

**THIRD SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3565 of 10th November, 2006

B. 32/06

EQUAL OPPORTUNITIES ORDINANCE 2006

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BILL

FOR

AN ORDINANCE to repeal and re-enact the Equal Opportunities Ordinance 2004 and certain provisions in the Employment Ordinance; to transpose into the law of Gibraltar Council Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, to transpose into the law of Gibraltar the provisions on age and disability discrimination in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and for connected purposes.

ENACTED by the Legislature of Gibraltar.

PART I
Preliminary.

Title and Commencement.

1. This Ordinance may be cited as the Equal Opportunities Ordinance 2006 and comes into operation on the day appointed by the Government by notice in the Gazette.

Interpretation.

2.(1) In this Ordinance, unless the context otherwise requires—

“act” includes a deliberate omission;

“benefit”, except in sections 27 to 28 and 35 to 36, in relation to occupational pension schemes, includes facilities and services;

“contract of service” means any agreement, whether express or implied, oral or in writing, in any form whereby a person binds himself to be or to become an employee in return for remuneration;

“detriment” does not include harassment within the meaning of section 14;

“directive 75/117/EEC” means Council Directive of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women;

“directive 97/80/EC” means Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex;

“directive 2000/43/EC” means Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;

“directive 2000/78/EC” means Council Directive 2000/78/EC of 27 June 2000 establishing a general framework for equal treatment in employment and occupation;

“directive 2002/73/EC” means Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions;

“discrimination” includes discrimination on equal opportunities grounds, victimisation (in section 13) and treatment under section 5 (instructions to discriminate);

“equality clause” has the meaning given in section 31;

“equal treatment rule” has the meaning given in section 34;

“Gibraltar” includes the territorial waters of Gibraltar;

“harassment” has the meaning given in section 14 and includes sexual harassment under section 14(2);

“man” includes a male of any age;

“non-discrimination rule”, in relation to an occupational pension scheme, means the provision set out section 27(3)(a);

“school” has the meaning assigned to it by section 2(1) of the Education and Training Ordinance;

“statutory maternity leave” means absence from employment—

- (a) in exercise of the right conferred by regulation 3 (maternity leave) or regulation 11 (right to return to work) of the Employment (Maternity and Parental Leave and Health and Safety) Regulations 1996; or
- (b) in consequence of the prohibition on working during the two weeks following childbirth in regulation 5 (compulsory maternity leave) of the Employment (Maternity and Parental Leave and Health and Safety) Regulations 1996;

“trade union” means a trade union or a staff association registered under section 5 of the Trade Unions and Trade Disputes Ordinance;

“the Tribunal” means the Industrial Tribunal established under section 12 of the Employment Ordinance;

“woman” includes a female of any age;

“worker” in relation to sections 27(8), 59, 60 and Schedule 2 (occupational pensions –age) means, as the case may be,—

- (a) an employee;
- (b) a person holding an office or post to which section 20 applies (office holders);
- (d) a person to whom section 21 (police) applies;
- (e) a partner within the meaning of section 22;

- (f) a member of a limited liability partnership within the meaning of section 22.

(2) In this Ordinance—

(a) “employment” means employment under—

- (i) a contract of service or of apprenticeship; or
- (ii) a contract personally to do any work, and related expressions (such as “employee” and “employer”) shall be construed accordingly, but this definition does not apply in relation to section 27(8), (occupational pensions – age), section 57 (exception for retirement), Schedule 2 (occupational pension schemes - exemption for age) or Schedule 3 (duty to consider working beyond retirement);

(b) a person’s tax or social insurance status shall not be determinative or whether he is in employment under paragraph (a)(i) or (ii);

(c) employment as defined in paragraph (a) includes employment on board a ship registered in Gibraltar or an aircraft or hovercraft registered in Gibraltar and operated by a person who has his principal place of business, or is ordinarily resident, in Gibraltar, if the employee—

- (i) does his work wholly or partly in Gibraltar; or
- (ii) does his work wholly outside Gibraltar and the employee is ordinarily resident in Gibraltar at the time when he applies for or is offered the employment, or at any time during the course of the employment.

(3) In this Ordinance, references to “employer”, in their application to a person at any time seeking to employ another, include a person who has no employees at that time.

(4) This Ordinance transposes and shall be construed in accordance with the following directives—

- (a) directive 2000/43/EC, in relation to discrimination on the grounds of racial or ethnic origin;
- (b) directive 2000/78/EC, in relation to discrimination on the grounds of religion or belief, disability, age or sexual orientation;
- (c) directive 2002/73/EC and directive 97/80/EC, in relation to discrimination of the grounds of sex, marital status, pregnancy or maternity;
- (d) directive 75/117/EEC in relation to equal pay and equal pensions.

Meaning of equal opportunities grounds and categories.

3.(1) In this Ordinance, except where otherwise provided, “equal opportunities ground” means the grounds of–

- (a) age or age group;
- (b) disability;
- (c) pregnancy or maternity leave;
- (d) racial or ethnic origin;
- (e) religion or belief;
- (f) sex (including marital or family status);
- (g) sexual orientation;
- (h) victimisation.

(2) In this Ordinance, except where otherwise provided, “equal opportunities category” means persons–

- (a) of a particular age or age group;
- (b) with a disability;

- (c) who are pregnant or on statutory maternity leave within the meaning of section 7;
- (d) of a particular racial or ethnic origin;
- (e) of a particular religion or belief;
- (f) of a particular sex (including persons of a particular marital or family status);
- (g) of a particular sexual orientation.

(3) In this Ordinance—

“disability”—

- (a) means a physical or mental impairment which has a substantial and long-term adverse effect on a person’s ability to carry out normal day-to-day activities;
- (b) is further defined in Part I of Schedule 1;

“disabled person” means a person who—

- (a) has a disability; or
- (b) who has had a past disability, and Part II of Schedule 1 shall apply in relation to such persons;

“racial group” means a group of persons defined by reference to race, ethnic or national origins, and reference to a person’s racial group refers to any racial group into which he falls; the fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a racial group;

“racial or ethnic grounds” means a ground based on racial or ethnic origins;

“religion or belief” means any religion, religious belief or a similar philosophical belief and includes a lack of religion or religious or philosophical belief;

“sex” includes marital or family status;

“sexual orientation” means a sexual orientation towards—

- (a) persons of the same sex;
- (b) persons of the opposite sex; or
- (c) persons of the same sex and of the opposite sex.

Application of the Ordinance.

4.(1) Save where otherwise provided, this Ordinance shall apply in both the private and public sectors, including public bodies, to discrimination on all equal opportunities grounds (as defined in section 3(1)) and harassment.

(2) This Ordinance—

- (a) does not apply to any difference of treatment based on nationality; and
- (b) is without prejudice to provisions and conditions relating to entry into and residence of third-country nationals and stateless persons (within the meaning of Article 3(2) directive 2000/43/EC and Article 3(2) directive 2000/78/EC) in Gibraltar, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

(3) This Ordinance is binding on the Crown.

PART II

Discrimination (including victimisation) and harassment.

Instructions to discriminate.

5.(1) A person (“A”) discriminates against another person (“B”) on an equal opportunities ground if A instructs B to do an act which would be unlawful discrimination against other persons on an equal opportunities ground.

(2) The Government may, by regulations, further provide for the effect of instructions or pressure to discriminate and for the enforcement of such provisions.

Meaning of discrimination on the ground of sex.

6.(1) A person discriminates against a woman if on the ground of her sex if he treats her less favourably than he treats or would treat men.

(2) A person discriminates against a woman if he applies to her a provision, criterion or practice—

- (a) which he applies or would apply equally to men;
- (b) which puts women at a disadvantage compared to men;
- (c) which puts her at that disadvantage; and
- (d) which he cannot show to be an appropriate and necessary means of achieving a legitimate aim.

(3) A comparison of the case of persons of different sex under subsection (1) or (2) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

(4) If a person treats or would treat a man differently according to the man’s marital status, his treatment of a woman is for the purposes of subsection (1) to be compared with his treatment of a man having the like marital status.

(5) This section is to be read as applying equally to the treatment of men and for that purpose shall have effect with such modifications as required.

(6) In the application of subsection (5) no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth.

Meaning of discrimination on the grounds of pregnancy or maternity leave.

7.(1) A person discriminates against a woman if—

- (a) at a time in a protected period, and on the ground of the woman's pregnancy the person treats her less favourably than he would treat her had she not become pregnant; or
- (b) on the ground that the woman is exercising or seeking to exercise, or has exercised or sought to exercise, a right to statutory maternity leave, the person treats her less favourably than he would treat her if she were neither exercising nor seeking to exercise, and had neither exercised nor sought to exercise, such right.

(2) In any circumstance relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if, on the ground that regulation 5(4) of the Employment (Maternity and Parental Leave and Health and Safety) Regulations 1996 (compulsory maternity leave) has to be complied with in respect of the woman, he treats her less favourably than he would treat her if that provision did not have to be complied with in respect of her.

(3) For the purposes of subsection (1)—

- (a) a protected period, in respect of a woman, begins each time she becomes pregnant, and the protected period associated with any particular pregnancy of hers ends in accordance with the following rules—
 - (i) if she is entitled to maternity leave under regulation 3 of the Employment (Maternity and Parental Leave, and Health and Safety) Regulations 1996, the protected period ends at the end of her period of maternity leave connected with the pregnancy or, if earlier, when she returns to work after the end of her pregnancy;

- (ii) if she is entitled to maternity leave under regulation 3 of the Employment (Maternity and Parental Leave, and Health and Safety) Regulations 1996 and has the right to return to work provided in regulation 11 of the Employment (Maternity and Parental Leave, and Health and Safety) Regulations 1996, the protected period ends at the expiry of the period within which she has a right to return to work or, if earlier, when she returns to work after the end of her pregnancy;
 - (iii) if she is not entitled to maternity leave under regulation 3 of the Employment (Maternity and Parental Leave, and Health and Safety) Regulations 1996, in respect of the pregnancy, the protected period ends at the end of the 2 weeks beginning with the end of the pregnancy;
- (b) where a person's treatment of a woman is on the grounds of illness suffered by the woman as a consequence of a pregnancy of hers, that treatment shall be taken to be on the ground of the pregnancy.

Meaning of discrimination on the ground of religion or belief.

8.(1) A person ("A") discriminates against another person ("B") if on the grounds of religion or belief of B or of any other person except A (whether or not it is also A's religion or belief) A treats B less favourably than A treats or would treat other persons.

(2) In subsection (1) a reference to a person's religion or belief includes a reference to a religion or belief to which he is thought to belong or subscribe.

(3) A person ("A") discriminates against another person ("B") if A applies to B a provision, criterion or practice—

- (a) which A applies or would apply equally to persons not of B's religion or belief;
- (b) which puts persons of B's religion or belief at a disadvantage compared to some or all others;

- (c) which puts B at a disadvantage compared to some or all persons who are not of B's religion or belief; and
- (d) which A cannot show to be an appropriate and necessary means of achieving a legitimate aim.

(3) A comparison of the case of B with that of another person under subsection (1) or (3) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

Meaning of discrimination on the ground of racial or ethnic origin.

9.(1) A person ("A") discriminates against another person ("B") if on the grounds of racial or ethnic origin, A treats B less favourably than A treats or would treat other persons.

(2) A person ("A") discriminates against another person ("B") if A applies to B a provision, criterion or practice—

- (a) which A applies or would apply equally to persons not of B's racial or ethnic origin;
- (b) which puts persons of B's racial or ethnic origin at a disadvantage when compared to some or all others;
- (c) which puts B at that disadvantage; and
- (d) which A cannot show to be an appropriate and necessary means of achieving a legitimate aim.

(3) For the purposes of subsection (1) segregating a person from other persons on the ground of racial or ethnic origin is treating him less favourably than those other persons.

(4) A comparison of the case of B with that of another person under subsection (1) or (2) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

Meaning of discrimination on the ground of sexual orientation.

10.(1) A person (“A”) discriminates against another person (“B”) if on the grounds of sexual orientation, A treats B less favourably than A treats or would treat other persons.

(2) A person (“A”) discriminates against another person (“B”) if A applies to B a provision, criterion or practice—

- (a) which A applies or would apply equally to persons not of B’s sexual orientation;
- (b) which puts, or would put, persons of B’s sexual orientation at a disadvantage when compared to some or all others;
- (c) which puts B at that disadvantage; and
- (d) which A cannot show to be an appropriate and necessary means of achieving a legitimate aim.

(3) A comparison of the case of B with that of another person under subsection (1) or (2) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

Meaning of discrimination on the ground of age.

11.(1) A person (“A”) discriminates against another person (“B”) if on the ground of B’s age, A treats B less favourably than A treats or would treat other persons and A cannot show that the treatment is an appropriate and necessary means of achieving a legitimate aim.

(2) A person (“A”) discriminates against another person (“B”) if A applies to B a provision, criterion or practice which A applies or would apply equally to persons not of the same age group as B, but—

- (a) which puts, or would put, persons of the same age group as B at a disadvantage when compared to some or all others;
- (b) which puts B at that disadvantage; and
- (c) which A cannot show to be an appropriate and necessary means of achieving a legitimate aim.

(3) A comparison of the case of B with that of another person under subsection (1) or (2) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

(4) In this section,—

- (a) “age group” means a group of persons defined by reference to age, whether by reference to a particular age or a range of ages and the reference to the age of B includes the apparent age of B; and
- (b) the reference in subsection (1) to B’s age includes B’s apparent age.

Meaning of discrimination on the ground of disability.

12.(1) A person (“A”) discriminates against another person (“B”) if on the grounds of B’s disability, A treats B less favourably than A treats or would treat other persons not having that particular disability.

(2) A person (“A”) discriminates against a disabled person (“B”) if—

- (a) for a reason which relates to B’s disability, A treats B less favourably than A treats or would treat others to whom that reason does not or would not apply, and
- (b) A cannot show that the treatment in question is justified by a reason which is both material to the circumstances of the particular case and substantial.

(3) A person discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.

(4) A comparison of the case of B with that of another person under subsection (1) must be such that the relevant circumstances of the other person, including his abilities, are the same as, or not materially different from, those of the disabled person.

(5) If, in a case falling within subsection (2), a person is under a duty to make reasonable adjustments in relation to a disabled person but fails to comply with that duty, his treatment of that person cannot be justified under

subsection (2)(b) unless it would have been justified even if he had complied with that duty.

(6) For the purpose of subsection (3) the following persons have a duty to make reasonable adjustments—

- (a) an employer, as provided in subsection 15(6);
- (b) a principal, as provided in section 19;
- (c) relevant persons, in relation to office holders, as provided in section 20(9);
- (d) firms, as provided in section 22(5);
- (e) trade organisations, as provided in section 23(4);
- (f) employment agencies, as provided in section 24(6) to (7);
- (g) qualification bodies, as provided in section 25(3);
- (h) vocational training providers, as provided in section 26(3);
- (i) trustees and managers, in relation to occupational pension schemes, as provided in section 27(9);
- (j) persons who have had a relevant previous relationship with a disabled person, under section 46(3).

Meaning of discrimination by victimisation.

13.(1) A person (“A”) discriminates against another person (“B”), in any circumstances for the purposes of this Ordinance, if A treats B less favourably than, A treats or would treat other persons in the same circumstances, and does so by reason of the fact that, or by reason of A’s knowledge or suspicion that, B has—

- (a) brought or intended to bring, or intend to bring, proceedings under this Ordinance;

- (b) given or intended to give, or intends to give, evidence or information in connection with proceedings under this Ordinance;
- (c) otherwise done, intended to do, or intends to do, any other thing under or by reference to this Ordinance;
- (d) has alleged or intended to allege, or intends to allege that A or any other person has contravened this Ordinance;

(2) Subsection (1) does not apply to treatment of B by reason of any allegation made by him, or evidence or information given by him, if the allegation, evidence or information was false and not made (or, as the case may be, given) in good faith.

Meaning of harassment (including sexual harassment).

14.(1) A person (“A”) subjects another person (“B”) to harassment where on an equal opportunities ground A engages in conduct which has the purpose or effect of—

- (a) violating B’s dignity; or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A person subjects a woman to sexual harassment if he engages in any form of verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect—

- (a) of violating her dignity; or
- (b) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

(3) A person (“A”) also subjects a woman to harassment if, on the ground of her rejection of or submission to conduct of a kind mentioned in subsection (1) or (2), A treats her less favourably than A would treat her had she not rejected, or submitted to the conduct.

(4) Subsections (2) and (3) are to be read as applying equally to the harassment of men, and for that purpose shall have effect with such modifications as required.

(5) Conduct shall be regarded as having an effect specified in subsection (1) or (2) only if, having regard to all the circumstances, including the perception of the other person, it should be reasonably considered as having that effect.

PART III

Discrimination in employment, self-employment, occupational and vocational training

Applicants and employees.

15.(1) It is unlawful for an employer, in relation to employment by him, to discriminate against a person, on any equal opportunities ground—

- (a) in the arrangements (including advertisements) he makes for the purpose of determining who should be offered employment;
- (b) in the terms on which he offers him employment; or
- (c) by refusing or deliberately not offering him employment.

(2) It is unlawful for an employer, in the case of a person employed by him, to discriminate against that person on any equal opportunities ground—

- (a) in the terms of employment which he affords him;
- (b) in the opportunities which he affords him for promotion, transfer or training, or to any other benefits, or by refusing or deliberately not affording him any such opportunity; or
- (c) by dismissing him, or subjecting him to any other detriment.

(3) It is unlawful for an employer, in relation to employment by him, to subject a person who he employs or who has applied to him for employment to harassment.

(4) Subsection (2) does not apply to benefits, of any description if the employer is concerned with the provision (for payment or not) of benefits, of that description to the public, or to a section of the public which includes the employee in question, unless—

- (a) that provision differs in a material respect from the provision of the benefits, by the employer to his employees;
- (b) the provisions of the benefits, to the employee in question is regulated by his contract of employment; or
- (c) the benefits, relate to training.

(5) In subsection (2)(c) the reference to the dismissal of a person from employment includes reference—

- (a) to the termination of that person's employment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the employment is renewed on the same terms and conditions; and
- (b) to the termination of that person's employment by any act of his (including the giving of notice) in circumstances such that he is entitled to terminate the appointment without notice by reason of the conduct of the employer.

(6) An employer is under a duty to make reasonable adjustments as defined in section 29—

- (a) in the case of a provision, criterion or practice for determining to whom employment should be offered, in relation to any disabled person who is, or who has notified the employer that he may be, an applicant for that employment;
- (b) in any other case, in relation to a disabled person who is—
 - (i) an applicant for the employment concerned; or
 - (ii) an employee of the employer concerned.

(7) Nothing in subsection (6) imposes any duty on an employer in relation to a disabled person if the employer does not know and could not be reasonably expected to know—

- (a) in the case of an applicant or potential applicant, that the disabled person is, or may be, an applicant for the employment; or
- (b) in any case, that that person has a disability and is likely to be placed at a substantial disadvantage by the provision, criterion, practice or physical feature in comparison to persons who are not disabled.

(8) Subsection (1)(a) and (c) does not apply to discrimination on the ground of age in relation to a person—

- (a) to whom, if he was recruited by the employer, section 57 (age discrimination-retirement) could apply; and
- (b) either—
 - (i) whose age is greater than the employer's normal retirement age or, if the employer does not have a normal retirement age, the age of 65; or
 - (ii) who would, within a period of six months from the date of his application to the employer, reach the employer's normal retirement age or, if the employer does not have a normal retirement age, the age of 65.

(9) In paragraph (8) “normal retirement age” is an age of 65, or more, which meets the requirements of the Employment Ordinance.

Discrimination on the ground of sex – relationship with equality and equal treatment clauses and exceptions during maternity leave.

16.(1) In relation to discrimination on the ground of sex—

- (a) section 15(1)(b) and (2) do not render it unlawful for a person to discriminate against a woman in relation to her membership of, or rights under, an occupational pension scheme in such a way that, were any term of the scheme to provide for

discrimination in that way, then, by reason only of any provision made by or under sections 34 to 36 (equal treatment rule), an equal treatment rule would not operate in relation to that term;

- (b) subject to section 32(2) (relationship of section 31 and section 15), section 15(1)(b) does not apply to any provision for the payment of money which, if the woman in question were given the employment, would be included in the contract under which she was employed;
- (c) section 15(2) does not apply to benefits consisting of the payment of money when the provision of those benefits is regulated by the woman's contract of employment (i.e. where section 31 applies);
- (d) section 15(2) does not apply to benefits, facilities or services of any description if the employer is concerned with the provision (for payment or not) of benefits, facilities or services of that description to the public, or to a section of the public comprising the woman in question, unless—
 - (i) that provision differs in a material respect from the provision of the benefits, facilities or services by the employer to his employees,
 - (ii) the provision of the benefits, facilities or services of a woman is regulated by her contract of employment; or
 - (iii) the benefits, facilities or services relate to training.

(2) Any reference in subsection (1) to a woman includes reference to a man.

(3) Section 15(1)(b) and (2) does not make it unlawful to deprive a woman who is on maternity leave (as defined in regulation 3 of the Employment (Maternity and Parental Leave, and Health and Safety) Regulations 1996) of any benefit from the terms and conditions of her employment relating to remuneration; except that this does not apply to—

- (a) benefit by way of maternity-related remuneration;

- (b) benefit by way of maternity-related remuneration that is increase-related;
- (c) benefit by way of remuneration in respect of times when the woman is not on maternity leave (as defined in regulation 3 of the Employment (Maternity and Parental Leave, and Health and Safety) Regulations 1996) nor exercising a right to be absent from work under regulation 11 of the Employment (Maternity and Parental Leave, and Health and Safety) Regulations 1996, including increase related remuneration in respect of such times.

(4) Section 15(1)(b) and (2) does not make it unlawful to deprive a woman who is exercising a right to return to work after maternity of any benefit from the terms and conditions of her employment, except that this does not apply to—

- (a) benefit by way of maternity-related remuneration;
- (b) benefit by way of maternity-related remuneration that is increase-related;
- (c) benefit by way of remuneration in respect of times when the woman is not on maternity leave nor exercising a right to return to work after maternity, including increase related remuneration in respect of such times;
- (d) the benefit of her employer's implied obligation to her of trust and confidence; or
- (e) any benefit of terms and conditions in respect of—
 - (i) notice of termination by her employer of her contract of employment;
 - (ii) compensation in the event of redundancy;
 - (iii) disciplinary or grievance procedures; or
 - (iv) membership of a pension scheme.

(5) In subsection (3) and (4)–

“increase related remuneration” means remuneration which falls to be calculated by reference to increases in remuneration that the woman would have received had she not been on maternity leave or exercising a right to be absent from work under regulation 11;

“maternity leave” means absence from work to which the woman is entitled under regulation 3 of the Employment (Maternity and Parental Leave, and Health and Safety) Regulations 1996;

“right to return to work after maternity” means absence from work to which the woman is entitled under regulation 11 of the Employment (Maternity and Parental Leave, and Health and Safety) Regulations 1996;

“maternity-related remuneration” means remuneration to which she is entitled as a result of being pregnant, on maternity leave or exercising a right to return to work after maternity; and

“remuneration” means benefits–

- (a) that consist of the payment of money to an employee by way of wages or salary; and
- (b) that are not benefits whose provision is regulated by the employee’s contract of employment.

Genuine occupational requirements – general.

17.(1) Where subsection (2), (3) or (4) applies, then–

- (a) section 15(1)(a) or (c) does not apply to any employment;
- (b) section 15(2)(b) does not apply to promotion or transfer to, or training for, any employment;
- (c) section 15(2)(c) does not apply to dismissal from any employment.

(2) This subsection applies where, having regard to the nature of the employment or the context in which it is carried out–

- (a) being of a particular religion or belief, racial or ethnic origin, sex, sexual orientation or possessing a characteristic relating to age is a genuine and determining occupational requirement;
- (b) it is proportionate to apply that requirement in the particular case; and
- (c) either—
 - (i) the person to whom that requirement is applied does not meet it; or
 - (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

(3) Provided the criteria in subsection (2) are satisfied, the following are examples where being of a particular sex may be a genuine and determining occupational requirement—

- (a) if the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or, in dramatic performances or other entertainment, for reasons of authenticity, so that the essential nature of the job would be materially different if carried out by a woman;
- (b) if the job needs to be held by a man to preserve decency or privacy because—
 - (i) it is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by a woman; or
 - (ii) the holder of the job is likely to do his work in circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities;
- (c) if the job is likely to involve the holder of the job doing his work, or living, in a private home and needs to be held by a man because objection might reasonably be taken to allowing a woman—

- (i) the degree of physical or social contact with a person living in the home, or
 - (ii) the knowledge of intimate details of such a person's life,
- which is likely, because of the nature of circumstances of the job or of the home, to be allowed to, or available to, the holder of the job;
- (d) if the nature or location of the workplace makes it impracticable for the holder of the job to live elsewhere than in premises provided by the employer, and—
 - (i) the only such premises which are available for persons holding that kind of job are lived in, or normally lived in, by men and are not equipped with separate sleeping accommodation for women and sanitary facilities which could be used by women in privacy from men; and
 - (ii) it is not reasonable to expect the employer either to equip those premises with such accommodation and facilities or to provide other premises for women;
 - (e) if the nature of the workplace, or of the part of it within which the work is done, requires the job to be held by a man because—
 - (i) it is, or is part of, a hospital, prison or other establishment for persons requiring special care, supervision or attention;
 - (ii) those persons are all men (disregarding any woman whose presence is exceptional); and
 - (iii) it is reasonable, having regard to the essential character of the workplace or that part, that the job should not be held by a woman;
 - (f) if the holder of the job provides individuals with personal services promoting their welfare or education, or similar

personal services, and those services can most effectively be provided by a man;

- (g) if the job needs to be held by a man because it is likely to involve the performance of duties outside Gibraltar in a country whose laws or customs are such that the duties could not, or could not effectively, be performed by a woman; or
- (h) if the job is one of two to be held by a married couple.

(4) Subsection (2) may apply where only some of the duties of the job fall within paragraphs (a) to (g) of that subsection as well as where all of them do, but paragraph (a), (b), (d), (e), (f) or (g) of subsection (3) shall not apply in relation to the filling of a vacancy at a time when the employer already has male employees—

- (a) who are capable of carrying out the duties falling within that paragraph; and
- (b) whom it would be reasonable to employ on those duties; and
- (c) whose numbers are sufficient to meet the employer's likely requirements in respect of those duties without undue inconvenience.

(5) Subsections (3) and (4) are to be read as applying equally to the treatment of men when being a woman would be a genuine occupational qualification for the job and for that purpose, shall have effect with such modifications as required.

Genuine occupational requirements – religious ethos and organised religion.

18.(1) Where subsection (2) or (3) applies, then—

- (a) section 15(1)(a) or (c) does not apply to any employment;
- (b) section 15(2)(b) does not apply to promotion or transfer to, or training for, any employment;
- (c) section 15(2)(c) does not apply to dismissal from any employment.

(2) This subsection applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out—

- (a) being of a particular religion or belief is a genuine and determining occupational requirement for the job;
- (b) it is proportionate to apply that requirement in the particular case; and
- (c) either—
 - (i) the person to whom that requirement is applied does not meet it; or
 - (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

(3) This subsection applies where—

- (a) the employment is for purposes of an organised religion;
- (b) the requirement is one to which subsection (4) applies; and
- (c) the requirement is applied—
 - (i) so as to comply with the doctrines of the religion;
 - (ii) because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

(4) The requirements referred to in subsection (3)(b) are—

- (a) a requirement to be of a particular sex;
- (b) a requirement to be of a particular sexual orientation;

- (c) a requirement not to be undergoing or to have undergone gender reassignment;
- (d) a requirement relating to not being, or being, married;
- (e) a requirement, applied to a person who is married, that relates–
 - (i) to the person, or the person’s spouse, not having a living former spouse; or
 - (ii) to how the person, or the person’s spouse, has at any time ceased to be married.

Contract workers.

19.(1) In this section–

- (a) “principal” means a person (“A”) who makes work available for doing by individuals who are employed by another person who supplies them under a contract made with A;
- (b) “contract work” means work so made available and includes work on board a ship, vessel, aircraft or hovercraft registered in Gibraltar wherever trading or registered elsewhere but operated by a person who has his principal place or business, or is ordinarily resident, in Gibraltar; and
- (c) “contract worker” means any individual who is supplied to the principal under such a contract.

(2) It is unlawful for a principal, in relation to contract work, to discriminate against a contract worker on any equal opportunities ground–

- (a) in the terms on which he allows him to do that work;
- (b) by not allowing him to do it or continue to do it;
- (c) in the way he affords him access to any benefits, or by refusing or deliberately omitting to afford him access to them; or

(d) by subjecting him to any other detriment.

(3) The principal does not contravene subsection (2)(b) by doing any act in relation to a contract worker where, if the work were to be done by a person taken into the principal's employment, that act would be lawful by virtue of sections 17 and 18 (genuine occupational requirements).

(4) It shall be unlawful for a principal, in relation to contract work, to subject a contract worker to harassment.

(5) Subsection (2)(c) shall not apply to benefits of any description if the principal is concerned with the provision (for payment or not) of benefits of that description to the public, or to a section of the public to which the contract worker in question belongs, unless that provision differs in a material respect from the provision of the benefits by the principal to his contract workers.

(6) The employer ("C") of a disabled contract worker ("B") is under a duty to take such steps in relation to B as he would have to take under section 15(6) where—

(a) by virtue of—

- (i) a provision, criterion or practice applied by or on behalf of all or most of the principals to whom B is or might be supplied, or
- (ii) a physical feature of premises occupied by such persons,

B is likely, on each occasion when he is supplied to a principal to do contract work, to be placed at a substantial disadvantage (which is the same or similar in each case) in comparison with persons who are not disabled; and

(b) C would have had a duty to make reasonable adjustments in relation to B under section 15(6) if the provision, criterion or practice were applied by C or on his behalf or (as the case may be) if the premises were occupied by him.

(7) Section 15(6) (reasonable adjustments) applies to any principal, in relation to contract work, as if he were, or would be, the employer of the

disabled contract worker and as if any contract worker supplied to do work for him were an employee of his.

(8) However, for the purposes of section 15(6) as applied by subsection (7), a principal is not required to take a step in relation to a disabled contract worker if under that section the disabled contract worker's employer is required to take the step in relation to him.

Office-holders.

20.(1) This section—

(a) applies to—

- (i) any office or post to which persons are appointed to discharge functions personally under the direction of another person and in respect of which they are entitled to remuneration;
- (ii) any office or post to which appointments are made by, or on the recommendation of or subject to the approval of, the Governor, the House of Assembly, the Government, a Minister or a government department, but

(b) does not apply to—

- (i) a political office; or
- (ii) a case where section 15 (applicants and employees), 19 (contract workers), 22 (partnerships) applies or would apply but for the operation of any other provision of this Ordinance.

(2) It is unlawful for a relevant person, in relation to an appointment to an office or post to which this section applies, to discriminate against a person on any equal opportunities ground—

- (a) in the arrangements (including advertisements) which he makes for the purpose of determining to whom the appointment should be offered;

- (b) in the terms on which he offers him the appointment; or
- (c) by refusing to offer him the appointment.

(3) It is unlawful in relation to an appointment to an office or post to which this section applies and which is an office or post referred to in subsection (1)(b) for a relevant person on whose recommendation (or subject to whose approval) appointments to the office or post are made to discriminate against a person on any equal opportunities ground—

- (a) in the arrangements which he makes for the purpose of determining who should be recommended or approved in relation to the appointment; or
- (b) in making or refusing to make a recommendation, or giving or refusing to give an approval, in relation to the appointment.

(4) It is unlawful for a relevant person, in relation to a person who has been appointed to an office or post to which this section applies, to discriminate against him on any equal opportunities ground—

- (a) in the terms of the appointment;
- (b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit, or by refusing to afford him any such opportunity;
- (c) by terminating the appointment; or
- (d) by subjecting him to any other detriment in relation to the appointment.

(5) It is unlawful for a relevant person, in relation to an office or post to which this section applies, to subject to harassment a person—

- (a) who has been appointed to the office or post;
- (b) who is seeking or being considered for appointment to the office or post; or

- (c) who is seeking or being considered for a recommendation or approval in relation to an office or post referred to in subsection (1)(a).

(6) Subsections (2) and (4) do not apply to any act in relation to an office or post where, if the office or post constituted employment, that act would be lawful by virtue of sections 17 to 18 (genuine occupational requirements) and subsection (3) does not apply to any act in relation to an office or post where, if the office or post constituted employment, it would be lawful by virtue of sections 17 to 18 to refuse to offer the person such employment.

(7) Subsection (4) does not apply to benefits of any description if the relevant person is concerned with the provision (for payment or not) of benefits of that description to the public, or a section of the public to which the person appointed belongs, unless—

- (a) that provision differs in a material respect from the provision of the benefits, by the relevant person to persons appointed to offices or posts which are the same as, or not materially different from, that which the person appointed holds;
- (b) the provision of the benefits to the person appointed is regulated by the terms and conditions of his appointment; or
- (c) the benefits relate to training.

(8) In subsection (4)(c) the reference to the termination of the appointment includes a reference—

- (a) to the termination of the appointment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the appointment is renewed on the same terms and conditions; and
- (b) to the termination of the appointment by any act of the person appointed (including the giving of notice) in circumstances such that he is entitled to terminate the appointment without notice by reason of the conduct of the relevant person.

(9) It is the duty of the relevant person to make reasonable adjustments as defined in section 29—

- (a) in the case of a provision, criterion or practice for determining who should be appointed to, or recommended or approved in relation to, an office or post to which this section applies, in relation to any disabled person who—
 - (i) is, or has notified the relevant person that he may be, seeking appointment to, or (as the case may be) seeking a recommendation or approval in relation to, that office or post; or
 - (ii) is being considered for appointment to, or (as the case may be) for a recommendation or approval in relation to, that office or post;
- (b) in any other case, in relation to a disabled person—
 - (i) who is seeking or being considered for appointment to, or a recommendation or approval in relation to, the office or post concerned; or
 - (ii) who has been appointed to the office or post concerned.

(10) Nothing in this section imposes any duty on the relevant person in relation to a disabled person if the relevant person does not know, and could not reasonably be expected to know—

- (a) in the case of a person who is being considered for, or is or may be seeking, appointment to, or a recommendation or approval in relation to, an office or post, that the disabled person concerned—
 - (i) is, or may be, seeking appointment to, or (as the case may be) seeking a recommendation or approval in relation to, that office or post; or
 - (ii) is being considered for appointment to, or (as the case may be) for a recommendation or approval in relation to, that office or post; or

- (b) in any case, that that person has a disability and is likely to be placed at a substantial disadvantage by the provision, criterion, practice or physical feature in comparison to persons who are not disabled.

(11) For the purposes of subsection (1)(a) the holder of an office or post—

- (a) is to be regarded as discharging his functions under the direction of another person if that other person is entitled to direct him as to when and where he discharges those functions;
- (b) is not to be regarded as entitled to remuneration merely because he is entitled to payments—
 - (i) in respect of expenses incurred by him in carrying out the functions of the office or post; or
 - (ii) by way of compensation for the loss of income or benefits he would or might have received from any person had he not been carrying out the functions of the office or post.

(12) In this section—

- (a) appointment to an office or post does not include election to an office or post;
- (b) “political office” means any office of the House of Assembly or a political party;
- (c) “relevant person”, in relation to an office or post, means—
 - (i) any person with power to make or terminate appointments to the office or post, or to determine the terms of appointment;
 - (ii) any person with power to determine the working conditions of a person appointed to the office or post;

- (iii) any person or body referred to in subsection (1)(b) on whose recommendation or subject to whose approval appointments are made to the office or post;
- (iv) any person falling within one or more of paragraphs (i) to (iii) subjecting any other person to any other detriment or to harassment in relation to such cases as are there mentioned.
- (d) “working conditions” in paragraph (c)(ii) includes—
 - (i) any opportunity for promotion, a transfer, training or receiving any other benefit; and
 - (ii) any physical feature of premises at or from which the functions of the office or post are performed;
- (e) references to making a recommendation include references to making a negative recommendation;
- (f) references to refusal include references to deliberate omission;

Police.

21.(1) For the purposes of this Part, the holding of the office of a police officer shall be treated as employment by—

- (a) the Commissioner of Police as respects any act done by him in relation to a police officer or that office;
 - (b) the police authority as respects any act done by it in relation to a police officer or that office.
- (2) For the purposes of section 47 (liability of employers and principals)—
- (a) the holding of the office of police officer shall be treated as employment by the Commissioner of Police; and
 - (b) anything done by a person holding such an office in the performance, or purported performance, of his functions shall be treated as done in the course of that employment.

(3) Any proceedings under this Ordinance which, by virtue of subsection (1), would lie against the Commissioner of Police shall be brought against the Commissioner of Police for the time being or, in the case of a vacancy in his office, against the person for the time being performing the functions of the Commissioner of Police.

(4) Subsections (1) to (3) shall apply–

- (a) to the Gibraltar Services Police as they apply to the Royal Gibraltar Police, and in such a case “the Commissioner of Police” shall be read as the person or body responsible for the management and control of the Gibraltar Services Police;
- (b) to a special constable, police cadet and police reservist and appointment to those posts as they apply to a police officer and the office of police officer.

(5) The Police Ordinance, any regulations made under it or legislation governing the police shall not treat men and women differently except–

- (a) as to requirements relating to height, uniform or equipment, or allowances in lieu of uniform or equipment;
- (b) so far as special treatment is accorded to women in connection with pregnancy or childbirth; or
- (c) in relation to pensions to or in respect of special constables, police cadets or police reservists.

(6) Nothing in this Part shall render unlawful any discrimination between male and female constables as to matters such as are mentioned in subsection (5)(a).

(7) In this section–

“Commissioner of Police” has the meaning given in the Police Ordinance;

“Gibraltar Services Police” has the same meaning as in section 51 of the Police Ordinance;

“police cadet” means any person appointed to undergo training with a view to becoming a police officer as defined in section 5A of the Police Ordinance;

“police officer” means any member of the Royal Gibraltar Police;

“police reservist” means a member of the Police Reserve as defined in the Police Ordinance;

“Royal Gibraltar Police” means the police force established by the Police Ordinance;

“special constable” has the meaning given in Part VII of the Police Ordinance.

Partnerships.

22.(1) It is unlawful for a firm, in relation to a position as a partner in that firm, to discriminate against a person on any equal opportunities ground—

- (a) in the arrangements (including advertisements) they make for the purpose of determining to whom it should offer that position;
- (b) in the terms on which it offers him that position;
- (c) by refusing to offer, or deliberately not offering, him that position; or
- (d) in a case where the person already holds that position—
 - (i) in the way it affords him access to any benefits or by refusing to afford, or deliberately not affording, him access to them; or
 - (ii) by expelling him from that position, or subjecting him to any other detriment.

(2) It is unlawful for a firm, in relation to a position as partner in the firm, to subject a person who holds or has applied for that position to harassment.

(3) In subsection (1)(d)(ii) reference to the expulsion of a person from a position as partner includes reference—

- (a) to the termination of that person's partnership by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the partnership is renewed on the same terms; and
- (b) to the termination of that person's partnership by any act of his (including the giving of notice) in circumstances such that he is entitled to terminate it without notice by reason of the conduct of the other partners.

(4) Subsection (1) does not apply to any act in relation to a position as partner where, if the position were employment, that act would be lawful by virtue of sections 17 to 18 (genuine occupational requirements).

(5) A firm is under a duty to make reasonable adjustments as defined in section 29—

- (a) in the case of a provision, criterion or practice for determining to whom the position of partner should be offered, in relation to any disabled person who is, or has notified the firm that he may be, a candidate for that position;
- (b) in any other case, in relation to a disabled person who is—
 - (i) a partner; or
 - (ii) a candidate for the position of partner.

(6) Nothing in subsection (5) imposes any duty on a firm in relation to a disabled person if the firm does not know, and could not reasonably be expected to know—

- (a) in the case of a candidate or potential candidate, that the disabled person concerned is, or may be, a candidate for the position of partner; or
- (b) in any case, that that person has a disability and is likely to be placed at a substantial disadvantage by the provision, criterion, practice or physical feature in comparison to persons who are not disabled.

(7) Where a firm is required by this section to make reasonable adjustments in relation to the disabled person concerned, the cost of making those adjustments shall be treated as an expense of the firm; and the extent to which such cost should be borne by that person, where he is or becomes a partner in the firm, shall not exceed such amount as is reasonable, having regard in particular to the proportion in which he is entitled to share in the firm's profits.

(8) Subsections (1)(a) to (c), (2) and (5) apply in relation to persons proposing to form themselves into a partnership as they apply in relation to a firm.

(9) In this section, "firm" has the meaning given by section 6 of the Partnership Ordinance and section 2 of the Limited Partnerships Ordinance.

(10) In the case of a limited partnership references in this section to a partner shall be construed as references to a general partner as defined in section 3 of the Limited Partnerships Ordinance.

(11) This section applies to a limited liability partnership as it applies to a firm; and, in its application to a limited liability partnership, references to a partner in a firm are references to a member of the limited liability partnership.

Trade organisations.

23.(1) It is unlawful for a trade organisation to discriminate against a person, who is not a member of the organisation, on any equal opportunities ground—

- (a) in the terms on which it is prepared to admit him to membership of the organisation; or
- (b) by refusing to accept, or deliberately not accepting, his application for membership.

(2) It is unlawful for a trade organisation, in relation to a member of the organisation, to discriminate against him on any equal opportunities ground—

- (a) in the way it affords him access to any benefits, or by refusing or deliberately omitting to afford him access to them;

- (b) by depriving him of membership, or varying the terms on which he is a member; or
- (c) by subjecting him to any other detriment.

(3) It is unlawful for a trade organisation, in relation to a person's membership or application for membership of that organisation, to subject a person to harassment.

(4) A trade organisation is under a duty to make reasonable adjustments as defined in section 29—

- (a) in the case of a provision, criterion or practice for determining to whom membership should be offered, in relation to any disabled person who is, or has notified the organisation that he may be, an applicant for membership;
- (b) in any other case, in relation to a disabled person who is—
 - (i) a member of the organisation, or
 - (ii) an applicant for membership of the organisation.

(5) Nothing in subsection (4) imposes any duty on an organisation in relation to a disabled person if the organisation does not know, and could not reasonably be expected to know—

- (a) in the case of an applicant or potential applicant, that the disabled person concerned is, or may be, an applicant for membership of the organisation; or
- (b) in any case, that that person has a disability and is likely to be placed at a substantial disadvantage by the provision, criterion, practice or physical feature in comparison to persons who are not disabled.

(6) Nothing in this Ordinance shall render unlawful any act done by a trade organisation in or in connection with—

- (a) affording only members who are of a particular equal opportunities category access to facilities for training which

would help fit them for holding a post of any kind in the organisation; or

- (b) encouraging only members who are of a particular equal opportunities category to take advantage of opportunities for holding such posts in the organisation,

where it reasonably appears to the organisation that the act prevents or compensates for disadvantages linked to that particular equal opportunities category suffered by those of that equal opportunities category holding such posts or likely to hold such posts.

(7) Nothing in this Ordinance shall render unlawful any act done by a trade organisation in, or in connection with, encouraging only persons of a particular equal opportunities category to become members of the organisation where it reasonably appears to the organisation that the act prevents or compensates for disadvantages linked to that particular equal opportunities category suffered by persons of that equal opportunities category who are, or are eligible to become, members.

(8) In this section—

“trade organisation” means an organisation of workers, a trade union, an organisation of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists;

“profession” includes any vocation or occupation; and

“trade” includes any business.

Employment agencies, careers guidance, etc.

24.(1) It is unlawful for an employment agency to discriminate against a person on any equal opportunities ground—

- (a) in the terms on which the agency offers to provide any of its services;
- (b) by refusing or deliberately not providing any of its services; or

(c) in the way it provides any of its services (including the standard of service which it provides).

(2) It is unlawful for an employment agency, in relation to a person to whom it provides its services, or who has requested it to provide its services, to subject that person to harassment.

(3) This section shall not apply if the discrimination only concerns employment which, by virtue of sections 17 and 18 (genuine occupational requirements) the employer could lawfully refuse to offer the person in question.

(4) An employment agency shall not be subject to any liability under this section if it proves that—

(a) it acted in reliance on a statement made to it by the employer to the effect that, by reason of the operation of subsection (3), its action would not be unlawful; and

(b) it was reasonable for it to rely on the statement.

(5) A person who knowingly or recklessly makes a statement such as is referred to in subsection (4)(a) which in a material respect is false or misleading commits an offence, and shall be liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.

(6) An employment agency is under a duty to make reasonable adjustments as defined in section 29 where—

(a) it has a practice, policy, procedure, provision or criteria which places disabled persons at a substantial disadvantage in comparison with persons who are not disabled in relation to the provision of a service which it provides, or is prepared to provide, to other members of the public;

(b) a physical feature (for example, one arising from the design or construction of a building or the approach or access to premises) places disabled persons at a substantial disadvantage in comparison with persons who are not disabled in relation to the provision of a service.

(7) An employment agency is also under a duty to make reasonable adjustments by providing auxiliary aids or services (for example, the provision of information on audio-tape or of a sign language interpreter) where they would—

- (a) enable disabled persons to make use of a service which a provider of services provides, or is prepared to provide, to members of the public; or
- (b) facilitate the use of disabled persons of such a service, it is the duty of the provider of that service to take such steps as it is reasonable.

(8) Discrimination under section 11(4) and a failure to comply with a duty to make reasonable adjustments under subsection (6)(b) may be justified, and if justified shall not be unlawful, if—

- (a) in the opinion of the employment agency, one or more of the conditions in subsection (9) is satisfied; and
- (b) it is reasonable, in all the circumstances of the case, for the employment agency to hold that opinion.

(9) The conditions are that—

- (a) in any case, the treatment is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person);
- (b) in any case, the disabled person is incapable of entering into an enforceable agreement, or of giving an informed consent, and for that reason the treatment is reasonable in that case;
- (c) in a case falling within subsection (1)(b), the treatment is necessary because the provider of services would otherwise be unable to provide the service to members of the public;
- (d) in a case falling within subsection (1)(c)—
 - (i) the treatment is necessary in order for the provider of services to be able to provide the service to the disabled person or to other members of the public; or

- (ii) the difference in the terms on which the service is provided to the disabled person and those on which it is provided to other members of the public reflects the greater cost to the provider of services in providing the service to the disabled person save that any increase in the cost of providing a service to a disabled person which results from compliance by an employment agency with a duty to make reasonable adjustments shall be disregarded.

(10) For the purposes of this section—

- (a) “employment agency” means a person who, for profit or not, provides services for the purpose of finding employment for workers or supplying employers with workers, but it does not include an educational establishment to which section 39 applies, or would apply but for the operation of any other provision of this Ordinance; and
- (b) references to the services of an employment agency include guidance on careers, self-employment, and any other services related to employment or self-employment.

Qualifications bodies.

25.(1) It is unlawful for a qualifications body to discriminate against a person on any equal opportunities ground—

- (a) in the terms on which it is prepared to confer an authorisation or qualification on him;
- (b) by refusing or deliberately not granting any application by him for such an authorisation or qualification; or
- (c) by withdrawing such an authorisation or qualification from him or varying the terms on which he holds it.

(2) It is unlawful for a qualifying body, in relation to an authorisation or qualification, to subject a person who holds or applies for such an authorisation or qualification to harassment.

(3) A qualifications body is under a duty to make reasonable adjustments as defined in section 29, save in relation to competence standards—

- (a) in the case of a provision, criterion or practice for determining on whom a professional or trade qualification is to be conferred, in relation to any disabled person who is, or has notified the qualifications body that he may be, an applicant for the conferment of that qualification;
- (b) in any other case, in relation to a disabled person who—
 - (i) holds a professional or trade qualification conferred by the qualifications body, or
 - (ii) applies for a professional or trade qualification which it confers.

(4) Nothing in subsection (3) imposes a duty on a qualifications body in relation to a disabled person if the body does not know, and could not reasonably be expected to know—

- (a) in the case of an applicant or potential applicant, that the disabled person concerned is, or may be, an applicant for the conferment of a professional or trade qualification; or
- (b) in any case, that that person has a disability and is likely to be placed at a substantial disadvantage by the provision, criterion, practice or physical feature in comparison to persons who are not disabled.

(5) Subsection (1) shall not apply to an authorisation or qualification where—

- (a) the authorisation or qualification is for the purposes of an organised religion;
- (b) the requirement is one to which subsection (6) applies; and
- (c) where the requirement is applied so as to comply with the doctrines of the religion or, by the authority or body concerned, so as to avoid conflict with the strongly held religious convictions of a significant number of the religion's followers.

(6) This subsection applies to—

- (a) a requirement to be of a particular sex;
- (b) a requirement not to be undergoing or to have undergone gender reassignment;
- (c) a requirement relating to not being married;
- (d) a requirement, applied in relation to a person who is married, that relates to the person, or the person's spouse, not having a living former spouse, or how the person, or the person's spouse, has at any time ceased to be married; or
- (e) a requirement relating to sexual orientation.

(7) In this section—

“authorisation or qualification” means any authorisation, qualification, recognition, registration, enrolment, approval or certification, which is needed for, or facilitates, engagement in a particular profession or trade;

“confer” includes renew or extend;

“profession” and “trade” have the meanings given by section 23(7) (trade organisations).

“qualifying body” means any authority or body which can confer an authorisation or qualification, but it does not include an educational establishment to which section 39 applies or would apply but for the operation of any other provision of this Ordinance.

Providers of vocational training (including by bodies providing further and higher education).

26.(1) It is unlawful, in relation to a person seeking or undergoing vocational training, for any vocational training provider to discriminate against him on any equal opportunities ground—

- (a) in the arrangements (including advertisements) the provider makes for the purpose of selecting people to receive vocational training;
- (b) in the terms on which the provider affords him access to any vocational training;
- (c) by refusing or deliberately not affording him such access;
- (d) by terminating his vocational training; or
- (e) by subjecting him to any other detriment during the course of his vocational training.

(2) It is unlawful for a vocational training provider, in relation to a person to whom he is providing vocational training, or who is seeking vocational training, to subject him to harassment.

(3) A vocational training provider is under a duty to make reasonable adjustments as defined in section 29—

- (a) in the case of a provision, criterion or practice for determining to whom vocational training should be offered, in relation to any disabled person who is, or has notified the placement provider that he may be, an applicant for that work placement;
- (b) in any other case, in relation to a disabled person who is—
 - (i) an applicant for the vocational training concerned, or
 - (ii) undertaking a vocational training with the vocational training provider.

(4) Nothing in subsection (3) imposes any duty on a vocational training provider in relation to a disabled person if he does not know, and could not reasonably be expected to know—

- (a) in the case of an applicant or potential applicant, that the disabled person is, or may be, an applicant for the vocational training; or

- (b) in any case, that that person has a disability and is likely to be placed at a substantial disadvantage by the provision, criterion, practice or physical feature in comparison to persons who are not disabled.

(5) Subsection (1) does not apply if the discrimination only concerns training for employment which, by virtue of section 17 and 18 (genuine occupational requirements) the employer could lawfully refuse to offer the person seeking training.

(6) In this section—

(a) “vocational training” means—

- (i) all types and all levels of training which would help fit a person for any employment;
- (ii) vocational guidance;
- (iii) facilities for training;
- (iv) practical work experience provided by an employer to a person whom he does not employ;
- (v) any assessment related to the award of any professional or trade authorisation or qualification as defined in section 25(8).

(b) “vocational training provider” means any person who provides, or makes arrangements for the provision of, vocational training—

- (i) and includes –
 - (aa) a person acting under regulation 4(1) of the Training Regulations 2001; or
 - (bb) an educational establishment under section 39 when it provides, or makes arrangements for the provision of, vocational training;

- (ii) but does not include an employer in relation to training for persons employed by him.

(7) This section does not apply in relation to age requirements operated by the Department of Education and Training in respect of school pupils.

Occupational pension schemes.

27.(1) It is unlawful, except in relation to rights accrued or benefits payable in respect of periods of service prior to the coming into operation of this Ordinance, for the trustees or managers of an occupational pension scheme to discriminate against a member or prospective member of the scheme on any equal opportunities ground in carrying out any of their functions in relation to it (including in particular their functions relating to the admission of members to the scheme and the treatment of members of it).

(2) It is unlawful for the trustees or managers of an occupational pension scheme, in relation to the scheme, to subject a member or prospective member of the scheme to harassment.

(3) Every occupational pension scheme shall be treated as including—

- (a) a provision (“the non-discrimination rule”) containing a requirement that the trustees or managers of the scheme refrain from doing any act which is unlawful by virtue of this section; and
- (b) in relation to discrimination on the grounds of sex, a provision (the “equal treatment rule”) containing the requirements set out in section 34.

(4) The other provisions of the scheme are to have effect subject to the non-discrimination rule and the equal treatment rule.

(5) The trustees or managers of an occupational pension scheme may, by resolution, make such alterations to the scheme as may be required to secure conformity with the non-discrimination rule or the equal treatment rule if—

- (a) they do not (apart from this subsection) have power to make such alterations to the scheme; or
- (b) they have such power, but the procedure for doing so—

- (i) is liable to be unduly complex or protracted; or
- (ii) involves the obtaining of consents which cannot be obtained, or can only be obtained with undue delay or difficulty.

(6) Alterations made by a resolution such as is referred to in subsection (5) may—

- (a) in relation to the non-discrimination rule, have effect in relation to a period before the alterations are made (but may not have effect in relation to any time before the coming into operation of this Ordinance);
- (b) in relation to the equal treatment rule, have effect in relation to a period before the alterations are made.

(7) Where alterations to an occupational pension scheme are required to secure conformity with the non-discrimination rule in relation to discrimination on the grounds of age, any alterations made by a resolution such as referred to in subsection (5) shall be subject to the consent of any employer in relation to the scheme whose consent would be required for such a modification if it were to be made under the scheme rules.

(8) For the purpose of this section, nothing in Part III (discrimination in employment etc.) or Part VI (other unlawful acts) of this Ordinance shall render it unlawful for—

- (a) an employer, or for trustees or managers to maintain or use, in relation to an occupational pension scheme, any of the rules, practices, actions or decisions set out in Part 1 of Schedule 2 (occupational pension schemes – exceptions for age);
- (b) an employer, in relation to the payment of contributions to any personal pension scheme in respect of a worker, to maintain or use any of the rules, practices, actions or decisions set out in Part 2 of Schedule 2 (occupational pension schemes—exceptions for age).

(9) Trustees and managers of occupational pension schemes are under a duty to make reasonable adjustments as defined in section 29 in respect of—

- (a) a provision, criterion or practice (including a scheme rule) applied by or on behalf of the trustees or managers of an occupational pension scheme, or
- (b) any physical feature of premises occupied by the trustees or managers,

which places a relevant disabled person at a substantial disadvantage in comparison with persons who are not disabled.

(10) Nothing in subsection (9) imposes any duty on trustees or managers in relation to a disabled person if they do not know, and could not reasonably be expected to know—

- (a) that the disabled person is a relevant disabled person; or
- (b) that that person has a disability and is likely to be placed at a substantial disadvantage by the provision, criterion, practice or physical feature in comparison to persons who are not disabled.

(11) In this section and Schedule 2—

“active member” means a person who is in pensionable service under the scheme;

“deferred member” means a person (other than an active or pensioner member) who has accrued rights under the scheme;

“employer” means the employer of persons in the description or category of employment to which the scheme in question relates;

“firm” means a body corporate or a partnership;

“member” means any active, deferred or pensioner member;

“occupational pension scheme” means any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories of employments so as to provide benefits, in the form of pensions or otherwise, payable on termination of service, or on death or retirement, to or in respect

of employed or self-employed persons with qualifying service in an employment of any such description or category;

“pensionable service”, in relation to a member of an occupational pension scheme, means service in any description or category of employment to which the scheme relates which qualifies the member (on the assumption that it continues for the appropriate period) for pension or other benefits under the scheme;

“pensioner member” means a person who in respect of his pensionable service under the scheme or by reason of transfer credits, is entitled to the present payment of pension or other benefits;

“prospective member”, in relation to an occupational scheme, means any person who, under the terms of his employment or the rules of the scheme or both—

- (a) is able, at his own option, to become a member of the scheme,
- (b) will become so able if he continues in the same employment for a sufficient period of time,
- (c) will be admitted to it automatically unless he makes an election not to become a member, or
- (d) may be admitted to it subject to the consent of his employer;

“transfer credits” means rights allowed to a member under the rules of an occupational pension scheme by reference to a transfer to that scheme of his accrued rights from another scheme (including any transfer credits allowed by that scheme);

“trustees or managers” means—

- (a) in the case of a trust scheme, the trustees of the scheme and,
- (b) in any other case, the managers of the scheme;

“trust scheme” means an occupational pension scheme established under a trust.

Occupational pensions - prohibition on different rules for overseas residents, etc.

28.(1) This section applies where an occupational pension scheme contains provisions contravening subsection (2) or (3).

(2) Except so far as regulations otherwise provide, provisions of an occupational pension scheme shall contravene this subsection to the extent that they would (apart from this section) have an effect with respect to—

- (a) the entitlement of any person to benefits under the scheme, or
- (b) the payment to any person of benefits under the scheme,

which would be different according to whether or not a place outside Gibraltar is specified by that person as the place to which he requires payments of benefits under the scheme to be made to him.

(3) Except so far as regulations otherwise provide, provisions of an occupational pension scheme shall contravene this subsection to the extent that they would (apart from this section) have an effect with respect to—

- (a) the entitlement of any person to remain a member of the scheme,
- (b) the eligibility of any person to remain a person by or in respect of whom contributions are made towards or under the scheme, or
- (c) the making by or in respect of any person who is a member of the scheme of any contributions towards or under the scheme,

which would be different according to whether that person works wholly in Gibraltar or wholly or partly outside Gibraltar.

(4) Provisions contravening subsection (2) shall have effect, in relation to all times after the coming into operation of this Ordinance as if they made the same provision in relation to a person who requires payments of benefits to be made to a place outside Gibraltar as they make in relation to a person in whose case all payments of benefits fall to be made to a place in Gibraltar.

(5) Provisions contravening subsection (3) shall have effect, in relation to all times after the coming into operation of this Ordinance, as if they made the same provision in relation to persons working wholly or partly outside Gibraltar as they make in relation to persons working wholly in Gibraltar.

(6) This section—

- (a) shall be without prejudice to any enactment under which any amount is to be or may be deducted, or treated as deducted from amounts payable by way of benefits under the scheme or treated as so payable; and
- (b) shall not apply in relation to so much of any provision of a scheme as is required for securing compliance with the conditions of any approval, exemption or relief given or available under the Income Tax Ordinance.

Meaning of duty to make reasonable adjustments – disability.

29.(1) For the purposes of this Ordinance, “duty to make reasonable adjustments” means that where—

- (a) a provision, criterion or practice applied by or on behalf of a person set out in section 12(6) (“A”); or
- (b) any physical feature of premises occupied or controlled by A,

place the disabled person concerned at a substantial disadvantage in comparison to persons who are not disabled, it is the duty of A to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.

(2) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to—

- (a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;
- (b) the extent to which it is practicable for him to take the step;

- (c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;
- (d) the extent of his financial and other resources;
- (e) the availability to him of financial or other assistance with respect to taking the step;
- (f) the nature of his activities and the size of his undertaking;
- (g) where the step would be taken in relation to a private household, the extent to which taking it would—
 - (i) disrupt that household, or
 - (ii) disturb any person residing there.

(3) The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments—

- (a) making adjustments to premises (including access to the premises);
- (b) allocating some of the disabled person's duties to another person;
- (c) transferring him to fill an existing vacancy;
- (d) altering his hours of working or training;
- (e) assigning him to a different place of work or training;
- (f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;
- (g) giving, or arranging for, training or mentoring (whether for the disabled person or any other person);
- (h) acquiring or modifying equipment;

- (i) modifying instructions or reference manuals;
- (j) modifying procedures for testing or assessment;
- (k) providing a reader or interpreter;
- (l) providing supervision or other support;
- (m) in relation to trustees or managers of occupational pension schemes, making alterations to scheme rules;
- (n) in relation to employment agencies, providing alternative methods of making the service, or services, available to disabled persons.

(4) For the purposes of a duty to make reasonable adjustments, where under any binding obligation a person is required to obtain the consent of another person to any alteration of the premises occupied by him—

- (a) it is always reasonable for him to have to take steps to obtain that consent; and
- (b) it is never reasonable for him to have to make that alteration before that consent is obtained.

(5) The steps referred to in subsection (4)(a) shall not be taken to include an application to a court or tribunal.

(6) In subsection (4), “binding obligation” means a legally binding obligation (not contained in a lease (within the meaning of section 30(3)) in relation to the premises, whether arising from an agreement or otherwise.

(7) A provision imposing a duty to make reasonable adjustments applies only for the purpose of determining whether a person has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such.

Reasonable adjustments to premises occupied under leases - disability.

30.(1) This section applies where—

- (a) a person to whom a duty to make reasonable adjustments applies (“the occupier”) occupies premises under a lease;
- (b) but for this section, the occupier would not be entitled to make a particular alteration to the premises; and
- (c) the alteration is one which the occupier proposes to make in order to comply with that duty.

(2) Except to the extent to which it expressly so provides, the lease shall have effect by virtue of this subsection as if it provided—

- (a) for the occupier to be entitled to make the alteration with the written consent of the lessor;
- (b) for the occupier to have to make a written application to the lessor for consent if he wishes to make the alteration;
- (c) if such an application is made, for the lessor not to withhold his consent unreasonably; and
- (d) for the lessor to be entitled to make his consent subject to reasonable conditions.

(3) The occupier is to be treated for the purposes of subsection (1) as not being entitled to make the alteration if the terms and conditions of a lease—

- (a) impose conditions which are to apply if the occupier alters the premises, or
- (b) entitle the lessor to impose conditions when consenting to the occupier’s altering the premises.

(4) If any question arises as to whether the occupier has failed to comply with any duty to make reasonable adjustments by failing to make a particular alteration to the premises, any constraint attributable to the fact that he occupies the premises under a lease is to be ignored unless he has applied to the lessor in writing for consent to the making of the alteration.

(5) In this section—

- (a) “lease” includes a tenancy, sub-lease or sub-tenancy and an agreement for a lease, tenancy, sub-lease or sub-tenancy; and “sub-lease”;
- (b) “sub-lease” means any sub-term created out of, or deriving from, a leasehold interest; and
- (c) “sub-tenancy” means any tenancy created out of, or deriving from, a superior tenancy.

PART IV

Equal treatment of Men and Women - Employment and Occupational Pensions

Requirement of equal pay for male and female employees – equality clauses.

31.(1) If the terms of a contract (whether written, oral or otherwise) under which a woman is employed do not include (directly or by reference to a collective agreement or otherwise) an equality clause, they shall be deemed to include one.

(2) An equality clause is a provision which relates to terms of a contract, under which a woman is employed (the “woman’s contract”), and has the effect that–

- (a) where the woman is employed on like work with a man in the same employment–
 - (i) if (apart from the equality clause) a term relating to pay defined in subsection (6) of the woman’s contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman’s contract shall be treated as so modified as not to be less favourable; and
 - (ii) if (apart from the equality clause) at any time the woman’s contract does not include a term relating to pay as defined in subsection (6) corresponding to a term benefiting that man included in the contract

under which he is employed, the woman's contract shall be treated as including such a term;

- (b) where the woman is employed on work rated as equivalent with that of a man in the same employment—
 - (i) if (apart from the equality clause) any term relating to pay as defined in subsection (6) of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable; and
 - (ii) if (apart from the equality clause) at any time the woman's contract does not include a term relating to pay as defined in subsection (6) corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term;
- (c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision) of equal value to that of a man in the same employment—
 - (i) if (apart from the equality clause) any term relating to pay as defined in subsection (6) of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable; and
 - (ii) if (apart from the equality clause) at any time the woman's contract does not include a term relating to pay as defined in subsection (6) corresponding to a term benefiting that man included in the contract

under which he is employed, the woman's contract shall be treated as including such a term;

(d) where—

- (i) any term of the woman's contract regulating maternity pay provides for any of her maternity pay to be calculated by reference to her pay at a particular time;
- (ii) after that time (but before the end of the statutory maternity leave period) her pay is increased, or would have increased had she not been on statutory maternity leave; and
- (iii) the maternity pay is neither what her pay would have been had she not been on statutory maternity leave nor the difference between what her pay would have been had she not been on statutory maternity leave and any statutory maternity pay to which she may be entitled;

if (apart from the equality clause) the terms of the woman's contract do not provide for the increase to be taken into account for the purpose of calculating the maternity pay, the term mentioned in sub-paragraph (i) shall be treated as so modified as to provide for the increase to be taken into account for that purpose;

(e) if (apart from the equality clause) the terms of the woman's contract as to—

- (i) pay (including pay by way of bonus) in respect of the time before she begins to be on statutory maternity leave; or
- (ii) pay by way of bonus in respect of the time after she returns to work following her having been on statutory maternity leave;

do not provide for such pay to be paid when it would be paid but for her having time off on statutory maternity leave, the

woman's contract shall be treated as including a term providing for such pay to be paid when ordinarily it would be paid;

- (f) if (apart from the equality clause) the terms of the woman's contract regulating her pay after returning to work following her having been on statutory maternity leave provide for any of that pay to be calculated without taking into account any amount by which her pay would have increased had she not been on statutory maternity leave, the woman's contract shall be treated as including a term providing for the increase to be taken into account in calculating that pay.

(3) An equality clause falling within subsection (2)(a), (b) or (c) shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which—

- (a) is not the difference of sex, but
- (b) is a material difference between the woman's case and the man's case.

(4) A woman shall be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs, regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences.

(5) A woman shall be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value, in terms of the demand made on a worker under various headings (for instance effort, skill, decision), on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value but for the evaluation being made on a system setting different values for men and women on the same demand under any heading.

(6) For the purposes of—

(a) this section—

“maternity pay” means pay (including pay by way of bonus) to which she is entitled as a result of being pregnant or in respect of times when she is on statutory maternity leave except that it shall not include any statutory maternity pay to which she may be entitled;

“pay” includes the ordinary or minimum wage or salary, overtime pay, performance-related pay, piece rates, sick pay and any other consideration whether in cash or in kind which the employee receives, directly or indirectly, in respect of his employment for his employer and as further defined by the European Court of Justice in relation to directive 75/117/EEC and Article 141 of the Treaty establishing the European Community;

“statutory maternity pay” means maternity allowance under section 11A of the Social Security (Insurance) Ordinance .

(b) subsection (2)(d) to (f), an increase in an amount is taken into account in a calculation if in the calculation the amount as increased is substituted for the unincreased amount.

(7) Subject to subsections (8) to (10), for the purposes of this section—

(a) men shall be treated as in the same employment with a woman if they are men employed by—

(i) her employer; or

(ii) by any associated employer in Gibraltar at which common terms and conditions of employment are observed either generally or for employees of the relevant classes;

(b) two employers shall be treated as associated if one is a company of which the other (directly or indirectly) has control, or if both are companies of which a third person (directly or indirectly) has control.

(8) This section also applies to any office or post in section 20(1) (office holders) as it applies to employment by a private person, and shall so apply as if references to–

- (a) a contract of employment included references to the terms of appointment;
- (b) the employer included references to the person responsible for paying any remuneration that a holder of the office or post is entitled to in respect of the office or post.

(9) For the purposes of subsection (8), section 20(11) and (12)(a) and (b) (office holders) shall apply.

(10) For the purposes of this Ordinance it shall be immaterial whether the law which (apart from this subsection) is the law applicable to a contract is the law of Gibraltar.

(11) An equality clause shall not operate in relation to terms–

- (a) affected by compliance with any law regulating the employment of women; or
- (b) affording special treatment to women in connection with pregnancy or childbirth save that this subparagraph does not affect the operation of an equality clause falling within subsection (2)(d), (e) or (f).

(12) An equality clause shall not operate in relation to terms relating to a person's membership of, or rights under, an occupational pension scheme, being terms in relation to which, by reason only of any provision made by or under sections 34 to 36 (equal treatment – occupational pensions), an equal treatment rule would not operate if the terms were included in the scheme.

(13) The provisions of this section with reference to women and their treatment relative to men shall be read as applying equally in a converse case to men and their treatment relative to women and, for that purpose, shall have effect with such modification as required.

Relationship of section 31 with section 15 (applicants and employees).

32.(1) Section 31(1) does not apply in determining for the purposes of section 15(1)(b) the terms on which employment is offered.

(2) Where a person offers a woman employment on certain terms, and if she accepted the offer then, by virtue of an equality clause, any of those terms would fall to be modified, or any additional term would fall to be included, the offer shall be taken to contravene section 15(1)(b).

(3) Where a person offers a woman employment on certain terms, and subsection (2) would apply but for the fact that, on her acceptance of the offer, section 31(3) would prevent the equality clause from operating, the offer shall be taken not to contravene section 15(1)(b).

(4) An act shall not be considered to contravene section 15(2) if—

- (a) it contravenes a term which has been modified or included by virtue of an equality clause, or
- (b) it would contravene such a term but for the fact that the equality clause is prevented from operating by section 31(3).

(5) The provisions of this section with reference to women shall be read as applying equally to men.

Interpretation of sections 34 and 35.

33. The definitions given in section 27(11) (occupational pensions) apply equally to sections 34 and 35.

Occupational pensions - Equal Treatment Rule.

34.(1) An occupational pension scheme which does not contain an equal treatment rule shall be treated as including one.

(2) An equal treatment rule is a clause which relates to the terms on which—

- (a) persons become members of the scheme, and
- (b) members of the scheme are treated.

(3) Subject to subsection (6), an equal treatment rule has the effect that where—

- (a) a woman is employed on like work with a man in the same employment,
- (b) a woman is employed on work rated as equivalent with that of a man in the same employment, or
- (c) a woman is employed on work which, not being work in relation to which paragraph (a) or (b) applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision) of equal value to that of a man in the same employment,

but (apart from the equal treatment rule) any of the terms referred to in subsection (2) is or becomes less favourable to the woman than it is to the man, the term shall be treated as so modified as not to be less favourable.

(4) An equal treatment rule does not operate in relation to any difference as between a woman and a man in the operation of any of the terms referred to in subsection (2) if the trustees or managers of the scheme prove that the difference is genuinely due to a material factor which—

- (a) is not the difference of sex; but
- (b) is a material difference between the woman's case and the man's case.

(5) References in subsection (4) and sections 35, 36, 27(5) to the terms referred to in subsection (2), or the effect of any of those terms, include—

- (a) a term which confers on the trustees or managers of an occupational pension scheme, or any other person, a discretion which, in a case within subsection (3)(a), (b) or (c)—
 - (i) may be exercised so as to affect the way in which persons become members of the scheme, or members of the scheme are treated, and

(ii) may (apart from the equal treatment rule) be so exercised in a way less favourable to the woman than to the man, and

(b) the effect of any exercise of such a discretion,

and references to the terms on which members of the scheme are treated shall be read accordingly.

(6) In the case of a term within subsection (5)(a) the effect of an equal treatment rule is that the term shall be treated as so modified as not to permit the discretion to be exercised in a way less favourable to the woman than to the man.

(7) The provisions of this section with reference to women and their treatment relative to men shall be read as applying equally in a converse case to men and their treatment relative to women and, for that purpose, shall have effect with such modification as required.

Equal Treatment Rule: supplementary.

35.(1) The reference in section 34(2) to the terms on which members of a scheme are treated includes those terms as they have effect for the benefit of dependants of members, and the reference in section 34(5) to the way in which members of a scheme are treated includes the way they are treated as it has effect for the benefit of dependants of members.

(2) Where the effect of any of the terms referred to in section 34(2) on persons of the same sex differs according to their family or marital status, the effect of the term shall be compared for the purposes of section 34 with its effect on persons of the other sex who have the same family or marital status.

(3) An equal treatment rule shall have effect subject to provisions relating to the protection of women by reason of maternity and any provision which suspends the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid for by the employer shall be construed as being contrary to the equal treatment rule.

(4) Section 34 shall be construed as one with section 31 (requirement of equal pay for male and female employees).

(5) Section 34 so far as it relates to the terms on which members of a scheme are treated, shall be treated as having had effect in relation to any pensionable service on or after 17th May 1990.

Equal Treatment Rule: exceptions.

36.(1) An equal treatment rule does not operate in relation to any variation as between a woman and a man in the effect of any of the terms referred to in section 34(2) if the variation is permitted by or under any of the provisions of this section.

(2) Where a man and a woman are eligible, in prescribed circumstances, to receive different amounts by way of pension, the variation shall be permitted by this subsection if, in prescribed circumstances, the differences are attributable only to differences between men and women in the benefits derived from an old age pension to which, in prescribed circumstances, they are or would be entitled.

(3) A variation is permitted by this subsection if—

- (a) the variation consists of the application of actuarial factors which differ for men and women to the calculation of contributions to a scheme by employers, being factors which fall within a prescribed class or description, or
- (b) the variation consists of the application of actuarial factors which differ for men and women to the determination of benefits falling within a prescribed class or description;

and in this subsection “benefits” include any payment or other benefit made to or in respect of a person as a member of the scheme.

(4) In subsection (2) “state old age pension” means an old age pension under section 18 of the Social Security (Open Long-Term Benefits Scheme) Ordinance 1997.

(5) Regulations—

- (a) may permit further variations, or amend or repeal subsection (2) or (3);

- (b) made by virtue of paragraph (a), may have effect in relation to pensionable service on or after 17th May 1990 and before the date on which the regulations are made.

Article 141 of the Treaty establishing the European Community.

37. The provisions of this Part are in addition to any directly effective rights to equal pay under Article 141 of the Treaty establishing the European Community.

PART V

Discrimination in other fields

Meaning of equal opportunities ground in Part V.

38. For the purpose of this Part “equal opportunities ground” means—

- (a) the ground of racial or ethnic origin; and
- (b) victimisation.

Educational establishments (including further and higher education).

39.(1) It is unlawful for the responsible body of an educational establishment, to discriminate against a person on an equal opportunities ground—

- (a) in the terms on which it offers to admit him as a pupil;
- (b) by refusing, or deliberately omitting, to register him for admission or to accept an application to admit him, as a pupil; or
- (c) where he is a pupil of the establishment—
 - (i) in the way it affords him access to any benefit;
 - (ii) by refusing, or deliberately omitting to afford, him access to a benefit;
 - (iii) by excluding him from the establishment; or

(iv) by subjecting him to any other detriment.

(2) It is unlawful for the responsible body of an educational establishment to subject to harassment—

- (a) a person who applies for admission to the educational establishment as a pupil; or
- (b) a pupil at the educational establishment.

(4) In this section—

“educational establishment” includes the following bodies, as defined in the Education and Training Ordinance—

- (a) a Government school including a special school, or an institution of further education (including educational provision provided under section 28(2) of the Education and Training Ordinance);
- (b) an independent school including an institution of further education;

“pupil” means a person who receives education at an educational establishment; and

“responsible body” includes—

- (a) a committee of a college of further education under section 29 of the Education and Training Ordinance;
- (b) a school committee of a Government school under section 22 of the Education and Training Ordinance;
- (c) the proprietor of an independent school;
- (d) the proprietor of a special school which is not a Government school; and
- (e) any other person or body responsible for an educational establishment.

Educational Awards.

40.(1) It is unlawful, in relation to a person seeking the grant of an educational award under the Educational Awards Regulations, for the committee to discriminate against him on any equal opportunities ground—

- (a) in the arrangements it makes for the purpose of selecting people for the grant of an educational award;
- (b) in the terms on which it affords him access to any educational award; or
- (c) by refusing or deliberately not affording him such access.

(2) It shall be unlawful for the Department of Education and Training or the committee to discriminate against a person who is studying under an educational award on any equal opportunities ground—

- (a) in the way it affords him access to any benefit;
- (b) by refusing or deliberately not affording him access to them;
- (c) by terminating the educational award; or
- (d) by subjecting him to any other detriment.

(3) It shall be unlawful for the Department of Education and Training or the Committee, in relation to a person who is studying under an educational award or who sought the grant of an educational award, to subject him to harassment on any equal opportunities ground.

(4) In this section, the “committee” means the Scholarships Award Committee appointed under regulation 5 of the Educational Awards Regulations 1990.

Other discrimination in relation to education and training.

41. It is unlawful for the Department of Education and Training, in the exercise of its functions under the Education and Training Ordinance, to do any act which constitutes discrimination or harassment of a person on an equal opportunities ground.

Public authorities.

42.(1) It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination on an equal opportunities ground.

(2) It is unlawful for a public authority to subject a person to harassment, on an equal opportunities ground in the course of carrying out any functions of the authority which consists of the provision of—

- (a) any form of social security;
- (b) healthcare;
- (c) any other form of social protection; or
- (d) any form of social advantage,

which does not fall within section 43 (provision of goods etc).

(3) “Public authority” includes a person some of whose functions are functions of a public nature, but does not include the House of Assembly.

(4) This section does not apply to—

- (a) any judicial act (whether done by a court or tribunal or other person);
- (b) any act done on behalf of, or on the instructions of, a person exercising a judicial function (whether in connection with a court or tribunal);
- (c) any act of, or relating to, making, confirming or approving an enactment or any instrument made by a Minister of the Government, or the Governor, under an enactment;
- (d) a decision not to institute criminal proceedings and, where such a decision has been made, any act done for the purpose of enabling the decision whether to institute the criminal proceedings to be made;

- (e) where criminal proceedings are not continued as a result of a decision not to continue them, the decision and, where such a decision has been made—
 - (i) any act done for the purpose of enabling the decision whether to continue the proceedings to be made; and
 - (ii) any act done for the purpose of securing that the proceedings are not continued.

Provision of goods, facilities and services.

43.(1) It is unlawful for a person (“A”) concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate, on an equal opportunities ground, against a person (“B”) who seeks to obtain or use those goods, facilities or services—

- (a) by refusing or deliberately omitting to provide B with goods, facilities or services; or
- (b) by refusing or deliberately omitting to provide B with goods, facilities or services of the like quality, in the like manner and on the like terms that A normally provides to other members of the public or (where B belongs to a section of the public) to other members that section of the public to which B belongs.

(2) The following are examples of the facilities and services mentioned in subsection (1)—

- (a) access to and use of a place which the public are permitted to enter;
- (b) accommodation in a hotel, boarding house or other similar establishment;
- (c) facilities by way of banking or insurance or for grants, loans, credit or finance;
- (d) facilities for education;
- (e) facilities for entertainment, recreation or refreshment;

- (f) facilities for transport or travel;
- (g) the services of a profession or trade or any public authority;
- (h) access to and use of means of communication;
- (i) access to and use of information services.

(3) It is unlawful for a person concerned with the provision of goods, facilities or services mentioned in subsection (1), in relation to such provision, to subject to harassment, on an equal opportunities ground,

- (a) a person who seeks to obtain or use those goods, facilities or services; or
- (b) a person to whom he provides, those goods, facilities or services.

Disposal or management of premises.

44.(1) It shall be unlawful for a person, in relation to premises in Gibraltar of which he has the power to dispose, to discriminate against another person on an equal opportunities ground—

- (a) in the terms on which he offers him those premises;
- (b) by refusing to dispose of premises to him or by refusing permission for the disposal of premises to him; or
- (c) in his treatment of him in connection with any list of persons requiring premises of that description.

(2) It is unlawful for a person, in relation to premises managed by him, to discriminate, on an equal opportunities ground, against a person occupying those premises—

- (a) in the manner in which he provides access to any benefits or facilities or by refusing or deliberately omitting to afford him access to them;
- (b) by evicting him; or

(c) by subjecting him to any other detriment.

(3) It shall be unlawful for a person, in relation to such premises as are referred to in subsection (1) or (2) to subject to harassment on an equal opportunities ground, a person who applies for or occupies such premises.

Consent for assignment or sub-letting.

45.(1) Where the licence or consent of the landlord or of any other person is required for the disposal to any person of premises comprised in a tenancy, it is unlawful for the landlord or other person—

- (a) to discriminate against a person, on an equal opportunities ground, by withholding the licence or consent for disposal of the premises to him; or
- (b) in relation to such a licence or consent, to subject to harassment on any equal opportunities ground, a person who applies for the licence or consent, or from whom the licence or consent is withheld.

(2) In this section—

“tenancy” means a tenancy created by a lease or sub-lease, by an agreement for a lease or sub-lease or by a tenancy agreement or in pursuance of any enactment; and

“disposal”, in relation to premises comprised in a tenancy, includes assignment or assignation of the tenancy and sub-letting or parting with possession of the premises or any part of the premises.

(3) This section applies to tenancies created before the coming into operation of this Ordinance as well as to others.

PART VI

Other unlawful acts

Relationships which have come to an end.

46.(1) In this section a “relevant relationship” is a relationship during the course of which an act of discrimination against, or harassment of, one party to the relationship (“B”) by the other party to it (“A”) is unlawful by virtue of—

- (a) any provision of Part III (employment and occupation field);
- (b) sections 39 to 41 (education);
- (c) section 42, so far as relating to—
 - (i) any form of social security;
 - (ii) health care;
 - (iii) any other form of social protection; and
 - (iv) any form of social advantage;

which does not fall within section 43;

- (d) sections 43 to 45 (goods, facilities, services and disposal of premises); or
- (e) any provision of Part VI in its application to paragraphs (a) to (d).

(2) Where a relevant relationship has come to an end, it is unlawful for A to—

- (a) discriminate against B on an equal opportunities ground by subjecting him to a detriment, or
- (b) subject B to harassment,

where the discrimination or harassment arises out of and is closely connected to that relationship.

(3) Where B is a disabled person, it is the duty of A to make reasonable adjustments as defined in section 29 in relation to—

- (a) a provision, criterion or practice applied by A to B in relation to any matter arising out of the relevant relationship; or
- (b) a physical feature of premises occupied by A;

(4) Nothing in subsection (3) shall impose any duty on A if he does not know, and could not reasonably be expected to know that B has a disability and is likely to be placed at a substantial disadvantage by the provision, criterion, practice or physical feature in comparison with persons who are not disabled.

(5) In subsection (1), reference to an act of discrimination or harassment which is unlawful shall include, in the case of a relationship which has come to an end before the coming into operation of this Ordinance, reference to an act of discrimination or harassment which would, after that date, be unlawful.

Liability of employers and principals.

47.(1) Anything done by a person in the course of his employment shall be treated for the purposes of this Ordinance as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.

(2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Ordinance as done by that other person as well as by him.

(3) In proceedings brought under this Ordinance against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment, acts of that description.

Aiding unlawful acts.

48.(1) A person who knowingly aids another person (whether or not his employee or agent) to do an act made unlawful by this Ordinance shall be

treated for the purposes of this Ordinance as himself doing an unlawful act of the like description.

(2) For the purposes of subsection (1) an employee or agent for whose act the employer or principal is liable under section 47 (or would be so liable but for section 47(3)) shall be deemed to aid the doing of the act by the employer or principal.

(3) A person does not under this section knowingly aid another to do an unlawful act if—

- (a) he acts in reliance on a statement made to him by that other person that, by reason of any provision of this Ordinance, the act which he aids would not be unlawful; and
- (b) it is reasonable for him to rely on the statement.

(4) A person who knowingly or recklessly makes a statement such as is referred to in subsection (3)(a) which in a material respect is false or misleading commits an offence, and shall be liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.

PART VIII

General exceptions.

Exception for the security of Gibraltar.

49. Nothing in this Ordinance shall render unlawful an act done for the purpose of safeguarding the security of Gibraltar, if the doing of that act was justified by that purpose.

Exceptions for positive action.

50. Nothing in this Ordinance shall render unlawful any act done in or in connection with—

- (a) affording persons of a particular equal opportunities category access to facilities for training which would help fit them for particular work; or

- (b) encouraging persons of a particular equal opportunities category to take advantage of opportunities for doing particular work,

where it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to that particular equal opportunities category suffered by persons of that equal opportunities category doing that work or likely to take up that work or where there are no persons of that particular equal opportunities category doing that work in Gibraltar or the number of persons of that particular equal opportunities category doing that work in Gibraltar is comparatively small.

Education, training and welfare – race and ethnicity.

51. Nothing in this Ordinance shall make it unlawful to do anything by way of meeting special needs for education, training or welfare of persons of a particular race or ethnicity or providing ancillary benefits in connection with meeting those needs.

Protection of Sikhs from discrimination in connection with requirements as to wearing of safety helmets

52.(1) Where–

- (a) any person applies to a Sikh any provision, criterion or practice relating to the wearing by him of a safety helmet while he is on a construction site; and
- (b) at the time when he so applies the provision, criterion or practice that person has no reasonable grounds for believing that the Sikh would not wear a turban at all times when on such a site,

then, for the purposes of section 9(2), (indirect discrimination on the ground of religion or belief) the provision, criterion or practice shall be taken to be one which cannot be shown to be a proportionate means of achieving a legitimate aim.

(2) Any special treatment afforded to Sikh in consequence of this section shall not be regarded as giving rise, in relation to any other person, to any discrimination falling within section 8 (discrimination on the ground of religion or belief).

(3) In this section—

- (a) “construction site” means any place in Gibraltar where any building operations or works of engineering construction are being undertaken; and
- (b) “safety helmet” means any form of protective headgear.
- (c) any reference to a Sikh is a reference to a follower of the Sikh religion; and
- (d) any reference to a Sikh being on a construction site is a reference to his being there whether while at work or otherwise.

Acts done for the protection of women.

53.(1) Nothing in Part III or Part VI so far as it has effect in relation to the provisions in Part III shall render unlawful any act done by a person in relation to a woman if it was necessary for that person to do it in order to comply with a requirement of a statutory provision concerning the protection of women.

(2) The reference in subsection (1) to a statutory provision concerning the protection women shall be a reference to any such provision having effect for the purpose of protecting women as regards pregnancy or maternity or other circumstances giving rise to risks specifically affecting women, whether the provision relates only to such protection or to the protection of any other class of persons as well.

(3) The reference in subsection (1) to the protection of a particular woman or class of women is a reference to the protection of that woman or those women as regards any circumstances falling within subsection (1).

Exception for sex discrimination— Sport.

54. Nothing in this Ordinance, in relation to any sport, game or other activity of a competitive nature where the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man shall render unlawful any act related to the participation of a person as a competitor in events involving that activity which are confined to competitors of one sex.

Exception for sex discrimination – Insurance etc.

55. Nothing in this Ordinance shall render unlawful the treatment of a person in relation to an annuity, life assurance policy, accident insurance policy, or similar matter involving the assessment of risk, where the treatment–

- (a) was effected by reference to actuarial or other data from a source on which it was reasonable to rely, and
- (b) was reasonable having regard to the data and any other relevant factors.

Exception for benefits dependent on marital status.

56. Nothing in Parts II, III or VI shall render unlawful anything which prevents or restricts access to a benefit by reference to marital status provided that there is no discrimination on the ground of sex.

Exception for Age Discrimination - Retirement and Duty to Consider Working Beyond Retirement

57.(1) This section applies in relation to an employee within the meaning of section 2(2)(a)(i) .

(2) Nothing in Part III or section 47 or 48 shall render unlawful the dismissal of a person to whom this regulation applies at or over the age of 65 where the reason for the dismissal is retirement.

(3) For the purposes of this section, whether or not the reason for a dismissal is retirement shall be determined in accordance with the Employment Ordinance.

(4) Where this section applies, the employer must consider whether to allow the employee to continue working beyond retirement following the procedure laid down in Schedule 3, Part 1 (duty to consider working beyond retirement) or Schedule 3, Part 2 (transitional provisions - duty to consider working beyond retirement) as appropriate.

Exception for Age Discrimination – National minimum wage.

58.(1) Nothing in Part III or section 47 or 48 shall render it unlawful for a relevant person (“A”) to be remunerated in respect of his work at a rate which is lower than the rate at which another such person (“B”) is remunerated for his work where the hourly rate of the minimum wage for a person of A’s age is lower than that for a person of B’s age.

(2) Nothing in Part III or section 47 or 48 shall render unlawful any statutory provision which provides that the following are not relevant persons–

- (a) an apprentice or trainee whose service ends at the end of his apprenticeship or traineeship;
- (b) an employee who is engaged in a full time course of education and who is employed during academic holiday periods.

(3) In this section–

“minimum wage” means–

- (a) any statutory provision made by the Minister under the Employment Ordinance, in relation to the payment of minimum rate of remuneration to the category of employment in which A is employed; or
- (b) where paragraph (a) does not apply, any statutory provision made by the Minister under the Employment Ordinance in relation to the payment of a minimum rate of remuneration to employees.

“relevant person” means a person who qualifies for the minimum wage.

Exception for Age Discrimination – provision of certain benefits based on length of service.

59.(1) Subject to paragraph (2), nothing in Part III or section 47 (liability of employers and principals) or 48 (aiding unlawful acts) shall render it unlawful for a person (“A”), in relation to the award of any benefit by him, to put a worker (“B”) at a disadvantage when compared with another worker

(“C”), if and to the extent that the disadvantage suffered by B is because B’s length of service is less than that of C.

(2) Where B’s length of service exceeds 5 years, it must reasonably appear to A that the way in which he uses the criterion of length of service, in relation to the award in respect of which B is put at a disadvantage, fulfils a business need of his undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers).

(3) In calculating a worker’s length of service for these purposes, A shall calculate–

- (a) the length of time the worker has been working for him doing work which he reasonably considers to be at or above a particular level (assessed by reference to the demands made on the worker, for example, in terms of effort, skills and decision making); or
- (b) the length of time the worker has been working for him in total,

and on each occasion on which he decides to use the criterion of length of service in relation to the award of a benefit to workers, it is for him to decide which of these definitions to use to calculate their lengths of service.

(4) For the purposes of paragraph (3), in calculating the length of time a worker has been working for him–

- (a) A shall calculate the length of time in terms of the number of weeks during the whole or part of which the worker was working for him;
- (b) A may discount any period during which the worker was absent from work (including any period of absence which at the time it occurred was thought by A or the worker to be permanent) unless in all the circumstances (including the way in which other workers’ absences occurring in similar circumstances are treated by A in calculating their lengths of service) it would not be reasonable for him to do so;
- (c) A may discount any period of time during which the worker was present at work (“the relevant period”) where–

- (i) the relevant period preceded a period during which the worker was absent from work, and
- (ii) in all the circumstances (including the length of the worker's absence, the reason for his absence, the effect his absence has had on his ability to discharge the duties of his work, and the way in which other workers are treated by A in similar circumstances) it is reasonable for A to discount the relevant period.

(5) In this section—

“benefit” does not include any benefit awarded to a worker by virtue of his ceasing to work for A; and

“year” means a year of 12 calendar months.

Exception for Age Discrimination – life assurance cover for retired workers.

60.(1) Where a person (“A”) arranges for workers to be provided with life assurance cover after their early retirement on grounds of ill health, nothing in Part II, Part III or section 47 (liability of employers and principals) or 48 (aiding unlawful acts) shall render it unlawful—

- (a) where a normal retirement age applied in relation to any such workers at the time they took early retirement, for A to arrange for such cover to cease when such workers reach that age;
- (b) in relation to any other workers, for A to arrange for such cover to cease when the workers reach the age of 65.

(2) In this section, “normal retirement age”, in relation to a worker who has taken early retirement, means the age at which workers in A's undertaking who held the same kind of position as the worker held at the time of his retirement were normally required to retire.

PART VIII

Validity of contracts, collective agreements and rules of undertakings.

Validity and revision of contracts.

61.(1) A term of a contract is void where—

- (a) the making of the contract is, by reason of the inclusion of the term, unlawful by virtue of this Ordinance;
- (b) it is included in furtherance of an act which is unlawful by virtue of this Ordinance; or
- (c) it provides for the doing of an act which is unlawful by virtue of this Ordinance.

(2) Subsection (1) does not apply to a term the inclusion of which constitutes, or is in furtherance of, or provides for, unlawful discrimination against, or harassment of, a party to the contract, but the term shall be unenforceable against that party.

(3) A term in a contract which purports to exclude or limit any provision of this Ordinance shall be unenforceable by any person in whose favour the term would operate apart from this section.

(4) Subsections (1), (2) and (3) shall apply whether the contract was entered into before or after the coming into operation of this Ordinance; but in the case of a contract made before that date, those subsections do not apply in relation to any period before that date.

(5) Any term in a contract for the provision of goods, facilities or services (other than a contract of service) or in any other agreement shall be void so far as it purports to—

- (a) require a person to do anything which would contravene any provision of this Ordinance;
- (b) exclude or limit the operation of the Ordinance; or
- (c) prevent any person from making a complaint or claim under this Ordinance.

(6) On the application of a person interested in a contract to which subsection (1) or (2) applies, the Supreme Court may make such order as it thinks fit for—

- (a) removing or modifying any term rendered void by subsection 61(1); or
- (b) removing or modifying any term made unenforceable by subsection 61(2);

but such an order shall not be made unless all persons affected have been given notice in writing of the application (except where under rules of court notice may be dispensed with) and have been afforded an opportunity to make representations to the court.

(7) An order under subsection (6) may include provision as respects any period before the making of the order (but after the coming into operation of this Ordinance).

Exception to section 61 – compromise contracts and arbitration.

62.(1) Section 61(3) does not apply—

- (a) to a contract settling a complaint to which section 69(1) (jurisdiction of the Industrial Tribunal) applies where the contract is made with the assistance of the Director of Employment in the exercise of his powers as a conciliation officer under rule 5 of the Industrial Tribunal Rules (or any other conciliation officer appointed under an enactment);
- (b) to a contract settling a complaint to which section 69(1) (jurisdiction of the Tribunal) applies if the conditions regulating compromise contracts under subsection (2) are satisfied in relation to the contract; or
- (c) to a contract settling a claim to which section 76 (jurisdiction of the Supreme Court) applies.

(2) The conditions regulating compromise contracts under this section are that—

- (a) the contract must be in writing;

- (b) the contract must relate to the particular complaint;
- (c) the complainant must have received advice from a relevant independent adviser as to the terms and effect of the proposed contract and in particular its effect on his ability to pursue a legal complaint;
- (d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the complainant in respect of loss arising in consequence of the advice;
- (e) the contract must identify the adviser; and
- (f) the contract must state that the conditions regulating compromise contracts under this section are satisfied.

(3) A person is a relevant independent adviser for the purposes of subsection (2)(c)–

- (a) if he is a qualified lawyer;
- (b) if he is an officer, official, employee or member of a trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union; or
- (c) if he works at an advice centre (whether as an employee or a volunteer) and has been certified in writing by the centre as competent to give advice in relation to employment and equal opportunities law and as authorised to do so on behalf of the centre.

(4) But a person is not a relevant independent adviser for the purposes of subsection (2)(c) in relation to the complainant–

- (a) if he is, employed by, or is acting in the matter for the other party, or a person who is connected with the other party;

- (b) in the case of a person within subsection (3)(b) or (c), if the trade union or advice centre is the other party or a person who is connected with the other party; or
- (c) in the case of a person within subsection (3)(c), if the complainant makes a payment for the advice received from him.

(5) In subsection (4), “qualified lawyer” means a barrister or solicitor.

(6) For the purposes of subsection (4)(a) any two persons are to be treated as connected—

- (a) if one is a company of which the other (directly or indirectly) has control; or
- (b) if both are companies of which a third person (directly or indirectly) has control.

(7) An agreement under which the parties agree to submit a dispute to arbitration shall be regarded as neither being nor including a contract.

Collective agreements and rules of undertakings.

63.(1) This section applies to—

- (a) any term of a collective agreement, including an agreement which was not intended, or is presumed not to have been intended, to be a legally enforceable contract;
- (b) any rule made by an employer for application to all or any of the persons who are employed by him or who apply to be, or are, considered by him for employment;
- (c) any rule made by a trade organisation (within the meaning of section 23) or qualifications body (within the meaning of section 25) for application to—
 - (i) all or any of its members or prospective members; or
 - (ii) all or any of the persons on which it has conferred authorisations or qualifications (within the meaning

of section 25) or who are seeking the authorisations or qualifications which it has the power to confer.

(2) Any term or rule to which this section applies is void where—

- (a) the making of the collective agreement is, by reason of the inclusion of the term, unlawful by virtue of this Ordinance;
- (b) the term or rule is included or made in furtherance of an act which is unlawful by virtue of this Ordinance; or
- (c) the term or rule provides for the doing of an act which is unlawful by virtue of this Ordinance.

(3) Subsection (2) shall apply whether the agreement was entered into, or the rule made, before or after the date on which this Ordinance came into operation; but in the case of an agreement entered into, or a rule made, before that date, that subsection does not apply in relation to any period before that date.

(4) A person to whom this subsection applies may present a complaint to the Tribunal that a term or rule is void by virtue of subsections (1) to (3) if he has reason to believe—

- (a) that the term or rule may at some future time have effect in relation to him; and
- (b) where he alleges that it is void by virtue of subsection (2)(c), that—
 - (i) an act for the doing of which it provides, may at some such time be done in relation to him; and
 - (ii) the act would be unlawful by virtue of this Ordinance if done in relation to him in present circumstances.

(5) Subsection (4) applies, in the case of a complaint about—

- (a) a term of a collective agreement made by or on behalf of—
 - (i) an employer,

- (ii) an organisation of employers of which an employer is a member, or
 - (iii) an association of such organisations of one of which an employer is a member, or
- (b) a rule made by an employer within the meaning of subsection (1)(b),

to any person who is, or is genuinely and actively seeking to become, one of his employees.

(6) Subsection (4) applies, in the case of a complaint about a rule made by a body or organisation to which subsection (1)(c) applies, to any person—

- (a) who is, or is genuinely and actively seeking to become, a member of the organisation or body;
- (b) on whom the body or organisation has conferred an authorisation or qualification (within the meaning of section 25); or
- (c) who is genuinely and actively seeking such an authorisation or qualification (within the meaning of section 25) which the body or organisation has power to confer.

(7) When the Tribunal finds that a complaint presented to it under subsection (4) is well-founded the Tribunal shall make an order declaring that the term or rule is void.

(8) An order under subsection (7) may include provision as respects any period before the making of the order (but after the coming into operation of this Ordinance).

(9) The avoidance by virtue of subsection (2) of any term or rule which provides for any person to be discriminated against shall be without prejudice to the following rights (except in so far as they enable any person to require another person to be treated less favourably than himself), namely—

- (a) such of the rights of the person to be discriminated against; and

- (b) such of the rights of any person who will be treated more favourably in direct or indirect consequence of the discrimination,

as are conferred by or in respect of a contract made or modified wholly or partly in pursuance of, or by reference to, that term or rule.

(10) In this section—

“collective agreement” means any agreement or arrangement made by or on behalf of one or more trade unions, or other organisations of workers, or associations of such trade unions or organisations of workers and one or more employers or associations of employers’ and relating to one or more of the following matters—

- (a) the terms and conditions of employment or the physical conditions in which any workers are required to work;
- (b) the engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
- (c) the allocation of work or the duties of employment between workers or groups of workers;
- (d) matters of discipline;
- (e) a worker’s membership or non-membership of a trade union;
- (f) the facilities for officials of trade unions; and
- (g) the machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers’ associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures;

“employers’ association” means an organisation (whether temporary or permanent)—

- (a) which consists wholly or mainly of employers or individual owners of undertakings of one or more descriptions and whose

principal purposes include the regulation of relations between employers of that description or those descriptions and workers or trade unions; or

- (b) which consists wholly or mainly of—
 - (i) constituent or affiliated organisations which fulfil the conditions in paragraph (a) (or themselves consist wholly or mainly of constituent or affiliated organisations which fulfil those conditions); or
 - (ii) representatives of such constituent or affiliated organisations, and whose principal purposes include the regulation of relationships between employers and workers or between employers and trade unions, or the regulation of relations between its constituent or affiliated organisations.

PART IX

Remedies

Restriction of proceedings for breach of this Ordinance.

64.(1) Except as provided by this Ordinance no proceedings, whether civil or criminal, shall lie against any person in respect of an act by reason that the act is unlawful by virtue of a provision of this Ordinance.

(2) Subsection (1) shall not prevent the making of an application for judicial review or for an injunction.

Questioning of respondent or prospective respondent.

65.(1) For the purposes of this section—

- (a) a person who considers that he has been discriminated against or subjected to harassment in contravention of this Ordinance is referred to as “the complainant”
- (b) a woman who considers that she has or may have a claim under section 31 (equality clause) or section 34 (equal treatment rule) is referred to as “the complainant”, and

- (c) a person against whom the complainant may decide to make, or has made, a complaint to the Industrial Tribunal (under section 69 or 71) or to the Supreme Court (under section 76) is referred to as “the respondent”.

(2) The complainant, with a view to helping him decide whether to institute proceedings under this Ordinance and to formulate and present his case in the most effective manner to the Tribunal or Supreme Court, may serve on the respondent questions on any issue which is or may be relevant—

- (a) using Form 1 in Schedule 4; or
- (b) using forms with the like effect as Form 1 in Schedule 4 with such variation as the circumstances require.

(3) Where the complainant questions the respondent (whether in accordance with subsection (2) or not)—

- (a) the respondent may reply using—
 - (i) Form 2 in Schedule 4; or
 - (ii) forms with like effect as Form 2 in Schedule 4 with such variation as the circumstances require; and
- (b) the question and any reply by the respondent (whether in accordance with subsection (2) or paragraph (a) or not) shall, subject to subsections (5) to (7), be admissible as evidence in any proceedings before the Tribunal (under section 69 or 71) or before the Supreme Court (under section 76).

(4) If in any proceedings it appears to the Tribunal or to the Supreme Court that the complainant has questioned the respondent (whether in accordance with subsection (2) or not) and that—

- (a) the respondent deliberately and without reasonable excuse omitted to reply within four weeks starting on the day that the question was duly served, or

- (b) the respondent's reply is evasive or equivocal,

it may draw any inference which it considers it just and equitable to draw, including an inference that the respondent has committed an unlawful act or contravened a term modified or included by virtue of the complainant's equality clause or corresponding term of service or by an equal treatment rule.

(5) In proceedings before the Tribunal, a question shall only be admissible as evidence in pursuance of subsection (3)–

- (a) where it was served before a complaint had been presented to the Tribunal, if it was so served within the period of three months beginning when the act complained of was done;
- (b) where it was served when a complaint had been presented to the Tribunal, either–
 - (i) if it was so served within the period of twenty-one days beginning with the day on which the complaint was presented; or
 - (ii) if it was so served later with leave given, and within a period specified, by a direction of the Tribunal.

(6) In proceedings before the Supreme Court, a question shall only be admissible as evidence in pursuance of subsection (3)–

- (a) where it was served before those proceedings had been instituted, if it was so served within the period of six months beginning when the act complained of was done;
- (b) where it was served when those proceedings had been instituted, if it was served with the leave of, and within a period specified by, the Court.

(7) This section is without prejudice to any other provisions of law regulating interlocutory and preliminary matters in proceedings before the Supreme Court or the Tribunal, and has effect subject to any other provisions of law regulating the admissibility of evidence in such proceedings.

Questioning of Employer by other persons.

66.(1) Where under section 71(3) the Director of Employment questions an employer in relation to whom he may decide to make, or has made, a reference under section 71, the question and any reply by the employer shall, subject to the following provisions of this section, be admissible as evidence in any proceedings under that provision.

(2) If in any proceedings on a reference under section 71(3) it appears to the Tribunal that the Director of Employment has questioned the employer to whom the reference relates and that—

- (a) the employer deliberately and without reasonable excuse omitted to reply within four weeks starting on the day that the question was duly served; or
- (b) the employer's reply is evasive or equivocal,

it may draw any inference which it considers just and equitable to draw, including an inference that the employer has contravened a term modified or included by virtue of the equality clause of the woman, or women, as respects whom the reference is made.

(3) Sections 66(5) to (7) apply to questions by the Director of Employment under this section as they do to questions by a complainant.

Service of questions and replies under section 65 or section 66.

67.(1) Questions under section 65 or 66 and replies thereto may be served on the respondent or, as the case may be, on the person aggrieved—

- (a) where the person to be served is the respondent, by delivering the question to him, or by sending it by post to him at his usual or last known residence or place of business;
- (b) where the person to be served is a body corporate, trade organisation or employers' association, by delivering it to the secretary or clerk of the body, organisation or association at its registered or principal office or by sending it by post to the secretary or clerk at that office; or

- (c) where the person to be served is acting by a lawyer (or relevant independent adviser as defined in section 62), by delivering it at, or sending it by post to, the lawyer's (or relevant independent adviser as defined in section 62), address for service; or
- (d) where the person to be served is the complainant, by delivering the reply, or by sending it by post, to him at his address for reply as stated by him in the document containing the questions or, if no address is so stated, at his usual or last known residence.

(2) Questions and replies may be served on a party by delivering it to or posting it to him or, where he has so indicated, to his representative.

(3) This section is without prejudice to any other provisions of law regulating interlocutory and preliminary matters in proceedings before the Supreme Court or the Tribunal, and has effect subject to any other provisions of law regulating the admissibility of evidence in such proceedings.

Time limits for bringing proceedings in the Tribunal or Supreme Court.

68.(1) The Tribunal shall not consider a complaint—

- (a) under section 69 (jurisdiction of the tribunal) unless the complaint is presented to the Tribunal within the period of three months beginning when the act complained of is alleged to have been done; or
- (b) under 71 (disputes equality clauses and equal treatment rules) unless the proceedings are instituted on or before the qualifying date.

(2) The Supreme Court shall not consider a claim brought under section 76 unless proceedings in respect of the claim are instituted within the period of six months beginning when the act complained of was done.

(3) The Supreme Court or the Tribunal may nevertheless consider any such complaint or claim which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(4) For the purposes of this section and section 66 (questioning of employer by Director of Employment) or 65 (questioning of employer etc.)—

- (a) when the making of a contract is, by reason of the inclusion of any term, an unlawful act, that act shall be treated as extending throughout the duration of the contract; and
- (b) any act extending over a period shall be treated as done at the end of that period; and
- (c) a deliberate omission shall be treated as done when the person in question decided upon it,

and in the absence of evidence establishing the contrary a person shall be taken for the purposes of this section to decide upon an omission when he does an act inconsistent with doing the omitted act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it was to be done.

(5) For the purpose of subsection (1)(b) the qualifying date is—

- (a) in a standard case, the date falling six months after the last day on which the woman was employed in the employment;
- (b) in a case which is a stable employment case (but not also a concealment or a disability case or both), the date falling six months after the day on which the stable employment relationship ended;
- (c) in a case which is a concealment case (but not also a disability case), the date falling six months after the day on which the woman discovered the qualifying fact in question (or could with reasonable diligence have discovered it);
- (d) in a case which is a disability case (but not also a concealment case), the date falling six months after the day on which the woman ceased to be under a disability;
- (e) in a case which is both a concealment and a disability case, the later of the dates referred to in subsections (c) and (d) above.

(6) In subsection (5)—

“concealment case” means a case where—

- (a) the employer deliberately concealed from the woman any fact (referred to in this subsection as a “qualifying fact”)—
 - (i) which is relevant to the contravention to which the proceedings relate, and
 - (ii) without knowledge of which the woman could not reasonably have been expected to institute the proceedings, and
- (b) the woman did not discover the qualifying fact (or could not with reasonable diligence have discovered it) until after—
 - (i) the last day on which she was employed in the employment, or
 - (ii) the day on which the stable employment relationship between her and the employer ended;

“disability case” means a case where the woman was under a disability at any time during the six months after—

- (a) the last day on which she was employed in the employment,
- (b) the day on which the stable employment relationship between her and the employer ended, or
- (c) the day on which she discovered (or could with reasonable diligence have discovered) the qualifying fact deliberately concealed from her by the employer (if that day falls after the day referred to in paragraph (a) or (b));

“stable employment case” means a case where the proceedings relate to a period during which a stable employment relationship subsists between the woman and the employer, notwithstanding that the period includes any time after the ending of a contract of employment when no further contract of employment is in force;

“standard case” means a case which is not—

- (a) a stable employment case,
- (b) a concealment case,
- (c) a disability case, or
- (d) both a concealment and a disability case;

“under a disability” means that the person concerned is a minor or is a patient as defined in section 45 of the Mental Health Ordinance.

Jurisdiction of the Industrial Tribunal.

69.(1) A complaint by any person (“the complainant”) that another person (“the respondent”)—

- (a) has committed against the complainant an act to which this section applies; or
- (b) is by virtue of section 47 (liability of employers and principals) or 48 (aiding unlawful acts) to be treated as having committed against the complainant such an act,

may be presented to the Tribunal.

(2) This section shall apply to any act of discrimination or harassment which is unlawful by virtue of any provision of Part III or Part VI other than—

- (a) section 25 (qualifying bodies), where the act is one in respect of which an appeal or proceedings in the nature of an appeal may be brought under any other enactment;
- (b) section 26 where the vocational training provider is an educational establishment; or
- (c) section 46 (relationships which have come to an end), where the respondent is an educational establishment and the act arises out of and is closely connected to a relationship between the complainant and the respondent which has come to an end but during the course of which

an act of discrimination against, or harassment of, the complainant by the respondent would have been unlawful by virtue of section 26 (vocational training providers).

(3) In section (2)(c), reference to an act of discrimination or harassment which would have been unlawful includes, in the case of a relationship which has come to an end before the coming into operation of this Ordinance reference to an act of discrimination or harassment which would, after that date, have been unlawful.

Remedies on complaints to the Industrial Tribunal under section 69.

70.(1) Where the Industrial Tribunal finds that a complaint presented to it under section 69 (jurisdiction of the Industrial Tribunal) is well-founded, the Tribunal shall make such of the following as it considers just and equitable—

- (a) an order declaring the rights of the complainant and the respondent in relation to the act to which the complaint relates;
- (b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages (including damages for injury to feelings) he could have been ordered by the Supreme Court to pay to the complainant if the complaint had fallen to be dealt with under section 76 (jurisdiction of Supreme Court);
- (c) a recommendation that the respondent take within a specified period action appearing to the Tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination or harassment to which the complaint relates.

(2) As respects an unlawful act of discrimination falling within sections 6(2), 8(3), 9(2), 10(2) or 11(2) if the respondent proves that the provision, criterion or practice was not applied with the intention of treating the complainant unfavourably on the equal opportunities ground, an order may be made under subsection (1)(b) only if the Tribunal—

- (a) makes such order under subsection (1)(a) (if any) and such recommendation under subsection (1)(c) (if any) as it

would have made if it had no power to make an order under subsection (1)(b); and

- (b) (where it makes an order under subsection (1)(a) or a recommendation under subsection (1)(c) or both) considers that it is just and equitable to make an order under subsection (1)(b) as well.

(3) If without reasonable justification the respondent to a complaint fails to comply with a recommendation made by the Tribunal under subsection (1)(c), then, if it thinks it just and equitable to do so—

- (a) the Tribunal may increase the amount of compensation required to be paid to the complainant in respect of the complaint by an order made under subsection (1)(b); or
- (b) if an order under subsection (1)(b) was not made, the Tribunal may make such an order.

(4) Where an amount of compensation falls to be awarded under subsection (1)(b), the Tribunal—

- (a) may include in the award interest subject to, and in accordance with, the provisions of section 75 (interest on compensation); and
- (b) shall consider whether to do so, without the need for any application by the complainant.

(5) Where subsection (6) applies, subsections (1) to (4) shall have effect subject to subsections (7) to (9).

(6) This subsection shall apply where—

- (a) under section 69 (jurisdiction of the Industrial Tribunal) a member or prospective member of an occupational pension scheme (“the complainant”) presents a complaint to the Tribunal against the trustees or managers of the scheme or an employer;
- (b) the complainant is not a pensioner member of the scheme;

(c) the complaint relates to the terms on which persons become members of the scheme, or the terms on which members of the scheme are treated; and

(d) the Tribunal finds the complaint to be well-founded.

(7) Where subsection (6) applies, the Tribunal may, without prejudice to the generality of its power under subsection (1)(a), make an order declaring that the complainant has a right—

(a) where the complaint relates to the terms on which persons become members of the scheme, to be admitted to the scheme;

(b) where the complaint relates to the terms on which members of the scheme are treated, to membership of the scheme without discrimination.

(8) An order under subsection (7)—

(a) may be made in respect of such period as is specified in the order (but may not be made in respect of any time before the coming into operation of this Ordinance);

(b) may make such provision as the Tribunal considers appropriate as to the terms on which, or the capacity in which, the complainant is to enjoy such admission or membership.

(9) Where subsection (6) applies, the Tribunal may not make an order for compensation under subsection (1)(b), whether in relation to arrears of benefits or otherwise, except—

(a) for injury to feelings; or

(b) by virtue of subsection (3) above.

Disputes and enforcement - equality clauses (section 31) and equal treatment rules (section 34).

71.(1) Any claim in respect of the contravention of a term modified or included by virtue of an equality clause (as mentioned in section 31) or an

equal treatment rule (as mentioned in section 34) including a claim for arrears of remuneration or damages in respect of the contravention, may be presented by way of a complaint to the Tribunal.

(2) Where a dispute arises in relation to the effect of—

- (a) an equality clause, the employer may apply to the Tribunal for an order declaring the rights of the employer and the employee in relation to the matter in question; or
- (b) an equal treatment rule, the trustees or managers may apply to the Tribunal for an order declaring the rights of the trustees or managers and the members or prospective members of the occupational pension scheme in relation to the matter in question.

(3) Where it appears to the Director of Employment—

- (a) that there may be a question whether—
 - (i) the employer of any woman is or has been contravening a term modified or included by virtue of their equality clauses, or
 - (ii) the trustees or managers of the pension scheme of any member or prospective member are or have been contravening a term modified or included by virtue of an equal treatment rule; but
- (b) that it is not reasonable to expect them to take steps to have the question determined,

the question may be referred by him as respects all or any of them to the Tribunal and shall be dealt with as if the reference were of a claim by the women or woman against the employer.

(4) Where it appears to the Supreme Court in which any proceedings are pending that a claim or counter-claim in respect of the operation of an equality clause or equal treatment rule could more conveniently be disposed of separately by the Tribunal, the court may direct that the claim or counter-claim shall be struck out; and (without prejudice to the foregoing) where in proceedings before the court a question arises as to the operation of an

equality clause or equal treatment rule, the court may on the application of any party to the proceedings or otherwise refer that question, or direct it to be referred by a party to the proceedings, to the Tribunal for determination by the Tribunal, and may stay the proceedings in the meantime.

(5) A woman shall not be entitled, in proceedings brought in respect of a contravention of a term modified or included by virtue of an equality clause (including proceedings before the Tribunal), to be awarded any payment by way of arrears of remuneration or damages, in respect of any time earlier than the arrears date.

(6) In this section “employer”, in relation to the holder of an office or post to which 31(8) applies, shall be construed in accordance with section 31(8).

(7) For the purposes of subsection (5)–

(a) “arrears date”–

- (i) in a standard case, is the date falling six years before the day on which the proceedings were instituted;
- (ii) in a case which is a concealment or a disability case or both, is the date of the contravention;

(b) “concealment case” means a case where–

- (i) the employer deliberately concealed from the woman any fact–
 - (aa) which is relevant to the contravention to which the proceedings relate, and
 - (bb) without knowledge of which the woman could not reasonably have been expected to institute the proceedings, and
- (ii) the woman instituted the proceedings within six years of the day on which she discovered the fact (or could with reasonable diligence have discovered it);

(c) “disability case” means a case where–

- (i) the woman was under a disability at the time of the contravention to which the proceedings relate, and
 - (ii) the woman instituted the proceedings within six years of the day on which she ceased to be under a disability;
- (d) “standard case” means a case which is not–
- (i) a concealment case,
 - (ii) a disability case, or
 - (iii) both a concealment and a disability case;
- (e) “under a disability” has the meaning given in section 68(6).

Procedure before the Tribunal in cases under section 71.

72.(1) Where on a complaint or reference made to the Tribunal under section 71, a dispute arises as to whether any work is of equal value as mentioned in section 31(2)(c) or section 34(3)(c) the Tribunal may either–

- (a) proceed to determine that question; or
- (b) require the Director of Employment to prepare a report, or cause independent experts to prepare a report, with respect to that question; or
- (c) request the Director of Employment to provide it with any documentation specified by it or make any other request to him.

(2) The Tribunal shall not make any determination under subsection (1)(a) if it has imposed a requirement under subsection (1)(b) or made a request under subsection (1)(c) unless it has received the report or the documentation.

(3) Subsection (4) shall apply in a case where–

- (a) the Tribunal is required to determine whether any work is of equal value as mentioned in section 31(2)(c) or section 34(3)(c); and

- (b) the work of the woman and that of the man in question have been given different values on a study such as is mentioned in section 31(5).

(4) The Tribunal shall determine that the work of the woman and that of the man are not of equal value unless it has reasonable grounds for suspecting that the evaluation contained in the study—

- (a) was (within the meaning of subsection (5) made on a system which discriminates on grounds of sex); or
- (b) is otherwise unsuitable to be relied upon.

(5) An evaluation contained in a study such as is mentioned in section 31(5) is made on a system which discriminates on grounds of sex where a difference, or coincidence, between values set by that system on different demands under the same or different headings is not justifiable irrespective of the sex of the person on whom those demands are made.

Procedure before the Tribunal – occupational pension schemes.

73. Where under section 69 (jurisdiction of the Tribunal) a member or prospective member of an occupational pension scheme presents to the Tribunal a complaint that the trustees or managers of the scheme—

- (a) have committed against him an act which is unlawful by virtue of 46 (relationships which have come to an end) or section 27 (trustees and manager); or
- (b) are by virtue of section 47 (liability of employers and principals) or 48 (aiding unlawful acts) to be treated as having committed against him such an act,

the employer in relation to the scheme shall be treated as a party and be entitled to appear and be heard in accordance with the Tribunal's rules governing its procedures.

Burden of proof: Industrial Tribunal.

74.(1) This section shall apply to any complaint presented to the Tribunal—

- (a) under section 69; or

(b) under section 71.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the Tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent—

(a) has committed against the complainant an act to which section 69 or 71 applies; or

(b) is by virtue of section 47 (liability of employers and principals) or 48 (aiding unlawful acts) to be treated as having committed against the complainant such an act,

the Tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act.

Interest on compensation.

75.(1) The provisions of this section shall apply for the purposes of determining interest under section 70(4) or 71.

(2) Interest shall be calculated as simple interest which accrues from day to day.

(3) Subject to subsection (4), the rate of interest to be applied shall be the rate of interest prescribed in respect of judgment debts in the Supreme Court by the order made under section 36 of the Supreme Court Ordinance in force from time to time.

(4) Where the rate of interest in subsection (3) has varied during a period for which interest is to be calculated, the Tribunal may, if it so desires in the interests of simplicity, apply such median or average of those rates as seem to it appropriate.

(5) No interest shall be included in respect of any sum awarded for a loss or matter which will occur after the date of calculation, or in respect of any time before the contravention or act of discrimination complained of.

(6) Subject to subsections (7) and (8),—

- (a) in the case of any sum for injury to feelings, interest shall be for the period beginning on the day of the contravention or act of discrimination complained of and ending on the day of calculation;
- (b) in the case of all other sums of damages or compensation in the award (other than any sum referred to in subsection (5)), and all arrears of remuneration, interest shall be for the period beginning on the mid point date and ending on the day of calculation.

(7) Where any payment has been made before the day of calculation to the complainant by or on behalf of the respondent in respect of the subject matter of the award, interest in respect of that part of the award shall be calculated as if the references in subsection (6), and in the definition of “mid point date” in subsection (11), to the day of calculation were to the date on which the payment was made.

(8) Where the tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period or periods referred in subsection (6) or (7), it may—

- (a) calculate interest, or as the case may be, interest on the particular sum, for such different period, or
- (b) calculate interest for such different periods in respect of various sums in the award,

as it considers appropriate in the circumstances, having regard to the provisions of this section.

(9) The Tribunal’s written statement of reasons for its decision shall—

- (a) contain a statement of the total amount of any interest awarded and, unless this amount has been agreed between the parties, either a table showing how it has been calculated or a description of the manner in which it has been calculated; or
- (b) include reasons for any decision not to award interest.

(11) In this section—

“day of calculation” means the day on which the amount of interest is calculated by the Tribunal;

“mid point date” means the date half way through the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation,

or where the number of days in that period is even, the first day of the second half of the period.

Jurisdiction of the Supreme Court.

76.(1) A claim by any person (“the claimant”) that another person (“the respondent”)–

- (a) has committed against the claimant an act to which this section applies;
- (b) is by virtue of sections 47 (liability of employers and principals), 48 (aiding unlawful acts) or 5 (instructions to discriminate) to be treated as having committed against the claimant such an act,

may be made the subject of civil proceedings in the Supreme Court in like manner as any other claim in tort.

(2) Proceedings brought under subsection (1) shall be brought only in the Supreme Court.

(3) Damages in respect of an unlawful act to which this section applies may include compensation for injury to feelings whether or not they include compensation under any other head.

(4) This section applies to any act of discrimination or harassment which is unlawful by virtue of–

- (a) any provision in Part V;
- (b) section 26 where the vocational training provider is an educational establishment; or

- (c) where the act arises out of and is closely connected to a relationship between the claimant and the respondent which has come to an end but during the course of which an act of discrimination against or harassment of, the claimant by the respondent would have been unlawful by virtue of section 46 (relationships which have come to an end).

(5) In subsection (4)(b), reference to an act of discrimination or harassment which would have been unlawful includes, in the case of a relationship which has come to an end before the coming into operation of this Ordinance, reference to an act of discrimination or harassment which would, after the coming into operation of this Ordinance, have been unlawful.

Burden of proof in the Supreme Court.

77.(1) This section shall apply to any claim brought under section 76 in the Supreme Court.

(2) Where, on the hearing of the claim, the claimant proves facts from which the Court could, apart from this section, conclude in the absence of an adequate explanation that the respondent—

- (a) has committed against the claimant an act to which section 76 applies; or
- (b) is by virtue of section 47 (liability of employers and principals) or 48 (aiding unlawful acts) to be treated as having committed against the claimant such an act, or by virtue of section 5 instructing such an act,

the Court shall uphold the claim unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act.

PART XI
Miscellaneous

Body for the Promotion of equal treatment.

78.(1) Unless or until regulations are made under section 79, the Gibraltar Citizens' Advice Bureau shall be responsible for the promotion of equal treatment of all persons without discrimination on the grounds of sex or racial or ethnic origins.

(2) For the purpose of subsection (1), the Gibraltar Citizen's Advice Bureau shall have, without prejudice to any other powers conferred on it by any enactment or otherwise, and the rights of victims and of associations, organisations or other legal entities, powers to—

- (a) provide independent assistance to victims of discrimination (on the grounds of sex or racial or ethnic origin) in pursuing their complaints about discrimination;
- (b) conduct independent surveys concerning such discrimination; and
- (c) publish independent reports and make recommendations on any issue relating to such discrimination.

(3) The Government may, by regulations, extend the equal opportunities grounds for which the Gibraltar Citizens' Advice Bureau has responsibility under subsection (1) to include any additional ground which is an equal opportunities ground.

Equal Opportunities Commission.

79.(1) The Government may by regulations establish an Equal Opportunities Commission and any such Commission shall have such duties and powers as are necessary for it—

- (a) to promote equal treatment of all persons without discrimination on all or any equal opportunities ground;
- (b) without prejudice to the rights of victims and of associations, organisations or other legal entities to—

- (i) provide independent assistance to victims of discrimination in pursuing their complaints about discrimination;
- (ii) conduct independent surveys concerning discrimination; and
- (iii) to publish independent reports and make recommendations on any issue relating to such discrimination.

(2) The Government may by regulations allow for the issuing, or use, of Codes of Practice by the Equal Opportunities Commission, or other body, and the effect of such Codes of Practice.

Public authorities: general statutory duty.

80.(1) A public authority shall in carrying out its functions have due regard to the need to eliminate unlawful discrimination and harassment on the grounds of sex, to promote equality of opportunity between men and women.

(2) In subsection (1)–

- (a) subject to subsection (3), “public authority” includes a person who has functions of a public nature;
- (b) the reference to unlawful discrimination on the grounds of sex shall be treated as including a reference to contravention of terms of contracts having effect in accordance with an equality clause within the meaning of Part IV and pension schemes having effect in accordance with an equal treatment rule within the meaning of Part IV.

(3) The duty in subsection (1) shall not apply to the House of Assembly and shall not apply to the exercise of–

- (a) a function in connection with the proceedings of the House of Assembly;
- (b) a judicial function (whether in connection with a court or a tribunal); or

- (c) a function exercised on behalf of or on instructions of a person exercising a judicial function (whether in connection with a court or a tribunal).

(4) Subsection (1) is without prejudice to the effect of any exception to or limitation of this Ordinance in relation to sex discrimination.

(5) A failure in respect of performance of the duty under subsection (1) shall not confer a cause of action at private law.

(6) In this section—

“public authority” includes any person who has functions of a public nature, (subject to subsection (3));

“functions” means functions of a public nature.

Duty to notify the provisions of this Ordinance.

81. It shall be the duty of every employer to whom Part III applies to bring the provisions of this Ordinance to the attention of employees by appropriate means, including posting at the place of employment.

Power to make Regulations.

82. The Government may, by regulations—

- (a) provide for such other matters as are reasonably necessary for or incidental to the due administration of this Ordinance including such transitional provisions as are necessary;
- (b) prescribe anything which under this Ordinance may be prescribed;
- (c) provide for the delegation of functions, either generally or specifically, exercisable by virtue of the regulation making power in this Ordinance or by virtue of the regulations;
- (d) provide for the issuing and legal force of Codes of Practice or for Codes of Practice issued by the United Kingdom Commission for Equality and Human Rights to have persuasive effect in Gibraltar;

- (e) prohibit discriminatory practices or advertisements which indicate (expressly or impliedly) an intention by any person to do an act made unlawful by this Ordinance and make provision for the enforcement of such prohibitions;
- (f) provide for other or additional means of enforcing this Ordinance;
- (g) give effect in the law of Gibraltar, including by amending this Ordinance, to the law of the European Union or to any provision of a relevant international agreement or convention ratified by the United Kingdom and extended to Gibraltar, relating to any of the matters contained in or dealt with under this Ordinance and this power shall include the power to provide for the provision to come into force although the law, Agreement or Convention, as the case may be, has not yet come into operation.

Rules of court and tribunal.

83.(1) The Chief Justice may make such rules of court as are necessary or expedient for the purposes of claims to the Supreme Court under this Ordinance.

(2) The Minister with responsibility for employment may, by regulations, make such rules for the Tribunal as are necessary or expedient for the purposes of claims to the Tribunal under this Ordinance including rules providing for the hearing of cases in private where appropriate because of the nature of the case.

Repeal of Equal Opportunities Ordinance 2004.

84. The Equal Opportunities Ordinance 2004 is repealed.

SCHEDULE 1

Section 3(3)

**PART 1
Definition of Disability**

Impairment.

1.(1) Regulations may make provision, for the purposes of this Ordinance—

- (a) for conditions of a prescribed description to be treated as amounting to impairments;
- (b) for conditions of a prescribed description to be treated as not amounting to impairments.

(2) Regulations made under sub-paragraph (1) may make provision as to the meaning of “condition” for the purposes of those regulations.

Long-term effects.

2.(1) The effect of an impairment is a long-term effect if—

- (a) it has lasted at least 12 months;
- (b) the period for which it lasts is likely to be at least 12 months;
or
- (c) it is likely to last for the rest of the life of the person affected.

(2) Where an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring shall be disregarded in prescribed circumstances.

(4) Regulations may prescribe circumstances in which, for the purposes of this Ordinance—

- (a) an effect which would not otherwise be a long-term effect is to be treated as such an effect; or

- (b) an effect which would otherwise be a long-term effect is to be treated as not being such an effect.

Severe disfigurement.

3.(1) An impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities.

(2) Regulations may provide that in prescribed circumstances a severe disfigurement is not to be treated as having that effect.

(3) Regulations under sub-paragraph (2) may, in particular, make provision with respect to deliberately acquired disfigurements.

Normal day-to-day activities.

4.(1) An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following—

- (a) mobility;
- (b) manual dexterity;
- (c) physical co-ordination;
- (d) continence;
- (e) ability to lift, carry or otherwise move everyday objects;
- (f) speech, hearing or eyesight;
- (g) memory or ability to concentrate, learn or understand; or
- (h) perception of the risk of physical danger.

(2) Regulations may prescribe—

- (a) circumstances in which an impairment which does not have an effect falling within sub-paragraph (1) is to be taken to affect

the ability of the person concerned to carry out normal day-to-day activities;

- (b) circumstances in which an impairment which has an effect falling within sub-paragraph (1) is to be taken not to affect the ability of the person concerned to carry out normal day-to-day activities.

Substantial adverse effects.

5. Regulations may make provision for the purposes of this Ordinance—

- (a) for an effect of a prescribed kind on the ability of a person to carry out normal day-to-day activities to be treated as a substantial adverse effect;
- (b) for an effect of a prescribed kind on the ability of a person to carry out normal day-to-day activities to be treated as not being a substantial adverse effect.

Effect of medical treatment.

6.(1)An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.

(2) In sub-paragraph (1) “measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) Sub-paragraph (1) does not apply—

- (a) in relation to the impairment of a person’s sight, to the extent that the impairment is, in his case, correctable by spectacles or contact lenses or in such other ways as may be prescribed; or
- (b) in relation to such other impairments as may be prescribed, in such circumstances as may be prescribed.

Cancer, HIV infection, Multiple Sclerosis.

7.(1) Subject to sub-paragraph (2), a person who has cancer, HIV infection or multiple sclerosis is to be deemed to have a disability, and hence to be a disabled person.

(2) Regulations may provide for sub-paragraph (1) not to apply in the case of a person who has cancer if he has cancer of a prescribed description.

(3) A description of cancer prescribed under sub-paragraph (2) may (in particular) be framed by reference to consequences for a person of his having it.

Progressive conditions.

8.(1) Where—

- (a) a person has a progressive condition (such as cancer, multiple sclerosis or muscular dystrophy or HIV infection),
- (b) as a result of that condition, he has an impairment which has (or had) an effect on his ability to carry out normal day-to-day activities, but
- (c) that-effect is not (or was not) a substantial adverse effect,

he shall be taken to have an impairment which has such a substantial adverse effect if the condition is likely to result in his having such an impairment.

(2) Regulations may make provision, for the purposes of this paragraph—

- (a) for conditions of a prescribed description to be treated as being progressive;
- (b) for conditions of a prescribed description to be treated as not being progressive.

Interpretation.

9. In this Schedule “HIV infection” means infection by a virus capable of causing the Acquired Immune Deficiency Syndrome.

PART 2

Section 3(3)

PAST DISABILITIES

1. The modifications referred to in section 2 are as follows.
2. References in this Ordinance to a disabled person are to be read as references to a person who has had a disability.
- 2C. In sections 12(1), after “not having that particular disability” insert “and who has not had that particular disability”.
3. In section 29(1) after “not disabled” (in each place it occurs) insert “and who have not had a disability”.
4. In sections 15(7)(b), 20(10)(b), 22(6)(b), 23(5)(b), 25(4)(b), 26(4)(b), 27(10)(b) and 46(4) for “has” (in each place it occurs) substitute “has had”.
5. For paragraph 2(1) to (3) of Part 1 to this Schedule, substitute—
 - “(1) The effect of an impairment is a long-term effect if it has lasted for at least 12 months.
 - (2) Where an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect recurs.
 - (3) For the purposes of sub-paragraph (2), the recurrence of an effect shall be disregarded in prescribed circumstances.”

Schedule 2

Section 27(8)

Occupational Pension Schemes – Exceptions for Age

Part 1

Excepted rules, practices, actions and decisions relating to occupational pension Schemes

Admission to schemes.

1. In relation to admission to a scheme–

- (a) a minimum or maximum age for admission, including different ages for admission for different groups or categories of worker;
- (b) a minimum level of pensionable pay for admission, provided that such a minimum is not above any lower earnings limit provided by legislation in respect of Gibraltar social security pensions.

The use of age criteria in actuarial calculations.

2. The use of age criteria in actuarial calculations, for example in the actuarial calculation of–

- (a) any age related benefit commencing before any early retirement pivot age or enhancement of such benefit commencing after any late retirement pivot age;
- (b) member or employer contributions to a scheme; or
- (c) any age related benefit commuted in exchange for the payment of any lump sum.

Contributions.

3. Any difference in the rate of member or employer contributions by or in respect of different members to the extent that this is attributable to any differences in the pensionable pay of those members.

Contributions under money purchase arrangements.

4. Under a money purchase arrangement—

- (a) different rates of member or employer contributions according to the age of the members by or in respect of whom contributions are made where the aim in setting the different rates is—
 - (i) to equalise the amount of benefit to which members of different ages who are otherwise in a comparable situation will become entitled under the arrangement, or
 - (ii) to make the amount of benefit to which such members will become entitled under the arrangement more nearly equal;
- (b) equal rates of member or employer contributions irrespective of the age of the members by or in respect of whom contributions are made.

Contributions under defined benefits arrangements.

5. Under a defined benefits arrangement, different rates of member or employer contributions according to the age of the members by or in respect of whom contributions are made, to the extent that—

- (a) each year of pensionable service entitles members in a comparable situation to accrue a right to defined benefits based on the same fraction of pensionable pay, and
- (b) the aim in setting the different rates is to reflect the increasing cost of providing the defined benefits in respect of members as they get older.

Age related rules, practices, actions and decisions relating to benefit.

6. A minimum age for entitlement to or payment of any age related benefit to a member, provided that, in the case of any age related benefit paid under a defined benefits arrangement before any early retirement pivot age—

- (a) such benefit is subject to actuarial reduction for early receipt, and
- (b) the member is not credited with additional periods of pensionable service.

7. In relation to workers who are active or prospective members of a scheme on the date on which these Regulations come into force, a minimum age for entitlement to or payment of any age related benefit to such members under defined benefit arrangements before any early retirement pivot age, where such benefit is calculated in one or both of the following ways—

- (a) it is not made subject to actuarial reduction for early receipt;
- (b) it results from crediting the member with additional periods of pensionable service.

8. An early retirement pivot age or a late retirement pivot age, including different such ages for different groups or categories of member.

9. The enhancement of any age related benefit in the event of a member's retirement before any early retirement pivot age on ill health grounds, where that enhancement is calculated by reference to the years of pensionable service which that member would have completed if he had continued in pensionable service up to the age specified for that purpose in the scheme rules.

10. Any rule, practice, action or decision whereby a male member who reaches pensionable age is not entitled or is no longer entitled to any additional amount of pension which would have been payable to such a member before pensionable age in the circumstances prescribed for the purposes of section 36(2) of this Ordinance.

11. The reduction of any pension payable in consequence of a member's death to any dependant of the member where that dependant is more than a specified number of years younger than the member.

12. In relation to pensioner members who have retired on ill health grounds before any early retirement pivot age, discontinuation of any life assurance cover once any such members reach the normal retirement age which applied to them at the time they retired, or in relation to members to whom no such normal retirement age applied, once such members reach the age of 65.

Other rules, practices, actions and decisions relating to benefit.

13. Any difference in the amount of any age related benefit or death benefit payable under a defined benefits arrangement to or in respect of members with different lengths of pensionable service to the extent that the difference in amount is attributable to their differing lengths of service, provided that, for each year of pensionable service, members in a comparable situation are entitled to accrue a right to benefit based upon the same fraction of pensionable pay.

14. Any difference in the amount of any age related benefit or death benefit payable from a scheme to or in respect of different members to the extent that the difference in amount is attributable to differences over time in the pensionable pay of those members.

15. Any limitation of the amount of any age related benefit or death benefit payable from a scheme where the limitation results from imposing a maximum number of years of service by reference to which such benefit may be calculated.

16. Any rule, practice, action or decision whereby any age related benefit or death benefit is only payable to or in respect of members who have completed a minimum period of service, provided that such a minimum period is not longer than 2 years qualifying service; "2 years' qualifying service" means 2 years (whether a single period of that duration or two or more periods, continuous or discontinuous, totalling 2 years) in which the member was at all times employed either—

- (a) in pensionable service under the scheme;
- (b) in service in employment which was contracted-out by reference to the scheme; or
- (c) in linked qualifying service under another scheme.

17. Any limitation on the amount of any age related benefit or death benefit payable from a scheme where the limitation results from imposing a minimum level of pensionable pay by reference to which any such benefit may be calculated, provided that such a minimum is not above the lower earnings limit referred provided by legislation in respect of Gibraltar state social security pensions.

18. Any limitation on the amount of any age related benefit or death benefit payable from a scheme where the limitation results from imposing a maximum level of pensionable pay by reference to which such benefit may be calculated.

Closure of schemes.

19. The closure of a scheme, from a particular date, to workers who have not already joined it.

Other rules, practices, actions and decisions.

20. Increases of pensions in payment which are made to members over 55 but not to members below that age.

21. Any difference in the rate of increase of pensions in payment for members of different ages to the extent that the aim in setting the different rates is to maintain the relative value of members' pensions.

22. Any difference in the rate of increase of pensions in payment for members whose pensions have been in payment for different lengths of time to the extent that the aim in setting the different rates is to maintain the relative value of members' pensions.

23. The application of an age limit for transfer of the value of a member's accrued rights into or out of a scheme, provided that any such age limit is not more than one year before the member's normal pension age.

Registered pension schemes.

24.(1) Subject to sub-paragraph (2), any rules, practices, actions or decisions relating to entitlement to or payment of benefits under a pension scheme approved by the Commissioner of Income Tax or in the Pensions Ordinance insofar as compliance is necessary to secure any tax relief or exemption available under the Income Tax Ordinance or to prevent any charge to tax arising under that Ordinance, whoever is liable in relation to such charge.

(2) Sub-paragraph (1) does not apply to any rules, practices, actions or decisions setting a minimum age for entitlement to or payment of any age related benefit.

Part 2

Excepted rules, practices, actions and decisions relating to contributions by employers to personal pension schemes

Contributions by employers.

25. Different rates of contributions by an employer according to the age of the workers in respect of whom the contributions are made where the aim in setting the different rates is—

- (a) to equalise the amount of benefit to which workers of different ages who are otherwise in a comparable situation will become entitled under their personal pension schemes, or
- (b) to make the amount of benefit to which such workers will become entitled under their personal pension schemes more nearly equal.

26. Any difference in the rate of contributions by an employer in respect of different workers to the extent that this is attributable to any differences in remuneration payable to those workers.

SCHEDULE 3
DUTY TO CONSIDER WORKING BEYOND RETIREMENT

Section 57(4)

PART 1
Duty to Consider Working Beyond Retirement

Interpretation.

1.(1) In this Schedule—

“dismissal” means a dismissal within the meaning of section 64 of the Employment Ordinance;

“employee” means a person to whom section 57 (exception for retirement) applies and references to “employer” shall be construed accordingly;

“intended date of retirement” has the meaning given by sub-paragraph (2);

“operative date of termination” means (subject to paragraph 10(3))—

- (a) where the employer terminates the employee’s contract of employment by notice, the date on which the notice expires, or
- (b) where the employer terminates the contract of employment without notice, the date on which the termination takes effect;

“request” means a request made under paragraph 5.

(2) In this Schedule “intended date of retirement” means—

- (a) where the employer notifies a date in accordance with paragraph 2, that date;
- (b) where the employer notifies a date in accordance with paragraph 4 and either no request is made or a request is made after the notification, that date;
- (c) where,

- (i) the employer has not notified a date in accordance with paragraph 2,
- (ii) a request is made before the employer has notified a date in accordance with paragraph 4 (including where no notification in accordance with that paragraph is given),
- (iii) the request is made by an employee who has reasonable grounds for believing that the employer intends to retire him on a certain date, and,
- (iv) the request identifies that date,

the date so identified;

- (d) in a case to which paragraph 3 has applied, any earlier or later date that has superseded the date mentioned in paragraph (a), (b) or (c) as the intended date of retirement by virtue of paragraph 3(3);
- (e) in a case to which paragraph 10 has applied, the later date that has superseded the date mentioned in paragraph (a), (b) or (c) as the intended date of retirement by virtue of paragraph 10(3)(b).

Duty of employer to inform employee.

2.(1) An employer who intends to retire an employee has a duty to notify the employee in writing of—

- (a) the employee's right to make a request; and
- (b) the date on which he intends the employee to retire,

not more than one year and not less than six months before that date.

(2) The duty to notify applies regardless of—

- (a) whether there is any term in the employee's contract of employment indicating when his retirement is expected to take place,
- (b) any other notification of, or information about, the employee's date of retirement given to him by the employer at any time, and
- (c) any other information about the employee's right to make a request given to him by the employer at any time.

3.(1) This paragraph applies if the employer has notified the employee in accordance with paragraph 2 or 4 or the employee has made a request before being notified in accordance with paragraph 4 (including where no notification in accordance with that paragraph is given), and—

- (a) the employer and employee agree, in accordance with paragraph 7(3)(b) or 8(5)(b), that the dismissal is to take effect on a date later than the relevant date;
- (b) the employer gives notice to the employee, in accordance with paragraph 7(7)(a)(ii) or, where the employee appeals, paragraph 8(9)(a)(ii), that the dismissal is to take effect on a date later than the relevant date; or
- (c) the employer and employee agree that the dismissal is to take effect on a date earlier than the relevant date.

(2) This Schedule does not require the employer to give the employee a further notification in respect of dismissal taking effect on a date—

- (a) agreed as mentioned in sub-paragraph (1)(a) or notified as mentioned in sub-paragraph (1)(b) that is later than the relevant date and falls six months or less after the relevant date; or
- (b) agreed as mentioned in sub-paragraph (1)(c) that is earlier than the relevant date.

(3) If—

- (a) a date later than the relevant date is agreed as mentioned in sub-paragraph (1)(a) or notified as mentioned in sub-paragraph (1)(b) and falls six months or less after the relevant date, or
- (b) a date earlier than the relevant date is agreed as mentioned in sub-paragraph (1)(c),

the earlier or later date shall supersede the relevant date as the intended date of retirement.

(4) In this paragraph, “the relevant date” means the date that is defined as the intended date of retirement in paragraph (a), (b) or (c) of paragraph 1(2).

Continuing duty to inform employee.

4. Where the employer has failed to comply with paragraph 2, he has a continuing duty to notify the employee in writing as described in paragraph 2(1) until the fourteenth day before the operative date of termination.

Statutory right to request not to retire.

5.(1) An employee may make a request to his employer not to retire on the intended date of retirement.

(2) In his request the employee must propose that his employment should continue, following the intended date of retirement—

- (a) indefinitely,
- (b) for a stated period, or
- (c) until a stated date;

and, if the request is made at a time when it is no longer possible for the employer to notify in accordance with paragraph 2 and the employer has not yet notified in accordance with paragraph 4, must identify the date on which he believes that the employer intends to retire him.

(3) A request must be in writing and state that it is made under this paragraph.

(4) An employee may only make one request under this paragraph in relation to any one intended date of retirement and may not make a request in relation to a date that supersedes a different date as the intended date of retirement by virtue of paragraph 3(3) or 10(3)(b).

(5) A request is only a request made under this paragraph if it is made—

- (a) in a case where the employer has complied with paragraph 2, more than three months but not more than six months before the intended date of retirement, or
- (b) in a case where the employer has not complied with paragraph 2, before, but not more than six months before, the intended date of retirement.

An employer's duty to consider a request .

6. An employer to whom a request is made is under a duty to consider the request in accordance with paragraphs 7 to 9.

Meeting to consider request.

7.(1) An employer having a duty under paragraph 6 to consider a request shall hold a meeting to discuss the request with the employee within a reasonable period after receiving it.

(2) The employer and employee must take all reasonable steps to attend the meeting.

(3) The duty to hold a meeting does not apply if, before the end of the period that is reasonable—

- (a) the employer and employee agree that the employee's employment will continue indefinitely and the employer gives notice to the employee to that effect; or
- (b) the employer and employee agree that the employee's employment will continue for an agreed period and the employer gives notice to the employee of the length of that period or of the date on which it will end.

(4) The duty to hold a meeting does not apply if—

- (a) it is not practicable to hold a meeting within the period that is reasonable, and
- (b) the employer complies with sub-paragraph (5).

(5) Where sub-paragraph (4)(a) applies, the employer may consider the request without holding a meeting provided he considers any representations made by the employee.

(6) The employer shall give the employee notice of his decision on the request as soon as is reasonably practicable after the date of the meeting or, if sub-paragraphs (4) and (5) apply, his consideration of the request.

(7) A notice given under sub-paragraph (6) shall—

- (a) where the decision is to accept the request, state that it is accepted and—
 - (i) where the decision is that the employee's employment will continue indefinitely, state that fact, or
 - (ii) where the decision is that the employee's employment will continue for a further period, state that fact and specify the length of the period or the date on which it will end,
- (b) where the decision is to refuse the request, confirm that the employer wishes to retire the employee and the date on which the dismissal is to take effect,

and, in the case of a notice falling within paragraph (b), and of a notice referred to in paragraph (a) that specifies a period shorter than the period proposed by the employee in the request, shall inform the employee of his right to appeal.

(8) All notices given under this paragraph shall be in writing and be dated.

Appeals.

8.(1) An employee is entitled to appeal against—

- (a) a decision of his employer to refuse the request, or
- (b) a decision of his employer to accept the request where the notice given under paragraph 7(6) states as mentioned in paragraph 7(7)(a)(ii) and specifies a period shorter than the period proposed by the employee in the request,

by giving notice in accordance with sub-paragraph (2) as soon as is reasonably practicable after the date of the notice given under paragraph 7(6).

(2) A notice of appeal under sub-paragraph (1) shall set out the grounds of appeal.

(3) The employer shall hold a meeting with the employee to discuss an appeal within a reasonable period after the date of the notice of appeal.

(4) The employer and employee must take all reasonable steps to attend the meeting.

(5) The duty to hold a meeting does not apply if, before the end of the period that is reasonable—

- (a) the employer and employee agree that the employee's employment will continue indefinitely and the employer gives notice to the employee to that effect; or
- (b) the employer and employee agree that the employee's employment will continue for an agreed period and the employer gives notice to the employee of the length of that period or of the date on which it will end.

(6) The duty to hold a meeting does not apply if—

- (a) it is not practicable to hold a meeting within the period that is reasonable, and
- (b) the employer complies with sub-paragraph (7).

(7) Where sub-paragraph (6)(a) applies, the employer may consider the appeal without holding a meeting provided he considers any representations made by the employee.

(8) The employer shall give the employee notice of his decision on the appeal as soon as is reasonably practicable after the date of the meeting or, if sub-paragraphs (6) and (7) apply, his consideration of the appeal.

(9) A notice under sub-paragraph (8) shall—

- (a) where the decision is to accept the appeal, state that it is accepted and—
 - (i) where the decision is that the employee's employment will continue indefinitely, state that fact, or
 - (ii) where the decision is that the employee's employment will continue for a further period, state that fact and specify the length of the period or the date on which it will end,
- (b) where the decision is to refuse the appeal, confirm that the employer wishes to retire the employee and the date on which the dismissal is to take effect.

(10) All notices given under this paragraph shall be in writing and be dated.

Right to be accompanied.

9.(1) This paragraph applies where—

- (a) a meeting is held under paragraph 7 or 8, and
- (b) the employee reasonably requests to be accompanied at the meeting.

(2) Where this paragraph applies the employer must permit the employee to be accompanied at the meeting by one companion who—

- (a) is chosen by the employee;
- (b) is an employee employed by, or a person within the meaning of section 2(2)(a)(ii) working for, the same employer as the employee;

- (c) is to be permitted to address the meeting (but not to answer questions on behalf of the employee); and
- (d) is to be permitted to confer with the employee during the meeting.

(3) If—

- (a) an employee has a right under this paragraph to be accompanied at a meeting,
- (b) his chosen companion will not be available at the time proposed for the meeting by the employer, and
- (c) the employee proposes an alternative time which satisfies sub-paragraph (4),

the employer must postpone the meeting to the time proposed by the employee.

(4) An alternative time must—

- (a) be convenient for employer, employee and companion, and
- (b) fall before the end of the period of seven days beginning with the first day after the day proposed by the employer.

(5) An employer shall permit an employee or a person within the meaning of section 2(2)(a)(ii) to take time off during working hours for the purpose of accompanying an employee in accordance with a request under sub-paragraph (1)(b).

Dismissal before request considered.

10.(1) This paragraph applies where—

- (a) by virtue of paragraph 6 an employer is under a duty to consider a request;
- (b) the employer dismisses the employee;

- (c) that dismissal is the contemplated dismissal to which the request relates; and
- (d) the operative date of termination would, but for sub-paragraph (3), fall on or before the day on which the employer gives notice in accordance with paragraph 7(6).

(2) Subject to sub-paragraph (4), the contract of employment shall continue in force for all purposes, including the purpose of determining for any purpose the period for which the employee has been continuously employed, until the day following that on which the notice under paragraph 7(6) is given.

(3) The day following the day on which that notice is given shall supersede—

- (a) the date mentioned in sub-paragraph (1)(d) as the operative date of termination; and
- (b) the date defined as the intended date of retirement in paragraph (a), (b) or (c) of paragraph 1(2) as the intended date of retirement.

(4) Any continuation of the contract of employment under sub-paragraph (2) shall be disregarded when determining the operative date of termination for the purposes of the Employment Ordinance.

Complaint to Industrial Tribunal: failure to comply with paragraph 2.

11.(1) An employee may present a complaint to the Tribunal that his employer has failed to comply with the duty to notify him in paragraph 2.

(2) The Tribunal shall not consider a complaint under this paragraph unless the complaint is presented—

- (a) before the end of the period of six months beginning with—
 - (i) the last day permitted to the employer by paragraph 2 for complying with the duty to notify, or

- (ii) if the employee did not then know the date that would be the intended date of retirement, the first day on which he knew or should have known that date; or
- (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of six months.

(3) Where the Tribunal finds that a complaint under this paragraph is well-founded it shall order the employer to pay compensation to the employee of such amount, not exceeding 8 weeks' pay, as the tribunal considers just and equitable in all the circumstances.

(4) For the purposes of sub-paragraph (3) "a weeks pay" has the meaning given in section 2 of the Employment Ordinance and in applying that meaning, if a calculation date is required, the calculation date shall be taken to be the date on which the complaint was presented or, if earlier, the operative date of termination.

Complaint to Industrial Tribunal: denial of right to be accompanied.

12.(1) An employee may present a complaint to the Tribunal that his employer has failed, or threatened to fail, to comply with paragraph 9(2) or (3).

(2) The Tribunal shall not consider a complaint under this paragraph in relation to a failure or threat unless the complaint is presented—

- (a) before the end of the period of three months beginning with the date of the failure or threat; or
- (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where the Tribunal finds that a complaint under this paragraph is well-founded it shall order the employer to pay compensation to the employee or person within the meaning of section 2(2)(a)(ii) of an amount not exceeding two weeks' pay.

(4) For the purposes of sub-paragraph (3) “a weeks pay” has the meaning given in section 2 of the Employment Ordinance and in applying that meaning, if a calculation date is required, the calculation date shall be taken to be the date on which the relevant meeting took place (or was to have taken place).

Detriment and dismissal.

13.(1) An employee has the right not to be subjected to any detriment by any act by his employer done on the ground that he exercised or sought to exercise his right to be accompanied in accordance with paragraph 9.

(2) An employee, or a person within the meaning of section 2(2)(a)(ii), has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he accompanied or sought to accompany an employee pursuant to a request under paragraph 9.

(3) Sub-paragraph (2) does not apply to an employee where the detriment in question amounts to dismissal (within the meaning of section 64 of the Employment Ordinance).

(4) An employee who is dismissed shall be regarded for the purposes of the Employment Ordinance as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he—

- (a) exercised or sought to exercise his right to be accompanied in accordance with paragraph 9, or
- (b) accompanied or sought to accompany an employee pursuant to a request under that paragraph.

(5) The Tribunal may grant interim relief in relation to dismissal for the reason specified in sub-paragraph (4)(a) or (b) to the same extent, and on the basis of the same procedures, as it may grant interim relief in relation to a complaint of unfair dismissal brought under section 70 of the Employment Ordinance.

Part 2

Duty to consider working beyond retirement - transitional provisions

1. In paragraphs 2 to 6—

- (a) “the expiry date” means the date on which notice of dismissal given by an employer expires; and
- (b) words and expressions shall have the same meanings as they do in Part 1.

2.(1) This paragraph applies in a case where—

- (a) an employer has given notice of dismissal to the employee before the commencement date of—
 - (i) at least the period required by the contract of employment; or
 - (ii) where the period required by the contract exceeds four weeks, at least four weeks;
- (b) the expiry date falls before 1st April 2007; and
- (c) the employer has made the employee aware, before the commencement date, that the employer considers that the employee is being retired on the expiry date.

(2) Where this paragraph applies and the employer on or as soon as is practicable after the commencement date notifies the employee in writing of the employee’s right to make a request under paragraph 5 of Part 1—

- (a) the employer shall be treated as complying with the duty in paragraph 2 of Part 1;
- (b) a request shall be treated as being a request made under paragraph 5 of Part 1 provided it—
 - (i) is made after the employer notified the employee of his right to make a request;

- (ii) satisfies the requirements of sub-paragraphs (2) and (3) of paragraph 5 of Part 1; and
- (iii) is made—
 - (aa) where practicable, at least four weeks before the expiry date; or
 - (bb) where that is not practicable, as soon as reasonably practicable (whether before or after the expiry date) after the employer notified the employee of his right to make a request, but not more than four weeks after the expiry date.

(3) Where this paragraph applies and the employer does not, on or as soon as is practicable after the commencement date, notify the employee in writing of the employee's right to make a request under paragraph 5 of Part 1—

- (a) the duty to notify in accordance with paragraph 2 of Part 1 does not apply;
- (b) the duty to notify in accordance with paragraph 4 of Part 1 applies as if—
 - (i) the employer had failed to notify in accordance with paragraph 2 of that Schedule; and
 - (ii) the duty was one to notify at any time before the expiry date;
- (c) a request shall be treated as being a request made under paragraph 5 of Part 1 if it satisfies the requirements of sub-paragraphs (2) and (3) of that paragraph and is made—
 - (i) before any notification given in accordance with paragraph 4 of Part 1; or
 - (ii) after such notification and—
 - (aa) where practicable, at least four weeks before the expiry date; or

- (bb) where that is not practicable, as soon as reasonably practicable (whether before or after the expiry date) after the employer notified the employee of his right to make a request, but not more than four weeks after the expiry date.

3.(1) This paragraph applies in a case where the employer has given notice of dismissal to the employee before the commencement date and—

- (a) the expiry date falls before 1st April 2007, but
- (b) the period of notice given is shorter than the minimum period of notice required by paragraph 2(1)(a) or the employer has not complied with paragraph 2(1)(c).

(2) Where this paragraph applies—

- (a) the duty to notify in accordance with paragraph 2 of Part 1 does not apply;
- (b) the duty to notify in accordance with paragraph 4 of Part 1 applies as if—
 - (i) the employer had failed to notify in accordance with paragraph 2 of that Schedule; and
 - (ii) the duty was one to notify at any time before the expiry date;
- (c) a request shall be treated as being a request made under paragraph 5 of Part 1 if it satisfies the requirements of sub-paragraphs (2) and (3) of that paragraph and is made—
 - (i) before any notification given in accordance with paragraph 4 of Part 1; or
 - (ii) after such notification and—
 - (aa) where practicable, at least four weeks before the expiry date; or

- (bb) where that is not practicable, as soon as reasonably practicable (whether before or after the expiry date) after the employer notified the employee of his right to make a request, but not more than four weeks after the expiry date.

4.(1) This paragraph applies in a case where—

- (a) notice of dismissal is given on or after the commencement date of at least—
 - (i) the period required by the contract of employment; or
 - (ii) if longer, the period required by section 54 of the Employment Ordinance; and
- (b) the expiry date falls before 1st April 2007.

(2) Where this paragraph applies and the employer notifies the employee in writing of the employee's right to make a request under paragraph 5 of Part 1 before, or on the same day as, the day on which notice of dismissal is given—

- (a) the employer shall be treated as complying with the duty in paragraph 2 of Part 1;
- (b) a request shall be treated as being a request made under paragraph 5 of Part 1 provided it—
 - (i) is made after the employer notified the employee of his right to make a request;
 - (ii) satisfies the requirements of sub-paragraphs (2) and (3) of paragraph 5 of Part 1; and
 - (iii) is made—
 - (aa) where practicable, at least four weeks before the expiry date; or
 - (bb) where that is not practicable, as soon as reasonably practicable (whether before or after

the expiry date) after the employer notified the employee of his right to make a request, but not more than four weeks after the expiry date.

(3) Where this paragraph applies but the employer does not notify the employee in writing of the employee's right to make a request under paragraph 5 of Part 1 before, or on the same day as, the day on which notice of dismissal is given—

- (a) the duty to notify in accordance with paragraph 2 of Part 1 does not apply;
- (b) the duty to notify in accordance with paragraph 4 of Part 1 applies as if—
 - (i) the employer had failed to notify in accordance with paragraph 2 of that Schedule; and
 - (ii) the duty was one to notify at any time before the expiry date;
- (c) a request shall be treated as being a request made under paragraph 5 of Part 1 if it satisfies the requirements of subparagraphs (2) and (3) of that paragraph and is made—
 - (i) before any notification given in accordance with paragraph 4 of Part 1; or
 - (ii) after such notification and—
 - (aa) where practicable, at least four weeks before the expiry date; or
 - (bb) where that is not practicable, as soon as reasonably practicable (whether before or after the expiry date) after the employer notified the employee of his right to make a request, but not more than four weeks after the expiry date.

5.(1) This paragraph applies in a case where—

- (a) notice of dismissal is given on or after the commencement date and is for a period shorter than—
 - (i) the period required by the contract of employment; or
 - (ii) if longer, the period required by section 54 of the Employment Ordinance; and
 - (b) the period of notice expires on a date falling before 1st April 2007.
- (2) Where this paragraph applies—
- (a) the duty to notify in accordance with paragraph 2 of Part 1 does not apply;
 - (b) the duty to notify in accordance with paragraph 4 of Part 1 applies as if—
 - (i) the employer had failed to notify in accordance with paragraph 2 of that Part; and
 - (ii) the duty was one to notify at any time before the expiry date;
 - (c) a request shall be treated as being a request made under paragraph 5 of Part 1 if it satisfies the requirements of subparagraphs (2) and (3) of that paragraph and is made—
 - (i) before any notification given in accordance with paragraph 4 of Part 1; or
 - (ii) after such notification and—
 - (aa) where practicable, at least four weeks before the expiry date; or
 - (bb) where that is not practicable, as soon as reasonably practicable (whether before or after the expiry date) after the employer notified the employee of his right to make a request, but not more than four weeks after the expiry date.

6. In every case to which paragraph 2, 3, 4 or 5 applies–
- (a) paragraph 10 of Part 1 does not apply; and
 - (b) the employer is under a duty to consider any request which complies with the requirements of paragraph 2(2)(b), 2(3)(c), 3(2)(c), 4(2)(b), 4(3)(c) or 5(2)(c) in accordance with paragraphs 7 to 9 of Part 1.

Schedule 4

Section 65

Forms

FORM 1

Equal Opportunities Ordinance 2006

Question Form (for complainant)

To..... (name of the person to be questioned (the respondent))

of.....(address)

From.....(name of complainant)

of..... (address)

Part I Discrimination and Harassment Claims under the Equal Opportunities Ordinance 2006

1.(1) I, the complainant, consider that you may have discriminated against me/subjected me to harassment contrary to the Equal Opportunities Ordinance 2006.

1.(2) (Give date, approximate time and a factual description of the treatment received and of the circumstances leading up to the treatment).

1.(3) I consider that this treatment may have been unlawful because (complete if you wish to give reasons, otherwise delete).

2. Do you agree that the statement in paragraph 1(2) is an accurate description of what happened? If not, in what respect do you disagree or what is your version of what happened?

3. Do you accept that your treatment of me was unlawful discrimination/harassment/sexual harassment? If you do not—

(a) why not?

(b) for what reason did I receive the treatment accorded to me?

(c) how far did considerations of sex/ religion or belief/ racial or ethnic origin/ pregnancy and maternity/ marital status/ sexual orientation/ gender reassignment/ disability/ age/ affect your treatment of me?

4. (Add any other questions you may wish to ask.)

Part II – Claims in respect of equality clauses (contracts of employment) and equal treatment rules (occupational pensions) under Part IV of the Equal Opportunities Ordinance 2006

1. I, the complainant, believe, for the following reasons, that I may not have received equal pay or other contract terms/pension in accordance with the Equal Opportunities Ordinance 2006.

(Give a short summary of the reason(s) that cause you to believe this).

2. I am claiming equal pay/pension with the following comparator(s)

.....

(Give the names or, if not known, the job titles, of the person or persons in relation to whom you are comparing yourself.)

- Do you agree that I have received less pay/pension than my comparator(s)?
- If you agree that I have received less pay/pension, please explain the reasons for this difference.
- If you do not agree that I have received less pay/pension, please explain why you disagree.

3. The Equal Opportunities Ordinance requires equal pay/pension between men and women where they are employed on equal work, which comprises like work, work rated as equivalent, or work of equal value.

- Do you agree that my work is equal to that of my comparator(s)?
- If you do not think that I am doing equal work, please give your reasons'

4. Include any other relevant questions you may want to ask.

Return Address

Please send your reply to the following address if different from my home address above.

.....

.....(address)

.....(signature of complainant)

.....(date)

IMPORTANT

By virtue of section 65(3) of the Ordinance, this questionnaire and any reply are (subject to the provisions of the section) admissible in proceedings under the Ordinance and the Industrial Tribunal may draw any such inference as is just and equitable from a failure without reasonable excuse to reply within 4 weeks or from an evasive or equivocal reply, including an inference that the person questioned has discriminated unlawfully.

FORM 2

Section 65

Equal Opportunities Ordinance

Reply Form
(for respondent's replies to complainant's questions)

To.....
(name of complainant)

of.....
(address)

1. I.....
(name of person questioned)

of.....
(address)

acknowledge receipt of the questionnaire signed by you and dated
..... (date)

which was served on me on (date).

Part I Discrimination and Harassment Claims under the Equal Opportunities Ordinance 2006

1. (delete and give details as appropriate)

- I agree that the statement in paragraph 1(2) of the questionnaire is an accurate description of what happened.
- I disagree with the statement in paragraph 1(2) of the questionnaire in that—

2. (delete and give details as appropriate)

- I accept that my treatment of you was unlawful discrimination/ harassment/ sexual harassment.

- I dispute that my treatment of you was unlawful discrimination/ harassment/ sexual harassment for the following reasons–

3. The reason why you received the treatment accorded to you and the answers to the other questions in paragraph 3 of the questionnaire are–

4. My replies to questions in paragraph 4 of the questionnaire are–

5. I have deleted (in whole or in part) the paragraph(s) numbered above, since I am unable/unwilling (*delete as appropriate*) to reply to the relevant questions in the correspondingly numbered paragraph(s) of the questionnaire for the following reasons–

Part II Claims in respect of equality clauses (contracts of employment) and equal treatment rules (occupational pensions) under Part IV of the Equal Opportunities Ordinance 2006

2.(1) In respect of question 2–

(delete as appropriate)

- I agree that the complainant has not received equal pay/pension in accordance with the Equal Opportunities Ordinance.
- I do not agree that the complainant has not received equal pay/pension in accordance with the Equal Opportunities Ordinance for the following reasons–

2.(2) In respect of question 2–

(delete as appropriate)

- I agree that the complainant has received less pay/pension than his or her comparator(s); the reason for this are –
- I do not agree that the complainant has received less pay/pension than his or her comparator(s) for the following reasons–

2.(3) In respect of question–

(delete as appropriate)

- I agree that the complainant is doing work equal to that of her comparator.
- I do not agree that the complainant is doing work equal to that of her comparator. The reason that I disagree is–

2.(4) My replies to the questions in Part II, paragraph 4 of the questionnaire are–

3. I have deleted (in whole or in part) the paragraphs numbered _____ above since I am unable/unwilling (*delete as appropriate*) to reply to the corresponding questions of the questionnaire for the following reasons–

.....(*signature of respondent*)

.....(*date*)

IMPORTANT

By virtue of section 65(3) of the Ordinance, this questionnaire and any reply are (subject to the provisions of the section) admissible in proceedings under the Ordinance and the Industrial Tribunal may draw any such inference as is just and equitable from a failure without reasonable excuse to reply within 4 weeks or from an evasive or equivocal reply, including an inference that the person questioned has discriminated unlawfully.

EXPLANATORY MEMORANDUM

1. When originally enacted, the Equal Opportunities Ordinance 2004 (“the 2004 Ordinance”) made it unlawful to discriminate on the grounds of sex, religion or belief, racial or ethnic origin and sexual orientation in relation to employment, vocational training and education. It also outlawed victimisation and harassment on those grounds and made it unlawful to discriminate in relation to the provision of goods, facilities and services and certain other specified activities on the grounds of racial or ethnic origin. In addition, the Employment Ordinance contained various provisions concerning sex discrimination.

2. The main purposes of this Bill are to—

- (a) extend the prohibition on discrimination to the grounds of disability, age, pregnancy and maternity and extend the statutory prohibition of harassment to sexual harassment;
- (b) transpose Council Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions;
- (c) transpose the age and disability provisions of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation;
- (d) clarify and streamline the relationship between Gibraltar’s employment and equal opportunities legislation.

3. Part II of the Bill sets out the definitions of discrimination on the different grounds covered by the Ordinance. Discrimination includes both direct discrimination (where one person is treated less favourably than another on an equal opportunities ground) and indirect discrimination (where an apparently neutral provision affects persons of an equal opportunities ground more negatively than others) and victimisation (which occurs where a person receives less favourable treatment than others by reason of the fact that he has brought (or given evidence in) proceedings, made an allegation or otherwise done anything under or by reference to the Bill). In relation to discrimination on the grounds of disability, discrimination also includes a failure to make reasonable adjustments to modify premises and practices to

ensure that disabled persons are not substantially disadvantaged. The Bill also prohibits harassment including sexual harassment.

4. Part III of the Bill prohibits discrimination and harassment on equal opportunities grounds in the field of employment, self-employment, occupation and vocational training. It also defines “reasonable adjustments”. Not all differences of treatment will be unlawful discrimination under the Bill and specific provisions are made as to when discrimination may be legally justifiable or when, because of a genuine occupational requirement, it is lawful to discriminate on specific grounds.

5. Part IV of the Bill provides special provisions in relation to male and female employees – providing that they are entitled to equal pay and equal pension payments. The provisions stem from directive 75/117/EEC. The provisions insert into every contract of employment, whether written or unwritten, two implied terms – 1) an equality clause in relation to equal pay (as defined by European law) and, 2) an equal treatment term in relation to equal pensions.

6. Part V of the Bill deals with discrimination in other fields and applies only to discrimination on the grounds of racial or ethnic origin. It prohibits discrimination in education, in relation to the sale and letting of property, by public authorities generally and by both public and private bodies in relation to the provision of goods, facilities and services such as entry to hotels and provision of services.

7. Parts VI, VII, VIII deal with other unlawful acts, exceptions and validity of contracts and collective agreements. Particular points of note are that employers and principals have vicarious liability for discriminatory acts of their employees unless they can show they have taken reasonable steps to prevent employees from taking discriminatory actions and both individual contracts and collective agreements must comply with the provisions of the Bill. The Bill provides for remedies in Part IX.

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