Schedule includes a number of other amendments to existing employment law, which are, generally, unconnected to the main equality provisions in the Bill. These amendments were proposed by the Department of Economic Development (DED) and they concern some potential cost saving measures and some issues that have emerged since the Employment Act 2006, which was the last major piece of employment law in the Island, came into operation. Since the Bill deals in large part with rights and obligations relating to employment, it was considered that it was both opportune and appropriate to include these amendments in a Schedule to the Bill. The effect of the amendments is explained below.

**PART 1 – EMPLOYMENT ACT 2006 AMENDED**

597. Paragraph 1 is introductory.
598. Paragraph 2 is consequential to the establishment of the Employment and Equality Tribunal by the Bill.
599. Paragraph 3 amends section 9(1) of the Employment Act 2006 to correct a numerical error.
600. Paragraph 4 re-enacts section 17 of the [Employment Act 2006](#) with amendments. That section enables an employee to complain to the Employment Tribunal if his or her employer fails to issue or update a written statement or issue an itemised pay statement. The main changes to the existing provision are as follows:
- In the case of a complaint under section 17 of the Act it is no longer necessary for an employee to make a written request to the employer that he or she be given a written statement as a pre-condition of receiving an award. This is because the requirement to issue a written statement is an important long established statutory requirement.
  - A distinction is made between a case where particulars have been issued but are incomplete and a case where they have not been issued at all. In the former case an award will be limited to a maximum of 2 weeks' pay and in the latter case to a maximum of 4 weeks' pay.
  - At present the Tribunal must order an employer who has not issued particulars or who has issued incomplete particulars to pay an award of at least 2 weeks' pay to the employee. Under the revised provision the Tribunal has discretion as to whether or not to make an award in the case where particulars have been issued

but are incomplete (and could thus, for example, choose to make no award where the employer has not complied with the statutory duty in some minor respect).

- The presently little understood and complex remedy for breach of the statutory duty to issue a pay statement(s)<sup>20</sup> is made consistent with the remedy for breach of the duty to issue written particulars. So where an incomplete statement has been issued the Tribunal may make an award of up to 2 weeks' pay; where no statement has been issued the Tribunal must make an award of 2 weeks' pay and may make an award of up to 4 weeks' pay if just and equitable.
- There is a new provision allowing the Department of Economic Development to prescribe exceptions or to make modifications to the general rules in respect of payments to be made by employers to employees. An order or any regulations would require the approval of Tynwald.

601. Paragraph 5 re-enacts section 18 of the Employment Act 2006 with amendments. Under that section the Employment Tribunal is required to make an award of 2-4 weeks' pay to the employee in certain proceedings other than under section 17 of that Act, where it finds that the employer has failed to issue or update a written statement.

602. The main changes to the existing provision are as follows:

- As in the case of the amendment to section 17 of the 2006 Act, a distinction is made between the case where particulars have been issued but are incomplete and the case where they have not been issued at all. In the former case an award is to be limited to a maximum of 2 weeks' pay and in the latter case to a maximum of 4 weeks' pay.
- At present the Tribunal must order an employer who has not issued particulars or who has issued incomplete particulars to pay an award of at least 2 weeks' pay to the employee. As in the amendment to section 17, the Tribunal is given discretion as to whether or not to make an award in the case where particulars have been issued but are incomplete.
- Whereas at present the Tribunal is only to make an award in the case where it finds in favour of the employee in respect of his or her principal complaint to the Tribunal (for example, an unfair dismissal claim), under the revised provision whether or not the employee succeeds in his or her original complaint ceases to be a criterion for an award if the employer was in breach of the statutory duty to issue or update a written statement.
- There is a new provision allowing the Department of Economic Development to prescribe exceptions or to make modifications to the general rules in respect of payments to be made by employers to employees. An order or any regulations would require the approval of Tynwald.

603. Paragraph 6 amends section 25 of the [Employment Act 2006](#) which deals with complaints to the Tribunal by workers when an employer has made an unlawful deduction or received an unlawful payment from a worker's wages. The effect of this paragraph is twofold:

- The Tribunal is prohibited from making any award in respect of a deduction or payment made more than 6 years before a complaint was made.

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<sup>20</sup> Where the employer does not issue a pay statement and the Tribunal finds that there has been an 'unnotified deduction' from pay it can order the employer to pay the employee a sum not exceeding the aggregate of the unnotified deductions during the 13 week period preceding the date of the application to the Tribunal.

- The overlap between the section 25 of the Employment Act 2006 and the [Annual Leave Regulations 2007](#), both of which enable unpaid holiday pay to be recovered by workers, is removed by the insertion of section 25(9) which requires such claims to be dealt with under the Annual Leave Regulations 2007.
604. Paragraph 7 makes a consequential amendment to section 66 of the Employment Act 2006 (Flexible working: detriment) arising out of the extension of the existing right to make a request for flexible working from parents of children under 6, or 18 if disabled, and certain carers, to any employee who has been employed for 26 weeks. [See further at Paragraph 606 below].
605. Paragraph 8 amends section 72 of the Employment Act 2006 [detriment: remedies] to limit the amount of compensation that can be awarded to a worker who has suffered a detriment (including termination of his or her contract) to the sum of the basic award and the compensatory award that can be awarded to an employee on a finding of unfair dismissal. The limit does not apply where the detriment is on the ground of a dismissal for a health and safety reason or for making a protected disclosure (in keeping with the two exceptions in Part X of the Employment Act 2006 where the usual compensatory award limit in unfair dismissal cases does not apply).
606. Paragraphs 9, 10 and 11 update the enabling powers (in sections 99, 100 and 101 respectively of the Employment Act 2006) for regulations which give employees the right to request flexible working. Most notably the existing right of parents of children under the age of 6 years, or 18 if disabled, and certain carers, to request flexible working is extended to any employee who has been employed for at least 26 weeks. Any Regulations made under the new powers will require the approval of Tynwald.
607. Paragraph 12 re-enacts section 105(1) of the Employment Act 2006, which defines terms used in Part 8 of that Act [Disciplinary and Grievance Procedures] to widen the definition of "employer" for the purposes of Part 8.
608. Paragraph 13 amends section 107 of the Employment Act 2006 [Rights of employee in period of notice] to remove an anomaly. The existing section provides that Schedule 2 of the Act [rights of employee in period of notice] is to apply. The Schedule provides for employees who are on maternity leave to be paid during the notice period. However, section 107(3) provides that the Schedule does not apply where the notice to be given by the employer is at least 2 weeks more than the statutory notice period. This creates an anomaly whereby an employee working for an employer whose notice period is more than 2 weeks longer than the statutory notice period may not receive pay in the notice period if she is on (unpaid) maternity leave when given notice. The amendment removes the anomaly by disapplying section 107(3) in the case where an employee has an entitlement under any other enactment to the benefit of the terms and conditions of employment despite her absence.
609. Paragraph 14 makes changes to existing provisions on unfair dismissal in the [Employment Act 2006](#). The main changes are as follows:
- A dismissal which would constitute unlawful discrimination under the Equality Bill is added to the existing categories of automatically unfair dismissals which are set out at sections 124 to 128 of the Employment Act 2006 and in respect of which, under section 132, no qualifying period of continuous employment is required. [It should be noted that some existing provisions which provide for a dismissal on grounds of race, religion or sexual orientation to be automatically unfair are repealed].

- A dismissal for a spent conviction under the [Rehabilitation of Offenders Act 2001](#) is also added to the categories of automatically unfair dismissals. Such protection does not, however, apply to those employments which are excluded from protection under the Act (for example, doctors, accountants) by virtue of an order made under that Act.
610. Paragraph 15 provides that it is automatically unfair to select an employee for redundancy if the reason is or relates to a protected characteristic under the Equality Bill or because the employee in question has a “spent” conviction under the Rehabilitation of Offenders Act 2001. In the latter case such protection does not apply to those employments which are excluded from protection under the 2001 Act
611. Paragraph 16 is a consequential numbering amendment.
612. Paragraph 17 re-enacts section 132 of the Employment Act 2006 with amendments. The paragraph makes the following changes:
- The exclusion on employees over retirement age claiming unfair dismissal is removed (because age is a protected characteristic in the Equality Bill).
  - Dismissal on grounds of a protected characteristic under the Equality Bill or because the employee in question has a spent conviction under the Rehabilitation of Offenders Act 2001 are added to the list of exceptions in section 132(2) of the Employment Act 2006 whereby the usual requirement for an employee to have one year’s continuous employment with the employer in question to bring an unfair dismissal case is disapplied.
  - The qualifying period is disapplied in two further cases. These are, firstly, where the dismissal is because of, or is connected with, the employee’s membership of HM Reserve Forces. This is in line with changes made in the UK by the [Defence Reform Act 2014](#). The second case is where the reason for the dismissal is because of, or is connected with, the employee’s political affiliations or opinions. It may be noted that in neither case will a dismissal on one of these grounds be automatically unfair; the effect of the provision is intended only to give the Tribunal jurisdiction to hear the case where the employee has less than a year’s continuous employment with the employer.
613. Paragraph 18 makes a numerical correction.
614. Paragraph 19 amends section 142 [calculation of basic award] of the [Employment Act 2006](#) to change the basis of calculation of the Basic Award in unfair dismissal cases. Under the existing legislation the award is calculated on the basis of 1 week’s pay times the number of years of continuous employment up to the effective date of termination. Paragraph 19 amends the calculation basis as follows:
- Subsections (3) and (4), which provide for the reduction and extinguishment of the award, where the effective date of termination is after the employee’s 64th birthday, are repealed. (This is because age is a protected characteristic in the Equality Bill).
  - The number of years of continuous employment to be used in the calculation is to be capped at 26. (This is to balance the effect of removing the upper age limit of the award).
615. Paragraph 20 amends section 144 of the Employment Act 2006 to replace the amount of the compensatory award to reflect the present amount which was set by the [Employment \(Maximum Amount of Awards\) Order 2016](#). In addition, the Department’s

order making powers are amended so that when a new a maximum amount is set by order it may be inserted at section 144.

616. Paragraph 21 replaces a reference to the [Employment \(Sex Discrimination\) Act 2000](#) which is repealed by the Equality Bill.
617. Paragraph 22 re-enacts section 147(1) of the Employment Act 2006 with amendments. Sub-section (1) requires the Treasury to pay certain debts due on the “relevant date” to an employee whose employment has ceased and whose employer is insolvent. The sums are payable out of the Manx National Insurance Fund but are only payable if the employer made or was liable to make class 1 national insurance contributions in respect of the employee.
618. The re-enacted section 147(1) removes that condition, the effect of which was to exclude some part-time workers whose earnings fell below the point at which they are liable to pay NI contributions (“the primary threshold”) from entitlement to compensation.
619. New subsection 147(1A) makes any payments made by the Treasury subject to various conditions which are specified, namely: section 150 of the Employment Act 2006 [Restriction on payment in certain cases] and section 153 [Subrogation of Treasury], so that the Treasury takes over the rights to claim in the bankruptcy or liquidation for any amount which it has paid out. In addition, as in the UK, debts owed to employees by their former employer (arrears of pay, payment in lieu of notice, accrued holiday pay and compensation for unfair dismissal) are to be made subject to the maximum of a week’s pay (presently £540 per week<sup>21</sup>) which currently applies to statutory redundancy payments and certain other Tribunal awards.
620. Paragraph 23 re-enacts section 148(1) of the Employment Act 2006 with amendments. It makes similar provision to clause 146, where the employer is not insolvent but has ceased to carry on business in the Isle of Man. As in the case of section 147, a new subsection (1A) imposes various conditions etc. on payments to be made by the Treasury.
621. Paragraph 24 re-enacts section 149 of the [Employment Act 2006](#), which makes similar provision to section 147(1) of the Employment Act 2006 in relation to unpaid employees’ or employers’ contributions to an occupational pension scheme or personal pension scheme, with stylistic improvements. As in the two preceding paragraphs various conditions etc. are imposed on payments to be made by the Treasury.
622. Paragraph 25 replaces references to the former Department of Social Care in section 153 of the Employment Act 2006 with references to the Treasury to take account of the transfer of functions from the former to the latter.
623. Paragraph 26 makes consequential amendments arising from the repeal and re-enactment of Part 12 of the Employment Act 2006 by the Equality Bill.
624. Paragraph 27 enables the Department of Economic Development to make regulations about zero hours contracts and contains extensive enabling powers for this purpose.
625. In particular, the regulations may make provision:

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<sup>21</sup> See: <http://www.tynwald.org.im/links/tls/SD/2016a/2016-SD-0219.pdf>

- that a term of a zero hours contract prohibiting a worker from doing work or performing services under another contract is unenforceable against the worker;
  - modifying zero hours contracts;
  - imposing financial penalties on employers;
  - requiring employers to pay compensation to zero hours workers;
  - conferring jurisdiction on the Tribunal or the High Court;
  - conferring rights on zero hours workers.
626. Paragraph 28 makes a consequential amendment to section 171 of the Employment Act 2006 arising out of the Equality Bill and removes the Department of Economic Development's power to issue codes of practice relating to discrimination and equality of opportunity. This is in order to remove any overlap with clause 154 of the Equality Bill which gives the Council of Ministers powers to issue codes of practice in connection with any matter addressed by the Bill. In practice, however, DED would lead on the preparation and consultation on any code of practice relating to employment, which it would then submit to the Council of Ministers for final approval.
627. Paragraph 29 amends section 173 of the Employment Act 2006 [General Interpretation] to update the definition of certain terms used in the Employment Act 2006. The definition of "successor" at section 123(5) is also updated so that it is consistent with section 11 of the [Redundancy Payments Act 1990](#) [Transfer of Business] as amended.
628. Paragraph 30 amends section 174(3) of the Employment Act 2006 [subordinate legislation: general provisions] so that powers conferred by that Act on the Department of Economic Development to make subordinate legislation are extended to a maker of subordinate legislation other than the Department (for example, it is the Treasury rather than the Department of Economic Development which makes regulations on recoupment of benefit).
629. Paragraph 31 updates the list of jurisdictions in Schedule 1 of the Employment Act 2006 in respect of which the Tribunal has a duty under section 18 of that Act to check whether or not an employer is in breach of his or her duty to issue or update a written statement of employment particulars and where there is a breach, to award between 2-4 weeks' pay to the employee in certain circumstances [See paragraph 601 above].
630. Paragraph 32 amends paragraph 1 of Schedule 4 [treatment of special categories of worker] of the 2006 Act to remove an exception which is no longer required following amendments to sections 99 to 101 which concern insolvency of the employer, etc.
631. Paragraph 33 amends Schedule 5 of the [Employment Act 2006](#) [computation of period of employment] as follows:
- Paragraph 8 of the Schedule deals with the rules of continuous employment<sup>22</sup> where there is a change of employer. In order for the legislation to be in step with changes to section 11 of the [Redundancy Payments Act 1990](#) [Transfer of business] (see further at paragraph 635 below) sub-paragraph 8(2) of the Schedule, which deals with the transfer of a trade, business or undertaking, is broadened to include the transfer of part of a trade, business or undertaking.

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<sup>22</sup> Some employment rights are conditional upon an employee having worked a qualifying period of continuous employment, for example one year's continuous employment is generally required to bring a claim of unfair dismissal though there are exceptions to this rule.

- In addition, a note is added to sub-paragraph 8(2) to clarify that a transfer of a business from one person to another for the purposes of which a person is employed may apply regardless of whether the business which is being transferred has been carried on by the person's employer.
  - Also, in paragraph 8, new provision is made to enable an employee of a Department, Statutory Board or an office of the Government, who is not an employee of the Public Services Commission, to be transferred to another Department, Statutory Board or office and to retain his or her continuous employment built up with the first employer.
  - Paragraph 13 of the Schedule removes a reference to class 1 National Insurance contributions in order to remove a requirement which had the effect of excluding some part-time workers from being able to accumulate "continuous employment" for employment protection purposes in certain circumstances.
  - Finally, there is a new power to amend the Schedule, which is technical in nature, by order. Such an order would require the approval of Tynwald.
632. Paragraph 34 amends Schedule 6 of the Employment Act 2006 [Calculation of normal working hours and a week's pay] as follows:
- A paragraph which refers to remuneration on suspension on medical grounds is repealed as there is no provision in Isle of Man employment law covering suspension on these grounds.
  - Payments made by the Treasury under section 147 (insolvency of employer) and section 148 (cessation of employer's business), are added to the list of payments at paragraph 10 which are subject to the maximum amount of a week's pay.
  - The maximum amount of a week's pay is updated to substitute the present amount, £540, set by the [Employment \(Maximum Amount of a Week's Pay\) Order 2016](#), for the amount presently at paragraph 10 of the Employment Act 2006 (£420).
  - Finally, there is a new power to amend the Schedule, which is technical in nature, by order. Such an order would require the approval of Tynwald.

## **PART 2 – AMENDMENT OF OTHER LEGISLATION**

633. Paragraph 35 amends the Redundancy Payments Act 1990 (RPA).
634. Subparagraph 1 is introductory.
635. Subparagraph 2 amends section 11 of the [Redundancy Payments Act 1990](#) [Transfer of business] to clarify the intended meaning of the section and, in particular, that a transfer of a business from one person to another for the purposes of which a person is employed may apply regardless of whether the business which is being transferred has been carried on by the person's employer. The intention is to confirm that a service transfer provision (i.e. when an organisation engages a contractor to provide a service on its behalf changes the contractor or brings the service back in-house) falls within the scope of section 11.<sup>23</sup> This means broadly that when there is a changeover

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<sup>23</sup> Subsequent to the passage of the Bill through the Legislative Council, additional work was undertaken on these provisions and further legal advice was received. While the amendments included in the Bill probably do cover all the likely cases of outsourcing or insourcing, DED has been advised that to put the matter beyond doubt a new section 11A which deals specifically with service

of contractor and an employee of the old contractor is employed by the new contractor on the same terms and conditions he or she will not be entitled to a redundancy payment.<sup>24</sup> It is to be noted that the employee will retain “continuous employment” built up with the first contractor under Schedule 5, paragraph 8(2) of the Employment Act 2006 [see paragraph 631 above].

636. Subparagraph 2 also clarifies that for the purposes of section 11 a “business” includes a trade or undertaking; and part of a business, trade or undertaking.
637. Subparagraph 3 amends section 25(2) of the Redundancy Payments Act 1990 [Payments out of the Manx National Insurance Fund to employees] to remove a requirement that an employee claiming a payment from the Manx National Insurance Fund in the event of the employer’s insolvency must have been subject to Class 1 national insurance contributions. The effect of this is that some part-time employees, previously excluded from eligibility to receive payments from the Fund will become eligible.
638. Subparagraph 4 updates references to social security legislation.
639. Subparagraph 5 amends section 38 [restrictions on contracting out] which prohibits employees from contracting out of the rights conferred by the Bill. The amendment makes a new exception in the case of an agreement which is concluded with the assistance of an industrial relations officer. This makes the position consistent with other Isle of Man employment law.
640. Subparagraph 6 gives the Treasury enabling powers to abolish or modify redundancy rebates by order. Such rebates are paid to small employers out of the Manx National Insurance Fund. An order would require the approval of Tynwald.
641. Subparagraph 7 makes an amendment consequential to the Equality Bill.
642. Sub-paragraph 8 inserts a new paragraph into Schedule 1 of the Redundancy Payments Act 1990 [Calculation of redundancy payments] to change the basis of the calculation of a redundancy payment. Under the existing legislation an award is calculated on the basis of 1 week’s pay times the number of years of continuous employment up to the effective date of termination. Sub-paragraph 18 amends the calculation basis so that the number of years of continuous employment to be used in the calculation is to be capped at 26. (This is intended to balance the removal of the upper age limit for entitlement to a payment). [Compare to paragraph 614 above].
643. Paragraph 36 makes amendments to the [Shops Act 2000](#). The significant amendments to that Act are as follows:

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provision changes should be inserted into RPA and some consequential amendments should be made.

<sup>24</sup> If the transferee, before the termination, makes an employee an offer to renew his contract or to re-engage him or her under a new contract and the renewal or re-engagement takes effect not more than 4 weeks after the termination, then –

- if the employee accepts the offer, he or she is treated as not having been dismissed by the transferor (and therefore is not entitled to a redundancy payment);
- if the offer is of suitable employment and the employee unreasonably refuses it (or unreasonably terminates the contract within a trial period of 4 weeks, if the new contract terms differ from the old), he or she will lose the right to a redundancy payment.

- The Department of Economic Development is given a new power to amend the definition of “retail trade or business” in section 1(1) of the Act by order. Such an order requires the approval of Tynwald.
- Two new subsections are added to section 19 of the Act [Tribunal remedies for breach of the Act]. These limit the amount of compensation that can be awarded to a worker who has suffered a detriment (including termination of his or her contract) to the sum of the basic award and the compensatory award that could be awarded to an employee on a finding of unfair dismissal. [Compare to paragraph 605 above].
- Section 20 [Restrictions on shop workers’ contracting out of their rights in respect of Sunday working] is amended to allow an exception in the case of an agreement which is concluded with the assistance of an industrial relations officer. This makes the law in respect of contracting out consistent with other Isle of Man employment law.

644. Paragraph 37 makes amendments to the [Minimum Wage Act 2001](#). The significant amendments to that Act are as follows:

- Under Section 4 of the Minimum Wage Act 2001 the Department of Economic Development may make regulations preventing specified categories of persons from qualifying for the minimum wage or prescribing an hourly rate for the minimum wage other than the single hourly rate. The amendment broadens the existing category of persons over the age of 25 who are attending a course of further education who require attendance for a period of work experience to include a course of higher education.
- Section 21(7)(b) of the Act (remedies) is amended to limit the amount of compensation that can be awarded to a worker who has suffered a detriment (including termination of his or her contract) to the sum of the basic award and the compensatory award that can be awarded to an employee on a finding of unfair dismissal. [See also paragraph 605 above].
- Section 37 [voluntary workers] is amended to make additional provision about voluntary workers. Voluntary workers are a special class of workers who are exempt from the Minimum Wage Act 2001. Paragraph 36(4) amends section 37 of the Act to broaden the type of expenses which can be paid to voluntary workers without triggering entitlement to the minimum wage to include expenses which are incurred in order to enable the voluntary worker to perform his or her duties and are reasonably so incurred. As with expenses incurred in the performance of duties, both expenses which have actually been incurred and expenses which have been reasonably estimated as likely to be or to have been so incurred can be paid to voluntary workers without triggering entitlement to the minimum wage. New subsection (1A) provides that accommodation expenses cannot be paid to voluntary workers. The effect of this amendment is to maintain the existing treatment of accommodation expenses under the Minimum Wage Act 2001. Whilst accommodation expenses cannot be paid, under section 37 such accommodation as is reasonable in the circumstances of the employment can be provided directly to voluntary workers without triggering entitlement to the minimum wage.

645. Paragraph 38 amends the [Control of Employment Act 2014](#).

646. Subparagraph (1) amends section 4 of the Act [Isle of Man workers] to create a new category of Isle of Man worker for the purposes of the [Control of Employment Act](#)

[2014](#). Under new subsection 8A a person is an Isle of Man worker if he or she is the grandchild of a person who —

- (a) was born in the Island, and
- (b) was ordinarily resident in the Island for an unbroken period of at least 5 years immediately following the birth.

647. Sub-paragraph (2) amends section 9(1)(b) of the Act to extend the right to a spouse / civil partner permit to spouses and civil partners of persons from outside the European Economic Area who are working in the Isle of Man under the Points Based System. The Department of Economic Development may prescribe exceptions to the general rule. Under section 9 of the Control of Employment Act 2014 [spouse / civil partner permits] where a work permit holder or exempt person is engaged in permanent, regular full-time employment (referred to as “the primary employment”), his or her spouse or civil partner is, upon application, entitled to a work permit, often referred to as “a spouse/civil partner permit”. A spouse/civil partner permit is granted for a year at a time, beginning with the date on which it is granted or renewed and it can be used in any employment.
648. Sub-paragraph (3) re-enacts section 14(1) of the Control of Employment Act 2014. The purpose of the amendment is to clarify that a decision to grant a permit but in terms which differ from those in respect of which a person applied for the permit is subject to appeal.

## **SCHEDULE 22 CONSEQUENTIAL AND MINOR AMENDMENTS**

649. This Schedule sets out a number of amendments to Acts of Tynwald which are either consequentially required as a result of the main provisions of the Bill or which are fairly minor in nature (including some corrections). The Acts are the Douglas Municipal Corporation Act 1895, Housing (Miscellaneous Provisions) Act 1976, Marriage Act 1984, Licensing Act 1995, Road Transport Act 2001, Construction Contracts Act 2004, Tribunals Act 2006, Civil Partnership Act 2011, Social Services Act 2011 and Regulation of Care Act 2013.
650. These amendments are mostly necessary to ensure that these Acts refer accurately to the new provisions contained in the Bill and work properly with those new provisions.
651. The amendment to the [Douglas Municipal Corporation Act 1895](#) substitutes a gender neutral term for the pronoun “He”.
652. The amendment to the [Housing \(Miscellaneous Provisions\) Act 1976](#) is to ensure the Department of Infrastructure has sufficient powers to assist with adaptations to a disabled person’s home now that responsibility for housing rests with that Department.
653. Section 31 of the [Marriage Act 1984](#) (which concerns the solemnization in a registered building of a marriage according to the usages of the church, denomination or religious body of which the building is a place of public religious worship) is amended so that the marriage cannot be solemnised in the building without the consent of the minister or one of the trustees, owners, deacons or managers of the building; or in the case of a building of the Roman Catholic Church, without the consent of the minister of the registered building.

654. The amendment to section 35 of the [Licensing Act 1995](#) is to ensure it is clear that the powers in subsections 35(1) and (2) to refuse entry to, or expel a person from, licenced premises without giving a reason are not to be used if the refusal or expulsion is incompatible with the provisions of the Bill. Licensees and their agents will be subject to the provisions of the Bill in respect of the prohibition of discrimination on the grounds of the protected characteristics in the same way as other providers of goods and services. However, without this amendment the exercise of the powers in section 35(1) and (2) in the absence of having to give a reason might be seen as a potential loophole in the requirement on providers of goods and services not to discriminate on the grounds of a protected characteristic. For the avoidance of doubt, the amendment does not require a licensee or his or her agents to provide a reason when refusing to admit a person or when asking a person to leave licenced premises.

#### Examples

- A black man is refused entry to a public house. No reason is given, or required to be given, for the refusal by the door staff. The man believes he has been discriminated against because of his colour and he later makes a claim of discrimination on the grounds of race to the Employment and Equality Tribunal. The licensee is able to show that all door staff have been made aware that they must not exercise their powers to refuse entry, without giving a reason, in a way that conflicts with the Equality Bill and also that the man has been abusive to bar staff on previous occasions. The Tribunal will consider the facts before it and come to a decision.
- The licensee of a pub refuses to serve a man who has cerebral palsy because she believes that he is drunk as he has slurred speech. However, the slurred speech is a consequence of his impairment. If the licensee is able to show that she did not know, and could not reasonably have been expected to know, that the customer was disabled, she has not subjected him to discrimination arising from his disability.

655. Section 37 of the [Road Transport Act 2001](#) is amended to provide additional powers in respect of the obligation to carry passengers in relation to disabled persons with assistance dogs.

656. The amendment to the [Construction Contracts Act 2004](#) is to update an outdated reference.

657. The [Tribunals Act 2006](#) is amended to reflect the new name (and expanded remit) of the current Employment Tribunal.

658. Section 7 (place of registration) of the [Civil Partnership Act 2011](#) is amended to make a minor correction; make further provision in respect of the guidance to be taken into account as to which a place may be registered; and to confirm, for the avoidance of doubt, that a religious organisation is not obliged to permit the use of its premises for the purposes of civil partnership ceremonies if it does not wish to do so.

659. The [Social Services Act 2011](#) is amended to remove a reference to the Disabled Persons (Employment) Act 1946 (which is repealed by Schedule 23 as it is redundant).

660. A typographical error in the [Regulation of Care Act 2013](#) is corrected.

## **SCHEDULE 23 REPEALS AND REVOCATIONS**

661. This Schedule lists the legislative provisions which will cease to have effect when the relevant provisions in the Bill come into force.
662. In addition to the enactments which are consequentially repealed because of the equality provisions of the Bill or because they are inconsistent with those provisions, certain employment law provisions are repealed as follows:
- In the [Minimum Wage Act 2000](#), section 43(2)(b) is repealed to remove “compromise agreements” as an exception to the non contracting out rule. This makes the position consistent with all other Isle of Man employment law, i.e. the only exception that is permitted is in the case of a conciliated settlement concluded with the assistance of the Manx Industrial Relations Service.
  - In the [Employment Act 2006](#) Part XII (including Schedule 3) [Resolution of Disputes Relating to Employment] is repealed and substantially re-enacted with necessary modifications in Part 9 of the Equality Bill. A replacement section 156 [the Employment and Equality Tribunal] is inserted by section 101(2) of the Equality Bill.
  - Section 172 of the Employment Act 2006 [Publication of employees’ rights] is repealed as the requirement to publish information in newspapers has been superseded by technological developments.
  - Paragraphs 14 to 19 of Schedule 7 to the Employment Act 2006 are also repealed. These are old transitional provisions which are now redundant.

## **SCHEDULE 24 GLOSSARY**

663. This Schedule lists words and expressions which are defined in the Bill.
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<b>DEPARTMENT: Cabinet Office</b>		
<b>IMPACT ASSESSMENT OF: Equality Bill</b>		
<b>Stage: Post Consultation</b>	<b>Version: 2.2</b>	<b>Date: 03/11/16</b>
<b>Related Publications:</b>		
<b>Responsible Officer: Anne Shimmin</b>		
<b>Email Address: anne.shimmin@gov.im</b>		<b>Telephone: 685202</b>

## **SUMMARY: INTERVENTION AND OPTIONS**

### **Briefly summarise the proposal's purpose and the intended effects**

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

The Bill will, subject to certain objectively justifiable exceptions, prohibit discrimination against persons on the grounds of any of the following "protected characteristics":

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

The Bill will cover discrimination in relation to all aspects of employment (from recruitment to dismissal) and also the provision of "goods and services" in their broadest sense, including education, benefits, health care and social care, housing, retail services, insurance, transport, and pensions.

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

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

### **What are the options that have been considered?**

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

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

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

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

**Link to Government Strategic Plan**

**Protect the Vulnerable**

**Link to Department/Statutory Board/Office Aims and Objectives**

**Responsible Departmental Member**

**Chief Minister**

**Ministerial sign off**

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

Signed by the Responsible Minister

Date:

## **SUMMARY: ANALYSIS AND EVIDENCE**

### **IMPACT OF PROPOSAL**

#### **Resource Issues - Financial (including manpower)**

##### **Statement**

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

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

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

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

In other words, in the UK it is believed that equality legislation results in an overall ongoing financial benefit rather than a cost but the range of possible cost benefits varied by a huge amount.

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

In addition, as a result of the Tynwald Resolution on the commencement of the Disability Discrimination Act 2006, any costs in relation to reasonable adjustments for disabled persons in respect of the provision of goods and services and public functions can no longer be attributed to this Bill (which would still in due course supersede and repeal the DDA).

In relation to the potential costs that might arise out of the implementation of equal pay for work of equal value (which the Island is under an international obligation to implement), it is impossible to predict what the costs might be. Although there have been some well-known long running and costly cases in the UK, the employer will have a defence if it can demonstrate that the variation in the compared employees' terms is due to a material factor:

- that does not involve treating one less favourably because of his or her sex; and
- that is still objectively justified (as being 'a proportionate means of achieving a legitimate aim') even if puts the complainant's sex at a relative particular disadvantage.

This may be the case, for example, where there has been "red circling" or pay protection for existing employees to safeguard jobs when an organisation has re-structured its pay arrangements for new entrants. While English case law would be persuasive it would not be binding in the Island. For this reason in order to provide great certainty of the position a power has been included in the Bill for the DED to make further provision by Regulations as to what constitutes (or does not constitute) a proportionate means of achieving a legitimate aim for the purposes of the relevant provision of the Bill (see clause 60). This is a provision which does not exist in the Equality Act 2010.

#### Likely Financial Costs

##### One off costs

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

If the principle of a limited term appointment is accepted (along the lines of the arrangements which were made to assist with the implementation of the Employment (Sex Discrimination) Act 2000 and the Human Rights Act 2001), this post might be graded at SEO level so that the person could be expected to largely work on their own initiative in preparing and presenting guidance materials, advice, briefings, etc. for Government, employers and the public. This person would also be responsible for co-ordinating the various relevant parts of Government in the preparation of the secondary legislation that would be necessary for the implementation of the Act. It is therefore proposed that the role should be based in the Cabinet Office.

Currently the starting point of the pay band 25 (SEO) scale is £43,846<sup>25</sup> so over a 2-year limited term appointment total salary costs may around £90,000 (allowing for one increment progression excluding pension scheme costs, employer NI, etc.

##### Average annual costs (excluding one off costs)

Certain reasonable adjustments for persons with a disability will have a cost to them – in 2014 it was reported that the average cost in the UK for each employee with a disability who needed a reasonable adjustment was £75<sup>26</sup>. Even if this figure were to be something of an underestimate and taking into account inflation a figure of £100 might be an average. Some adjustments will cost nothing of course and some will be more expensive. Each case must be considered on its merits but

<sup>25</sup> As of 1 April 2016 under the terms for new entrants and promotions.

<sup>26</sup> <http://www.peoplebusiness.co.uk/news.asp?ArticleID=59> – February 2014

the size of an organisation and the cost of a possible adjustment are amongst the factors that can be taken into to consideration when deciding whether an adjustment would be "reasonable"<sup>27</sup>.

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

Tribunals Administration in the General Registry has advised that from the figures available the estimated average cost of recruiting a member of a tribunal currently stands at £193.08. This is based on the costs per year of the Appointments Commission divided by the number of appointments made that year and does not factor in any consideration of the duration for which such appointments are made (which was recently generally increased from three to five years).

The average costs incurred across all Employment Tribunal cases dealt with during 2015 (Jan. to Dec. inclusive) was £1,991.51, such costs including the Chairman and members' expenses for attendance and mileage plus the cost of the Chairman's preparation for the hearing and Decision writing, but excluding staff and accommodation costs. This average figure was somewhat distorted by two particularly complex cases which required substantive hearings during 2015 of 8 days (plus 2 directions hearings) and 5 days' duration respectively, and for which the costs incurred during 2015 were £23,647.16 and £10,059.91 respectively (further costs for one of those cases were also incurred in the previous two years which have not been included here). If the costs of these two cases are removed the average for the remaining cases dealt with during 2015 was £1,229.36.

The Tribunals Administration suggested that although exceptional in the current legislative climate, the two cases referred to above perhaps give some indication of the higher levels of costs and time commitment that can arise where more complex cases come before the Tribunal.

Depending on the additional number of equality related employment and good and services cases that the Manx Industrial Relations Service (MIRS) and the Office of Fair Trading (OFT) may have to deal with for mediation/conciliation, it might be necessary to look at additional resources for these bodies. While there are no present plans to increase the establishment of the OFT at this time, the MIRS is being restructured so that the establishment of industrial relations officers will increase from 2 to 2.5 full time equivalent posts though there will be the loss of some administrative resource.

As referred to above, as a result of the Tynwald Resolution on the commencement of the Disability Discrimination Act 2006, any costs in relation to reasonable adjustments for disabled persons in respect of the provision of goods and services and public functions can no longer be attributed to this Bill (which would still in due course supersede and repeal the DDA).

#### Likely Financial Benefits

One off benefits -

Average annual benefits (excluding one off)

Assisting disabled persons to be able to contribute more fully in employment and be less reliant on public benefits is likely to be of an overall benefit to public finances. It has been estimated that 10% of the Island's population has some form of disability, and this population ranges across all social and economic groups. To ignore the potential spending power of this part of the Island's community in being able to access goods and services, together with that of their families and friends, would fail to recognise the potential positive economic impact which implementation of the Bill could bring to a range of organisations and businesses – not least in terms of retail, tourism and leisure, and in relation to employment and the consequential impact on the demand for benefits.

Similarly, enabling older workers to continue working longer is likely to be of benefit to both the

<sup>27</sup> <http://www.equalityhumanrights.com/private-and-public-sector-guidance/employing-people/workplace-adjustments/what-meant-reasonable>

Government in relation to tax and NI payments and to the Island's economy as a whole by boosting the spending power of older persons and increasing the percentage of the economically active population.

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

A number of the employment law amendments set out in Schedule 21 to the Bill have the potential to generate significant savings for Government. These include:

- enabling powers for Treasury to abolish redundancy rebates to small employers. This could lead to savings of between £150,000 to £200,000 per annum if Treasury were to bring forward Regulations abolishing rebates (the UK has long abolished such rebates);
- imposition of a maximum amount of a week's pay on certain payments (unpaid wages, holiday pay etc.) made by the Treasury to employees of employers that are insolvent or that have left the Island. (From 2013-15 Treasury made payments of more than £600,000 in total from the Manx National Insurance Fund to such employees);
- amendment of provisions in the Redundancy Payments Act 1990 (RPA) regarding transfer of a business and Schedule 5 of the Employment Act 2006 [Computation of period of employment] so that a transfer of a business from one person to another for the purposes of which a person is employed may apply regardless of whether the business which is being transferred has been carried on by the person's employer and so that a service transfer provision, (i.e. when an organisation engages a contractor to provide a service on its behalf, changes the contractor or brings the service back in-house) will definitely fall within the scope of the RPA. So where there is a changeover of contractor and an employee of the old contractor is employed by the new contractor on broadly the same terms and conditions the employee will retain any continuous employment built up with the old contractor for employment rights purposes but will not be entitled to a redundancy payment. This has the potential to produce savings for Government because (a) it allows tenderers contracting for services to submit lower bids (because any redundancy costs are likely to be lower should they subsequently lose a contract to another contractor) and (b) where the Government agrees to underwrite any future redundancy costs of contractors in the eventuality of their losing a contract to an alternative contractor when competitive tendering next takes place, those costs are likely to be lower as the transfer of workers from one contractor to another will be facilitated by the changes in the legislation and redundancy is less likely to take place;
- a new provision whereby an employee of a Department, Statutory Board or an office of the Government, who is not an employee of the Public Services Commission, may be transferred to another Department, Statutory Board or office and retain the continuous employment built up with the first employer. (If there is continuity of employment there can be no question of redundancy because the worker is treated as never having ceased employment).

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

All parts of Government will need to be familiar with this legislation. All parts of Government were included in the consultation which has taken place.

The legislation may result in some additional mediation/conciliation cases for the Manx Industrial Relations Service (MIRS) in respect of equality related employment cases. However, MIRS has already undergone some restructuring in anticipation of the new legislation.

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

There could be some slight increase in work for the Appointments Commission in appointing

additional members for the Employment and Equality Tribunal (an expanded Employment Tribunal) and for experts in equal pay for work of equal value cases<sup>28</sup>. Potentially there may be some additional cases for the Tribunal itself but the Bill will also include enabling powers to allow for some fees to be charged.

The Tribunals Administration has suggested that the following points should be considered:

- impact of the potential increased caseload and processing impacts upon the small Tribunals' team of 3 staff for which, despite increasing numbers of Tribunals<sup>29</sup> staffing level has been unchanged since 2007;
- possible impact upon listing times etc. for applications to the Tribunal;
- availability, selection & potential conflict issues relating to individual members of Tribunal Panels due to increased volumes and the longer duration of hearings;
- the potential cost of expert contributions for equal pay determinations ;
- specific training implications for chairpersons and members of the Tribunal, particularly in discrimination and equal pay matters;
- the question of whether Tribunal matters will be added to the list of proceedings for which civil legal aid is available and any financial impact on the Legal Aid Appeals Tribunal; and
- the possible need for an increased budget for the effective operation of the Tribunal generally.

There will be new provisions intended to deal with any vexatious claims. Further, new Tribunal Rules, which will be required in due course, are likely to substantially increase the costs that may be awarded by the Tribunal in certain circumstances while it is also possible that moderate 'threshold' fees to bring a complaint to the Tribunal may be introduced. And finally the Bill provides powers to make Rules which would allow the Chair to sit alone in respect of a wider range of cases (such as a claim for unpaid holiday pay under the Annual Leave Regulations 2007) than is the case at present, which should again help to drive down Tribunal costs.

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

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

The confirmation that the Island is a modern jurisdiction where the rights of all persons are respected in relation to employment and other areas of life will both safeguard the Island's reputation and may help it attract high quality workers and investors and meet their expectations.

The Bill will allow the Island to comply with existing and future international obligations related to human rights, in particular under United Nations conventions which apply to the Island or which have been ratified by the UK and which may be extended to the Island at the request of the Isle of Man Government in the future.

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

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

Does the proposal comply with privacy law? Please provide a brief statement as to any issue of privacy or security of personal information.

<sup>28</sup> It should be noted, however, that it is envisaged that the provisions of the Bill relating to equal pay for work of equal value will not be brought into operation until two years after the Bill has received Royal Assent.

<sup>29</sup> It is envisaged, however, that when there is a suitable legislative vehicle the four tribunals which can currently hear appeals against decisions of the Isle of Man Financial Services Authority should be consolidated into a single tribunal.

The Bill should not give rise to any issues concerning the privacy or security of personal information.

Has Treasury Concurrence been given for the preferred option?

Yes

Date of Treasury Concurrence: 3 February 2016

#### Key Assumptions / Sensitivities / Risks

Although discrimination, harassment and victimisation against people undoubtedly takes place in the Island, the extent of any discrimination is sometimes disputed - "We don't have a problem with that here, so we don't need any legislation".

Some people may argue that legislation for equality/against discrimination that may take place is unnecessary and people should just deal with it through "common sense".

The length and comprehensive nature of the Bill may be off-putting to some people. Careful explanation of the Bill will be needed, including presentations to Members, etc.

It is assumed that the Island should implement international conventions that it has accepted and work towards adopting accepted international standards that do not currently apply.

There is now a public and political expectation that the Equality Bill will be progressed, particularly its disability provisions, (the DDA deals only with employment and not goods and services) and there is risk of some frustration and discontent if expectations are not met..

The Bill may be seen by some as promoting the rights of certain groups above those of others. Although this is neither the purpose nor effect of the Bill in reality, UK and European Court of Human Rights case law has sometimes been portrayed in this way by sections of the UK media.

Costs in relation to reasonable adjustments for disabled persons in the provision of goods and services and public functions can no longer be attributed to this Bill due to the phased commencement of the Disability Discrimination Act 2006 following the Tynwald Resolution on bringing that Act into operation.

Approximate date for legislation to be implemented if known

It is hoped that the Bill can receive Royal Assent by July 2017.

#### **SUMMARY: CONSULTATION**

Consultation in line with Government standard consultation process Yes

Date  
1<sup>st</sup> Consultation 14/2/14 – 4/4/14  
(Government internal only)

2<sup>nd</sup> Consultation - 11 August 2014 - 28 November 2014

Summary of Responses:

The majority of the responses were largely supportive of the proposed legislation.

The Government response to consultation document and the text of the responses can be found at: <https://www.gov.im/ConsultationDetail.gov?id=454>

## EVIDENCE BASE

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

The Government response to consultation document and the text of the responses can be found at: <https://www.gov.im/ConsultationDetail.gov?id=454>

Some relevant background can be found at:

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

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

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

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

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

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

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

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

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

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