



## **EQUALITY ACT 2017**

### **EXPLANATORY NOTES**

Following the announcement of Royal Assent, on 18th July 2017 the [Equality Act 2017](#) is being phased in<sup>1</sup>. Most of the Act came into operation on 1<sup>st</sup> January 2019 but the protected characteristics of disability and age as well as the extension of equal pay rights to cover work of equal value will come into operation on 1<sup>st</sup> January 2020.

These Notes were originally published before the then Equality Bill entered the Legislative Branches. The Notes have been updated to –

- change references to ‘clauses’ in the Equality Bill to ‘sections’ in the Equality Act;
- include information on additional clauses (now sections) which were added to the Bill as a result of amendments in the Legislative Branches (and to renumber the Notes as necessary);
- note secondary legislation which has been laid before or approved by Tynwald since the Act received Royal Assent;
- update the names of Government Departments where these have changed or where functions have been transferred from one Department to another; and
- omit some out of date background material, for example discussion of earlier statutes which have now been repealed (for example, the Employment (Sex Discrimination) Act 2000), which is no longer relevant.

These Notes contains a number of hyperlinks to Acts of Tynwald. Acts may be amended from time to time and amendments made by subsequent legislation will be incorporated into the text of the original Act. The Attorney General’s Chambers update all Acts when they are amended and the current versions of Isle of Man Acts can be found on the Government legislation website at [legislation.gov.im](http://legislation.gov.im). These Notes contain the text of Acts as amended up to 1<sup>st</sup> January 2019.

#### **Disclaimer**

These Notes are written in general terms and are not intended to be a complete or authoritative description of the Act. No responsibility can be taken for errors or omissions or their consequences.

#### **ABBREVIATIONS**

DESC	the Department of Education, Sport and Culture
DfE	the Department for Enterprise
DHSC	the Department of Health and Social Care

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<sup>1</sup> The Act is brought into operation through the following Appointed Day Orders - The [Equality Act 2017 \(Appointed Day\) \(No. 1\) Order 2017](#); The [Equality Act 2017 \(Appointed Day\) \(No. 2\) Order 2017](#); The [Equality Act 2017 \(Appointed Day No. 3 and Transitional Provisions\) Order 2017](#); [The Equality Act 2017 \(Appointed Day No. 4\) Order 2018](#) and The [Equality Act 2017 \(Appointed Day\) \(No. 5\) Order 2018](#).

**INTRODUCTION**

1. These explanatory notes relate to the [Equality Act 2017](#) (“the Act”) for which Royal Assent was announced on 18 July 2017. They have been prepared by the Cabinet Office and Department for Enterprise (DfE) in order to assist readers of the Act. They do not form part of the Act and have not been endorsed by Tynwald or its Branches.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act.
3. Schedule 22 and 24 of the Act make, respectively, various amendments and repeals to the Island’s employment law. Some amendments and repeals are purely consequential to changes made by the Act to the employment law framework. But, in addition, the Act makes a number of changes to existing employment law which are, generally, not connected to the main equality provisions in the Act. These amendments were largely proposed by the former Department of Economic Development (now the Department for Enterprise) 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 Act 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 Schedules 22 and 24 to the Act.

**STRUCTURE OF THE ACT**

4. The Act is divided into 14 Parts and 25 Schedules. The structure of the Act is as follows:

<b>PART</b>	<b>SUMMARY</b>
Part 1	Introductory provisions relating to the short title, commencement, general interpretation and further interpretation in respect of maternity leave.
Part 2 and Schedule 1	Establishes the key concepts on which the Act is based including: <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> These key concepts are then applied in the subsequent Parts of the Act.
Part 3, Schedule 2, Schedule 3	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.
Part 4, Schedule 4, Schedule 5	Makes it unlawful to discriminate against, harass or victimise a person when disposing of (for example, by selling or letting) or managing premises.

<b>PART</b>	<b>SUMMARY</b>
Part 5, Schedule 6, Schedule 7, Schedule 8, Schedule 9	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.  It also contains provisions restricting the circumstances in which potential employees can be asked questions about disability or health.
Part 6, Schedule 10 Schedule 11 Schedule 12 Schedule 13 Schedule 14	Makes it unlawful for education bodies to discriminate against, harass or victimise a school pupil or student or applicant for a place.
Part 7, Schedule 15 Schedule 16	Makes it unlawful for associations (for example, private clubs and political organisations) to discriminate against, harass or victimise members, associates or guests.
Part 8	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.
Part 9, Schedule 17 Schedule 18	Deals with enforcement of the Act's provisions through the proposed Employment and Equality Tribunal and related matters.
Part 10	Makes terms in contracts, collective agreements or rules of undertakings unenforceable or void if they result in unlawful discrimination, harassment or victimisation.
Part 11	Establishes a general duty on public authorities to have due regard, when carrying out their functions, to the need to: <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> 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.
Part 12, Schedule 19	Deals with consent to make reasonable adjustments to premises and improvements to let dwelling houses.
Part 13, Schedule 20 Schedule 21	Establishes exceptions to the prohibitions in the earlier parts of the Act 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.

<b>PART</b>	<b>SUMMARY</b>
Part 14, Schedule 22 Schedule 23 Schedule 24 Schedule 25	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 Act in respect of Manx ships and seafarers; the Act's application to the Crown; information society services; power to apply UK and EU equality legislation. This Part also introduces the Schedules containing consequential amendments, additional employment law amendments and repeals; and the Tynwald procedure for subordinate legislation.

## COMMENTARY ON SECTIONS

### PART 1 - INTRODUCTORY

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

5. Section 1 gives the short title of the Act and Section 2 provides that it will come into operation on a day or days appointed by the Council of Ministers.

#### Section 3: Interpretation

6. This section provides for the general interpretation of terms and concepts used in the Act.

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

7. This is a further interpretation section which explains what is meant by the different types of maternity leave which are referred to in the Act.

### PART 2: EQUALITY: KEY CONCEPTS

#### Division 1: Protected characteristics

##### Subdivision 1 – Discrimination

#### Section 5: The protected characteristics

8. This section lists the characteristics that are protected by subsequent provisions of the Act. Subject to certain exceptions set out in the Act, 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 Equality Act 2010 (of Parliament), 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.
9. The Act will consolidate and replace all existing anti-discrimination provisions with a single consistent legal framework.<sup>2</sup>

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<sup>2</sup> All previous anti-discrimination legislation, such as the Employment (Sex Discrimination) Act 2000 was repealed on 1<sup>st</sup> January 2019 except the [Disability Discrimination Act 2006](#) (DDA). The DDA provides protection against discrimination on the ground of disability in respect of the provision 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 Act will in due course repeal and replace the DDA, no obligations in respect of reasonable adjustments in the provision of goods and services to disabled persons will be introduced by the Equality Act any sooner than the timetable that has been established for the DDA.

## **Section 6: Age**

10. This section establishes that where the Act 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.

## **Section 7: Disability**

11. This section establishes who is to be considered as having the protected characteristic of disability and so is a disabled person for the purposes of the Act. With Schedule 1 and regulations that can be made under that Schedule, it also establishes what constitutes a disability. In general terms under this section 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.
12. Where people have the same disability, they share the protected characteristic of disability.
13. The section 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 Act.

### 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 Act.
- 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 Act.

## **Section 8: Gender reassignment**

14. This section defines the protected characteristic of gender reassignment for the purposes of the Act 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.
15. The section 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 Act.
- 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 Act.

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

16. This section defines the protected characteristic of marriage and civil partnership. People who are not married or civil partners do not have this characteristic.
17. The section 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.

### **Section 10: Race**

18. This section defines the protected characteristic of race. For the purposes of the Act, "race" includes a person's colour, nationality, ethnic or national origins and caste.
19. The section 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.
20. 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.

### **Section 11: Religion or belief**

21. This section 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.
22. 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 section 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.

### **Section 12: Sex**

23. This section simply explains that references in the Act 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.

### **Section 13: Sexual orientation**

24. This section 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).
25. 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

#### **Section 14: Direct discrimination**

26. This section defines direct discrimination for the purposes of the Act. Direct discrimination occurs where the reason for a person being treated less favourably than another is a protected characteristic listed in section 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).
27. 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.
28. The section 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 section 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 section 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.

### **Section 15: Combined discrimination: dual characteristics<sup>3</sup>**

29. This section provides for the discrimination prohibited by the Act 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.
30. 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.
31. The section 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.
32. 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.
33. The section 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

<sup>3</sup> There are no plans to bring this section of the Act into operation.

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.

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

34. This section 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.
35. The section 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.
36. This section 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.

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

37. This section 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.

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

38. This section 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.
- A school must not prevent a pupil from taking an exam because she is pregnant.

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

39. This section 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.

### **Section 20: Indirect discrimination**

40. This section defines indirect discrimination for the purposes of the Act. 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.

41. 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.
42. 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

### Section 21: Duty to make adjustments

43. This section defines what is meant by the duty to make reasonable adjustments for disabled persons for the purposes of the Act; and it lists the Parts of the Act which impose the duty and the related Applicable Schedules to the Act 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).
44. The section 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.
45. 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.
46. The section also makes clear that, except where the Act 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.
47. The section 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.

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

48. This section 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 Act, 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.

## **Section 23: Regulations**

49. 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 section 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**

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

50. This section 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.

51. The section 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.

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

52. This section 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 section 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.

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

53. This section sets out what is meant by references to the types of discrimination covered by the Act.

#### Subdivision 4: Other Prohibited Conduct

### **Section 27: Harassment**

54. This section defines what is meant by harassment for the purposes of the Act. 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.
55. 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.

### **Section 28: Victimisation**

56. This section defines what conduct amounts to victimisation under the Act. Victimisation takes place where one person treats another badly because the other person has, in good faith, brought proceedings under the Act 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

### Section 29: Application of this Part

57. This section provides that this Part of the Act 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.
58. It also states that, if an act of discrimination, harassment or victimisation is made unlawful by other Parts of the Act 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.

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

59. This section 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.
60. 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.
61. The section also imposes the duty to make reasonable adjustments for disabled persons set out in section 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.
62. The prohibitions in this section 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.

### **Section 31: Interpretation and exceptions**

63. This section explains what is meant by the term "provision of a service" in the Act 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.
64. This section 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.
65. This section 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).
66. 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 Act 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

### Section 32: Application of this Part

67. This section provides that this Part of the Act does not apply to the protected characteristics of age or marriage and civil partnership.
68. It also states that, if an act of discrimination, harassment or victimisation is made unlawful by other Parts of the Act 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.

69. This section 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.
70. 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.

### Section 34: Permission for disposal

71. This section 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.
72. This section 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.

### **Section 35: Management**

73. This section 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.

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

74. This section 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 section 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.

### **Section 37: Interpretation and exceptions**

75. This section explains certain references that are used in Part 4 of the Act 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

**Section 38: Employees and applicants**

76. This section 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 sections 58, 65 and 66 of the Act) or if an equality clause does not apply, where the term constitutes direct or dual discrimination.
77. It also imposes the reasonable adjustments duty set out in section 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.

**Section 39: Employees and applicants: harassment**

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

**Section 40: Contract workers**

79. 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.
80. This section 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 section 38. 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).

**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

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

81. 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 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

##### **Section 42: Partnerships**

82. 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.
83. 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).
84. 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 – Membership of Limited Liability Companies

##### **Section 43: Limited liability companies under the Limited Liability Companies Act 1996**

85. This section makes it unlawful for limited liability companies under the Limited Liability Companies Act 1996 to discriminate against, harass or victimise their partners, or people seeking to be partners in the firm.

**Section 44: Personal offices: appointments, etc**

86. 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 Act. Section 44 makes provision in respect of appointments to personal offices while sections 45 and 46 make provision in respect of appointments to public offices.
87. Section 44 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 sections 58, 65 and 66) or, if that is not the case, where the term of the offer constitutes direct or dual discrimination.
88. 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).
89. 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.
90. 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.

**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.

**Section 45: Public offices: appointments, etc**

91. 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 (see sections 58, 65 and 66) or if that is not the case where the offer of the term constitutes direct or dual discrimination.

92. 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.
93. 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 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).
94. 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.

#### 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.

#### **Section 46: Public offices: recommendations for appointments, etc**

95. 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 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.
96. This section 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.

#### **Section 47: Subdivision 4: interpretation and exceptions**

97. This section explains the meaning of various terms, such as "relevant person", used in sections 44, 45 and 46. It provides that 'appointment' does not include election, so elected offices are not personal or public offices for the purpose of these sections.
98. 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.
99. The section provides that Schedule 6 sets out which offices are excluded from being public offices for the purposes of the Act.



## Subdivision 6 - Qualifications

### **Section 48: Qualifications bodies**

100. This section 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.
101. This section defines what a relevant qualification is and which bodies are not covered by the term "qualifications body". For this Part of the Act 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 Act 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 7 — Employment services

### **Section 49: Employment service-providers**

102. 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. The section 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 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 50: Trade organisations**

103. 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.

104. 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 8 — Local authorities

### **Section 51: Official business of local authority members**

105. 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 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 9 — Recruitment

### **Section 52: Enquiries about disability and health**

106. 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 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.
107. The section also allows questions to be asked where they are needed in the context of national security vetting.
  108. 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.
  109. 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 and Equality Tribunal for direct disability discrimination, it will be for the employer to show that it had not discriminated against the candidate.
  110. 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, limited liability companies and office-holders.
  111. 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

### **Section 53: Non-discrimination rule**

112. This section 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.
113. 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.
114. The rule will not apply to pension rights built up or benefits payable for periods of service before the commencement of this provision.

115. 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.
116. 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.
117. The non-discrimination rule does not apply where an equality rule (see section 59, 60 and 67) 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.

#### Section 54: Non-discrimination alterations

118. 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 53. 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.

#### Section 55: Communications

119. This section applies to sections 53, 110 (Tribunal jurisdiction), 115 (remedies: occupational pension schemes) and paragraph 17 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

120. Division 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.

### **Section 56: Relevant types of work**

121. This section explains that this Subdivision applies to employees and office-holders where one person's work is equal to the work of another.
122. This section should be read together with section 71 (comparators). Section 56(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>4</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.

### **Section 57: Equal work**

123. 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 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.

124. 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.

125. 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.

### **Section 58: Sex equality clause**

126. 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 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

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<sup>4</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)

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.

127. 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.
128. Subsection (3) is intended to ensure that the provisions relating to equality of terms at work and the provisions governing pension schemes in sections 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.
129. 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.

#### **Section 59: Sex equality rule — occupational pension schemes**

130. This section requires that every occupational pension scheme is to have a sex equality rule read into it.
131. 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.
132. 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>5</sup>.
133. 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 Act.

#### 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.

#### **Section 60: Sex equality rule: consequential alteration of schemes**

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<sup>5</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. These instruments have now been revoked by the [Equality Act 2017 \(Sex Equality Rule\) \(Exceptions\) Regulations 2018](#).

134. 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 59. 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.
135. It should be noted that because of the effect of section 59(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 section may only have effect from 6 April 2006<sup>6</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.

#### Section 61: Defence of material factor

136. 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. Section 61 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.
137. 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.
138. Subsection (4) deals with the application of the material factor defence to occupational pension schemes.
139. The section also allows the Department for Enterprise to make regulations setting out what constitutes (or does not constitute) a proportionate means of achieving a legitimate aim for the purposes of this section. 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

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<sup>6</sup> See previous footnote.

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 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 the Department for Enterprise will be able to make regulations, to provide certainly as to the position.

### **Section 62: Exclusion of sex discrimination provisions**

140. 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).

141. 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.

142. 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.

### **Section 63: Sex discrimination in relation to contractual pay**

143. 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 complainant 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 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.



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

144. 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, i.e. where a woman is employed, is a member of a limited liability company or holds a personal or public office.

#### **Section 65: Maternity equality clause**

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

146. 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 67) would. This ensures that the provisions relating to pregnancy and maternity equality of terms at work and the provision governing pension schemes in section 67 operate effectively together.

#### **Section 66: Maternity equality clause: pay**

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

148. 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.

149. 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.

150. 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.

#### **Section 67: Maternity equality rule**

151. This section 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.

152. 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. 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.
153. The provisions of the section apply only to women on unpaid ordinary maternity leave where the expected week of confinement began on or after 30 September 2007<sup>7</sup>.
154. When a woman is on unpaid additional maternity leave the provisions of the section 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 the Department for Enterprise (being a date not earlier than the date on which this paragraph comes into operation)<sup>8</sup>.
155. 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 Act.

#### 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 68: Exclusion of pregnancy and maternity discrimination provisions**

156. This section provides that the pregnancy and maternity discrimination provisions of the Act do not apply where a maternity clause or rule operates.
157. 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.
158. 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.
159. 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.

<sup>7</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>8</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 leave (AML) 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) and the [Maternity and Parental Leave etc. and the Paternity and Adoption Leave \(Amendment\) Regulations 2008](#) (SI 2008/1966). Such changes to AML have 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 Department for Enterprise.

## 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.

## Subdivision 3 — disclosure of information

### **Section 69: Discussions about pay**

160. This section 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 section is treated as victimisation within the meaning of section 28, as applied in the sections listed in the table in subsection (5) of this section.
161. 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.
162. The section 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 section in her contract. The employer could take action against her in relation to that breach.

### **Section 70: Gender pay gap information**

163. This section enables DED to make regulations requiring public, private and voluntary sector employers to publish information about the differences in pay between their male and female employees. The regulations may specify, among other things, the minimum number of employees that the employer must have to be subject to the requirement, and the form and timing of the publication which will be no more frequently than annually. The regulations may also specify penalties for non-compliance. 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.

### **Section 71: Comparators**

164. This section sets out the circumstances in which employees and others can be used as comparators for the purposes of Division 3 of Part 5 the Act. 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.
165. If two persons share the same employer and work at the same establishment, each may be a comparator for the other.
166. 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.
167. 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 (10) defines when employers are taken to be associated.
168. A comparator can include the person's predecessor in the same job.
169. 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.
170. A person holding the office of constable is treated for Division 3 of Part 5 of the Act as holding a personal office for the purpose of determining who can be that person's comparator.
171. The section 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 section 57).

### **Section 72: Interpretation and exceptions**

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

### **Section 73: Offshore work**

173. This section 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.
174. 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).

### **Section 74: International pension arrangements**

175. This section disapplies Part 5 of the Act 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.

### **Section 75: Interpretation and exceptions**

176. This section explains the meaning of various terms used in Part 5 of the Act. 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

### **Section 76: Application of this Division**

177. This section provides that this Division of the Act 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.

### **Section 77: Pupils: admission and treatment, etc**

178. This section 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 Department of Education, Sport and Culture (DESC) or the governing body, and for an independent educational institution or a non-maintained special school is the proprietor.

179. The section 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.

### **Section 78: Victimisation of pupils, their siblings and parents for giving false evidence or information or making false allegations**

180. This section 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.
181. 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.

#### **Section 79: Disabled pupils: accessibility**

182. This section introduces Schedule 10 which requires the DESC 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.

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

183. This section 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 Act 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 section 77(2)(a), so as to ensure issues are taught in a way which does not subject pupils to discrimination. This section 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

#### **Section 81: Students: admission and treatment, etc**

184. This section makes it unlawful for the University College Isle of Man (currently referred to in the Act 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.

185. Subsection (4) of the section specifically makes it unlawful to discriminate when considering conferring qualifications on disabled people who are enrolled at the institution.
186. The section 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.

#### **Section 82: Further and higher education courses**

187. This section 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.

#### **Section 83: Disabled students at further and higher education institutions: accessibility**

188. This section applies to a university and University College Isle of Man and it gives effect to Schedule 12 which imposes a duty on the responsible body for those further and higher education institutions to prepare and publish an accessibility plan for disabled students.

#### **Section 84: Recreational or training facilities**

189. This section 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.
190. The section 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.

### **Section 85: Interpretation and exceptions**

191. This section 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 Act 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 section 81(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 13 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**

### **Section 86: Application of this Division**

192. This section provides that this Division of the Act does not apply to the protected characteristic of marriage or civil partnership status.

### **Section 87: Qualifications bodies**

193. This section 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.

194. It also places a duty on qualifications bodies to make reasonable adjustments for disabled people. The section also includes a power for DESC 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 88: Interpretation**

195. This section explains what is meant by terms used in section 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

### **Section 89: Reasonable adjustments**

196. This section introduces the provisions of Schedule 14, 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.

### **Section 90: Educational charities**

197. This section 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 DESC, 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.

198. 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**

199. An "association" for the purposes of the Act is defined in section 95. 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.

### **Section 91: Application of this Part**

200. This section provides that this Part of the Act 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.).

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

### **Section 92: Members and associates**

202. This section 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 16 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.

### **Section 93: Guests**

203. This section 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.

### **Section 94: Sections 92 and 93: further provision**

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

### **Section 95: Interpretation and exceptions**

205. This section explains what is meant by terms used in Part 7 of the Act. 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.

206. 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.

207. The section introduces Schedule 15 (associations: reasonable adjustments) and Schedule 16 (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**

### **Section 96: Relationships that have ended**

208. This section makes it unlawful to discriminate against or harass someone after a relationship covered by the Act has ended. It covers any former relationship in which the Act 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 Act that results from, and is closely linked to, the existence of a relationship is still unlawful even though the relationship no longer exists.
209. This provision applies to conduct which takes place after the Act is commenced, whether or not the relationship in question ended before that date.
210. The section 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.
211. A breach of this section 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 section.

#### 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 Act, 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.

### **Section 97: Liability of employers and principals<sup>9</sup>**

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

213. 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 Act that are committed by their employees or agents.

214. This section is designed to ensure that employers and principals are made responsible for the acts of those over whom they have control. The section works together with the provisions on "Liability of employees and agents" (section 98), "Instructing, causing or inducing contraventions" (section 99), and "Aiding contraventions" (section 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.

### **Section 98: Liability of employees and agents**

215. This section makes an employee personally liable for unlawful acts committed in the course of employment where, because of section 97, 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.

216. An agent would be personally liable under this section 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.

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<sup>9</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 section 40.

217. 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 Act.
218. This section 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.

#### **Section 99: Instructing, causing or inducing contraventions**

219. This section 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.
220. However, the section 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.
221. The Attorney General is given statutory powers to enforce this section (see section 129). 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.

#### **Section 100: Aiding contraventions**

222. This section makes it unlawful for a person to help someone carry out an act which he or she knows is unlawful under the Act. 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 Act.

223. For the purposes of enforcement, breaches of the prohibition on aiding contraventions are dealt with under the same procedures in the Act as the contraventions themselves.
224. The section 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" (section 97), "Liability of employees and agents" (section 98), and "Instructing, causing or inducing contraventions" (section 99) this section 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

225. This Part deals with the methods of enforcement of the rights conferred and prohibitions imposed by the Act.

### DIVISION 1 - INTRODUCTORY

#### Section 101: Proceedings

226. Section 101 makes it clear that, with certain exceptions, proceedings under the Act may only be instituted in accordance with Part 9. The specified exceptions are as follows:

- criminal proceedings;
- proceedings on a petition of dolence;
- 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

227. 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 Act 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.

228. 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

### **Section 102: Definitions relating to the Tribunal, and proceedings before it**

229. This section defines "relevant officer" and other expressions.

### **Section 103: The Tribunal: constitution, functions and transition**

230. Section 103 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 17 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.<sup>10</sup>

231. 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". (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 Act).

### **Section 104: Conciliation**

232. Section 104 re-enacts section 157 of the Employment Act 2006 [Conciliation] with amendments. This section requires "a relevant officer" (defined in section 102) 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 107 (education cases), a person appointed by DESC to conciliate in proceedings under that section; and in relation to proceedings under any other provision of the Act, an officer of the Office of Fair Trading.

233. 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.

234. A relevant officer is to consider using alternative procedures for dispute resolution (e.g. mediation or arbitration), where appropriate, rather than Tribunal proceedings.

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<sup>10</sup> See the [Employment and Equality Tribunal Rules 2018](#).

235. Anything communicated to a relevant officer in the course of conciliation under this section 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

#### **Section 105: Jurisdiction of the Tribunal in relation to goods and services**

236. Section 105 sets out the jurisdiction of the Tribunal in non-work cases, i.e. those under the provisions of the Act 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 section 96 [Relationships that have ended], section 99 [Instructing, causing or inducing discrimination] and section 100 [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.

#### **Section 106: Immigration cases**

237. Section 106 sets out which claims under the Act 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 Act (which deals with services and public functions) has either been raised in immigration proceedings and rejected, or could be raised on appeal.

#### **Section 107: Education cases**

238. Section 107 gives effect to Schedule 18 which deals with the procedure where there is a discrimination claim relating to a school (see Division 1 of Part 6 of the Act). 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.

#### **Section 108: Time limits**

239. Section 108 prescribes the time limits applicable in non-work cases under the Act. A person must bring a claim under the Act to which section 105 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.
240. 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 Act (which deals with services and public functions) and that ruling can no longer be appealed.
241. Where the conduct in respect of which a claim under the Act 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.

### **Section 109: Remedies**

242. Section 109 deals with remedies in non-work cases. The section confers powers on the Tribunal when hearing claims relating to non-work cases under the Act 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.
243. 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.
244. 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

### **Section 110: Jurisdiction of the Tribunal in work cases**

245. Section 110 deals with the Tribunal's jurisdiction in proceedings in respect of rights and obligations under those provisions of the Act which are concerned with work-related matters (i.e. Part 5 of the Act and some other provisions).
246. Also, under section 53 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 section 53(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.
247. 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.

### **Section 111: Remedies for breach of provisions of the relevant enactments**

248. Section 111 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 section and the Department for Enterprise is given a power to specify other provisions by order<sup>11</sup>. Such an order requires Tynwald approval. The section also makes provision for complaints to be made in accordance with procedural rules under Schedule 17 to the Act.

NOTE: "the relevant enactments" is defined in section 3 of the Act 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

<sup>11</sup> See the [Equality Act 2017 \(Remedies\) Order 2018](#)

- (e) any statutory document made, or having effect, under any of those Acts.

### **Section 112: References by Court to Tribunal etc**

249. Section 112 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.

### **Section 113: Time limits**

250. Section 113 deals with time limits for bringing a work case under the Act 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.
251. Where the conduct in respect of which a claim under the Act 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.
252. The section does not apply for equality of terms cases, time limits for which are set out in section 120.

### **Section 114: Remedies: general**

253. Section 114 sets out the remedies available to the Tribunal in work related cases under the Act. The remedies under this section do not apply to a breach of an equality clause or an equality rule, which is dealt with in Subdivision 4.
254. 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.
255. 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.
256. 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.
257. 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>12</sup>.

258. 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;
  - 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.

#### **Section 115 Remedies: occupational pension schemes**

259. This section 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.

260. 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.

#### **Section 116: Remedies: supplemental**

261. Section 116 enables the Department for Enterprise to exercise a remedy under Part 5 of the Act 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.

262. The section 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

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<sup>12</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.

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.

### **Section 117: Recoupment of benefit**

263. This section 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.
264. The section lists the kinds of payments to which the section refers such as payments by employers to employees under Part 3 of the Employment Act 2006 (e.g. for unlawful deductions from wages).
265. The section 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.
266. 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 section.
267. Any amount recovered by the Treasury under this section is to be paid into the fund out of which the relevant benefit was paid.
268. Terms used in this section are defined at the end of the section.

#### Subdivision 4 – equality of terms

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

### **Section 118: Jurisdiction – equality of terms**

270. Section 118 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.
271. 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.

### **Section 119: References by Court to Tribunal**

272. Section 119 is similar to section 110. As in that section 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.

## **Section 120: Time limits**

273. Section 120 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 section or rule must normally do so within six months of the end of the employment contract. In certain circumstances though, this section gives a complainant more time to make a claim.
274. 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 section specifies the limits for such cases.
275. In a *standard case*, the time limit would start at the end of the contract of employment.
276. 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.
277. 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.
278. 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.

## **Section 121: Assessment of whether work is of equal value**

279. Where the Tribunal has to decide if the work of a complainant and comparator are of equal value, this section gives it the power to require an independent expert ("a qualified person") to prepare a report on the matter.

280. 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.
281. 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.
282. Under this section 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.

#### **Section 122: Remedies in non-pensions cases**

283. Under section 122, 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.
284. 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 section 125).

#### 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.

#### **Section 123: Remedies in pensions cases**

285. Section 123 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>13</sup>.

286. However, the section prevents the Tribunal from ordering an award of compensation to the complainant.

#### **Section 124: Remedies in claims for arrears brought by pensioner members**

287. Section 124 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 section 125).

#### **Section 125: Remedies: supplementary**

288. This section defines terms used in sections 122 to 124.

#### **Section 126: Time limits and “the arrears day” for proceedings**

289. This section enables the Department for Enterprise by order to amend any section of Division 2 of Part 9 of the Act which specifies a qualifying period or time limit for the bringing of proceedings, or the arrears day for the purpose of computing the amount of an award, so as to specify a longer or shorter period, or an earlier or later day, as the case requires. Any such order would require the approval of Tynwald.

### DIVISION 3 — APPEALS

290. Division 3, which comprises section 127, deals with appeals from decisions of the Tribunal.

#### **Section 127: Appeals**

291. Section 127 re-enacts section 160 of the Employment Act 2006 (Appeals) and expands it to encompass appeals under the Act, including in respect of goods and services. The section provides for an appeal to the High Court against a decision of the Tribunal under the Act or any of the employment law statutes.

292. However, a person aggrieved by a decision of the Tribunal in any proceedings under the Act 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).

293. 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.

294. Any decision of the High Court is enforceable in the same way as a corresponding decision of the Tribunal (e.g. by execution under section 130 or by regulations under section 117 as to recoupment of benefit).

295. The provisions of this Act regarding interest will apply to an award made by the High Court under section 133 (interest on sums awarded).

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<sup>13</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. These instruments have now been revoked by the [Equality Act 2017 \(Sex Equality Rule\) \(Exceptions\) Regulations 2018](#).

## DIVISION 4 — MISCELLANEOUS

### **Section 128: Action taken to safeguard national security**

296. Section 128 makes provision about the application of the Act 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.

### **Section 129: Enforcement of sections 99 or 100**

297. Section 129 re-enacts, with wider application, section 41 of the now repealed 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 section 99 (instructing, causing or inducing discrimination) or section 100 (aiding contraventions of the Act) and that, unless the person is restrained, he or she is likely to do further acts which by virtue of that section are unlawful.

### **Section 130: Enforcement of awards etc. of Tribunal**

298. Section 130 re-enacts section 159 of the Employment Act 2006. The section 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.

### **Section 131: Burden of proof**

299. Section 131 provides that, in any claim where a person alleges discrimination, harassment or victimisation under the Act, 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 Act. The exception to this rule is if the proceedings relate to a criminal offence under this Act.

#### 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.

### **Section 132: Previous findings**

300. Section 132 provides that if a person has brought a case under any of the previous legislation (which this Act replaces) listed in this section 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 Act.

### **Section 133: Interest on sums awarded**

301. Section 133 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 applied in respect of "like work" or "work rated as equivalent" cases under the now repealed Employment (Sex Discrimination) Act 2000 and now apply under this Act). This can form a significant part of the overall award that an employer is required to pay. At present in the Island, the Employment and Equality 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 Act when equal pay for work of equal value cases are added to the circumstances under which the 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 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%.

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.

**Section 134: Equal pay audits**

302. Section 134 enables the Department for Enterprise 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.
303. Regulations made under this power will be subject to the approval of Tynwald. The section 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.
304. 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>14</sup> came into force on 1 October 2014.

#### **Section 135: Restriction of frivolous or vexatious proceedings**

305. Section 135 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).

306. 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.

#### **Section 136: Interpretation etc**

307. Section 136 sets out how certain concepts and terms are to be interpreted for the purposes of Part 9 of the Act, 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**

#### **Section 137: Unenforceable terms**

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

309. For disability alone, this section also applies to terms of non-contractual agreements relating to the provision of employment services (within section 49(8)(a) to (e)) or group insurance arrangements for employees. These terms are referred to in the section as "relevant non-contractual terms".

310. This section 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 section 142(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 Act.

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<sup>14</sup> [The Equality Act 2010 \(Equal Pay Audits\) Regulations 2014](#)

### **Section 138: Removal or modification of unenforceable terms**

311. This section 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 section 137, 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.
312. 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.

### **Section 139: Contracting out**

313. Under this section, contractual and relevant non-contractual terms which try to exclude or limit the operation of any provision in the Act (including those dealing with equality of terms) or a provision of secondary legislation made under the Act are unenforceable by the person in whose favour the term operates. The section does not apply to:
- a contract which settles a complaint within section 110 (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 107 (education cases) with the assistance of a person appointed by DESC to conciliate in proceedings under that section; or
  - a contract which settles a claim within section 106 (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 Act 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**

### **Section 140: Void and unenforceable terms**

314. This section 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 section 142. This is a rule made by an employer, qualifications body or trade organisation (each of which is defined in Part 5).

315. 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 Act. 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.
316. A rule of an undertaking which discriminates against a person or would otherwise lead to conduct prohibited by the Act 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).

#### **Section 141: Declaration in respect of void term, etc**

317. This section enables the Tribunal to declare a term of a collective agreement void, or a rule of an undertaking unenforceable, as set out in section 140, 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.
318. The section 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 section 48).

#### 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

#### **Section 142: Interpretation**

319. This section explains what is meant by various terms used in this Part of the Act, or applies definitions provided elsewhere. These are referred to in the notes on earlier sections.

## PART 11: ADVANCEMENT OF EQUALITY

### DIVISION 1: PUBLIC SECTOR EQUALITY DUTY

#### Section 143: Duty to promote equality

320. This section 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 Act, 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.
321. 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.
322. As well as imposing a duty on the list of public authorities set out in subsection (9), the section 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.
323. 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.
324. 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 Act. 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 applied in relation to the provision of goods and services for the protected characteristic of race under the now repealed 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.

#### **Section 144: Exceptions from duty to promote equality**

325. This section sets out persons and functions to which the public sector equality duty does not apply.
326. Subsection (1) disappplies 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.
327. Subsection (2) disappplies 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.
328. Subsection (3) disappplies 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.
329. Subsection (4) disappplies the duty in respect of a person's functions under the [Control of Employment Act 2014](#).
330. Subsection (5) contains definitions and under subsection (6) the Council of Ministers can (by order subject to Tynwald approval) amend the section, 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.

### **Section 145: Enforcement**

331. This section 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

### **Section 146: Positive action: general**

332. This section provides that the Act 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.

333. 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.

334. To provide greater legal certainty about what action is proportionate in particular circumstances, the section contains a power to make regulations setting out action which is not permitted under it.

335. If positive action measures are taken in recruitment or promotion under section 147(3) those provisions will apply rather than this section.

336. This section 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.

### **Section 147: Positive action: recruitment and promotion**

337. This section 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 section 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.

338. The section defines recruitment broadly, so that, for example, offers of partnership or appointment to public offices are included.
339. The section 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**

### **Section 148: Reasonable adjustments**

340. This section gives effect to the supplementary provisions on reasonable adjustments set out in Schedule 19 to the Act 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 19.

### **Section 149: Improvements to let dwelling houses**

341. This section 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 section 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**

### **Section 150: Statutory provisions**

342. This section gives effect to Schedule 20, which allows differential treatment which would otherwise be made unlawful by specific parts of the Act, 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 20 for further information.

### **Section 151: National security**

343. This section 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 Act if this is proportionate.

### **Section 152: Charities**

344. This section 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.

345. Charities must not restrict benefits consisting of employment, contract work or vocational training to people who share a protected characteristic, except that the section 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.

346. The section 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 then Equality Bill being introduced into the Legislative Council<sup>15</sup>. 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 Act.

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<sup>15</sup> The Equality Bill received its 1<sup>st</sup> Reading in the Legislative Council on 8 March 2016.

## 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.

### **Section 153: Control of Employment**

347. This section 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 Act. The exemption ensures that the Act does not conflict with the Island’s work permit system.

### **Section 154: Sport**

348. This section 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.

349. In addition, this section 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.

### **Section 155: General**

350. This section gives effect to Schedule 21, 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 21 for further information.

### **Section 156: Age**

351. This section 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 Act. However, the power is retained in case further exceptions are required in the future.

## PART 14 – CLOSING PROVISIONS AND MISCELLANEOUS

### Section 157: Codes of practice

352. This section enables the Council of Ministers to issue codes of practice in connection with any matter addressed by the Act with a view to ensuring or facilitating compliance with the Act 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.
353. Before issuing a code under this section 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.
354. In determining any question arising in proceedings under the Act, the Employment and Equality 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.

### Section 158: Codes of practice: supplemental

355. This section confirms that the Council of Ministers may revise a code issued under section 157; and that a reference in that section to the issue of a code includes a reference to the revision of a code.
356. The section 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.

357. The Council of Ministers may by order (subject to Tynwald approval) amend section 157 to vary the range of matters on which codes of practice under that section can be made.

### **Section 159: Promoting equality**

358. This section 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 Act 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 Act this section would ensure that there was a power to do so.

### **Section 160: Manx ships, aircraft and hovercraft and those employed aboard them**

359. This section provides that the provisions of the Act 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 for Enterprise with the approval of Tynwald. In other words, the Act will not apply, for example, to aircraft which are registered with the Isle of Man Aircraft Registry unless the Department for Enterprise makes an order to that effect, and then only to the extent set out in that order.<sup>16</sup>

### **Section 161: Crown application**

360. This section confirms how the Act 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 Act 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 Act.

### **Section 162: Tynwald Equality Consultative Council<sup>17</sup>**

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<sup>16</sup> By virtue of Sch. 1 para 5 of the [Equality Act 2017 \(Appointed Day\) \(No. 5\) Order 2018](#) until an order under section 160 [Application of the Act to Manx ships, aircraft etc. and those employed aboard them] of the Equality Act is made and comes into operation, persons employed aboard a Manx ship, aircraft or hovercraft continue to enjoy the same rights as they would have done under the Employment (Sex Discrimination) Act 2000 and otherwise repealed provisions concerning discrimination in the Employment Act 2006.

<sup>17</sup> The current Tynwald Advisory Council for Disabilities was abolished pursuant to [The Equality Act 2017 \(Appointed Day No. 4\) Order 2018](#). The Government does not intend to commence section 162.

361. This section 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.
362. 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.
363. 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.
364. When the section 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.

### **Section 163: Information society services**

365. This section 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.
366. "Information society service" is defined as having the same meaning as in the relevant European Union legislation.

### **Section 164: Gender identity and expression**

367. This section is an enabling power to allow the Council of Ministers by order to replace the protected characteristic of gender reassignment in the Act with a protected characteristic of gender identity and expression. Such an order can amend the Act and other enactments as required to give effect to this change and provide for any necessary exceptions. An order under this section requires the approval of Tynwald.
368. The protected characteristic of "gender reassignment" primarily protects from discrimination persons who intend to undergo, are undergoing, or have undergone a transition from male to female or female to male with the intention of living the rest of their lives in the gender other than that assigned at birth. Such a transition may involve hormonal and surgical intervention but does not have to. The definition of discrimination in the Act is broad enough that persons who are perceived to be undergoing or have undergone gender reassignment are also protected from discrimination even if this not actually the case.
369. Despite the fact that people who are wrongly perceived to be undergoing or have undergone gender reassignment are protected from discrimination under the Act as it stands, persons who have a non-standard (e.g. non-binary) gender identity or expression are not necessarily protected. A new, broader protected characteristic of

“gender identity and expression” would ensure that such persons (as well as those who are transitioning from one gender to the other) are protected. However, such a change, which might at first sight appear to be very straightforward, would require very careful consideration of the implications and, for example, the need for any additional exceptions to general prohibition of discrimination.

### **Section 165: Application of UK and European equality legislation**

370. This section allows the Council of Ministers to make orders (with the approval of Tynwald) to apply UK and EU equality legislation to the Island should this be considered appropriate to do so. An order under this section can amend the Act and other enactments consequential to applied UK or EU legislation.

### **Section 166: Employment legislation amended**

371. This section gives effect to Schedule 22 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 Act 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 Act.

372. The amendments contained in Schedule 22 are described in detail in the separate paper *“Miscellaneous amendments to general employment law made by the Equality Act 2017”<sup>48</sup>*.

### **Section 167: Exercise of powers to make statutory documents**

373. This section sets out different ways that the powers to make statutory documents (i.e. subordinate legislation) can be used (see section 168 for the Tynwald procedure that applies).

### **Section 168: Statutory documents: Tynwald procedure**

374. This section sets out the Tynwald procedure that applies for all statutory documents (i.e. subordinate legislation) which may be made under the Act. In the majority of cases Tynwald approval is required before the statutory document can come into operation. The exceptions are: appointed day orders to bring the Act 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 Act (e.g. Tribunal Rules, where the negative resolution will apply in line with the procedure for rules of court).

### **Section 169: Consequential and minor amendments**

375. This section introduces Schedule 23 which contains amendments to other enactments that are consequential or on the provisions of the Act or are minor changes supplementary to the Act.

### **Section 170: Repeals**

376. This section gives effect to Schedule 24 which sets out the repeals of other enactments which are no longer required. Repeals of employment statutes and provisions are described in detail in the separate paper *“Miscellaneous amendments to general employment law made by the Equality Act 2017”<sup>49</sup>*.

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<sup>18</sup> <https://www.gov.im/media/1364235/amendments-to-general-employment-law-made-by-the-equality-act-2017-new-2812019.pdf>

<sup>19</sup> See previous footnote.

## **Section 171: Glossary**

377. This section introduces Schedule 25 which specifies the places where certain words and expressions used in this Act are defined or otherwise explained.

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

378. Part 1 of this Schedule clarifies and expands upon the definition of disability in section 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 Act.

379. 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 Act.

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

380. This Schedule explains how the duty to make reasonable adjustments in section 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.

381. This Schedule also explains how the duty to make reasonable adjustments in section 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**

382. This Schedule sets out exceptions to the prohibitions against discrimination set out in section 30 of the Act in respect of providing services or exercising a public function.

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

383. 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 Act, 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)

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

385. The reason for the provision in paragraph 4 is to prevent the DESC 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 DESC 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.



386. Paragraph 5 provides an exemption from the prohibition on age discrimination in Part 3 of the Act (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.

387. Paragraph 6 provides an exception for the DESC and governing bodies of schools from the provisions requiring reasonable adjustments in Part 3 of the Act, 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.)

388. Paragraph 7 provides an exception from the prohibition on religious or belief related discrimination in Part 3 of the Act (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 DESC in an order which has been laid before Tynwald.

389. Paragraph 8 provides an exception from section 30, so far as relating to religious or belief-related discrimination, in respect of the functions of DESC 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.

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

### **Part 3: Health and care**

391. 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.

392. 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.

393. 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 section 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**

394. Paragraph 13 provides for an exception in respect of age discrimination in relation to things done by a relevant person relating to immigration.

395. 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.

396. 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.

397. 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.

398. 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**

399. Paragraph 18 provides an exception to section 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).

400. 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.).

401. 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>20</sup>; or
- (b) in the nature of insurance or a personal pension.

402. 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.

403. 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 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

<sup>20</sup> SD 884/11 (the [Regulated Activities Order 2011](#)) as amended by SD 0373/2013 (the [Regulated Activities \(Amendment\) Order 2013](#)) and SD 2016/0188 (the [Regulated Activities Amendment \(Class 1\) \(Deposit Taking\) Order 2016](#))

404. Paragraph 22 contains exceptions from the general prohibition of gender reassignment discrimination in section 29 of the Act for the religious solemnisation of marriages.
405. 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.

406. Paragraph 23 confirms that a person does not contravene section 30 only because the person does not conduct a marriage; is not present at, does not carry out, or does not otherwise participate in, a relevant marriage; or does not consent to a relevant marriage being conducted, for the reason that the marriage is the marriage of a same sex couple.

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

407. 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.
408. 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.

409. 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.

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

411. 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.

412. 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. In addition, the exception does not apply if the conduct in question relates to a person who has been issued with a full gender recognition certificate under the Gender Recognition Act 2004 (of Parliament) which continues to be valid.

#### 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.

413. 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 Act so no exception is required).

#### Example

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

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

415. Paragraph 29 provides that a service provider does not breach the requirement in section 30 of the Act 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.

416. 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.

417. Paragraphs 30, 31 and 32 provide for exceptions in respect of age discrimination from the requirements of section 30 of the Act 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**

418. 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>21</sup>. This would include, for

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<sup>21</sup> Provisions of this Act were extended to the Island by The Communications (Isle of Man) Order 2003 (SI 2003/3198) the [Communications \(Isle of Man\) Order 2003](#), to which relevant amendments were made by The Broadcasting and Communications (Isle of Man) Order 2004 (SI 2004/309) the [Broadcasting and Communications](#)

example, editorial decisions on the content of a television programme or the distribution of online content.

419. 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.
420. 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

421. 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.
422. 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 Act 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](#)").<sup>22</sup>

#### 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

[\(Isle of Man\) Order 2004](#) and the Broadcasting and Communications (Isle of Man) Order 2004 (SI 2004/1115) the [Broadcasting and Communications \(Isle of Man\) \(No. 3\) Order 2004](#)

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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 is desirable that the Regulation should be applied to the Island. 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 Act 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 Act.

423. Paragraph 36 provides an exception from section 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**

424. 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**

425. Schedule 4 explains how the duty to make reasonable adjustments in section 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.

426. This Schedule also explains how the duty to make reasonable adjustments in section 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.

427. 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.
428. 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**

429. Schedule 5 sets out limited exceptions to the requirements in relation to premises which are contained in Part 4 of the Act.
430. 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.
431. 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.
432. 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)).
433. 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.
434. The small premises exception also exempts a controller of premises or a person responsible in relation to common parts (as defined in section 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.
435. 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**

436. This Schedule provides that an office or post is not treated as a personal or public office in the Act in circumstances where the office-holder is protected by one of the other forms of protection given in Part 5 of the Act — employment, contract work,

partnerships, limited liability companies and employment services (as they relate to work experience).

437. 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 Act.
438. The conferral of honours and dignities is treated as a public function for the purposes of the Act. 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**

439. 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 sections 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.
440. 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**

441. 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.
442. 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>23</sup>).<sup>24</sup>

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

443. This Schedule explains how the duty to make reasonable adjustments for disabled people in section 21 applies to an employer or other persons under Part 5 of the Act. It

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<sup>23</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.

<sup>24</sup> The [Equality Act 2017 \(Sex Equality Rule\) \(Exceptions\) Regulations 2018](#) came into operation on 1<sup>st</sup> January 2019.

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.

444. 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.
445. 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**

446. Part 1 of this Schedule concerns occupational requirements for particular kinds of work.
447. 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 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.
448. The exception can be used by employers, principals (as defined in section 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.

449. 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.

450. 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.

451. 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.

452. The requirement can also be applied by a qualifications body in relation to a relevant qualification (within the meaning of section 48), 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.

453. 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.
454. 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.

455. 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.

456. 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**

457. Paragraph 6 simply defines the term "age contravention" for the purposes of Part 2 of Schedule 9.
458. 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.

459. 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).
460. 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.
461. Sub-paragraph (7) defines what a benefit is and expressly rules out benefits provided only by virtue of a person's ceasing to work.
462. 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.
463. 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.
464. 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:

The minimum wage does not need to be paid to apprentices (i.e. those trainees under formal training agreement with their employer and DESC) who:

- have not attained the age of 19; or
  - have attained the age of 19 but are within the first 12 months of their apprenticeship.
- But an apprentice who has attained the age of 25 will be entitled to receive the minimum wage.

465. 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.



466. 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.
467. 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.
468. 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.

469. 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.
470. 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.

471. 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**

472. 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.

473. 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.<sup>25</sup>

#### **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.

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<sup>25</sup> Subparagraphs (1) - (3) of paragraph 15 are not being commenced because the corresponding provisions in the UK were found to be incompatible with the Convention rights.

- 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.

474. 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 Act [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 Act [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, limited liability companies 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 Act 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 section 38 (employees and applicants).

475. 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 Act — 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**

476. This Schedule provides for accessibility arrangements for disabled pupils in schools.
477. The DESC 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 DESC after taking account of pupils' disabilities and preferences expressed by them and their parents. It should be reviewed regularly, and revised if necessary.

478. 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**

479. 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.
480. Paragraph 1 allows schools which have been specified in an order made by the DESC 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.

481. 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.

482. 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**

483. 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 DESC, 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 STUDENTS IN FURTHER AND HIGHER EDUCATION: ACCESSIBILITY**

484. This Schedule provides for accessibility arrangements for disabled pupils in further and higher education in the Island. It applies to a university and University College Isle of Man.

485. The governing bodies of relevant institutions must develop and publish written accessibility plans which will increase the access of disabled students to the curriculum, improve the physical environment for such students and improve the provision of information to them. Plans must be implemented by these institutions after taking account of disabled students' disabilities and preferences expressed by them and (in the case of students who are minors) their parents or guardians. Plans should be reviewed regularly, and revised if needed.

## **SCHEDULE 13 FURTHER AND HIGHER EDUCATION – EXCEPTIONS**

486. 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.

487. Paragraph 2 confers on the DESC 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.

488. 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.

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

490. 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.

491. 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 14 EDUCATION – REASONABLE ADJUSTMENTS**

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

493. Paragraph 1 is introductory.

494. 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.
495. 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 section 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.
496. 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.
497. 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 DESC 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.
498. Paragraph 6 requires responsible bodies which provide recreation or training facilities to make reasonable adjustments for disabled users of those facilities.
499. 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 section 154.
500. 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.
501. Paragraph 9 sets out how the duty to make reasonable adjustments applies to an educational qualifications body.

**SCHEDULE 15**  
**ASSOCIATIONS – REASONABLE ADJUSTMENTS**

502. This Schedule explains how the duty to make reasonable adjustments under section 21 applies to associations.
503. Paragraph 1 is introductory.

504. 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 section 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.
505. Under Part 7 of the Act 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 16 ASSOCIATIONS – EXCEPTIONS**

506. Schedule 16 contains exceptions from the provisions concerning associations in Part 7 of the Act.
507. 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.
508. 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.

509. 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.



510. 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 17 THE TRIBUNAL**

511. Schedule 17 provides for the constitution, jurisdiction and procedures of the Employment and Equality Tribunal which is established under section 101 of the Act. The new Tribunal has replaced the former Employment Tribunal. Whereas the Employment Tribunal dealt 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**

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

513. 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.

514. Under subparagraph (2), subparagraph (1) is subject to the transitional provisions set out in section 103(6) of the Act.

515. 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.

516. 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.

517. 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.

518. 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**

519. 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**

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

521. 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.<sup>26</sup>

522. Paragraph 5 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. The former Department of Economic Development consulted on this matter and considers that a system of modest fees may be desirable.

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

523. Paragraph 6 specifies that Division 2 is to apply for the purposes of proceedings before the Tribunal in which it has jurisdiction by virtue of section 105 of the Act [Jurisdiction of the Tribunal in relation to goods and services].

524. Paragraph 7 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**

525. Paragraph 8 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 section 110 of the Act [jurisdiction of the Tribunal in work cases], section 111 [Remedies for breach of provisions of the relevant enactments] and section 118 [Jurisdiction – equality of terms].

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

527. 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.

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<sup>26</sup> The [Employment and Equality Tribunal Rules 2018](#) came into operation on 1<sup>st</sup> January 2019.

528. 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).
529. 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.
530. Paragraph 13 provides for the rules to include provision for sending certain documents to specified Departments or persons.
531. 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.
532. 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.
533. Paragraph 16 requires the rules to make special provision in connection with a case of unfair dismissal connected to an employee's pregnancy.
534. 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.
535. 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.
536. 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 121(2) of the Act [assessment of whether work is of equal value].
537. 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.
538. Paragraph 21 allows for the rules to make provision about the postponement of Tribunal hearings and to limit the number of permissible hearings.
539. 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.

- 540. 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).
- 541. Paragraph 24 allows for the rules to make special provision in respect of a complaint of detriment or dismissal arising out industrial action.
- 542. 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.
- 543. Paragraph 26 makes additional provision for cases which may touch on national security and makes it an offence to publish prohibited information.
- 544. Paragraph 27 provides for the Chief Minister to direct that, despite any employment rights conferred by the Act, information may not be disclosed in the interests of national security.
- 545. Paragraph 28 enables the Tribunal to sit in private if restricted information or any other confidential matter is to be disclosed.
- 546. Paragraph 29 excludes the application of the [Arbitration Act 1976](#) to any proceedings before the Tribunal.

### **PART 3 — MISCELLANEOUS**

- 547. Paragraph 30 makes further provision about conciliation which is additional to that in section 104.
- 548. 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.
- 549. Paragraph 32 enables a person to appear in person or to be represented by any other person before the Tribunal.
- 550. 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 18 EDUCATION CASES – ENFORCEMENT**

- 551. This Schedule contains special provision for dealing with complaints of discrimination under Division 1 of Part 6 of the Act (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.
- 552. 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.

553. Under paragraph 3 if the Tribunal decides that a contravention of the requirements of Division 1 of Part 6 of the Act 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.
554. Paragraph 4 requires the DESC 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 19 REASONABLE ADJUSTMENTS: SUPPLEMENTARY**

555. The provisions in this Schedule apply to earlier Schedules in the Act 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.
556. 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.
557. 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.

558. 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.
559. 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 Act 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 20 STATUTORY PROVISIONS**

560. Paragraph 1 of this Schedule provides exceptions from several Parts of the Act, 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.

561. 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.

562. 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 DESC to withdraw the exception either in relation to a particular institution or a class of institutions.

563. 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 section 45).

## **SCHEDULE 21 GENERAL EXCEPTIONS**

564. 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.

565. Paragraph 2 provides an exception for religious or belief organisations with regard to the provisions in the Act 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.

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

567. 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.

568. 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.

569. 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.

570. 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.

571. 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.

572. 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.

573. 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.

574. Employment or contract work can be covered by this exception where its sole or main purpose is the provision of training in skills.

575. 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 22 EMPLOYMENT LEGISLATION – MISCELLANEOUS AMENDMENTS**

### **General Comments on Schedule 22**

576. Schedule 22 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 [Redundancy Payments Act 1990](#) and the Control of Employment Act 2014.
577. Some amendments are consequential on changes made by the Act 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 Act).
578. 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 Act. These amendments were proposed by the Department for Enterprise (DfE) 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 Act 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 Act. The effect of the amendments is explained below.
579. The amendments contained in Schedule 22 are described in detail in the separate paper ***“Miscellaneous amendments to general employment law made by the Equality Act 2017”***<sup>27</sup>.

## **SCHEDULE 23 CONSEQUENTIAL AND MINOR AMENDMENTS**

580. 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 Act 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.

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<sup>27</sup> <https://www.gov.im/media/1364235/amendments-to-general-employment-law-made-by-the-equality-act-2017-new-2812019.pdf>

581. These amendments are mostly necessary to ensure that these Acts refer accurately to the new provisions contained in the Act and work properly with those new provisions.
582. The amendment to the Douglas Municipal Corporation Act 1895 substitutes a gender neutral term for the pronoun "He".
583. 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.
584. 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.
585. 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 Act. Licensees and their agents will be subject to the provisions of the Act 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 Act 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.

586. 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.
587. The amendment to the Construction Contracts Act 2004 is to update an outdated reference.

588. The Tribunals Act 2006 is amended to reflect the new name (and expanded remit) of the current Employment Tribunal.
589. 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.
590. The Social Services Act 2011 is amended to remove a reference to the Disabled Persons (Employment) Act 1946 (which is repealed by Schedule 24 as it is redundant).
591. A typographical error in the Regulation of Care Act 2013 is corrected.

#### **SCHEDULE 24 REPEALS AND REVOCATIONS**

592. This Schedule lists the legislative provisions which will cease to have effect when the relevant provisions in the Act come into force.
593. In addition to the enactments which are consequentially repealed because of the equality provisions of the Act or because they are inconsistent with those provisions, certain employment law provisions are repealed. Repeals of employment statutes and provisions are described in detail in the separate paper "***Miscellaneous amendments to general employment law made by the Equality Act 2017***"<sup>28</sup>.

#### **SCHEDULE 25 GLOSSARY**

594. This Schedule lists words and expressions which are defined in the Act.
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These Explanatory Notes were last updated in January 2019.

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<sup>28</sup> <https://www.gov.im/media/1364235/amendments-to-general-employment-law-made-by-the-equality-act-2017-new-2812019.pdf>