

EQUALITY BILL

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Equality Bill. They have been prepared in order to assist the reader in understanding the Bill. They do not form part of the Bill.

2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require explanation or comment, none is given.

SUMMARY

3. The Bill provides a single framework for eliminating discrimination and promoting equality between different people, regardless of their racial or ethnic origin, religion or belief, sex, marital or family status, sexual orientation, gender reassignment, age or disability. It establishes the Equality Commission for Great Britain (“the Commission”) with a range of statutory powers to encourage and enforce observation of Bill’s requirements.

4. The Bill makes provision, amongst other things, with respect to:
- the definition of unlawful discrimination and other unlawful acts;
 - the areas of activity in which such acts are, or are not, made unlawful;
 - the requirements with which public bodies must comply in discharging their functions;
 - arrangements for reviewing the profile of an employer’s workforce and for making changes to counteract under-representation or unequal pay;
 - the requirements with which certain persons have to comply with a view to facilitating access etc by disabled persons;
 - the constitution of the Commission;
 - the functions of the Commission, including its power —
 - (a) to address matters of detail by issuing codes of practice;
 - (b) to raise awareness and provide assistance;
 - (c) to seek undertakings and to enforce the Bill’s requirements.

5. The Bill applies to Great Britain.

6. An overview of the Bill is set out below. A detailed description of each Part and the clauses is contained in the commentary. Terms used are generally defined in the text where they first appear. Some terms are defined in clause 88.

BACKGROUND

Existing structure

7. The prevailing framework of anti-discrimination legislation deals with exclusions based on the grounds of sex, race and disability. In relation to race, there is also a general duty for specified public bodies to have regard, in carrying out their functions, to the need to eliminate discrimination and promote equality of opportunity and good relations between different racial groups.

8. There are three separate Commissions to oversee the legislation as it applies in relation to each ground:

- Equal Opportunities Commission;
- Commission for Racial Equality;
- Disability Rights Commission.

9. The Treaty of Amsterdam inserted a new article 13 into the Treaty Establishing the European Community. This allows the Council of the European Union to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. Two Directives (2000/43/EC¹ and 2000/78/EC²) were made in reliance on this provision in 2000. These must be implemented by 19 July 2003 and 2 December 2006, respectively.

10. The Bill is intended to implement these Directives and to coordinate, modernise and extend the arrangements for tackling discrimination which are currently established under a number of different enactments:

- Equal Pay Act 1970;
- Sex Discrimination Act 1975;
- Race Relations Act 1976 and Race Relations (Amendment) Act 2000;
- Disability Discrimination Act 1995;
- Disability Rights Commission Act 1999.

Consultation

11. In July 2000, the Centre for Public Law and Judge Institute of Management Studies in the University of Cambridge published a Report entitled “Equality: A New Framework - Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation” by Bob Hepple QC, Mary Coussey and Tufyal Choudhury. The report presents the findings of a project set up to review and evaluate proposals for the reform of UK anti-discrimination legislation, based on an assessment of the experience of those affected by the legislation. The specific objectives of the review were to develop an accessible legislative framework, to propose other measures that will promote equal opportunity policies and to spur compliance with those policies, and to ensure that the UK is in full compliance with its obligations under EU law and international human rights law. The principal methods used were targeted case studies and interviews, an initial consultation paper, regional and other consultation meetings, a second consultation paper published

¹ OJ No. L 180, 19.07.2000, p. 22– 26.

² OJ No. L 303, 02.12.2000 p. 16 – 22.

(together with seven working papers) in December 1999 and a consultative conference.

12. A draft Bill was drawn up on the basis of the findings in the Report and published for consultation in July 2002. That consultation exercise attracted comments from a significant number and range of different individuals and bodies with an interest in anti-discrimination law. The draft was revised on the basis of those comments.

INTERPRETATION

13. There are a number of defined words and expressions in the Bill.

14. Many definitions are for the purpose only of the clause or Schedule in which they are used. So, for example, the term defined in clause 2(4) is defined only for the purposes of clause 2.

15. Where there is no indication that a definition is intended to apply to a group of provisions, a Part of the Act or the Act as a whole, it applies only for the purposes of the clause or Schedule in which it appears.

16. Some of these single-provision definitions are drafting devices to reduce the length or complexity of particular propositions or to avoid repetition. See for example, clause 20(5) or 27(1) and (8).

17. Some of the words and expressions that are defined just for the purposes of the particular provision, or group of provisions, in which the definition occurs are used (and defined separately) in other provisions – where they may have a different meaning. For example, there are definitions of “employment” in clauses 19(7) and 28(5). However, these have a more limited meaning than the meaning given to ‘employment’ for the purposes of paragraph 10 of Schedule 2.

18. The Bill consists of a number of Parts. Clause 88 deals with a number of expressions that are used in a number of provisions. There is a separate interpretation clause for Part 2 of the Bill because many of the terms used there are not relevant elsewhere in the Bill. Where, as in Part 3, terms are used that are central in determining the scope of the provisions that follow, that term is defined right at the start of the relevant provisions (see clauses 25 and 28).

19. The purpose of the following glossary is to provide the reader with a guide to words or expressions which are defined generally as so liable to be met in provisions which do not themselves contain that definition.

<u>Expression</u>	<u>Where defined (references are to clauses)</u>
act	5
appropriate representatives	22(4)
body responsible for an educational establishment	Schedule 2, paragraphs 19(3) and 20 to 23
Central Arbitration Committee	88(1)

Commission	4(1)
Community law	88(1)
designated employer	28(2)
discrimination	9
disabled person and disability	4(1) and (3) and Schedule 1
education field	Schedule 2, para 19
employment equity plan	30(3)
employment field	Schedule 2, para 10
European Convention on Human Rights	88(1)
harassment	12
man	4(1)
Minister of the Crown	88(1)
occupation	88(1)
parent	88(1)
pay equity plan	31(2)
police cadet	88(1)
premises	88(1)
prescribed	88(1)
prohibited grounds	4(1)
protected area of activity	6
public authority	Schedule 2, para 2
public body	25(1)
racial group	4(1)
regulations	88(1)
religion or belief	4(1)
respondent (in relation to a complaint or	48(3)

application to a tribunal or court)	
sexual orientation	4(1)
training	88(1)
tribunal	48
victimisation	13
woman	4(1)
workforce review	29(1)

THE BILL

20. The Bill is in six Parts.

Part 1, Introductory. This Part sets out the purpose of the Bill and contains some general interpretative principles.

Part 2, Measures to target particular behaviour or arrangements. This Part describes the circumstances in which a number of acts are made unlawful. It also makes provision directly amending various contracts or other agreements so that they do not contravene or frustrate the remedies conferred by the Bill in connection with acts made unlawful by Part 2.

Part 3, Measures to facilitate general progress towards equality. This Part requires persons, such as public bodies and employers, to take steps to remove obstacles to equality and to take positive measures to secure it. It also requires certain persons to take steps to improve access etc by disabled persons to certain benefits, facilities or services.

Part 4, Equality Commission. This Part sets out the Commission's constitution, general functions and powers.

Part 5, Complaints and enforcement. This Part establishes the mechanisms for ensuring that the provisions of the Bill are complied with. It sets out the enforcement powers of the Commission and others and provides for the presentation of complaints or applications to an employment/equality tribunal (or, in some circumstances, to an alternative body). It also contains provision for dealing with persons who default in complying with orders made under this Part.

Part 6, Supplemental. This Part contains provision dealing with interpretation, commencement and territorial scope. It describes how the Bill applies to the Crown. It also confers certain powers on the Secretary of State in relation to consequential and transitional provisions and, with Schedule 8, makes certain amendments to other legislation.

COMMENTARY ON CLAUSES

PART 1: INTRODUCTORY

21. This Part contains interpretative principles to inform the application of the rest of the provisions of the Bill.

Clause 1: Purpose of Act

22. This clause provides a general statement of the underlying purpose of the Bill. This recognises that the provisions of the Bill cover a wide range of areas of activity and need to address a significant number of different grounds on which discrimination, victimisation and harassment currently take place. These grounds are referred to in the Act as “the prohibited grounds”. Given the disparity of the subject matter, the clause is intended to assist in achieving an application of the provisions of the Bill in a way that achieves its two main objectives. These are to eliminate unfair discrimination on the grounds listed in *subsection (1)(a) to (j)* and to secure the removal of obstacles to, and the encouragement of, progress towards achieving equality. The underlying aim is simply to ensure the protection of the dignity and worth of every individual.

Clause 2: General principles

23. This clause sets out a number of general principles to be applied in giving effect to the Bill.

24. *Subsection (1)* specifies three principles that apply to all provisions of the Bill. For example, *subsection (1)(a)* and *subsection (4)* make it clear that the Bill does not require or permit levelling down. This seeks to ensure that unlawful discrimination cannot be avoided, nor can equality of opportunity be achieved, by the removal or reduction of any advantages that are enjoyed by the better-off group (in comparison with any disadvantaged group).

25. *Subsection (2)* specifies two additional principles that apply only to the provisions of Part 2. The first principle is that limitations on the protections provided by the Bill are to be applied carefully with no wider effect than is strictly necessary in the circumstances of the case. The second principle is that an act may still be unlawful notwithstanding that the person carrying it out is doing so for reasons unrelated to a prohibited ground. Provided that one of the reasons for the act relates to a prohibited ground, then that will be sufficient to make the act unlawful.

Clause 3: Exclusivity of remedies under this Act

26. This clause sets out that the bill is intended to be a self-contained code for addressing any contraventions of its provisions and securing observance of the obligations imposed by it. This does not, of course, preclude applications for judicial review.

Clause 4: Interpretation

27. This clause contains a number of definitions that apply generally throughout the Bill.

28. *Subsections (1) and (3)* and Schedule 1 define “disabled person”. This includes a person who, in the past, has had a disability. *Subsection (5)* enables the Secretary of State to amend Schedule 1 by adding to it as well as by varying or

removing existing provisions. There is also power for the Secretary of State to make provision modifying the application of the Bill in order to deal with the fact that the disabled person includes persons with past disabilities.

29. *Subsection (2)* makes it clear that the protections conferred by the bill extend to cases where :

- action is taken against another on the basis of a prohibited ground but where it turns out that the ground in question was irrelevant; or
- action is taken against a person because of his connection with another person.

PART 2: MEASURES TO TARGET PARTICULAR BEHAVIOUR OR ARRANGEMENTS

30. This Part comprises four Chapters dealing with what conduct is unlawful and the economic spheres in which the provisions apply.

- Chapter 1 defines unlawful discrimination, unlawful victimisation and unlawful harassment. It also provides that a number of acts related to discriminatory conduct are unlawful.
- Chapter 2 makes provision relating to contracts and agreements (including leases) and sets out that persons and the Commission may take action in the tribunal to enforce the provisions of Part 2.

CHAPTER 1 : UNLAWFUL ACTS

Clause 5 : Unlawful acts, remedies and interpretation of Chapter 1

31. This clause introduces Chapter 1. It explains that the Chapter makes certain acts unlawful when done in a protected area of activity and sets out the consequences that apply when an unlawful act is done. It also defines a number of terms that are used in this Chapter.

Clause 6: Protected areas of activity

32. This clause lists the six protected areas of activity. These specify, in general terms, the fields of activity in which unlawful acts may be done. These are public functions, employment, education, the provision of goods, facilities, services, the disposal or management of premises and the management of private members' clubs. The clause specifies, in general terms, that it is the person who 'provides' or 'manages' the public services, education, employment, goods, facilities, services, premises or clubs whose acts or omission are caught. The provision does not apply to the persons 'receiving' them, such as employees, students or purchasers. There are a number of additional provisions that can make other people liable for unlawful acts done by others (see clauses 17(2), 19 and 20).

33. Schedule 2 sets out in more detail the scope of all the protected areas of activity. Each of Parts 2 to 7 of Schedule 2 groups provisions that define or explain a particular protected area of activity together with exclusions that relate only to that

area. Part 8 of the Schedule contains a number of additional exclusions that apply across two or more (and sometimes all) of the different activities.

34. *Subsection (3)* prevents overlap between certain areas of activity. For example, the activities of a local education authority in the education field will fall within subsection (1)(c). On account of subsection (3), it is prevented from also falling within either subsection (1)(a) or subsection (1)(d). This means that the exclusions relevant to subsection (1)(c) are the only ones that apply. These are contained in Parts 4 and 8 of Schedule 2.

Clause 7 & 8: Complaints concerning contraventions of this Part

35. **Clause 7** enables a person to initiate proceedings under Part 5 of the Bill. The Commission may also initiate proceedings or take other action under Chapter 2 of Part 5.

36. A person may make a complaint to a tribunal if he alleges that he has been the victim of any act made unlawful by this Part of the Bill. But this does not apply to publication of discriminatory advertisements where only the Commission can take enforcement action.

37. *Subsection (5)* makes it clear that claims can be brought against employers and others who made liable under clause 19 for the acts of others.

38. In addition to the person who has been directly affected by the unlawful act, a complaint may also be made by certain other persons acting on his behalf (see *subsection (2)(b) and (c)*). These include parents, trade unions and other bodies specified by the Secretary of State.

39. No complaint may be made under this clause if it can be the subject of a complaint relating to the effect of an equality clause inserted into a contract of employment by clause 21. Any proceedings relating to a contravention of such a clause must be brought under clause 72.

40. **Clause 8** sets the time limits for making a complaint under clause 7. This is generally six months from date of the act complained of. A longer period is allowed if facts relevant to the alleged victim were deliberately concealed by the person alleged to have done the act.

Clause 9 : Discrimination

41. This clause makes it unlawful for a person to act in a way that discriminates against another person in a protected area of activity (see clause 6). Discrimination is unlawful whether it is 'direct' or 'indirect' (explained in clauses 10 and 11).

42. In relation to unlawful discrimination generally, an act includes a deliberate omission (see clause 5(3)). It bears this extended meaning throughout Part 2 of the Bill.

Clause 10 : Meaning of direct discrimination

43. Direct discrimination is unlawful if it is done for a reason related to one or more of the prohibited grounds. In addition to sex³, race and disability, the Bill also covers discrimination on the grounds of age, gender reassignment, religion or belief or sexual orientation. The recent EC Directive relating specifically to these grounds applies only in the employment field. But the Bill goes beyond the minimum

³ Family status, marital status and pregnancy are specified in the Bill as prohibited grounds.

provisions required by the Directive (something specifically contemplated by the Directive) to produce a single coherent regime for combating discrimination in relation to all the prohibited grounds equally.

44. Direct discrimination occurs in two situations.

- The first situation is of general application (see *subsection (1)(a)*). It applies where, for a reason related to a prohibited ground, a person is treated less favourably than another person is, has been or would be treated in a comparable situation. *Subsection (2)* provides that the circumstances of the two persons in this comparison are to be taken to be either the same or with no material difference between them.
- The second situation arises where a person is subjected to a detriment on one of those grounds (see *subsection (1)(b)*). In this case there may be no appropriate comparators. For example, men do not become pregnant so there are difficulties in determining what a comparable situation for a man would be (as required by *subsection (1)(a)*). In the case of age, which is a process and not an immutable characteristic, it is difficult to choose an appropriate comparator of another age. In situations such as these it would be sufficient to show that the person has suffered direct discrimination by being subjected to a detriment (that is, put at a disadvantage).

45. *Subsection (3)* provides that segregating a person from others on the grounds of his colour, race, nationality or ethnic or national origins is direct discrimination. *Subsection (4)* makes it clear that this is not to prevent segregation on any other ground from being direct discrimination.

Clause 11: Meaning of indirect discrimination

46. Indirect discrimination occurs in the three Cases set out in *subsection (1)*. The definition is based on the definitions in the Burden of Proof Directive 97/80/EC and on Directives 2000/43/EC and 2000/78/EC (which this Bill implements). Account has also been taken of the draft Equal Treatment Directive 2002.

47. Cases 1 and 2 are results-oriented. It is not the equality of treatment meted out to a person that matters, but the fact that it has a disparate impact on a person because he or she:

- has one or more of the characteristics specified in *subsection (2)*; or
- is of a certain age.

In either of Cases 1 or 2, a person is not indirectly discriminated against for the purposes of this clause unless he is actually placed at a disadvantage.

48. But *subsection (3)* provides that there is no indirect discrimination in Cases 1 or 2 if a person shows that the application of the provision, criterion or practice can be objectively justified by a legitimate aim and that the means of achieving that aim are proportionate to it.

49. Case 3 provides that a failure to comply with the duties imposed by clauses 34, 35 and 36 (which relate to facilitating access by disabled persons) is also treated as indirect discrimination.

Clause 12 : Harassment

50. This clause makes it unlawful to harass another person for a reason related to a prohibited ground. This applies in any protected area of activity. These are considered above in relation to clause 6. Accordingly, the definitions and exclusions in Schedule 2 of the Bill will be relevant here too.

51. *Subsections (2) to (4)* set out what constitutes harassment. This includes the requirement that the victim must have suffered harm as a result of it. An objective standard is to be applied in assessing whether or not a person has been harassed but the perception of the victim of the relevant conduct must be taken into account (as well as other relevant circumstances).

52. A person who claims that he has been harassed may complain to a tribunal (see clause 7) and the Commission may also initiate proceedings or take other action under Chapter 2 of Part 5.

Clause 13 : Victimisation

53. In order to protect persons seeking to enforce their rights under the Bill, this clause makes it unlawful to victimise a person for taking any action in connection with a contravention, or possible contravention, of the Bill. This is likely to be of particular relevance in relation to employment where a person seeking to make a complaint or take other protected steps could be in an ongoing employment relationship with the employer. Giving protection to persons who raise particular issues should also assist with negotiation and settlement of any concerns at an early stage. However, the clause applies even after employment has ended (see clause 18).

54. The steps that are protected by this clause include those of presenting a complaint to a tribunal or giving evidence or information at any tribunal hearing. But they also include any allegation that a person has behaved in a way that would be unlawful if the allegation were true, as well as any other step relating to anything contained in the bill or taken in connection with it.

55. A person who claims that he has been victimised may complain to a tribunal (see clause 7) and the Commission may also initiate proceedings or take other action under Chapter 2 of Part 5.

Clauses 14 to 17 : Other unlawful acts

56. These clauses deal with conduct which is preliminary to, or instrumental in, acts made unlawful by clause 9, 12 or 13. They make it unlawful to do certain acts. These include giving instructions to discriminate, harass or victimize or publishing discriminatory advertisements.

Clause 18: Relationships in the employment field that have come to an end

57. This clause makes it unlawful to do an act after an employment relationship has ended if the act constitutes discrimination, harassment or victimisation and arises out of, or is closely connected with, the employment relationship.

Clauses 19 & 20 : Persons liable for the acts of others

58. **Clause 19** identifies persons who are made liable for the acts of others on certain circumstances.

- *Subsection (1)* of clause 19 provides that employers are liable for acts done by anyone in the course of their employment. This includes employment under a contract personally to do any work.
- Persons who provide contract work for individuals employed by a third party are liable for acts done by the contract workers whilst working for him (see *subsection (2)*).
- Principals are also made liable for the acts of their agents if they are acting in the course of their authority (see *subsection (3)*).

59. In such circumstances, clause 13 treats the employee is treated as having aided the act of the employer (which is itself an unlawful act in respect of which the Commission may apply to a tribunal – see clause 69).

60. The employer or principal is liable for acts done without their knowledge or approval as well as with. But this does not apply to an employer who can show that he took all reasonable steps to prevent the employee doing the act or acts of that description (see *subsection (5)*). For example, an employer may not be liable, depending on the circumstances, if he can show that he established proper systems and controls (such as training of staff, a reporting system and appropriate management intervention to prevent or deter discrimination, harassment or victimisation).

61. **Clause 20** makes provision to deal with the particular employment arrangements that apply in relation to the police and related services. It makes clear where the responsibility lies for unlawful acts carried out by constables etc.

CHAPTER 2 : DIRECT MODIFICATION OF AGREEMENTS CONTRARY TO THIS ACT

Clauses 21 & 22: Equality clauses in contract of employment

62. **Clause 21** has the effect of modifying contracts of employment if certain conditions are satisfied. There are four cases in which this happens and these are set out in *subsection (2)*. In broad terms they relate to cases in which a woman is employed on like work with a man or on work of equal value and the remuneration packages do not provide equivalent benefits (whether in relation to pay or otherwise). The concepts of ‘like work’ and ‘work of equal value’ are defined in **clause 22**. A number of other terms and expressions are also defined in that clause.

63. *Clause 21(3)* modifies the contract of whichever party is worse-off so as to bring them into line. This modification may be delayed in the circumstances described in *clause 21(4)* by a collective or workforce agreement or an award of the Central Arbitration Committee. This is to avoid placing a disproportionate burden on the employer.

64. A person who claims that a term of the equality clause inserted into his contract of employment by clause 21 may complain to a tribunal under clause 72. Other references to the tribunal may be made in accordance with that clause. The Commission may initiate proceedings or take other action under Chapter 2 of Part 5.

Clauses 23 & 24 : Avoidance and revision of certain terms in agreements

65. **Clause 23** directly invalidates terms in agreements that would be contrary to Part 2 of the Bill. *Subsection (1)* lists the circumstances in which provisions in an

agreement are invalidated. These include where an agreement requires someone to act in a way that would be unlawful under Part 2 or prevents him from instituting proceedings under Part 6 of the Bill in respect of such an act.

66. Any person interested in an agreement which is affected by invalidity on account of *clause 23(1)* can apply to a tribunal for the agreement to be revised. Since the court is given discretion under *clause 23(2)* to make any order that it considers just and equitable, this may extend to other modifications to the agreement (for example, to make modifications that take account of the alterations in the balance of the agreement between the parties).

67. **Clause 24** excludes certain agreements from the effect of *clause 23*. The excluded agreements are:

- agreements to settle a claim made under *clause 7*; and
- agreements not to institute or continue such proceedings.

68. *Subsections (3) to (8)* contain requirements that must be satisfied in relation to such agreements. These provisions specify the need for independent legal advice and for certain formalities that must be met in relation to the form and content of the agreement.

PART 3: MEASURES TO FACILITATE GENERAL PROGRESS TOWARDS EQUALITY

69. There are three distinct matters dealt with in this Part.

- **Clauses 25 to 27** require bodies exercising functions of a public nature to have due regard to the need to eliminate discrimination and to promote equality of opportunity. This general duty is supplemented by a framework for the creation of specific duties (and guidance) so as to deal with the range of public bodies and the different areas in which they operate.
- **Clauses 28 to 33** require employers to carry out periodic reviews of the composition of their workforce and their employment policies and practices. If a review indicates that there may be failings in terms of equal opportunities or equal pay, they are required to draw up proposals with a view to bringing about change.
- **Clauses 34 to 37** require certain persons to take steps in order to make accommodation or adjustments for disabled persons. This applies in connection with work-related matters, education matters and the provision of goods, facilities or services.

Clauses 25 to 27: Equality obligations in the public sector

70. This group of clauses imposes a general duty on public bodies requiring them to give active consideration in the course of carrying out their functions to the need to eliminate unlawful discrimination on any prohibited ground and to the need to promote equality of opportunity. Supplementary duties can be imposed by secondary legislation to flesh out this general duty. The bodies to which the duties apply are to be specified by order.

71. This approach allows for the phasing in of the general duty over time given the wide range and variety of public bodies that exist. It also allows appropriate implementation structures to be provided, having regard to the different circumstances of different bodies or of bodies of different types or sizes. In most respects, this follows the approach taken in relation to similar duties in the Race Relations Act 1976 (which were inserted into that Act by the Race Relations (Amendment) Act 2000).

72. **Clause 25** allows the Secretary of State to specify bodies to which the requirements of this Part of the Bill are to apply. As a result of *subsection (2)*, these can only be bodies which appear to the Secretary of State to exercise functions of a public nature. This will cover the main central and local government bodies, the police, educational bodies, planning authorities, and housing bodies as well as many others. *Subsection (3)* allows the Secretary of State to specify certain capacities or functions of the body. Amongst other things, this ensures that it will be possible to include bodies which may do things other than carry out functions of a public nature. But where a capacity or function is specified, clause 26(4) ensures that the general duty imposed by that clause will apply only in relation to that capacity or function.

73. *Subsection (4)* has the effect that the functions conferred by clauses 25 to 27 are exercisable by Scottish Ministers. This is because under the Scotland Act, imposing duties in relation to equal opportunities on office-holders in the Scottish Administration or on cross-border public authorities is a devolved function.

74. The consent of the National Assembly is required under *subsection (7)* if the order affects a Welsh public authority (that is, a person exercising functions only in relation to Wales).

75. *Subsection (5)* requires the Secretary of State to consult the Commission and other interested parties before making an order under this clause. This includes the National Assembly for Wales where the order affects functions exercisable by a body that is not Welsh public authority (*subsection 6*).

76. **Clause 26** imposes the general equality duty on public bodies to have due regard to the need to:

- eliminate unlawful discrimination on any prohibited ground;
- promote equality of opportunity as between the different groupings specified in *subsection (2)*;
- promote good relations between members of different racial groups.

77. *Subsection (3)* limits the requirements of the duty to promote equality of opportunity (the second bullet point of the previous paragraph) in so far as it applies to equality of opportunity as between different racial groups. Public bodies carrying out immigration functions will be subject to the general duty imposed by this clause in so far as it relates to eliminating unlawful discrimination and to promoting good relations between persons of different racial groups. But they will not be subject to the duty in so far as it requires the promotion of equality of opportunity between persons of different nationalities. This is required because immigration policy, by its very nature, denies opportunities to some nationalities that are offered to others.

78. *Subsection (5)* sets out that the Commission may take account of any failure to observe the duties imposed by clause 26 in exercising its functions. This will be of particular significance in relation to the enforcement powers of the Commission set

out in Chapter 2 of Part 5. A failure to observe the duties may also be taken into account by any tribunal or court in proceedings under Part 5 of this Act.

79. **Clause 27** allows the Secretary of State to make an order imposing specific duties on public bodies to ensure the better performance by them of the general duty under clause 26. *Subsections (4) to (8)* require consultation on a draft of any such order. The Commission will also be able to exercise its power under clause 45 to issue codes of practice in relation to both the general duty imposed by clause 26 and the specific duties imposed by an order under clause 27.

80. *Subsection (3)* allows the Secretary of State to apply Part 3 of the Bill in such a way as to impose different requirements on different public bodies or categories of public bodies. This allows for proportionality and flexibility. For example, it may be inappropriate to require the same of small public authorities as of a major department of state or local authority.

Clauses 28 to 33: Employment equity plans and pay equity plans

81. This group of clauses makes provision for the carrying out of workforce reviews and, if certain findings emerge from a review, the implementation of employment equity plans and pay equity plans. The purpose of these provisions is to provide structured arrangements under which employers and interest groups (in particular, workforce representatives) can work together to bring about change where there is unjustified under-representation of ‘employment equity groups’ (defined in clause 30(2)), or unequal pay between men and women carrying out work of equal value.

82. **Clause 28** allows the Secretary of State to designate the employers or types of employer to which the requirements of this group of clauses are to apply. As a result of *subsection (3)*, these can only be employers who have at least ten workers. This includes persons who contract personally to do any work as well as contract workers – see the definition of “worker” in *subsection (5)*. This general approach means that the obligations imposed by this Part could be gradually phased in over time, according to factors such as the size of the employer or the level of resources (including administrative resources) which are likely to be available to him. *Subsection (4)* requires the Secretary of State to consult the Commission and other interested parties before making an order under this clause.

83. *Subsection (5)* contains a list of terms which are used in more than one clause and which are defined in the first place they occur. ‘Appropriate representative’ (which is used in clauses 32 and 33) is given the same meaning as is used in relation to equality clauses in contracts of employment (see clause 22(4)). In general terms these would be recognised trade union representatives or, failing them, other representatives elected under arrangements that meet the requirements as to election of representatives which are specified in clause 22(5).

84. **Clause 29** requires designated employers to conduct workforce reviews in relation to conditions for access to employment and training and to the terms and conditions that apply to his workers. Designated employers are required by *subsections (4) and (5)* to carry out comparative evaluations of jobs that are generally carried out by groups of workers made up of mostly men or mostly women and of the pay levels that exist in relation to each group.

85. Where findings of under-representation or unequal pay emerge from a workforce review, *clauses 30 to 33* require designated employers to take action in response.

86. **Clause 30** is concerned with findings of under-representation of members of groups (referred to in the clause as ‘employment equity groups’) identified by reference to:

- colour, race or ethnic or national origins;
- sex;
- disability.

87. *Subsection (1)* requires the employer to draw up and implement a programme of action for the purposes of removing barriers that currently exist and giving effect to positive policies and practices to achieve fair participation of all such groups in the workforce.

88. *Subsection (6)* makes it clear that this requirement does not require an employer to take steps that would place a disproportionate burden on him, to create new jobs or to ignore a person’s merit or suitability for a particular job. However, *subsection (7)* indicates that a person’s qualification for a job may arise in a number of ways other than as a formal qualification.

89. **Clause 31** is concerned with findings of unequal pay between men and women carrying out work of equal value. *Subsection (1)* requires the employer to draw up and implement a programme of action for the purposes of removing disparities in pay. *Subsection (2)* provides that this may not be achieved by reducing the pay of the comparatively higher paid workers. This is a specific instance of the application of the general principle set out in clause 2.

90. *Subsection (3)* makes it clear that this requirement does not bite if the employer can demonstrate that the pay differential has a justification other than the sex of the persons doing the work or, in the case of indirect discrimination, is otherwise objectively justified by a legitimate aim which is achieved by genuine, determining and proportionate means.

91. **Clause 32** contains provision supplementing the requirements for workforce reviews, employment equity plans and pay equity plans. *Subsections (1) to (4)* require the involvement in that process of representatives of the workforce and provide for information flows between them and the employer. *Subsections (5) and (6)* confer power on the Secretary of State to make detailed provisions about the shape of workforce reviews, employment equity plans and pay equity plans. This may include provision to allow the employer and representatives to reach agreement to phase in any changes in order to allow the employer time to absorb the costs of implementation of an agreed pay equity plan. *Subsection (7)* requires the Secretary of State to consult the Commission and other interested parties before making regulations under this clause. The Commission will also be able to exercise its power under clause 45 to issue codes of practice in relation to workforce reviews, employment equity plans and pay equity plans.

92. **Clause 33(1)(b)** sets out that the Commission may, in the exercise of its functions, take account of any failure of a designated employer to comply with the requirements listed in *subsection (2)*. This will be of particular significance in relation to the enforcement powers of the Commission set out in Chapter 2 of Part 5.

93. In addition, disputes relating to pay equity plans may be referred to the Central Arbitration Committee by the Commission or by the appropriate workforce representatives (see *subsection (3)*). The Committee and its membership, proceedings and awards are described in section 259 to 265 of the Trade Union and Labour Relations (Consolidation) Act 1992. *Subsection (4)* enables the Committee to make an arbitration award specifying the pay equity plan to be adopted by the employer in any case referred to it.

94. **Clause 33(1)(c)** sets out that a failure to observe the duties may also be taken into account by any tribunal or court in proceedings under Part 5 of this Act. In such proceedings (or in any proceedings before the Central Arbitration Committee), *subsection (5)* ensures that regard is had to any disproportionate burden on the employer caused by his compliance with the obligations relating to workforce reviews, employment equity plans or pay equity plans.

Clauses 34 to 37: Duties to facilitate access etc by disabled persons

95. This group of clauses requires certain persons to take steps to remove or reduce the particular disadvantages faced by disabled persons in connection with work, education and the provision of goods, facilities and services. The duties do not themselves give rise to a right to complain to a tribunal. However, non-compliance with them will constitute indirect discrimination (see Case 3 in clause 11(1)). As such, it will be possible for a person to complain to a tribunal under clause 7, as explained above.

96. In addition, clause 34(5), 35(4) and 36(8) set out that the Commission may, in exercising its functions, take account of any failure to observe the duties imposed by each of those clauses respectively. This will be of particular significance in relation to the enforcement powers of the Commission set out in Chapter 2 of Part 5. A failure to observe the duties may also be taken into account by any tribunal or court in proceedings under Part 5 of this Act.

97. **Clause 34** imposes a general duty on all ‘responsible persons’ to take reasonable steps to enable particular disabled persons to have access to, or participate in, work, training or other work-related benefits.

- Part 1 of Schedule 3 sets out a Table that lists the responsible persons on whom the duty is imposed. This includes employers and other providers of work (such as partnerships or providers of contract work or work placements) but also covers bodies which issue professional or occupational qualifications, trade organisations etc.
- The duty is owed to a specified range of disabled persons who are termed ‘qualifying persons’. Again, these are listed in the Table in Schedule 3. Broadly speaking this covers applicants (or potential applicants) and incumbents (depending on whether the responsible body offers work, qualification, membership etc). Elected councilors of local authorities are also included as qualifying persons.

98. The Secretary of State has power to make changes to the categories of persons subject to the duty and persons to whom it is owed. This includes power to make additions to the lists. Part 2 of Schedule 3 contains detailed provision (including examples) as to when a step is reasonable and so required by the duty imposed by clause 34. What is reasonable will partly depend on the burden that taking

any particular step would place on the employer. Part 2 of that Schedule also enables the Secretary of State to make further provision in relation to the application of the duty. The Commission will also be able to exercise its power under clause 45 to issue codes of practice.

99. *Clause 34(3)* provides that no duty is employed if the responsible person does not know (and could not reasonably be expected to know) that a particular disabled person is or may be a qualifying person.

100. **Clause 35** imposes a duty on the certain bodies responsible for educational establishments to take reasonable steps to ensure that disabled pupils or students are not placed at a substantial disadvantage compared with persons who are not disabled. This applies to admissions arrangements and to education and associated services. Part 3 of Schedule 3 contains detailed provision (including a power to make further provision) as to when a step is reasonable and so required by the duty imposed by clause 35. The Commission will also be able to exercise its power under clause 45 to issue codes of practice.

101. **Clause 36** imposes a duty on providers of goods, facilities or services to take reasonable steps to ensure that it is not impossible or unreasonably difficult for disabled persons to make use of the goods, facilities or services. This applies in relation to physical features of premises and to practices, policies or procedures generally and extends to require the use of auxiliary aids or services. *Subsection (5) (a)* gives the Secretary of State power to exclude from this duty certain providers and certain goods, facilities or services. Part 4 of Schedule 3 contains detailed provision (including examples) as to when a step is reasonable and so required by the duty imposed by clause 36. There is also a power to make further provision. The Commission will also be able to exercise its power under clause 45 to issue codes of practice.

102. **Clause 37** overrides the provisions of certain leases so that premises can be modified so as to comply with the duties imposed by clauses 34 to 36. The clause applies where a person has no right to make particular alterations. *Subsection (3)* sets out arrangements under which the consent of the lessor must be obtained before any alterations to the premises can be made but it also restricts the lessor from withholding his consent if it would be unreasonable for him to do so. However, these arrangements do not apply if the lease expressly excludes them (see *subsection (4)*).

PART 4 : THE EQUALITY COMMISSION

103. This Part establishes a single body (the Equality Commission for Great Britain) to oversee the implementation of the provisions in the Bill and to take enforcement action in appropriate cases. The Commission is to have the functions conferred by or under the Bill.

Clause 38 : The Equality Commission

104. The Bill provides for a single Equality Commission to replace the Equal Opportunities Commission and the Commission for Racial Equality. The Disability Rights Commission (“DRC”) will continue to exist and will discharge the functions of the Commission conferred by this Bill. In so far as these are inconsistent with the DRC’s functions under existing legislation, these can be repealed or amended by

using the powers conferred by clauses 92 and 93. Alternatively, the DRC's existing functions can continue to exist. In this case, the provisions of the Bill that apply to discrimination on the grounds of disability might not be brought into effect at all until an order is made under *subsection (8)* (see below). The Secretary of State is given power by *subsection (6)* to modify the provisions of the Bill where functions are exercisable by the DRC.

105. The Secretary of State is also given power by *subsection (8)* to make an order transferring the functions of the Disability Rights Commission to the Equality Commission established by the Bill and providing for the DRC to cease to exist. Such an order could include any remaining functions that the DRC has under existing legislation. However, no order may be made until at least three years after the establishment of the single equality commission.

106. There are detailed provisions in Schedule 1 of the Bill about the constitution and status of the body.

Clause 39 : The Commission's general duty

107. This clause requires the Commission to discharge its functions in accordance with the objectives specified in *subsection (1)(a) and (b)*. It does not of itself impose a specific statutory duty to eliminate unlawful discrimination or promote equality of opportunity. Rather the clause requires the Commission to carry out the functions conferred on it by the Bill insofar as is possible in a way which, taking into account any need to balance priorities between the two, it considers most appropriate to their fulfilment.

108. *Subsection (2)* lists a number of matters to which the Commission must also have regard in exercising its functions. These include the international obligations of the United Kingdom in the field of human rights (defined in *subsection (4)*) and the need to conduct its affairs in the public interest and with an appropriate degree of independence.

109. The clause applies in relation to discrimination on any of the prohibited grounds. Likewise the clause requires the Commission to promote equality of opportunity between all the groupings listed in *subsection (3)*.

Clause 40 : Financial arrangements

110. This clause sets out the arrangements for the funding of the Commission. *Subsections (3) to (5)* require the Commission to allocate its resources so as to achieve:

- a balance as between eliminating discrimination and promoting equality; and
- a balance as between all the different grounds on which it seeks to achieve those aims.

Clause 41 : Reports to Parliament

111. This clause requires the Commission to make regular reports to Parliament, the Scottish Parliament and the National Assembly for Wales. A report must be made at least once every year but additional reports may be laid at other times. *Subsection (2)* lists some of the matters with which the report must deal (including its main objectives and priorities for the year).

Clauses 42 to 44: Functions relating to information etc

112. **Clause 42** places the Commission under a duty in relation to keeping itself informed so as to be able effectively to carry out its functions (including its enforcement functions). It also gives the Commission powers in relation to the conduct of research and surveys.

113. **Clauses 43 and 44** require the Commission to provide information and advice to the public and to Ministers. **Clause 43** also imposes obligations relating to raising public awareness of the damaging effects of discrimination and the benefits brought by equal opportunities. It also requires the Commission to raise public awareness of the requirements of the Act and of article 14 of the European Convention on Human Rights (which provides that the rights and freedoms secured by the Convention are to be enjoyed without discrimination on any ground).

Clause 45 : Codes of practice

114. The Commission has the general function of preparing and issuing codes of practice giving practical guidance on any matter dealt with in the Bill. It must prepare a code if the Secretary of State, Scottish Ministers or the National Assembly for Wales asks it to do so. The procedures for preparing and issuing draft Codes, and consulting on them, are set out in the provisions of Schedule 2 of the Bill.

115. *Subsection (2)* sets out that the Commission may take account of any failure to observe a code of practice in exercising its functions. This will be of particular significance in relation to the enforcement powers of the Commission set out in Chapter 2 of Part 5. A failure to observe the duties may also be taken into account by any tribunal or court in proceedings under Part 5 of this Act.

Clause 46 : Questionnaires relating to acts made unlawful by Part 2

116. This clause requires the Commission to draw up questionnaires to assist the parties to any complaint under clause 7. The purpose of the questionnaires is to assist a person in deciding whether or not to bring a complaint and in formulating his case in any proceedings that he does go ahead with. Questionnaires should also be available to assist in the giving of responses.

117. Under *subsection (3)*, any responses given in the course of questioning are admissible in evidence in any proceedings as are the questions asked. This applies whether or not the responses were given using the questionnaires. *Subsection (4)* provides that a tribunal or court may draw any inference it considers just and equitable from any failure to respond to a questionnaire or from any response that is evasive or equivocal.

Clause 47 : Assistance to persons in connection with certain proceedings

118. This clause enables the Commission to provide assistance in connection with certain proceedings. In broad terms, these are proceedings that concern the subject matter of this Bill.

119. *Subsections (1) and (2)* set out the circumstances in which such assistance may be given. In addition to proceedings under clause 7 of the Bill, the power to assist extends to proceedings against public authorities under section 7 of the Human Rights Act 1998, proceedings before the European Court of Human Rights which concern the application of article 14 of the European Convention of Human Rights and any other proceedings prescribed by regulations made by the Secretary of State.

Subsection (3) sets out that assistance may be given with respect to the provision of legal advice, arrangements for representation, procuring a settlement and any other appropriate assistance.

PART 5 : ENFORCEMENT

120. This Part brings together the mechanisms for ensuring that provisions of the Bill are observed and that there are effective remedies for persons who are victims of unlawful acts.

- Chapter 1 of this Part specifies who gets to hear any proceedings initiated under the Bill.
- Chapter 2 sets out the enforcement mechanisms open to the Commission. These can be used in relation to secure compliance with any provision Parts 2 and 3 of the Bill. This Chapter also provides for appeals against enforcement action taken by the Commission.
- Chapter 3 sets out in detail the operation of the complaints mechanism introduced by clause 7 of the Bill. This is open to individuals, or persons acting on their behalf, in respect of acts made unlawful by any provision of Part 2 of the Bill. Chapter 3 also contains provision for determining disputes as to the effect of the equality clause inserted into contracts of employment by clause 21 of the Bill.
- Chapter 4 makes provision for the enforcement of determinations made under the preceding provisions of the Part. This includes disqualification from government contracts and denial of financial assistance in certain cases involving persistent contravention or grave misconduct.

CHAPTER 1 : JURISDICTION

Clause 48 : Matters referred to a tribunal

121. In most cases, where the Bill provides for any matter to be referred to a tribunal, this means an employment tribunal. Since the Bill covers a range of matters that do not concern employment, *subsection (2)* states that the tribunal is to be called an “equality tribunal” when hearing such matters. The provisions of Part 5 refer to the “respondent” to a complaint or application to a tribunal or court and *subsection (3)* identifies who this means. It includes persons made liable by virtue of clause 19 for the acts of others (that is, employers, persons who use contract workers and principals).

Clauses 49 to 51 : Matters falling outside the tribunal’s jurisdiction

122. Clauses 49 and 50 apply to acts done in the education field.

123. **Clause 49** applies where appeal arrangements of a kind specified in subsection (1)(c) have been made for the hearing of disputes relating to the admission of a pupil from a school or Academy (or his exclusion from it). Any complaint under

clause 7 which relates to decisions on admissions or exclusions must be heard by the body appointed under those arrangements to hear such matters (*subsection (2)*). In hearing such a complaint, that body has the powers it has under those arrangements (*subsection (3)*).

124. **Clause 50** applies where a complaint under clause 7 alleges that an act made unlawful by Part 2 of the Bill has been done on disability grounds. The Special Educational Needs and Disability Tribunal must hear such a complaint. (This tribunal used to be the Special Educational Needs Tribunal and was renamed in the Special Educational Needs and Disability Act 2001). Detailed provision as to the jurisdiction and procedure of this Tribunal in dealing with such complaints is contained in Schedule 6 to the Bill.

125. **Clause 51** ensures that no question that has been or could be dealt with in appeal proceedings set up under the immigration legislation specified in subsection (2) can be dealt with on a complaint or application under the Bill. It also makes other provision to effectively remove certain other decisions relating to immigration matters from the jurisdiction of the tribunal and so remove the possibility of inconsistency with decisions relating to made by adjudicating authorities under immigration legislation.

Clause 52 : Transfer to county court or sheriff's court

126. This clause provides that non-employment matters may be transferred to the county court or, in Scotland, the sheriff court in any case where the President or Regional Chairman of tribunals thinks that it would be appropriate. *Subsection (4)* requires a transfer in any matter that may involve matters of national security.

127. *Subsection (6)* sets out a non-exhaustive list of factors that are to be taken into account in making a decision to transfer. These range over practical matters (such as access to the building), questions of law and procedure and available remedies.

Clause 53 : Proceedings involving matters of national security

128. This clause makes special provision for proceedings in the county or sheriff court where matters of national security arise. Rules may be made enabling a court which considers it expedient to do so for national security reasons:

- to exclude the claimant and his representatives from all or part of proceedings;
- to allow a person who has been excluded to make a statement to the court; and
- to take steps to keep the reasons for its decision secret.

129. *Subsections (3) to (5)* provide that, where a person has been excluded from proceedings, the Attorney General (or, in Scotland, the Advocate General for Scotland) may appoint a person suitably qualified to represent the interests of the claimant. It provides that this person is not responsible to the claimant. These provisions are based on similar provisions in section 6 of the Special Appeals Commission Act 1997.

CHAPTER 2 : ENFORCEMENT BY COMMISSION

Clause 54 : Commission powers to gather information

130. In order to carry out its functions, the Commission will need to obtain information. This clause makes provision for this.

131. *Subsection (1)* enables the Commission to request information from any person in connection with the discharge of its functions.

132. In addition, the Commission is given power in *subsections (2) to (4)* to conduct investigations to assist it in determining what needs to be done to secure compliance with the requirements of Parts 2 and 3 of the Bill or in determining how best a person can ensure that he does not contravene those requirements. This power to conduct investigations is supplemented by the provisions of Schedule 7 of the Bill.

Clause 55 : Restrictions on disclosure of information

133. In order to discharge its functions, the Commission may require access to confidential information. This clause contains safeguards to ensure that this information remains confidential, subject to certain exceptions. For example, *subsections (4)* allows disclosure where the person from whom the information was obtained consents to the disclosure and *subsection (5)* permits disclosure for the purpose of facilitating the Commission's discharge of its functions. The Commission may also disclose information to the Equality Commission for Northern Ireland to facilitate that body's discharge of its own functions (*subsection (6)*). A person who discloses information in breach of the requirements of this clause commits a criminal offence (see *subsection (7)*). The requirements of the Data Protection Act 1998 continue to apply in all cases (see *subsection (8)*).

Clause 56 : Obtaining undertakings

134. This clause provides for written undertakings to be made to the Commission by any person. This allows a person wishing to give one to undertake that he will take the steps specified in the undertaking.

135. An undertaking may be volunteered following discussions with the Commission or in response to a request made by the Commission. *Subsection (3)* sets out the circumstances in which the Commission may make a request and *subsection (4)* imposes certain minimum requirements as to the content of any undertaking given in response to a request.

Clause 57 : Commission's power to issue compliance notices

136. This clause gives the Commission power to issue a compliance notice if it is satisfied that any person has failed to do any of the things listed in *subsection (2)*. These include certain matters relating to the giving of undertakings or their adequacy and also cover failures relating to obligations imposed by Part 3 of the Bill.

137. A compliance notice must require the person to whom it is given to comply with an undertaking given by him or a duty to which he is subject. It should also specify the steps that the Commission considers necessary to achieve the necessary result. It might also require the recipient of the notice to inform the Commission of the steps that he has taken in response to the notice and to give the Commission other information to verify that the duty has been complied with.

138. Under *subsection (5)*, a person may apply to the Commission for the compliance notice to be amended or withdrawn. The Commission may also do this on its own initiative. The Commission may accept an undertaking under clause 56 in place of the notice.

Clause 58 : Compliance notices : procedure

139. This clause is concerned with the procedures of the Commission before and after the process of giving compliance notices. *Subsections (1) to (3)* ensure that the intended recipient has an opportunity to comment on the contents of the notice before the terms of it are finalised. The Commission may also consider written representations made by other persons and may invite any person to make representations to it.

Clause 59 : Compliance notices : appeals

140. A recipient of a compliance notice has a right to appeal to the tribunal in relation to the notice and the notice must inform of this (*subsections (1) and (2)*).

141. On an appeal, the tribunal has power to quash or replace all or any of the directions given by the Commission in the notice. It may do this if it considers that it is unreasonable to expect the recipient of the notice to comply with the directions or that they are inappropriate. Any substitute directions may only be enforced by an order of the tribunal made under clause 60 (see *subsection (6)*).

Clause 60 : Compliance notices : enforcement

142. This clause sets out that the Commission may apply to the tribunal to enforce any compliance notice it has given (including one that has been changed by order of the tribunal on an appeal under clause 59). The tribunal has power under *subsection (3)* to make any order it thinks fit in the circumstances of the case in order to give effect to the notice and, whether or not it does so, it may specify that the whole or part of the notice is no longer to have effect. Such an order may itself be revoked or varied under *subsection (5)*.

143. If it makes an order under this clause, the tribunal may summon the person to whom the notice was given to report back to the tribunal on any action he is required to take. When this happens, the Commission has the right to be heard on the matter (*subsection (6)*).

Clause 61 & 62: Commission's power to make tribunal applications

144. The Commission may make an application to the tribunal alleging that a person has done any act made unlawful by Part 2 of the Bill. It may also make an application seeking an order to prevent an act that would be a persistent contravention (see clause 66). An application may relate to persons who are made liable for the acts of others under clause 17 or 19. An application may either be brought in the Commission's name or together with the person or persons who are alleged to have been adversely affected by the unlawful act. However, no application may be made if it concerns a dispute as to the effect of an equality clause inserted into a person's contract of employment by virtue of clause 21. In such a case any reference to the tribunal must be made under clause 72.

Clause 63 : Tribunal applications : burden of proof

145. This clause provides that once a claimant has established facts from which it may be presumed that an act made unlawful by Part 2 of the Bill has taken place in relation to him, it is for the respondent to prove that that act was not in fact unlawful.

Clause 64 : Tribunal applications : determination

146. This clause sets out the recommendations and orders that a tribunal may make on an application by the Commission under clause 61 if it finds that an unlawful act has been done. These may be made for the benefit of any person making an application jointly with the Commission or who is identified as having been adversely affected by the unlawful act.

147. The Commission may make a recommendation or an order that the respondent take action to remove or reduce any damaging consequences of his action. It may also make any of the following orders.

- An order for payment by the respondent of compensation (*subsection (3)(a)*).
- An order that the respondent employ (or re-employ or reinstate) a particular person (*subsection (3)(b) or (c)*).
- An order to prevent the repetition of an unlawful act (*subsection (3)(e)*).
- An order to take remedial steps if that is practicable (*subsection (3)(f)*).

Clause 65 : Amount of awards

148. *Subsection (1)* directs the tribunal on the principles to be applied in determining the level of compensation to be ordered under clause 64(3)(a). It is to apply the same principles as apply to damages for claims in tort or (in Scotland) reparation for breach of statutory duty. These are, in broad terms, concerned to make good, so far as possible, the pecuniary or non-pecuniary loss suffered by the person adversely affected by the unlawful act by putting him into as good a position as if no wrong had occurred.

149. *Subsection (2)* makes clear that a sum may be included in respect of injury to the feelings of the complainant to compensate for harm suffered, whether or not compensation is awarded on any other grounds. This is intended to make it clear that compensation may be awarded for injury to the complainant which is caused or increased by the manner in which the respondent committed the unlawful act or by the respondent's conduct afterwards.

150. *Subsection (3)* goes on to include the possibility of the tribunal including a sum for punitive damages in an extreme case. The Law Commission's Report entitled 'Aggravated, Exemplary and Restitutionary Damages'⁴, describes the purpose of punitive damages as being to 'seek retribution, as well as being concerned to deter the respondent from repeating outrageously wrongful conduct and others from acting similarly'. In its report, the Law Commission recommended that punitive damages should be awarded where, in committing a wrong (or in subsequent conduct) a person deliberately and outrageously disregards the claimant's rights. *Subsections (3) to (5)* go on to apply this principle in more detail to acts made unlawful by Part 2 of this Act.

⁴ (LC 247, published 16.12.1997).

Clause 66 : Persistent contraventions

151. The Commission may also make an application to a tribunal seeking an order to prevent a person from carrying out an act that would qualify as a persistent contravention. In contrast to the position in the case of an application under clause 61, this does not require that an unlawful act should already have been carried out and be in danger of being repeated. Instead, this provision prevents the unlawful act being carried out at all. However, no application may be made unless a court or tribunal has found that the same person has done another unlawful act within the last five years.

CHAPTER 3 : ENFORCEMENT BY INDIVIDUALS AND OTHERS

Clause 67 : Complaints under section 7 : conciliation

152. This clause provides for the Commission to set up conciliation arrangements to provide advice and assistance to the parties to a complaint made under clause 7. The aim here is to promote the settlement of the complaint otherwise than in proceedings before the tribunal (see *subsection (8)*).

153. In order to encourage settlement through conciliation, *subsection (7)* provides that anything communicated during the conciliation process may not be disclosed in any proceedings before the tribunal without the consent of the communicator.

Clause 68 : Complaints under section 7 : interim relief

154. This clause allows a person who makes a complaint under clause 7 to apply to a tribunal for interim relief. This enables the position of the parties to be preserved in an appropriate case pending the hearing of the complaint. This is likely to be particularly important in cases that have resulted in loss of employment. For this reason, *subsections (5) to (7)* apply a number of provisions from the Employment Rights Act 1996 which set out the procedure for the tribunal to explore the practicability of reinstatement or re-engagement (and alternative orders) in cases where an unfair dismissal claim has been made.

Clause 69 : Complaints under section 7 : burden of proof

155. This clause provides that once a claimant has established facts from which it may be presumed that an act made unlawful by any provisions of Part 2 of the Bill has taken place in relation to him, it is for the respondent to prove that that act was not in fact unlawful.

156. This clause gives effect to the requirements of –

- article 4 of Council Directive (97/80/EC) of 17 December 1997 on the burden of proof in cases of discrimination based on sex⁵;
- article 8 of Council Directive (2000/43/EC) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin⁶;

⁵ OJ No. L 014, 20.01.1998, p. 6 – 8.

⁶ OJ No. L 180, 19.07.2000, p. 22– 26.

- article 10 of Council Directive (2000/78/EC) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation⁷.

Clause 70 : Complaints under section 7 : determination

157. If it is satisfied that an unlawful act has been done, the tribunal has the power to make such recommendations or orders as it thinks appropriate.

158. Recommendations under *subsection (2)(a)* may specify steps that the tribunal considers reasonable in order to prevent, remove or reduce the adverse effect complained of as arising from the unlawful act. The Commission may apply to the tribunal for an order enforcing these (see clause 76). If it makes a recommendation, the tribunal may specify the period within which the recommended steps must be completed (*subsection (4)*).

159. An order under *subsection (2)(b)* may require:

- payment by the respondent of compensation (*subsection (3)(a)*);
- that the respondent employ (or re-employ or reinstate) a particular person (*subsection (3)(b) or (c)*);
- that the respondent take action to remove or reduce any damaging consequences of his action (*subsection (3)(d)*);

Clause 71 : Amount of awards

160. This clause makes provision equivalent to that made by clause 65 in relation to the amount of awards on an application made by the Commission (see above).

Clauses 72 & 73: Equality clause : cases in which a tribunal reference may be made

161. **Clause 72** deals with references to a tribunal or any dispute relating to an equality clause inserted into a person's contract of employment by virtue of clause 21. Such references may be made:

- by any person who claims that the equality clause has been contravened (*subsection (2)*);
- by an employer for an order declaring the respective rights of the employer and employee (*subsection (3)*);
- by the Secretary of State (*subsection (4)*).

162. **Clause 73** imposes certain time limits for bringing a complaint. This is generally six months from the end of the employment relationship. However, a longer period applies where there has been deliberate concealment by the employer of material facts (*subsections (5)*) or if the woman was under a disability (*subsection (6), (7) and (9)*).

Clause 74 : Equality clause : determination

163. If it thinks appropriate to do so, a tribunal may make any of the following orders:

⁷ OJ No. L 303, 02.12.2000 p. 16 – 22.

- an order declaring whether there has been a contravention or as to the rights of the parties (*subsection (2)(a) and (c)*);
- an award of arrears of remuneration or damages (*subsection (2)(b)*);
- any order it considers appropriate (*subsection (2)(d)*).

164. No order may be made if the employer can demonstrate that the pay differential has a justification other than the sex of the persons doing the work or is objectively justified by a legitimate aim which is achieved by means which are genuine, determining and proportionate (*subsection (3)*).

Clause 75 : Limit on amount of awards

165. This clause places limits on the amount that may be awarded as remuneration or damages in relation to contravention of an equality clause. In England and Wales, this is generally restricted to a period 6 years before the proceedings were instituted (*subsection (2)*). However, a longer period applies where there has been deliberate concealment by the employer of material facts (*subsection (3)*) or if the woman was under a disability (*subsections (4) and (8)*). In Scotland, the restriction on the award is limited to the period of five years before the proceedings were instituted (*subsection (5)*). Again, the period is longer where a woman is induced not to commence proceedings by the employer or his representative or where she is under a disability (*subsections (6) to (8)*).

CHAPTER 4 : PERSONS IN DEFAULT

Clause 76 : Enforcement of recommendations

166. Where a tribunal or court has made a recommendation under clause 64 or 70 that has not been complied with, an application for enforcement action may be made under this clause. *Subsection (1)* sets out the persons who may make an application. If the tribunal or court thinks it would be just and equitable to do so, it may increase the amount of any compensation that it ordered the respondent to pay at the same time as it made the recommendation. If it did not make an order for compensation, *subsection (2)(b)* allows it to make such an order.

Clause 77 : Enforcement of tribunal orders

167. This clause enables an order of a tribunal to be enforced by the High Court or, in Scotland, the Court of Session. An application for enforcement must be made to the tribunal by any of the persons specified in *subsection (2)*. If the President of the tribunal or a Regional Chairman is satisfied that there has been a failure to comply with any tribunal order, he may certify the matter to the relevant court. By virtue of *subsection (5)*, the High Court or Court of Session then has the powers that it would have had if it had made the original order.

Clauses 78 to 86 : Disqualification from government contracts etc and denial of financial assistance

168. These clauses together establish arrangements which allow additional steps to be taken in the event of non-compliance with an original tribunal order. However, they only apply where the underlying matters to which the original tribunal order relates were particularly serious. To this end, the following factors must be present –

- a person must have failed to comply with a tribunal order made against him (see clause 78(1)(a));

- the matter must then have been referred to the High Court or Court of Session under clause 77 (see clause 78(1)(c)); and
- it must be clear from the original order that the matter concerns a persistent contravention (see clause 66) or grave misconduct (see clause 78(1)(b)).

169. **Clause 79** provides for the Commission to give a disqualification notice to a person who has failed to comply with the original tribunal order (referred to as ‘the person in default’) or to a linked person (within the meaning of clause 78(3) to (6)).

170. The effect of a disqualification notice is set out in **clauses 80 and 81**. Under clause 80, a person in receipt of a notice (“an unqualified person”) may not be considered for certain contracts awarded by any public authority. Clause 81 restricts the availability to an unqualified person of any financial assistance payable out of the Consolidated Fund. If the Commission becomes aware that any public authority is not observing the restriction imposed by clause 80, it may apply to the High Court or Court of Session for an appropriate order to ensure observance (**clause 85**). In addition, any person may bring an action for breach of statutory duty for non-observance of that restriction by a public authority (**clause 86**).

171. **Clauses 82 to 84** deal with procedural matters, cancellation of notices and appeals. In particular, clause 84 provides that any person who has been given a disqualification notice may appeal to the tribunal against the notice or against a refusal by the Commission to cancel it. On an appeal, the tribunal has power to cancel the notice if it is satisfied that there are no grounds for giving the notice or that those grounds no longer exist.

CHAPTER 5 : SUPPLEMENTAL

Clause 87 : Tribunal references made out of time

172. This clause allows a tribunal or court to consider any reference made to it under a provision of this Bill notwithstanding that it is made after the end of the period allowed for making references of that description. However, this is only if the tribunal considers that it would be just and equitable to consider the reference.

PART 6: MISCELLANEOUS AND SUPPLEMENTAL

173. This Part contains various miscellaneous and supplemental provisions.

Clauses 89 and 90 : Application to Crown and Parliament

174. This clause provides for the Bill to apply in relation to the Crown and Parliament.

Clause 92 : Power to make consequential and transitional provision

175. *Subsection (1)* provides for the repeal of certain enactments. The enactments to be repealed by the Act are listed in Schedule 8. This is not a complete list. Further repeals would have been made by order under clause 93(2)(a).

176. None of the provisions of the Disability Discrimination Act 1995 and the Disability Rights Commission Act 1999 are repealed by the Bill. When, in due

course, an order is made under clause 38(8), certain provisions of those enactments would need to be repealed. However, this would not affect the provisions of the Disability Discrimination Act 1995 which are free-standing and outside the scope of this Bill (see for example, sections 28D and 28E of the 1995 Act which deal with the duty of local education authorities to prepare accessibility plans and strategies or Part 5 of the 1995 Act which deals with public transport).

177. Clause 92 also confers on the Secretary of State a power, exercisable by order to make incidental, consequential or supplemental provision (see *subsection (2)*).

178. *Subsection (3)* confers a power to make transitional provision which is amplified in *subsection (4)*.

Clause 93 : Regulations and orders

179. This clause sets out the procedure for making statutory instruments under the powers in the Bill. The affirmative procedure is required for an order under:

- clause 25 – to identify the public bodies subject to the duties imposed by clause 26 and 27;
- clause 28 – to identify the designated employers subject to the duties to carry out workforce reviews and, in appropriate cases, draw up employment equity plans and pay equity plans (clauses 29 to 33)..

180. Otherwise the powers to make regulations and orders are subject to the negative resolution procedure.

Clause 94 : Short title, commencement and extent

181. The substantive provisions of the Act will come into effect on the date or dates specified by order by the Secretary of State.

SCHEDULE 1: DEFINITIONS RELATING TO THE MEANING OF DISABILITY

182. This Schedule elaborates on the definitions relating to disabled persons in clause 4.

183. **Paragraphs 1 to 6** expand on individual elements of the definition of disability in clause 4(3). This states that a person has a disability if:

- he has a physical or mental impairment
- which has substantial and long-term adverse effect
- on his ability to carry out normal day-to-day activities.

184. *Paragraph 1* makes provision as to what is meant by ‘impairment’.

185. *Paragraph 2* looks at when an effect is considered to be ‘long-term’.

186. *Paragraph 3* considers severe disfigurement in the context of what is considered to be a ‘substantial adverse effect’. *Paragraph 5* contains a power for the Secretary of State to make regulations as to what constitutes a ‘substantial adverse effect’.

187. *Paragraph 4* sets out circumstances in which an impairment is to be taken as ‘affecting a person’s ability to carry out day-to-day activities’.

188. *Paragraph 6* provides that the effect of medical treatment, or of other measures (such as the use of a prosthesis), in treating an impairment should be discounted if the impairment would otherwise be likely to have an adverse effect on a person’s ability to carry out day-to-day activities.

189. **Paragraphs 7 to 10** deal with deemed disability. For example, *paragraph 8* provides that persons certified by a consultant ophthalmologist as being blind or partially sighted are to be deemed to be disabled. This ensures that such persons will not be put to proof that they are disabled. *Paragraph 10* also identifies the point at which persons with HIV or cancer are to be deemed to be disabled persons for the purposes of the Bill.

190. In certain circumstances, the early stages of a progressive medical condition may be such that persons who have or have had the condition would not fall within the definition of a disabled person (because at that stage the effect of the condition is not ‘a substantial adverse effect’). This applies to conditions such as cancer, multiple sclerosis, muscular dystrophy or infection with HIV. **Paragraph 11** provides that persons with conditions that are likely to result in an impairment which has a substantial adverse effect on his ability to carry out normal day-to-day activities are to be treated as having such an impairment.

SCHEDULE 2 : PROTECTED AREAS OF ACTIVITY

Part 1 : General

191. The provisions in this Schedule provide further information as to the protected areas of activity in which Part 2 of the Bill makes certain acts unlawful. In broad terms, these relate to the provision of work, services or commodities which have a public element. The various acts are made unlawful only if done by the ‘provider’ of the work, services or commodities (for example the public authority, the provider of work, the body responsible for an educational establishment and so on).

192. Parts 2 to 7 of this Schedule deal separately with each of the six protected areas of activity. Each Part contains provisions which set out in more detail what each protected area of activity covers along with a number of exclusions that apply only in relation to that particular area.

193. Part 8 of the Schedule also contains a number of exclusions of more general application. Sometimes these apply to all protected areas of activity, sometimes to two or more.

Part 2 : Public authority functions

194. Part 2 of this Schedule sets out the scope of the protected area of activity specified in clause 6(1)(a). This specifies the carrying out by a public authority of its functions as being an area of activity in which it is unlawful to do an act amounting to discrimination (clause 9), harassment (clause 12), victimisation (clause 13) or any of the acts specified in clauses 14 to 17 of the Bill.

195. *Paragraph 2* makes provision as to the matters that come within this protected area of activity. *Paragraphs 3 to 9* then exclude certain matters from it.

Paragraph 2 : Meaning of “public authority”

196. Paragraph 2 sets the boundaries of this area of activity by using the concept of a ‘public function’. Whether or not a particular person is a public authority, and so liable for acts such as discrimination or victimisation etc, depends on the extent to which they carry out functions of a ‘public nature’ (see *sub-paragraph (1)(a)*). This clearly covers bodies which have only public functions (such as Government departments or the police). But it also catches bodies which have both public and private functions. However, in this case, *sub-paragraph (3)* provides that such bodies are public authorities only to the extent of their public functions. Certain bodies listed in *sub-paragraph (2)* are excluded from the scope of Part 2 of the Bill.

Paragraphs 3 to 5 : Exclusion for judicial and legislative acts etc

197. These paragraphs exclude from the scope of this protected area of activity acts that are done in the discharge of certain functions of the Judiciary, the Executive and the Legislature. In broad terms, these relate to the functioning of the judicial system, law-making and certain executive acts done in connection with immigration functions.

Paragraph 6 : Exclusion for certain acts in immigration and nationality cases

198. This paragraph exclude from the scope of this protected area of activity acts done on the grounds of nationality by certain persons in carrying out immigration functions.

Paragraphs 7 & 8 : Exclusion for decisions not to prosecute

199. These paragraphs ensure that decisions not to prosecute (and related acts) are not open to challenge as being unlawful under Part 2 of the Bill.

Paragraph 9 : Exclusion for unlawful acts other than discrimination, harassment or victimisation

200. This paragraph excludes acts done by public authorities which are made unlawful by clauses 14 to 17 (for example, publishing discriminatory advertisements). They remain liable for any act which constitutes discrimination, harassment or victimisation.

Part 3 : Acts in the employment field

201. Part 3 of this Schedule sets out the scope of the protected area of activity specified in clause 6(1)(b). This specifies the affording of opportunities, and the making of decisions or arrangements in the employment field, by a person

concerned with the provision of work as being an area of activity in which it is unlawful to do an act amounting to discrimination (clause 9), harassment (clause 12), victimisation (clause 13) or any of the acts specified in clauses 14 to 17 of the Bill.

202. *Paragraphs 10 to 12* make provision as to the matters that come within this protected area of activity. *Paragraphs 13 to 18* then exclude certain matters from it.

Paragraphs 10 to 12 : Scope of the employment field

203. *Paragraph 10* sets the boundaries of the employment field. It relates (in broad terms) to obtaining work and the terms and conditions that apply in relation to any work once a person has got it. It covers promotion, transfer and other benefits as well as training. It also covers and access to, and participation in, various organisations (such as trade unions or employers bodies and bodies providing professional or occupational qualifications).

204. *Paragraph 10 (3)* limits the scope of this protected area of activity to employment in the European Community. The Bill itself only applies to Great Britain. So it is only acts and deliberate omissions that take place in Great Britain that would be unlawful under Part 2 of the Bill. But such acts may relate to employment that, if it were offered and taken up, would take place in another EC State. The overall effect is that the Bill would cover any unlawful act in Great Britain (such as job interviews etc). Once a person starts work in that other country and they are discriminated against in that country, then that will fall within the jurisdiction of the anti-discrimination regime in force in that country (which will be broadly equivalent to the GB regime because of the various provisions of EC law that apply in this field). This ensures that the Bill captures, for example, the job interview that takes place in Great Britain for a job in Germany where, as a result of unlawful discrimination, no job is offered. But where a discriminatory act takes place in Great Britain and relates to employment in a non-EC State, then this would fall outside the scope of the Bill.

205. *Paragraph 10(4)* gives the term “employment” a wide meaning. As well as the more usual meaning set out in *paragraph 10(4)(a)(i)*, it includes contract work that is, work made available by a person which is carried out by someone who is employed by a third party under a contract between the provider of work and the third party). It also covers the performance of functions associated with any recognised office (such as a minister of religion or company director), engagement without reward or compensation and work placement or training.

206. *Paragraph 11* expands on this definition by providing a non-exhaustive list of examples of persons concerned with the provision of work who come within the scope of this protected area of activity. This includes any person who is listed in the Table in Part 2 of Schedule 3.

207. *Paragraph 12* provides that the employment field also extends to cover the affording of opportunities, or making decisions or arrangements, which relate to occupational pension schemes and insurance services offered by an employer. The Secretary of State is given power to modify Part 2 of the Bill in its application to trustees of managers of occupational pension schemes and employers.

Paragraph 13: Exclusion for genuine occupational qualifications

208. The Sex Discrimination Act and the Race Relations Act contain specific lists of genuine occupational qualifications, such as actors, models, and the

provision of personal welfare services. The Disability Discrimination Act has no exceptions for genuine occupational qualification but instead allows a defence of justification to a claim of discrimination. Paragraph 13 of this Schedule is intended to implement Article 4 of Directive 2000/43/EC and Article 4 of Directive 2000/78/EC by providing a general defence for genuine and determining occupational requirements in respect of all grounds of unlawful discrimination. The person imposing the requirement must show that it is genuine, given the job content or the context in which it is carried out, and that imposing the requirement is proportionate to the overall objective to be achieved by a person carrying out that particular job.

209. Paragraph 13 of this Schedule provides a general exclusion which is capable of applying to a wide range of different circumstances. The Commission has power under clause 45 to provide guidance as to the circumstances in which this exclusion may or may not apply in any particular sphere of employment or at any job level (see clause 45(3)(d)). This is an example of an area in which guidance from the Commission may be appropriate.

Paragraph 14 : Exclusion for charitable bodies

210. This paragraph applies in relation to certain requirements in the employment field which are imposed by charitable bodies which have as their principal purpose the promotion of a particular religion or belief. The exclusion is concerned with the employment of a person holding the same religion or belief (or a particular religion or belief) as the body. A requirement that this be the case for a particular appointment can be imposed by the body but only if the body can show it is a genuine and determining requirement that he hold that religion or belief and that it is proportionate having regard to the ethos of the body, the nature of the job and the context in which the job is to be carried out.

211. *Sub-paragraph (2)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of religion or belief.

Paragraph 15 : Exclusion for schools with a religious character

212. Section 60 of the School Standards and Framework Act 1998 contains certain provisions relating to the employment of staff at foundation or voluntary schools which have a religious character. For example, it allows preference to be given in certain circumstances to the appointment, remuneration or promotion of staff whose religious opinions reflect the school's character or who are prepared to give lessons in accordance the religious beliefs around which the school is centred. Paragraph 15(b) of this Schedule ensures that acting in accordance with the provisions of section 60 of the 1998 Act will not be unlawful under Part 2 of the Bill.

213. Paragraph 15(b) of this Schedule contains equivalent provision in relation to section 21 of the Education (Scotland) Act 1980.

Paragraph 16 : Exclusion for justifiable age-based discrimination

214. This paragraph excludes certain requirements in the employment field which are based on a requirement that the persons affected by the requirements should be a particular age. This applies regardless of whether the effect of the requirement would exclude persons who are above or below that age. However, the employer must be able to show that that the requirement is objectively justified by a legitimate objective and that the means of achieving that objective are genuine and determining

as well as being proportionate to it. *Sub-paragraph (2)* contains a non-exhaustive list of examples of requirements that may satisfy that requirement. This is another area in which the Commission guidance under clause 45 might be particularly appropriate.

215. *Sub-paragraph (3)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of age.

Paragraph 17 : Exclusion for compulsory retirement

216. This paragraph enables arrangements to be made for compulsory retirement at a certain age (which the Secretary of State is given power to specify in regulations). But it applies strict conditions that must be satisfied before this exclusion from the scope of this protected area of activity applies. These conditions are based on membership of an occupational pension scheme, worker choice and transparency.

217. *Sub-paragraph (2)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of age.

Paragraph 18 : Exclusion for acts benefiting a disabled person

218. This paragraph ensures that there is nothing to prevent an employer making special arrangements that apply only to disabled persons. However, these must be least as advantageous overall than those that apply to persons who are not disabled.

Part 4 : Acts in the education field

219. Part 4 of this Schedule sets out the scope of the protected area of activity specified in clause 6(1)(c). This specifies the affording of opportunities, and the making of decisions or arrangements in the education field, by certain persons as being an area of activity in which it is unlawful to do an act amounting to discrimination (clause 9), harassment (clause 12), victimisation (clause 13) or any of the acts specified in clauses 14 to 17 of the Bill. The persons to whose activities this applies are the body responsible for an educational establishment and any person providing facilities or services in connection with the operation of the establishment.

220. *Paragraphs 19 to 23* make provision as to the matters that come within this protected area of activity. *Paragraphs 24 to 29* then exclude certain matters from it.

Paragraphs 19 to 23 : Scope of protected area of activity and interpretation

221. *Paragraph 19* sets the boundaries of the education field. It relates to admission to (in broad terms) a school, college or university or exclusion from it. It also includes the benefits, services and facilities which are made available at the institution by or under the authority of the body responsible for it.

222. The Bill uses the single term “educational establishments” to cover a range of different types of schools (including nurseries and pupil referral units) and different types of institutions in the further and higher education sectors. These are all

listed in column 1 of the four Tables in *paragraphs 20 to 23*. Column 2 of each Table identifies the body that is responsible for each type of establishment.

Paragraphs 24 & 25: Exclusions for selection by educational establishments

223. These paragraphs ensure that anything done by schools or by an institution in the further education sector or higher education sector will not be unlawful under Part 2 of the Bill if it concerns the operation of selective admissions policies of a kind described in *paragraph 24 or 25*, as the case may be. Such policies include selection arrangements based on a person's ability.

Paragraph 26 : Exclusion for single-sex establishments

224. This paragraph allows educational establishments to restrict the persons it admits to persons of the same sex (give or take some marginal cases where members of the opposite sex are also admitted). *Sub-paragraph (2)* makes similar provision for boarding schools described in *sub-paragraph (3)* if they admit persons of both sexes for the course of the school day but restrict their residential admissions to one sex only.

225. *Sub-paragraph (5)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of sex.

Paragraph 27 : Exclusion for single-sex establishments turning co-educational

226. This paragraph provides an exclusion that applies whilst a single-sex establishment is in the course of changing its admissions policies in order to admit persons of both sexes. The exclusion applies only if the school has applied for a transitional exemption order in accordance with regulations made by the Secretary of State and that application is still under consideration or the order has been made and all conditions in it have been fully complied with.

Paragraph 28 : Exclusion for physical training

227. This paragraph makes provision excluding from the scope of this protected area of activity sports colleges in the further education sector or the higher education sector.

228. *Sub-paragraph (2)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of sex.

Paragraph 29 : Exclusion for religious education or worship

229. Chapter 6 of Part 2 of the School Standards and Framework Act 1998 (which contains sections 69 to 71 of that Act) places schools under certain duties relating to the provision of religious education and participation in acts of religious worship. Paragraph 29 of this Schedule ensures that acting in accordance with those provisions will not be unlawful under Part 2 of the Bill. The exclusion applies in relation to equivalent provision applicable to schools in Scotland or to institutions in Scotland which are in the further education sector or the higher education sector.

230. *Sub-paragraph (2)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of religion or belief.

Part 5 : Provision of goods, services and facilities

231. Part 5 of this Schedule sets out the scope of the protected area of activity specified in clause 6(1)(d). This specifies the provision of goods, facilities or services by any person as being an area of activity in which it is unlawful to do an act amounting to discrimination (clause 9), harassment (clause 12), victimisation (clause 13) or any of the acts specified in clauses 14 to 17 of the Bill. The persons to whose activities this applies are persons who provide (or are prepared to provide) such goods facilities or services to members of the public or a section of them.

232. *Paragraph 30* makes provision as to the matters that come within this protected area of activity. *Paragraphs 31 to 37* then exclude certain matters from it.

Paragraph 30 : Scope of protected area of activity

233. *Paragraph 30* of this Schedule sets the boundaries of this protected area of activity. As it is expressed in terms that are relatively straightforward, *paragraph 30* does not elaborate on what providing goods, facilities and services means. However, *sub-paragraph (1)* makes clear that the negotiations leading up to the provision of the goods, facilities and services are included within this protected area of activity.

234. *Sub-paragraph (2)* provides a non-exhaustive list of examples of activities that are included.

235. *Sub-paragraph (3)* limits the application of this protected area of activity to the provision of goods, facilities and services within the European Community.

Paragraph 31 : Exclusion for carers etc

236. This paragraph makes provision excluding from the scope of this protected area of activity the provision of facilities or services where a person looking after another person in their own homes. This would cover (amongst others) persons who are foster parents or are caring for sick or elderly relatives or for persons with special needs.

Paragraph 32 : Exclusion for hospitals etc restricted to persons of the same sex

237. This paragraph ensures that the provision of single-sex facilities or services is not unlawful under Part 2 of the Bill. This would include single-sex hospital wards, local authority homes or secure accommodation (such as prisons).

238. *Sub-paragraph (2)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of sex.

Paragraph 33 : Exclusion for places used for purposes of organised religion

239. This paragraph enables facilities or services that are provided at any place to be restricted to persons of one sex without being unlawful under Part 2 of the Bill. However, for this exclusion to apply, the person providing the facilities or services must be able to show that the place where they are provided is used for the purposes of an organised religion. He must also be able to show that the restriction is

necessary to comply with the doctrines of the religion or to avoid offending against the religious susceptibilities of a significant number of followers of the religion.

240. *Sub-paragraph (2)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of sex.

Paragraph 34 : Exclusion for restrictions avoiding invasion of personal privacy

241. This paragraph excludes from the scope of this protected area of activity certain single-sex facilities or services (for example, men’s or women’s changing rooms).

242. *Sub-paragraph (2)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of sex.

Paragraph 35 : Exclusion for insurance

243. This paragraph recognises that certain calculations in connection with risk in the context of insurance-based policies or products may need to be carried out in a way that, for example, treats men and women differently on account of the fact that women generally have a longer life expectancy.

244. *Sub-paragraph (2)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from those of sex or age.

Paragraph 36 : Exclusion for transactions with persons without capacity to act

245. This paragraph excludes from the scope of this protected area of activity any circumstances in which the provider of any goods, facilities and services has reasonable grounds for thinking that another person is unable to give his informed consent in connection with any particular transaction. *Sub-paragraph (3)* enables the Secretary of State to make regulations for the exclusion not to apply in situations where a third party has been granted certain legal powers to act on behalf of the person without capacity. This might be the case, for example, where the third party holds a power of attorney and the circumstances in question would come within the extent of the power granted.

246. *Sub-paragraph (2)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from those of age or disability.

Paragraph 37 : Exclusion for transactions affecting disabled persons

247. This paragraph recognises that it may sometimes be impracticable to avoid some differences in treatment in circumstances involving the provision of goods, facilities and services to a disabled person. The paragraph excludes certain difference in treatment. This exclusion only applies where there would otherwise be an unreasonable disruption of the provision of the goods, facilities and services to others or where the fact that a person is disabled may unavoidably affect the standard of service offered, the terms on which it is provided or the cost.

248. *Sub-paragraph (3)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of disability.

Part 6 : Disposal or management of premises

249. Part 6 of this Schedule sets out the scope of the protected area of activity specified in clause 6(1)(e). This specifies the disposal or management of premises by certain persons as being an area of activity in which it is unlawful to do an act amounting to discrimination (clause 9), harassment (clause 12), victimisation (clause 13) or any of the acts specified in clauses 14 to 17 of the Bill. The persons to whose activities this applies are persons who have power to dispose of or manage premises.

250. *Paragraph 38* makes provision as to the matters that come within this protected area of activity. *Paragraphs 39 and 40* then exclude certain matters from it.

Paragraph 38 : Scope of protected area of activity and interpretation

251. Paragraph 38 of this Schedule sets the boundaries of this protected area of activity. It includes the letting of property as well as its sale. It has effect in relation to existing tenancies regardless of when they were entered into (see *sub-paragraph (2)*).

252. *Sub-paragraph (1)* makes clear that a person whose consent is required for any disposal is to be treated as having power to dispose of the premises. Any exercise of that power will therefore come within this protected area of activity. Persons (such as a housing association or local authority) who operate lists of names from which selections are made for the purposes of allocating property are also caught.

Paragraph 39 : Exclusion for owner-occupiers

253. This paragraph excludes from this protected area of activity situations where a person is selling his home privately. However, the exclusion does not apply if the premises are publicly advertised as being for sale or an estate agent is employed.

Paragraph 40 : Exclusion for small dwellings

254. This paragraph excludes from this protected area of activity certain small dwellings that are part-occupied by the person who is able to dispose of the property or by a relative of his. Any activities in relation to the letting of the other part or parts of the premises are also excluded.

Part 7 : Management of members clubs

255. Part 7 of this Schedule sets out the scope of the protected area of activity specified in clause 6(1)(f). This specifies the management of a members club by any person as being an area of activity in which it is unlawful to do an act amounting to discrimination (clause 9), harassment (clause 12), victimisation (clause 13) or any of the acts specified in clauses 14 to 17 of the Bill.

256. *Paragraph 40* makes provision as to the matters that come within this protected area of activity. *Paragraphs 42 to 44* then exclude certain matters from it.

Paragraph 41 : Definitions relating to members clubs

257. *Paragraph 41* sets the boundaries of this protected area of activity. A ‘members club’ is defined simply in *sub-paragraph (3)* as any association with at least 25 members. The only other positive requirement of the definition is that the association must regulate admission to membership through its constitution. However, ‘members club’ does not include any association of a kind mentioned in paragraph 10(1)(d) of this Schedule (such as a trade union, employer’s association, professional body etc).

258. This protected area of activity consists of affording opportunities, or making decision or arrangements, relating to (in broad terms) the admission to, the exclusion of, or the participation by, members or associates of the club. It also extends to opportunities, decisions and arrangements relating to access to benefits, facilities or services provided by the club to non-members.

Paragraph 42 : Exclusion for members clubs for racial and religious groups

259. This paragraph contains two exclusions from the scope of this protected area of activity. Both apply only to members clubs that are not carried on for profit.

260. The exclusion in *sub-paragraph (1)* excludes the activity of managing a members club where the club is principally restricted to particular groups of persons identified by reference to race, nationality or ethnic or national origins. However, this does not cover members clubs that are restricted to persons of a certain colour (see the words in brackets at the end of *sub-paragraph (1)*). *Sub-paragraph (4)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of race, nationality or ethnic or national origins.

261. The exclusion in *sub-paragraph (2)* excludes the activity of managing a members club where the club is principally restricted to persons of the same religion or belief. *Sub-paragraph (4)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of religion or belief.

Paragraph 43 : Exclusion for single-sex clubs

262. This paragraph excludes from the scope of this protected area of activity:

- the operation of members clubs (which may be profit-based) that are principally restricted to persons of the same sex, for example a single-sex gym; and
- the operation of members clubs that are not-for-profit which have as their principal purpose enabling the benefits of membership to be enjoyed by persons of one sex, for example a campaigning group concerned with women’s rights.

263. *Sub-paragraph (4)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of sex.

Paragraph 44 : Exclusion for single-sex sporting events

264. This paragraph makes provision excluding from the scope of this protected area of activity certain matters relating to the organisation of sporting events for persons of one sex. This is not unlawful provided that certain conditions are satisfied. These are specified in *paragraphs 44(1)(a) to (c)*.

265. *Sub-paragraph (2)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of sex.

Part 8 : Exclusions applying to two or more areas of activity

266. This Part of this Schedule sets out a number of exclusions that apply to more than one protected area of activity. The exclusions in *paragraphs 45 to 48* are capable of applying in relation to all the prohibited grounds. The exclusions in *paragraphs 49 to 53* will only apply in relation to certain grounds. These are expressly indicated in each provision.

Paragraph 45 : Exclusion for acts safeguarding national security

267. Acts that are done for in order to safeguard national security are excluded altogether from being unlawful under Part 2 of the Bill. However, this exclusion applies only if the reason behind the act justifies it.

Paragraph 46 : Exclusion for positive action

268. This paragraph provides a general exclusion for positive action which is capable of applying to a range of different circumstances. The exclusion does not amount to a requirement that positive action be taken. It simply ensures that it is not unlawful under Part 2 of the Bill if it is taken.

269. *Sub-paragraph (3)* defines what is meant by positive action and *sub-paragraphs (4) and (5)* give some examples of it in relation to certain protected areas of activity. This is another area in which the Commission guidance under clause 45 might be particularly appropriate.

Paragraph 47 : Exclusion for positive action required or permitted by Part 3

270. This paragraph ensures that doing anything required or permitted by or under Part 3 of the Bill will not be unlawful under Part 2. This ensures that there is no inconsistency between Parts 2 and 3.

Paragraph 48 : Exclusion for positive action for equal opportunities required under devolved powers

271. This paragraph ensures that doing anything in pursuance of a duty imposed under powers devolved to Scottish Ministers will not be unlawful under Part 2.

Paragraph 49 : Exclusion for acts avoiding risks to health and safety

272. This paragraph allows for acts in relation to disabled persons which are necessary to protect the health and safety of disabled persons or anybody else.

273. *Sub-paragraph (2)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of disability.

Paragraph 50 : Exclusion for communal accommodation

274. This paragraph recognises that in certain circumstances, operating shared residential accommodation for a number of people may require certain compromises to be made as between men and women in relation to rights of access and services etc provided on the premises. *Sub-paragraph (1)* provides that imposing restrictions etc on admission to the accommodation by persons of one sex is not unlawful under Part 2 of the Bill provided that the way the premises are managed is fair and equitable. *Sub-paragraph (2)* deals with restrictions on the availability to one sex of any benefit, facilities or services that are available on the premises.

275. *Sub-paragraph (3)* ensures that neither of these exclusions applies in any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of sex.

Paragraph 51 : Exclusion for participation in sport

276. *Sub-paragraph (1)* excludes any act relating to participation in sport which is based on the differences in strength or physique between men and women. For example, restricting participation in a rugby game to members of the same sex. *Sub-paragraph (3)(a)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of sex.

277. *Sub-paragraph (2)* makes provision excluding restrictions etc on participation in sport in a representative capacity where such participation is based on nationality, place of birth or length of residence. *Sub-paragraph (3)(b)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of national origin.

Paragraph 52 : Exclusion for political parties

278. This paragraph allows for special provision to be made (without it being unlawful) for persons of one sex only in connection with the constitution, organisation or administration of political parties (see *sub-paragraph (1)*). *Sub-paragraph (2)* makes similar provision in relation to selection procedures applying to election candidates. Such procedures must have been adopted with a view to reducing the inequality in numbers of men and women standing for election to the Parliaments of Scotland, the United Kingdom or Europe or to the Welsh Assembly or local councils.

279. *Sub-paragraph (3)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from that of sex.

280. The exclusion for selection procedures is due to expire at the end of 2015 unless it is renewed by order made by the Secretary of State (see *sub-paragraphs (6) and (7)*).

Paragraph 53 : Exclusion for acts protecting women

281. This paragraph ensures that acts required by various statutory provisions that have effect specifically in relation to the health and safety of women (in particular women who are pregnant) will not be unlawful under Part 2 of the Bill.

282. *Sub-paragraph (3)* ensures that this exclusion does not apply to any case where an unlawful act is done for a reason related to any of the prohibited grounds apart from those of sex or pregnancy.

SCHEDULE 3: DUTY TO FACILITATE ACCESS BY DISABLED PERSONS

283. This Schedule sets out provisions which supplement the duties imposed to facilitate access by clauses 34 to 36.

284. The Table in Part 1 explains who are responsible persons and qualifying persons for the purposes of the duty imposed by clause 34. These are the terms used to identify the persons subject to the duty ('responsible persons') and those to whom the duty is owed ('qualifying persons'). *Paragraph 1* contains provision defining certain terms used in that Table.

285. Parts 2 to 4 contain detailed provision as to the circumstances in which the persons subject to the duties imposed by clauses 34 to 36 are required to take certain measures. These Parts also give examples of the kind of steps that they may have to take. They contain powers for the Secretary of State to make regulations as to these matters.

SCHEDULE 4: THE EQUALITY COMMISSION

286. This Schedule sets out the requirements for the Commission's constitution and imposes certain obligations on it.

Paragraphs 1 to 3 : Commissioners

287. *Paragraph 1* requires that the Commission is to be a body corporate with not fewer than seven commissioners and not more than nine. There is to be a chief commissioner and the commissioners are appointed and liable to be removed from office by the Secretary of State. *Paragraphs 2 and 3* make detailed provision in relation to appointment, loss of office and remuneration.

Paragraph 4 : Staff

288. The Commission will determine what human resources it needs to discharge its functions. This paragraph requires the approval of the Secretary of State to be given in respect of numbers of staff and other appointees, their terms and conditions of service and any arrangements for staff pensions.

Paragraphs 5 to 7 : Procedure

289. *Paragraph 5* allows the Commission's functions to be delegated below the level of the commissioners. The Commission is able to regulate its own procedure.

290. *Paragraph 6* provides for acts of the Commission still to be valid irrespective of a vacancy in the office of commissioner or any defect in the appointment of a commissioner. This is to prevent any action taken by the Commission in pursuit of its functions being rendered invalid purely as a result of such a vacancy or defect.

Paragraph 8 : The Commission's powers

291. This paragraph gives the Commission certain incidental powers in order to ensure that it is able properly to discharge the functions conferred on it by the Bill.

Paragraph 9 : Accounts

292. The Commission must keep accounts. Copies of the accounts must be sent to the Comptroller and Auditor General for audit as well as to the Secretary of State. The Secretary of State must lay the accounts before Parliament.

Paragraphs 10 and 11 : Disqualification for membership of the House of Commons

293. Commissioners are disqualified from membership of the House of Commons. Paragraph 12 makes similar provision in respect of the Northern Ireland Assembly.

Paragraph 12 : Status

294. The Commission does not act on behalf of the Crown and none of the commissioners, officers and staff is a Crown servant.

SCHEDULE 5: PROCEDURE FOR MAKING CODES OF PRACTICE

295. This Schedule sets out the procedure for preparing and issuing draft codes of practice and for their approval by the Secretary of State and for laying the Codes before Parliament.

296. The Commission must first consult on the provisions of any draft code that it intends to submit to the Secretary of State for approval (see *paragraph 2*). *Paragraph 2(2)* requires it to have regard to any representations that are made to it.

297. Paragraph 3 makes provision for any draft code that is to be proceeded with to be submitted to the Secretary of State and for him to either approve the code or publish his reasons for not doing so. Once a code has been approved by the Secretary of State it may not be issued unless it has been laid before Parliament for a period of 40 days and neither House has voted not to approve it. However, before deciding whether to approve a draft and before making any order to bring it into effect, the Secretary of State must consult with Scottish Ministers and the National Assembly for Wales, in so far as the code concerns any matter for which they are responsible.

SCHEDULE 6: PROCEDURE OF THE SPECIAL EDUCATIONAL NEEDS AND DISABILITY TRIBUNAL

298. *Paragraph 1* of this Schedule provides that the Special Educational Needs Tribunal ("SEND Tribunal") is to exercise the jurisdiction conferred on it by clause 50 of the Bill. This provides for certain matters relating to the enforcement of the provisions of Part 2 should be heard by the SEND Tribunal. These matters relate to complaints made by individuals (or persons acting on their behalf) concerning acts made unlawful under Part 2 of the Bill or applications made by the Commission relating to such acts.

299. *Paragraphs 2 to 7* make detailed provision in relation to the making of a reference to the SEND Tribunal and proceedings before it. This includes provision as to proof of certain matters and the holding of proceedings in private. The Secretary of State also has power under *paragraph 4* to pay allowances to person attending hearings.

300. The Secretary of State has power under *paragraphs 2, 3 and 5* to make regulations. The matters that may be covered by such regulations include the allocation of cases between different tribunals, dealing with preliminary matters, representation of parties, disclosure, conduct of the hearing, costs, proof of decisions and so on. Regulations may also make provision in relation to hearings before the SEND Tribunal which corresponds to provisions in Part 1 of the Arbitration Act 1996. *Paragraph 6* makes it an offence for a person to fail to comply with any regulations which require the disclosure or inspection of documents or require a person to attend before the Tribunal to give evidence or produce documents.

SCHEDULE 7: INVESTIGATIONS

301. This Schedule sets out the powers of the Commission in connection with investigations conducted under clause 54(2) of the Bill.

302. *Paragraphs 1 to 3* set out the formal requirements as to notice and the making of representations to it in relation to the scope to an investigation and on the issues it raises.

303. *Paragraphs 4 to 6* deal with what the Commission may do. In addition to requiring documents and information, it may also require any person to attend in person in order to answer questions put to him.

304. Under *paragraph 7*, failure to comply with any requirement imposed using the power to conduct investigations can be certified to the court and dealt with as if the defaulter were in contempt of court.