

# EQUALITY ACT 2010

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 5: Work**

#### *Chapter 1: Employment, etc.*

#### *Section 39: Employees and applicants*

##### **Effect**

143. This section makes it unlawful for an employer to discriminate against or victimise employees and people seeking work. It applies where the employer is making arrangements to fill a job, and in respect of anything done in the course of a person's employment. In respect of discrimination because of sex or pregnancy and maternity, a term of an offer of employment which relates to pay is treated as discriminatory where, if accepted, it would give rise to an equality clause or if an equality clause does not apply, where the offer of the term constitutes direct or dual discrimination. It also imposes the reasonable adjustments duty set out in section 20 on employers in respect of disabled employees and applicants.

##### **Background**

144. This section replaces similar provisions in previous legislation.

##### **Examples**

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

#### *Section 40: Employees and applicants: harassment*

##### **Effect**

145. This section makes it unlawful for an employer to harass employees and people applying for employment. It also makes the employer liable for harassment of its employees by third parties, such as customers or clients, over whom the employer does not have direct control. Liability in relation to third party harassment will however only

arise when harassment has occurred on at least two previous occasions, the employer is aware that it has taken place, and has not taken reasonable steps to prevent it happening again.

## **Background**

146. This section is designed to replicate the effect of provisions in the Sex Discrimination Act 1975 as regards harassment by employers, and extend to the other protected characteristics (apart from marriage and civil partnership and pregnancy and maternity) the position in relation to employer liability for sex harassment under that Act.

## **Example**

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

## **Section 41: Contract workers**

### **Effect**

147. This section makes it unlawful for a person (referred to as a principal) who makes work available to contract workers to discriminate against, harass or victimise them. Contract workers are separately protected from discrimination by their employer (for example, the agency for which they work and which places them with the principal) under section 39. This section 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).

## **Background**

148. This section is designed to replicate the effect of provisions in previous legislation, while codifying case law to make clear that there does not need to be a direct contractual relationship between the employer and the principal for this protection to apply.

## **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.

## **Section 42: Identity of employer**

### **Effect**

149. This section provides that police constables and police cadets are treated as employees for the purposes of this Part of the Act. It identifies the relevant employer as either the chief officer (or, in Scotland, the chief constable) or the responsible authority as defined in section 43, depending on who commits the act in question.
150. Constables serving with the Civil Nuclear Constabulary are treated as employees of the Civil Nuclear Police Authority.
151. A constable seconded to the Serious Organised Crime Agency (SOCA) or Scottish Police Services Authority (SPSA) is treated as employed by SOCA or SPSA.

152. A constable at the Scottish Crime and Drugs Enforcement Agency (SCDEA) is treated as employed by the Director General of SCDEA.

### **Background**

153. This section is designed to replicate the provisions in previous legislation and extends coverage to constables at SPSA and SCDEA. It also removes the requirement to pay out of police funds compensation and related costs arising from the personal liability of chief officers (or in Scotland, chief constables) for acts which are unlawful under the Act. Payments of compensation and related costs arising from the personal liability of chief officers (or in Scotland, chief constables) will instead be dealt with by the Police Act 1996 and the Police (Scotland) Act 1967, as for all other police officers.

### **Example**

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

### **Section 43: Interpretation**

#### **Effect**

154. This section explains what is meant by terms such as “chief officer” and “relevant Act” used in section 42.

#### **Background**

155. This section replaces similar provisions in previous legislation, but includes some additional terms, such as those relevant to the SPSA and SCDEA.

### **Section 44: Partnerships**

#### **Effect**

156. This section 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.
157. 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).

#### **Background**

158. 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. This section is designed to replicate the effect of provisions in previous legislation but also to provide consistent protection in respect of race (whereas previously the protection of colour and nationality differed in some respects from that of race and ethnic or national origin).

#### **Example**

- 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.

## **Section 45: Limited liability partnerships**

### **Effect**

159. This section makes it unlawful for a limited liability partnership (LLP), or a group of people setting up an LLP, to discriminate against, harass or victimise a member (or prospective member). Activities covered by these provisions include offers of membership or access to opportunities that the LLP makes available to its members. It imposes on LLPs a duty to make reasonable adjustments for disabled members and prospective members.

### **Background**

160. LLPs are distinct from general and limited partnerships, so separate provisions are needed to provide protection from discrimination, harassment and victimisation for their members. This section is designed to replicate the effect of provisions in previous legislation but also to achieve the same consistency in respect of race as is provided in section 44.

### **Examples**

- An LLP refuses a member access to use of a company car because he has supported a discrimination or harassment claim against the LLP. This would be victimisation.
- An LLP refuses a Muslim member access to its child care scheme because all the other children who attend the scheme have Christian parents. This would be direct discrimination.

## **Section 46: Interpretation**

### **Effect**

161. This section explains what is meant by terms used in sections 44 and 45. As well as defining the types of partnership to which these provisions apply, it establishes what is meant by expulsion from a partnership.

### **Example**

- A gay partner in a firm who, because of constant homophobic banter feels compelled to leave his position as a partner, can claim to have been expelled from the partnership because of his sexual orientation. Should an employment tribunal agree with him, the firm could be found to be in breach of these provisions in a similar way to how the employment tribunal would find for an employee who wins a claim for constructive dismissal.

## **Section 47: Barristers**

### **Effect**

162. This section makes it unlawful for a barrister or a barrister's clerk to discriminate against, harass or victimise a pupil (a trainee barrister) or tenant (including a squatter or door-tenant) in the barristers' chambers, or people seeking to be a pupil or tenant, in relation to the professional relationship between them. It also imposes on barristers a duty to make reasonable adjustments for disabled pupils and tenants.
163. It also makes it unlawful for a person instructing a barrister (for example, a client or instructing solicitor) to discriminate against, harass or victimise a barrister in relation to the giving of instructions.

### **Background**

164. This section replaces provisions in previous legislation providing similar protection for barristers, pupils, tenants and prospective pupils or tenants in barristers' chambers.

However, it no longer protects clients and clerks from discrimination by barristers because they can respectively seek redress under the “services” provisions or under other work provisions (section 39 and section 41) of the Act.

### **Examples**

- A barrister treats a female pupil less favourably than his male pupils by allowing her to be involved in a narrower range of cases, because of assumptions about the kind of cases women can handle competently. This would be direct discrimination.
- A clerk gives instructions to a Christian barrister in his chambers in preference to a Hindu barrister, because he fears that the barrister’s religion would prevent him representing a Christian client properly. This would be direct discrimination.

### **Section 48: Advocates**

#### **Effect**

165. This section makes it unlawful for practising advocates and their clerks to discriminate against, harass or victimise devils (trainee advocates) or members of the stable (a group of advocates working in shared premises) or people seeking to be a devil or member, in respect of the professional relationship between them. It imposes on advocates a duty to make reasonable adjustments for disabled devils and stable members.
166. It also makes it unlawful for a person instructing an advocate (for example, a direct access client or instructing solicitor) to discriminate against, harass or victimise an advocate in relation to the giving of instructions.

#### **Background**

167. This section replaces similar provisions in previous legislation. However, as with the section on barristers, this section no longer protects clients and clerks from discrimination by advocates because they can respectively seek redress under the “services” provisions or under other work provisions (section 39 and section 41) of the Act.

### **Examples**

- An advocate treats one devil less favourably than another by refusing to allow him to be involved in a particular case because he fears the devil’s sexual orientation may affect his involvement in the case. This would be direct discrimination.
- An advocate puts pressure on a stable member to leave because the member is disabled and the advocate does not want to make reasonable adjustments. This would be direct discrimination.

### **Section 49: Personal offices: appointments, etc.**

#### **Effect**

168. This section makes it unlawful to discriminate against, harass or victimise people who are or wish to become personal office-holders. These provisions apply in so far as other work provisions do not – this means that where office-holders are also employees, they will be protected by the provisions dealing with employment in respect of their employment relationship. In respect of sex or pregnancy and maternity discrimination, a term of an offer of an appointment to office which relates to pay is treated as discriminatory where, if accepted, it would give rise to an equality clause or, if that is not the case, where the offer of the term constitutes direct or dual discrimination.
169. 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). Section 52(4) provides that, where a personal office is a public office at the same time, it is to be treated as a public office only.

170. 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 section 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.
171. This section 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.

## **Background**

172. This section is designed to replicate the effect of provisions in previous legislation.

## **Examples**

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

## **Section 50: Public offices: appointments, etc.**

### **Effect**

173. This section 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 or if that is not the case where the offer of the term constitutes direct or dual discrimination.
174. Public office-holders are people appointed by, on the recommendation of, or with the approval of, a member of the executive branch of Government, such as a Government Minister, or people who are appointed on the recommendation, or subject to the approval of, either of the Houses of Parliament, the National Assembly for Wales, or the Scottish Parliament.
175. 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 section prohibits both the person with the power to make 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 (but does not include either of the Houses of Parliament, the National Assembly for Wales or the Scottish Parliament).
176. This section 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.

## **Background**

177. This section is for the most part designed to replicate the effect of provisions in previous legislation. It also extends protection from discrimination, harassment and victimisation to those appointed on the recommendation or approval of law-making bodies such as the Scottish Parliament and the Welsh Assembly.

## **Example**

- A Government Minister with the power to appoint the non-executive board members of a non-departmental public body fails to appoint a candidate because he is gay. This would be direct discrimination.

## **Section 51: Public offices: recommendations for appointments, etc.**

### **Effect**

178. This section 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 office- holders 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.
179. This section does not apply in respect of all public offices, only those to which the appointment is made on the recommendation or approval of a member of the executive or where the appointment is made by a member of the executive on the recommendation or approval of a relevant body (for example, a non-departmental public body).

## **Background**

180. This section is for the most part designed to replicate the effect of provisions in current legislation. It also extends protection from discrimination, harassment and victimisation to those appointed by a member of the executive on the recommendation or with the approval of a non-departmental public body (in respect of that appointment or recommendation).

## **Example**

- It would be direct discrimination for the Government Minister responsible for approving the appointment of members of the BBC Trust to refuse to approve the appointment of a person because he has a hearing impairment.

## **Section 52: Interpretation and exceptions**

### **Effect**

181. This section explains the meaning of various terms, such as “relevant person”, used in sections 49, 50 and 51. It provides that appointment does not include election, meaning elected offices will not constitute personal or public offices for the purpose of these sections.
182. 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.



### **Section 53: Qualifications bodies**

#### **Effect**

183. This section makes it unlawful for a qualifications body (as defined in section 54) 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.

#### **Background**

184. This section replaces similar provisions in previous legislation. It also extends the protection to cover discrimination in the arrangements made for determining upon whom a relevant qualification should be conferred.

#### **Examples**

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

### **Section 54: Interpretation**

#### **Effect**

185. This section explains the meaning of various terms used in section 53. In particular, it defines a qualifications body as a body which can confer any academic, medical, technical or other standard which is required to carry out a particular trade or profession, or which better enables a person to do so by, for example, determining whether the person has a particular level of competence or ability.
186. It also makes clear that bodies such as schools, institutions of further and higher education and education authorities which confer qualifications such as A Levels and GCSEs are not qualifications bodies for the purposes of section 53.

#### **Background**

187. This section is designed to replicate the effect of similar provisions in previous legislation.

#### **Example**

- Examples of qualifications bodies are the Public Carriage Office (which licenses cab drivers in London), the British Horseracing Authority and the General Medical Council. Also included is any body which confers a diploma on people pursuing a particular trade (for example, plumbers), even if the diploma is not strictly necessary to pursue a career in that trade but shows that the person has reached a certain standard.

### **Section 55: Employment service-providers**

#### **Effect**

188. This section 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. Employment services and vocational services are defined in section 56.

## **Background**

189. This section replaces the separate provisions for vocational training, employment agencies and assisting persons to obtain employment in previous legislation with a single provision covering all these aspects.

## **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.

## **Section 56: Interpretation**

### **Effect**

190. This section explains 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), for the purposes of section 55.

### **Example**

- Examples of the types of activities covered under this section include providing CV writing classes, English or Maths classes to help adults into work; training in IT/keyboard skills; or providing work placements.

## **Section 57: Trade organisations**

### **Effect**

191. This section 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.
192. A trade organisation is an organisation of workers (such as a trade union) or employers (such as the Chambers of Commerce); or an organisation whose members carry out a particular trade or profession (such as the British Medical Association, the Institute of Civil Engineers and the Law Society).

## **Background**

193. This section is designed to replicate the effect of similar provisions in previous legislation. It also extends the protection to cover discrimination in the arrangements made for determining to whom membership should be offered.

## **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.

### ***Section 58: Official business of members***

#### **Effect**

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

#### **Background**

195. This section extends protection previously in the Disability Discrimination Act 1995 to all protected characteristics.

#### **Example**

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

### ***Section 59: Interpretation***

#### **Effect**

196. This section explains the meaning of various terms used in section 58. In particular, it lists the various bodies which are included in the term "local authority" and provides a power for a Minister of the Crown to add to this list of bodies. It also explains what is meant by reference to the carrying-out of official business by members of a local authority.

#### **Example**

- A local authority member who is considering an application for planning permission while sitting on a council's Planning Committee would be undertaking "official business".

### ***Section 60: Enquiries about disability and health***

#### **Effect**

197. Except in the situations specified in this section, an employer must not ask about a job applicant's health until that person has been either offered a job (on a conditional or unconditional basis) or been included in a pool of successful candidates to be offered a job when a suitable position arises. The specified situations where health-related enquiries can be made are for the purposes of:
- finding out whether a job applicant would be able to participate in an assessment to test his or her suitability for the work;
  - making reasonable adjustments to enable the disabled person to participate in the recruitment process;
  - finding out whether a job applicant would be able to undertake a function that is intrinsic to the job, with reasonable adjustments in place as required;
  - monitoring diversity in applications for jobs;

- supporting positive action in employment for disabled people; and
  - enabling an employer to identify suitable candidates for a job where there is an occupational requirement for the person to be disabled.
198. The section also allows questions to be asked where they are needed in the context of national security vetting.
199. Where an employer makes a health or disability-related enquiry which falls outside the specified situations, he or she would be acting unlawfully under the Equality Act 2006. Together with Schedule 26, this section gives the Equality and Human Rights Commission (EHRC) an enforcement role. (Section 120(8) ensures that only the EHRC can enforce a breach of this provision.). This means, for example, that the EHRC would be able to conduct an investigation if there was evidence that a large employer might be routinely asking prohibited questions when recruiting.
200. Where the employer asks a question not allowed by this section and rejects the applicant, if the applicant then makes a claim to the employment tribunal for direct disability discrimination, it will be for the employer to show that it had not discriminated against the candidate.
201. As well as applying to recruitment to employment, the section also applies to the other areas covered by Part 5 of the Act, such as contract work, business partnerships, office-holders, barristers and advocates.

## **Background**

202. This is a new provision. The Disability Discrimination Act 1995 did not prevent an employer from making health- or disability- related enquiries of applicants for a job, although it did make it unlawful to use the result of such enquiries to discriminate against a candidate because of his or her disability. This provision will limit the making of 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 his health to establish whether he is able to do the job (with reasonable adjustments for a disabled applicant, if required). The employer would not be permitted to ask the applicant other health questions until he or she offered the candidate a job.

## **Chapter 2: Occupational pension schemes**

### **Section 61: Non-discrimination rule**

#### **Effect**

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

204. 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.
205. The rule does not apply to pension rights built up or benefits payable for periods of service before the commencement of this section. Periods of service prior to this date will be subject to the previous discrimination legislation.
206. Where there has been a breach of a non-discrimination rule, proceedings may be brought against the person responsible for the breach under Part 9 of the Act. The provisions in Part 9 do not prevent the investigation or determination of any matter in accordance with Part 10 of the Pension Schemes Act 1993 (investigations: the Pensions Ombudsman) by the Pensions Ombudsman as the Ombudsman's investigations are not legal proceedings.
207. Pension credit members are not protected from discrimination because their rights are derived from an order of the court, rather than directly from employment.
208. It would not be a breach of a non-discrimination rule if an employer or the trustees or managers maintain certain practices or make decisions in relation to age that are specified by order by Ministers.
209. The non-discrimination rule does not apply where an equality rule operates or would operate, but for the exceptions in Part 2 of Schedule 7.

## **Background**

210. Occupational pension schemes were already required by previous legislation to have non-discrimination rules in respect of age, disability, religion or belief and sexual orientation. This provision establishes non-discrimination rules in respect of race, gender reassignment, marriage and civil partnership, and sex.
211. Exceptions to the non-discrimination rule in relation to age were set out in Schedule 2 to the [Employment Equality \(Age\) Regulations 2006 \(SI 2006/1031\)](#).

## **Example**

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

## **Section 62: Non-discrimination alterations**

### **Effect**

212. This section 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 section 61.
213. 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.

### **Background**

214. This section is based on similar provisions which allowed trustees and managers to secure conformity with the non-discrimination rules in the Disability Discrimination

Act 1995, the Employment Equality (Religion or Belief) Regulations 2003, the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Age) Regulations 2006.

### **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.

### **Section 63: Communications**

#### **Effect**

215. This section applies to sections 61, 120, 126 and paragraph 19 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).

#### **Background**

216. This section replaces provisions in the Disability Discrimination Act 1995.

### **Chapter 3: Equality of terms**

### **Section 64: Relevant types of work**

#### **Effect**

217. **Chapter 3** of Part 5 of the Act 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.
218. This section explains that the sections mentioned which impose the equality clause and equality rule apply to employees, office-holders and, by virtue of subsection (3) of section 83, members of the armed forces, where one person's work is equal to the work of another.

#### **Background**

219. This is a new provision that is designed to clarify to whom the equality clause and equality rule provisions of the Act apply. It should be read together with section 79. The references to comparator (and its definition in section 79) clarify, but do not widen the choice of comparator available in previous legislation for the purpose of a claim for breach of an equality clause or rule. As was the case under previous law, a comparator has to be a real person and not a hypothetical one. Section 64(2) is a new provision which is intended to ensure that the effect of pre-existing case law *Macarthy's Ltd v Smith* (C 129/79; [1981] 1 All ER 111; [1980] ECR 1275) is maintained: 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.

## **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.

## **Section 65: Equal work**

### **Effect**

220. This section sets out when the work of two people, whose work is being compared, is taken to be equal so that an equality clause or equality rule can operate. For work to be equal, a claimant must establish that he or she is doing like work, work rated as equivalent or work of equal value to a comparator's work. The section 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.

### **Background**

221. This section is designed to replicate the substance of definitions contained in the Equal Pay Act 1970.

## **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.

## **Section 66: Sex equality clause**

### **Effect**

222. This section requires that a sex equality clause be read into the terms under which people are employed. The effect of this is that any term in the contract which is less favourable than that of the comparator of the opposite sex is modified so as to ensure that both have the same effect. Where the comparator benefits from a term which is not available to the employee, the effect of the sex equality clause is to include such a term in the employee's contract of employment.
223. A sex equality clause will operate similarly on the terms of a person who is an appointee to an office or a member of the armed forces, as it does in relation to an employee.
224. Subsection (3) is intended to ensure that the provisions relating to equality of terms at work and the provisions governing pension schemes in sections 67 and 68 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.
225. 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.

### **Background**

226. This section is designed to replicate the effect of definitions contained in the Equal Pay Act 1970.

### **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.

### **Section 67: Sex equality rule**

#### **Effect**

227. This section requires that every occupational pension scheme is to have a sex equality rule read into it.
228. 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.
229. 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 17 May 1990. This was the date of the European Court's decision in *Barber v Guardian Royal Exchange Assurance Group* (C 262/88; [1991] 1 QB 344; [1990] ECR I-1889), which established that occupational pensions were pay for the purposes of what was Article 119 of the Treaty of Rome (now Article 157 of the Treaty on the Functioning of the European Union). Where the application of the rule relates to the terms on which a person becomes a member of the scheme, it has effect from 8 April 1976. This was the date of the judgment in *Defrenne v Sabena* (C 43/75; [1981] 1 All ER 122; [1976] ECR 455), where the Court, in holding that the principle of equal pay was directly effective, indicated that what was Article 119 of the Treaty of Rome should not be applied to periods of service prior to the judgment.
230. 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 of the Act.

### **Background**

231. The section replaces equivalent equal treatment provisions in section 62 of the Pensions Act 1995.

### **Example**

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

### **Section 68: Sex equality rule: consequential alteration of schemes**

#### **Effect**

232. This section 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 section 67.



233. 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.
234. In line with section 67, where the operation of an equality rule relates to the terms on which a person becomes a member of the scheme, any alteration made relying on this section may only have effect from 8 April 1976. Where the alteration relates to a term on which a member of the scheme is treated, reliance on this section may have effect only from 17 May 1990.

### **Background**

235. The section replaces equivalent equal treatment provisions in section 65 of the Pensions Act 1995.

### **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.

### **Section 69: Defence of material factor**

#### **Effect**

236. As a general rule, if the work of a worker and a comparator of the opposite sex is equal but their terms are not, the sex equality clause takes effect. Section 69 provides that neither a sex equality clause nor a sex equality rule will apply if the employer can show that the difference in terms is due to a material factor which is relevant and significant and does not directly or indirectly discriminate against the worker because of her sex.
237. If there is evidence that the factor which explains the difference in terms is not directly discriminatory but would have an adverse impact on people of her sex (that is, without more, it would be indirectly discriminatory), the employer must show that it is a proportionate means of meeting a legitimate aim or the sex equality clause will apply. For these purposes, the long-term objective of reducing pay inequality will always count as a legitimate aim.
238. Subsection (4) deals with the application of the material factor defence to occupational pension schemes.

### **Background**

239. The Equal Pay Act 1970 and Pensions Act 1995 made similar provision permitting employers and trustees to objectively justify differences to which an equality clause or rule would otherwise apply. This section draws those separate provisions into one section and clarifies the way in which they are to be applied. The reference in the previous legislation to a difference being “genuinely” due to a material factor has not been repeated in this section since the adverb added nothing to the meaning of the requirement, which is that the employer’s obligation is to show that the reason for the difference is genuine and not a sham. The section incorporates the effect of EU law in respect of objective justification of indirectly discriminatory factors.
240. The reference to an employer’s long-term objective of reducing pay inequality between men and women always being considered a legitimate aim is new.

## **Examples**

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

## ***Section 70: Exclusion of sex discrimination provisions***

### **Effect**

241. This section ensures that the sex discrimination provisions of the Act 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).
242. 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.
243. The equality of terms provisions operate only in relation to the terms of a contract of employment, the terms of appointment to a personal or public office and the terms of service of members of the armed forces.

### **Background**

244. This provision brings together sex discrimination and equality of terms provisions previously found in the Equal Pay Act 1970 and the Sex Discrimination Act 1975 and explains how they work together.

### **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.

## ***Section 71: Sex discrimination in relation to contractual pay***

### **Effect**

245. This section deals with sex discrimination in relation to contractual pay in circumstances where a sex equality clause would not operate. This could be because there is no comparator doing equal work with whom a claimant can compare his or her pay or other terms. The section ensures that indirect sex discrimination in respect of contractual pay can be challenged only by means of an equality clause. However, the section for the first time 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.

### **Background**

246. The section replaces similar provision in the Sex Discrimination Act 1975 which ensured that the sole remedy in respect of claims made about sex discrimination in contractual pay matters was obtained through the Equal Pay Act 1970. This required that the comparator be a real person. This section however contains a new provision designed to allow claims to be brought where a person can show evidence of direct sex discrimination or dual discrimination (where sex is one of the protected characteristics in the combination) in relation to contractual pay but is unable to gain the benefit of a sex equality clause due to the absence of a comparator doing equal work.

### **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.

### **Section 72: Relevant types of work**

#### **Effect**

247. This section sets out the types of work that are covered by the provisions for pregnancy and maternity equality set out in the sections which follow.

### **Background**

248. This section replaces various provisions in the Equal Pay Act 1970, which set out who is covered by the pregnancy and maternity equality requirements.

### **Section 73: Maternity equality clause**

#### **Effect**

249. This section requires that a woman's contract must be read as including a maternity equality clause. Section 74 sets out how a maternity equality clause modifies a woman's pay. No comparator is required in these cases.
250. 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 section 75) would. This ensures that the provisions relating to pregnancy and maternity equality of terms at work and the provision governing pension schemes in section 75 operate effectively together.

### **Background**

251. This section reflects provisions of the Equal Pay Act 1970.

### **Section 74: Maternity equality clause: pay**

#### **Effect**

252. This section sets out how and when a maternity equality clause affects a woman's pay while she is on maternity leave.
253. 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.

254. 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.
255. 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.

## **Background**

256. This section is designed to replicate the effect of provisions previously in the Equal Pay Act 1970.

## **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.

## **Section 75: Maternity equality rule**

### **Effect**

257. This section introduces a maternity equality rule into all occupational pension schemes.
258. 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.
259. The section 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.
260. 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.
261. The provisions of the section apply only to women on unpaid ordinary maternity leave where the expected week of confinement began on or after 6 April 2003.
262. The provisions of the section apply only to a woman on unpaid additional maternity leave where the expected week of confinement began on or after 5 October 2008 and they do not apply to the accrual of scheme rights.
263. 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 of the Act.

## **Background**

264. This section replaces the previous provisions on “unfair maternity provisions” in paragraph 5 of Schedule 5 to the Social Security Act 1989 and replicates aspects of Regulations 9 and 18A of the Maternity and Parental Leave etc Regulations 1999.

## **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.

## ***Section 76: Exclusion of pregnancy and maternity discrimination provisions***

### **Effect**

265. This section provides that the pregnancy and maternity discrimination provisions of the Act do not apply where a maternity clause or rule operates.
266. 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.
267. The maternity equality clause provisions operate only in relation to terms of a contract of employment, the terms of appointment to a personal or public office and the terms of service of members of the armed forces and do so by including an equality clause to modify terms governing maternity-related pay.

## **Background**

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

## **Example**

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

## ***Section 77: Discussions about pay***

### **Effect**

269. This section is designed to make unenforceable terms of employment, appointment or service 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 section is treated as victimisation within the meaning of section 27, as applied in the sections listed in the table in subsection (5).
270. Generally, discussions about pay would take place between colleagues, but this section 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.

## **Background**

271. This section is new. It is intended to ensure that there is greater transparency and dialogue within workplaces about pay.

## **Examples**

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

## **Section 78: Gender pay gap information**

### **Effect**

272. This section enables a Minister of the Crown to make regulations requiring private and voluntary sector employers with at least 250 employees in Great Britain 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. Employers who do 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.

## **Background**

273. This is a new provision. The Government wants larger private and voluntary sector employers in Great Britain to 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.
274. The Government's aim is for employers regularly to publish such information on a voluntary basis. To give voluntary arrangements time to work, the Government does not intend to make regulations under this power before April 2013. The power would then be used only if sufficient progress on reporting had not been made by that time.

## **Section 79: Comparators**

### **Effect**

275. This section sets out the circumstances in which employees and others are taken to be comparators for the purposes of Chapter 3. 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. The application of Article 157 of the Treaty on the Functioning of the European Union, which has direct effect, will ensure that existing case law on the breadth of possible comparisons is carried forward, so that, for example, in relevant circumstances the concept of a comparator will include a predecessor doing the same job.
276. If two persons share the same employer and work at the same establishment, each may be a comparator for the other.
277. 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.

278. 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.
279. 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.
280. A person holding the office of constable is treated for the purposes of Chapter 3 as holding a personal office for the purpose of determining who can be that person's comparator.
281. The section also defines when staff of the Houses of Parliament may be taken to be each other's comparators.

### **Background**

282. These provisions generally reflect the effect of provisions in previous legislation.

### **Example**

- A woman is employed by a company at a factory. A man works for the same company at another factory. Common terms of employment apply at both establishments. The woman may treat the man as a comparator, if they are doing equal work (as defined in section 65).

### ***Section 80: Interpretation and exceptions***

#### **Effect**

283. This section explains the meaning of terms used in Chapter 3 of Part 5 of the Act. It also gives effect to Schedule 7, which sets out exceptions to the equality of terms provisions.

### ***Chapter 4: Supplementary***

### ***Section 81: Ships and hovercraft***

#### **Effect**

284. This section provides that the employment provisions in Part 5 will apply to seafarers and the crew of hovercraft only in the way set out in regulations made by a Minister of the Crown.

### **Background**

285. The Act is silent on the territorial application of the employment provisions. While this approach is acceptable for most workers, who at any given time are within either the territory of the United Kingdom or some other territory, seafarers work on ships that may be constantly moving between waters under the jurisdiction of different States. This section will allow the Minister to say how and when the employment provisions apply to seafarers on ships and crew on hovercraft in accordance with international law and custom and the global practices of the shipping industry. The Minister may make provision with regard to ships outside Great Britain.
286. This section replaces provisions in previous legislation concerning its application to seafarers.



## **Section 82: Offshore work**

### **Effect**

287. This section contains a power to make an Order in Council in relation to work on board offshore installations. The power may be used to apply Part 5 (with or without modification) to those working on such installations. The power may also be used in relation to any corresponding Northern Ireland legislation (with or without modification).

### **Background**

288. This section will enable protection to be extended to workers on offshore installations, such as oil and gas rigs and renewable energy installations (generally wind farms), to reflect the extent of previous discrimination legislation.

### **Example**

- Offshore workers are typically workers (either employees, contract workers, partners, members of an LLP, or personal or public office-holders) on oil and gas rigs located in the sea within the area of the United Kingdom Continental Shelf (UKCS), and on renewable energy installations (generally wind farms) within the part of the UKCS known as the Renewable Energy Zone.

## **Section 83: Interpretation and exceptions**

### **Effect**

289. This section explains the meaning of various terms used in Part 5 of the Act. In particular, it defines what is meant by “employment” and provides that people serving in the armed forces and people who work for the Crown and in the Houses of Commons and Lords are to be regarded as employed for the purposes of this Part of the Act.