

Equality Commission

FOR NORTHERN IRELAND

A UNIFIED GUIDE TO PROMOTING EQUAL OPPORTUNITIES IN EMPLOYMENT



Legal status of the Unified Guide

The Unified Guide is not a statutory code of practice and it does not have the same legal status as a code of practice that has been issued under the anti-discrimination legislation. Like a code of practice, the Unified Guide does not impose legal duties on any employer and a failure to observe any of the guidance will not render an employer liable in any legal proceedings. Unlike the provisions of a code of practice, an industrial tribunal or the Fair Employment Tribunal is not obliged to take any relevant provision of the Unified Guide into account when determining any question that arises in the course of proceedings.

Nevertheless, the value of the Unified Guide lies in the fact that its provisions substantially derive from the provisions of the existing statutory codes of practice and represent the Equality Commission's current recommendations on best practice.

Availability of the Unified Guide in other formats

The Unified Guide is available on request in a range of formats, including large print and Braille. It may also be downloaded from the Equality Commission's website.

Equality Commission for Northern Ireland

The Equality Commission for Northern Ireland is an independent public body that was established by the Northern Ireland Act 1998 to carry out functions in relation to Northern Ireland's equality and anti-discrimination legislation.

The Equality Commission's principal duties require it to work for the elimination of unlawful discrimination; to promote equality of opportunity and affirmative action and to keep under review the operation of the equality and anti-discrimination legislation.

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- 1.1 This publication aims to provide employers with practical guidance on how to comply with their responsibilities under each of the anti-discrimination laws in respect of their treatment of job applicants and employees, and to assist employers to promote equality of opportunity in employment across all of the statutory equality grounds.
- 1.2 The Equality Commission has on separate occasions published separate statutory codes of practice for employers under the sex discrimination, equal pay, fair employment, race relations and disability discrimination legislation. The Commission has also published numerous non-statutory guidance materials for employers on the anti-discrimination legislation, including publications in respect of equality grounds that are not currently covered by statutory codes of practice, i.e. the sexual orientation and age grounds. These codes and other publications address the same employment-related topics that are addressed by this Guide, but they each do so from the point-of-view of their own respective remits so that employers are required to read and implement each in order that they may universally apply the principles espoused in all.¹
- 1.3 Furthermore, there are various statutory employment rights which are not conventionally considered to be anti-discrimination laws as such but which nevertheless promote equality of opportunity in employment either directly or indirectly. For example, there are a number of provisions which aim to promote and protect the rights of pregnant workers and those taking maternity leave and several other provisions which aim to promote “*family friendly*” working practices. These statutory employment rights complement the rights provided by the anti-discrimination laws. Information about the nature and extent of these employment rights, their qualifying criteria and their procedural requirements may be obtained from a number of separate sources. In particular, the Department for Employment and Learning and the Labour Relations Agency have issued many very informative publications on these subjects.
- 1.4 The Equality Commission recognises that this separation of subject-matters is not always convenient for employers and realises that many employers might benefit from an opportunity to consult a single publication that provides guidance on employment-related topics across all of the statutory equality grounds. Consequently, that is what this publication aims to provide. This publication aims to amalgamate in one document the principles that are currently contained in the several equality codes of practice and other guidance materials that the Equality Commission has published. The provisions of the Guide substantially derive from the provisions of the existing statutory codes of practice and represent the Equality Commission’s current recommendations on best practice. In addition and where relevant, the Guide draws employers’ attentions to other corresponding and complementary employment rights of the kind mentioned in the preceding paragraph.

¹ A list of the relevant codes of practice and other guidance materials is set out in Appendix 1.

- 1.5 The Guide does not attempt to describe every set of circumstances that may arise and it should not be taken as an authoritative statement of the law. In circumstances where the subject-matter is particularly lengthy or complex the Guide will refer readers to more appropriate publications; for example, employers who are planning to undertake an equal pay audit should refer to the Equal Pay Code of Practice and Review Kit.
- 1.6 The Guide is not a statutory code of practice and it does not have the same legal status as a code of practice that has been issued under the anti-discrimination legislation. Like a code of practice, this Guide does not impose legal duties on any employer and a failure to observe any of the guidance will not render an employer liable in any legal proceedings. Unlike the provisions of a code of practice, an industrial tribunal or the Fair Employment Tribunal is not obliged to take any relevant provision of this Guide into account when determining any question that arises in the course of proceedings.
- 1.7 On the other hand, two issues are worth highlighting. Firstly, the provisions of this Guide substantially derive from the provisions of the existing codes of practice and the provisions of the codes are admissible in evidence in any tribunal proceedings and shall be taken into account by the tribunals where relevant. Secondly, the provisions of the Guide represent the Commission's current best practice recommendations.

- 2.1 The anti-discrimination laws prohibit discrimination and harassment on the statutory equality grounds in the fields of employment and occupation. The laws apply to all employers.
- 2.2 The laws use terms such as *direct discrimination*; *indirect discrimination*; *disability-related discrimination*; *failure to comply with a duty to make reasonable adjustments* (i.e. another form of discrimination against disabled people); *victimisation and harassment* to describe the different types of discriminatory conduct which are prohibited. Further information on the definitions of these terms may be found in Appendices 2, 3 and 4.
- 2.3 A list of the principal anti-discrimination laws which are relevant to employment and occupation and a description of their respective equality grounds are given below.

**Equal Pay Act (NI) 1970, and
Sex Discrimination (NI) Order 1976**

These laws prohibit discrimination and harassment on the grounds of sex; pregnancy and maternity leave; gender reassignment; being married or being a civil partner.

Fair Employment & Treatment (NI) Order 1998

This law prohibits discrimination and harassment on the grounds of religious or similar philosophical belief and political opinion.

Disability Discrimination Act 1995

This law prohibits discrimination and harassment against disabled persons.

Race Relations (NI) Order 1997

This law prohibits discrimination and harassment on the grounds of race; colour; ethnic or national origins; nationality; belonging to the Irish Traveller community.

Employment Equality (Sexual Orientation) Regulations (NI) 2003

This law prohibits discrimination and harassment on the grounds of sexual orientation.

Employment Equality (Age) Regulations (NI) 2006

This law prohibits discrimination and harassment on the grounds of age.

- 3.1 Public authorities who are designated for the purposes of *Section 75 of the Northern Ireland Act 1998* must comply with the equality and good relations duties contained in that section and the additional “disability duties” contained in *Section 49A of the Disability Discrimination Act 1995*.
- 3.2 Designated public authorities must comply with these duties *when carrying out their functions in Northern Ireland* and this includes the carrying out of their functions as employers.

Section 75 duties

- 3.3 Designated public authorities, in carrying out their functions in Northern Ireland, are required to have due regard to the need to promote equality of opportunity between:
- persons of different religious belief; political opinion; racial group; age; marital status; sexual orientation; and
 - between men and women generally; and
 - between persons with a disability and persons without; and
 - between persons with dependants and persons without.

Also, these public authorities are also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion and racial group.

Section 49A duties

- 3.4 Designated public authorities, in carrying out their functions in Northern Ireland, are required to have due regard to the need to:
- promote positive attitudes towards disabled people, and
 - encourage participation by disabled people in public life.

The remit of the Unified Guide

- 3.5 The Unified Guide is directed at both public authority employers, who have to comply with the *Section 75* and *Section 49A* duties, and employers from the private, community and voluntary sectors, who do not have to comply with these duties. For the convenience of the latter, the Guide has been written primarily from their perspective and is not framed in terms of the *Section 75* and *Section 49A* duties.
- 3.6 The principal aim of this Guide is to assist employers to promote equality of opportunity in employment across all of the statutory equality grounds. It logically follows, therefore, that the guidance outlined here necessarily conforms to many of the good practice principles and measures that public authority employers

should consider or follow in order to comply with the *Section 75* and *Section 49A* duties. By following the guidance outlined here, public authority employers will be taking significant steps towards complying with the said duties in relation to their employment-related functions.

- 3.7 The Guide, however, does not describe all of the steps that public authority employers should take account of in order to comply with their *Section 75* and *Section 49A* duties. Indeed, the Guide omits some substantial issues that public authorities must address. For example, the Guide gives no guidance on how to draft or implement an equality or disability scheme. Consequently, we recommend that public authorities continue to consult the separate and specific guidance materials that the Equality Commission has published on these matters. These publications are listed below and can be downloaded from the Commission's website:

Section 75 Guidance

- **Guidance for Implementing Section 75 of the Northern Ireland Act 1998.** ²
- **Monitoring Guidance for Use by Public Authorities**
- **Promoting Good Relations: A Guide for Public Authorities**
- **Equality of Opportunity and Sustainable Development in Public Sector Procurement**

Section 49A Guidance

- **A Guide for Public Authorities**

² The current version of the Section 75 Guidance (dated February 2005) was under review at the time of publication of this Guide. It is expected that the new revised version of the Guidance will be published in 2009. Until the new version is published public authorities should continue to refer to the current version.

Be committed to promoting equality of opportunity

- 4.1 The Equality Commission recommends that employers make a commitment to promote equality of opportunity in employment for all persons.

Develop an Equal Opportunities Policy

- 4.2 The Equality Commission also recommends that employers demonstrate this commitment by developing written Equal Opportunities Policies. When formulating these policies, employers should consult with the relevant trade union(s) or workplace representatives.
- 4.3 The Commission has published a Model Equal Opportunities Policy, a copy of which may be found in Appendix 5. The Model contains the key elements that should be incorporated in all equal opportunities policies. The Commission recommends that employers use this Model as a template for developing their own written policies. Employers may make appropriate amendments to it in order to suit their own particular needs.

Implement the Equal Opportunities Policy

- 4.4 Developing the written policy is merely one step, albeit an important one, in a continual process of promoting equality of opportunity. Employers should continually take reasonably practicable steps to fulfil the commitments that are expressed in the policy document.
- 4.5 If the policy is not effectively implemented then the commitments made in it are empty. In the event of a discrimination or harassment complaint, an industrial tribunal or the Fair Employment Tribunal may take the view that a failure by an employer to implement a written policy is evidence of a failure to take such steps as were reasonably practicable to prevent employees from committing acts of unlawful discrimination or harassment.
- 4.6 Consequently, an employer in this position is likely to find it difficult to establish a “reasonably practicable steps” defence in order to avoid legal liability for the discriminatory acts of his or her employees.
- 4.7 Conversely, an employer who can demonstrate that he or she has effectively implemented an equal opportunities policy will have a considerable advantage when it comes to defending a complaint. The following example illustrates this:

A –v- B & C [Industrial Tribunal, 2003]

The complainant was a female employee who had been sexually harassed by a co-worker at an office Christmas party. Nevertheless, the employer successfully avoided being held liable for the actions of its employee by demonstrating that it took such steps as were reasonably practicable to prevent such acts occurring. For example, the employer provided evidence that all its employees, including the employee whose conduct caused the harassment, had received equal opportunities training; that managers had received further equal opportunities training with an emphasis on their role as managers; that all staff had been provided with copies of the employer's equal opportunities policy, which was an anti-harassment policy too, and with copies of revised versions of the policy whenever it was updated; that managers proactively intervened when they heard employees engage in inappropriate banter, on which occasions they spoke to employees to warn of the dangers of such banter and to remind them of the terms of the equal opportunities policy; that in the run-up to the Christmas party season the employer circulated a memorandum to all employees which reminded them of the terms of the equal opportunities policy and specifically warned them to act appropriately during the party season; that the policy and memorandum described the kinds of behaviour that were unacceptable; that the policy and memorandum were discussed with employees on several occasions at staff meetings.

This case was concerned with the topic of harassment but its lessons can be applied to many other employment scenarios. For example, employees who sit on recruitment and selection panels should be provided with training that addresses equal opportunities issues in the context of recruitment and selection and they should be reminded of the content of the employer's equal opportunities policy before participating in recruitment exercises. These same principles also apply to employees who manage or supervise other staff and who have duties in respect of dealing with requests for flexible working, or managing absenteeism. These subjects are addressed in the other chapters of this Guide.

Secure and demonstrate the support of senior managers

- 4.8 An essential first step in implementing the equal opportunities policy is for the employer's senior management team to acknowledge and effectively demonstrate their support for the policy to the workforce.
- 4.9 The example cited above, the case of **A –v- B & C**, is a good illustration of how an employer's managers can effectively demonstrate their support for the policy. It also illustrates the benefits to be gained when they do so.

Secure and demonstrate the support of the workforce

- 4.10 It is important for employers, their workforces and their respective workforces' trade union(s) to jointly participate in the development of equal opportunities policies. This can be achieved through effective consultation when the policies are being developed.

- 4.11 It is also important for employers and their respective workforces' trade union(s) to publicly demonstrate that their commitment to promoting equality of opportunity for all persons is jointly held.
- 4.12 A practical and relatively easy way of doing this is for an employer and the trade union(s) to publicly show their commitment by co-signing a *Joint Declaration of Protection*. This is a document in which both the employer and the trade union(s) state that they are committed to promoting equality of opportunity, preventing discrimination and harassment and to promoting a good and harmonious working environment. The Joint Declaration of Protection can then be displayed on staff notice boards, intranets and in other prominent places within the workplace.
- 4.13 The Commission has drafted a Model Joint Declaration of Protection, a copy of which may be found in Appendix 8. Employers and trade unions may use this as a template for drafting their own Joint Declarations of Protection, although they are free to make appropriate amendments to suit their own particular needs.

Employment Equality Plans, or Diversity Plans

- 4.14 A useful way of planning and taking practical action to implement a commitment to promoting equality of opportunity, and one that is recommended by the Equality Commission, is for employers to develop an *Employment Equality Plan, or a Diversity Plan*. This is essentially an action plan that complements an Equal Opportunities Policy and assists in the implementation of the commitments described in it and provides a framework for the taking of affirmative or positive action.
- 4.15 An example of how an Employment Equality Plan, or Diversity Plan, might look is set out in Appendix 9. Employers who base their Plans on this template should make appropriate amendments to suit their own particular circumstances, needs and objectives.

Further Information and Advice

- 4.16 Employers may obtain further information and advice from the Equality Commission in relation to any of the issues addressed in this Chapter; such as how to develop an Equal Opportunities Policy, a Joint Declaration of Protection, or an Employment Equality Plan, or Diversity Plan.

Be committed to promoting a good and harmonious working environment

- 5.1 The Equality Commission recommends that employers should commit themselves to promoting good and harmonious working environments within their workplaces.
- 5.2 A good and harmonious working environment is one in which:
- all persons are treated with dignity and respect; and
 - no person is subjected to harassment by conduct that is related to religious or similar philosophical belief; political opinion; sex; gender reassignment; race; age; sexual orientation; disability; being married or being in a civil partnership.
- 5.3 Harassment is unwanted conduct that has the purpose or effect of violating an employee's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for that employee.³
- 5.4 The anti-discrimination laws prohibit harassment which is related to the equality grounds. Employers should particularly note that conduct may amount to harassment even where it is not deliberately carried out with the intention of

Grimes –v- Unipork Limited [Fair Employment Tribunal, 1992]

In this religious discrimination case, the Tribunal made the following comment about the nature of “banter”-

“banter, however innocent, has potential for mischief. What is “banter” for some, may be intimidating or embarrassing to others. What is “banter” today, may be dangerous tomorrow. There should be no place in the workforce for conduct that has the potential to disrupt the harmonious working environment or to intimidate or embarrass any worker because of his religious beliefs or political opinions.”

This was a religious discrimination case, but this comment by the Tribunal applies equally to “banter” that is related to any of the equality grounds.

Develop a Harassment Policy and Procedure

- 5.5 The Equality Commission also recommends that employers demonstrate this commitment by developing written harassment policies, which should also include

³ Further information on the statutory definitions of the word “harassment” may be found in Appendix 4.

procedures for addressing employees' grievances about harassment. When formulating these policies and procedures, employers should consult with the relevant trade union(s) or workplace representatives.

- 5.6 The Commission has published a Model Harassment Policy, a copy of which may be found in Appendix 6, and a Model Harassment Procedure, a copy of which may be found in Appendix 7. These Models contain the key elements that should be incorporated in all harassment policies and procedures. The Commission recommends that employers use these Models as templates for drafting their own written policies and procedures. Employers may make appropriate amendments to them in order to suit their own particular needs.

Implement the Harassment Policy

- 5.7 The anti-discrimination laws impose a responsibility on employers to take reasonably practicable steps to protect their employees from conduct by other employees that amounts to harassment. Employers who fail to do so will be held responsible for that conduct. The following example illustrates the view that tribunals take about this issue:

Best & Lowry –v- Donaldson t/a The New Vic [Fair Employment Tribunal, 1993]

In this complaint, the Fair Employment Tribunal stated that-

“Managers and owners must take proper steps to ensure that such matters do not occur, and where they do occur they should be dealt with properly and promptly and the perpetrators disciplined. Simply telling the perpetrators to “cut it out” is not an adequate response”.

- 5.8 In certain circumstances the anti-discrimination laws also impose a responsibility on employers to take reasonably practicable steps to protect their employees from conduct by third parties, such as clients, customers and other service users, that amounts to harassment. An example of a relevant situation might be where a particular customer, or group of customers, regularly use sexist or sexual language which upsets a female employee and which the employer knows of but does nothing to prevent.
- 5.9 Therefore, having a written harassment policy is merely one step, albeit an important one, in a continual process of promoting a good and harmonious working environment.
- 5.10 In the event of a harassment complaint, an industrial tribunal or the Fair Employment Tribunal may take the view that a failure by an employer to implement a written policy is evidence of a failure to take such steps as were reasonably practicable to prevent employees, or third parties, from committing acts of unlawful harassment.
- 5.11 An employer who can demonstrate that he or she has effectively implemented a harassment policy will have a considerable advantage when it comes to defending a complaint. This was plainly illustrated in the case of **A –v- B & C**, the example cited above in paragraph 4.7 of Chapter 4.

5.12 Conversely, an employer who fails to demonstrate that he or she has effectively implemented a harassment policy will find it difficult to establish a “reasonably practicable steps” defence in order to avoid legal liability for any acts of harassment committed by his or her employees, or by any third parties. This is amply illustrated by the case of **Brannigan –v- Belfast City Council**, which is noted below.

Secure and demonstrate the support of senior managers

5.13 An essential first step in implementing the harassment policy is for the employer’s senior management team to acknowledge and effectively demonstrate their support for the policy to the workforce.

5.14 The example cited above in paragraph 4.7 of Chapter 4, the case of **A –v- B & C**, is a good illustration of how an employer’s managers can effectively demonstrate their support for the policy. It also illustrates the benefits to be gained when they do so.

5.15 Conversely, the example cited below is a good illustration of the risks to be faced when an employer’s managers fail to effectively communicate their support for the policy and thus, in turn, fail to effectively implement the policy.

Brannigan –v- Belfast City Council [Fair Employment Tribunal, 2002]

In this case there was sectarian tension between the Protestant and Roman Catholic employees in a Council cleansing depot. In response, the employer issued a Joint Declaration of Protection setting out its commitment to providing a harmonious working environment. It also provided general equal opportunities training to most employees, but this training did not specifically address the issue of sectarian harassment. Also, there was no effective system in place to ensure that employees who missed the training sessions due to absence were subsequently provided with the training. The measures taken by the employer failed to prevent further incidents of sectarian harassment from occurring. The Tribunal did not accept that the employer had taken sufficient action to establish the “reasonably practicable steps” defence. The Tribunal considered that the employer had “rested on its laurels” after it had issued the Declaration. The Tribunal added-

“The tribunal considers that senior management ought to have visited the depot and spoken to the workforce rather than resort to written communications. The tribunal considers that speaking to the workforce would have been a more effective means of preventing these complaints of sectarian harassment than the issuing of written communications. In the circumstances, the tribunal finds that the respondent’s failure to speak to the workforce about the Declaration and about how it intended to implement it and how it would not tolerate any sectarian harassment as a result of it amounted to a failure to take such reasonably practicable steps...In the absence of a “hands on” management approach, the tribunal finds in the context of this case that it is not surprising that the sectarian harassment of the applicant persisted unabated...”

Secure and demonstrate the support of the workforce

- 5.16 It is important for employers, their workforces and their respective workforces' trade union(s) to jointly participate in the development of a harassment policy. This can be achieved through effective consultation when the policy is being developed.
- 5.17 It is also important for employers and their respective workforces' trade union(s) to publicly demonstrate that their commitment to promoting a good and harmonious working environment is jointly held. A practical way of doing this is for an employer and the respective workforce trade union(s) to state their commitment by issuing a *Joint Declaration of Protection*. Further information on how to do this was provided above in paragraphs 4.10 to 4.13 of Chapter 4.

Further Information

- 5.18 The Equality Commission and the Labour Relations Agency have jointly published a practical guidance book that addresses the subject of preventing harassment in much more detail than can be covered in this Guide. This publication, which is entitled **Harassment & Bullying in the Workplace** [2006], would be particularly useful to employers for training purposes and as a source of good practice advice to managers in dealing with complaints of harassment. It may be downloaded from the Commission's website.
- 5.19 Employers may obtain further information and advice from the Equality Commission in relation to any of the issues addressed in this Chapter; such as how to develop a harassment policy or a Joint Declaration of Protection.

6.1 This chapter deals exclusively with the key duties imposed on employers by *Part VII of the Fair Employment & Treatment (NI) Order 1998* (“FETO”).

Purpose of the key duties

6.2 The duties are primarily concerned with promoting and securing equality of opportunity and *fair participation* in employment for members of the Protestant community in Northern Ireland and members of the Roman Catholic community in Northern Ireland.

6.3 The term *fair participation* is discussed below in paragraphs 6.29 to 6.33 of this chapter.

The 6 key duties

6.4 The 6 key duties which relevant employers are required to comply with are as follows:

- (a) to register with the Equality Commission;
- (b) to monitor the *community background* composition of the workforce;
- (c) to submit annual monitoring returns to the Equality Commission;
- (d) to conduct periodic reviews of the composition of the workforce and of employment practices (“Article 55 reviews”);
- (e) to have regard to the Fair Employment Code of Practice when conducting these reviews; and
- (f) to take affirmative action, where it is reasonable and appropriate to do so, and to consider setting goals and timetables.

6.5 These duties are explained in further detail below. Further information may be obtained from the Equality Commission.

THE DUTY TO REGISTER WITH THE EQUALITY COMMISSION

6.6 The first of the key duties is the duty to register with the Equality Commission.

6.7 An employer is required to register with the Commission if he or she meets one of the following conditions:

Public authority employers: Public authorities who are specified in the *Fair Employment (Specification of Public Authorities) Order (NI) 2004* (as amended) are automatically treated as registered with the Commission.

All other employers (i.e. private, voluntary and community sectors) Employers who are not specified public authorities are required to register with the Commission if, at the end of any week, they employed more than 10 employees in Northern Ireland. For this purpose the employer should only count those employees who worked for 16 or more hours per week.

6.8 When a private, voluntary or community sector employer meets the employee threshold for registering, he or she must submit an application to register to the Commission within one month.

6.9 Registering with the Commission is easy and may be done in one of two ways-

Online method of registering

An employer may register through the Commission's website by completing and submitting an online registration form.

Alternative method of registering

An employer may also register by simply writing a letter to the Equality Commission setting out the following details:

- (a) the employer's full name;
- (b) the employer's registered address;
- (c) the addresses of the employer's place(s) of business in Northern Ireland (if different from (b));
- (d) a brief description of the nature of the business;
- (e) the number of employees employed in Northern Ireland who worked 16 or more hours per week on the date of the application for registration.

The letter should be sent to:

The Compliance Manager
 Equality Commission for Northern Ireland
 Equality House, 7 – 9 Shaftesbury Square
 Belfast, BT2 7DP

Registering a change of business ownership

6.10 If a concern is already registered with the Commission and if its ownership is subsequently transferred to another person or organisation, the new owner must apply to the Equality Commission for his or her name and address to be entered in the register.

6.11 To register the change of ownership, the new owner should simply write to the Commission's Compliance Manager at the address given in paragraph 6.9 above

THE DUTY TO MONITOR THE COMPOSITION OF THE WORKFORCE

6.12 The second of the key duties requires all registered employers to monitor the composition of their workforce in terms of *community background* and *sex*.

Which individuals should be monitored?

6.13 All registered employers are required to monitor their:

- employees;
- job applicants;
- appointees;
- apprentices.

In addition, private, voluntary and community sector employers who employ more than 250 employees, and all specified public authorities, are required to monitor the following persons too:

- promotees;
- leavers.

6.14 Although private, voluntary and community sector employers who employ less than 250 employees are not obliged by the Fair Employment legislation to monitor their promotees and leavers, the Equality Commission recommends that all employers should monitor these categories anyway. It is good practice for employers to monitor and review all their employment practices, including those that have an impact on employees' opportunities for promotion, and those which cause or contribute to the termination of employees' contracts of employment. Consequently, it is also good practice to monitor other activities too, such as employees who apply for and obtain training opportunities; employees who are subjected to disciplinary procedures; employees who lodge grievances or complaints.

Use a monitoring questionnaire

6.15 The community background of an individual refers to whether that individual has been treated as belonging to the Protestant community in Northern Ireland, or the Roman Catholic community in Northern Ireland, or neither of these two communities.

6.16 The principal method for determining community background is to use a questionnaire that directly asks individuals to specify which community they belong to. This is called the Direct Question method of making a determination.

Monitoring the racial group of job applicants and employees

6.17 The population of Northern Ireland is now more ethnically diverse than it was when the Fair Employment legislation was initially enacted. The Equality Commission recommends, as a matter of good practice, that employers should

also monitor the *racial group* of job applicants and employees. The Commission recommends that employers use the Model Equal Opportunities Monitoring Form which is set out in Appendix 10 to monitor job applicants and employees who have not previously been asked to submit this information.

Model Monitoring Forms

6.18 The Model Monitoring Form that is set out in Appendix 10, as well as enabling employers to comply with their duties under the Fair Employment legislation, will also assist them to monitor the composition of their workforces in respect of other characteristics such as race, disability, age and sexual orientation. Further information on monitoring these other equality categories is given in the next Chapter of the Guide.

6.19 Where a private, voluntary or community sector employer chooses not to monitor any equality characteristics other than the obligatory ones of *community background* and *sex*, that employer should at least use a form that complies with the Model Fair Employment Monitoring Form set out in Appendix 11.

Further guidance on Fair Employment monitoring

6.20 The Commission has published a practical guidance book that addresses the subject of Fair Employment monitoring in much more detail than can be covered in this Guide. The guidance is entitled **A Step by Step Guide to Monitoring** and may be downloaded from the Commission's website.

THE DUTY TO SUBMIT AN ANNUAL MONITORING RETURN

6.21 The third of the key duties requires all registered employers to prepare and submit an annual monitoring return to the Equality Commission. A failure to submit a return is a criminal offence, as is a failure to submit one within the prescribed period.

6.22 At the relevant time each year, the Equality Commission will send to every registered employer a pro-forma monitoring return, together with guidance on how to complete it. This guidance will also set out the prescribed period for completing the form and information on how to contact the Commission to obtain further advice and assistance.

THE DUTY TO CONDUCT PERIODIC REVIEWS

6.23 The fourth of the key duties requires all registered employers to conduct periodic reviews of the composition of their workforces and of their employment practices for the purposes of determining whether members of the Protestant and Roman Catholic communities are enjoying, and are likely to continue to enjoy, *fair participation* in employment in each employer's concern.

6.24 These reviews, which are commonly known as *Article 55 reviews*, must be conducted at least once every three years.

- 6.25 At the relevant time for completing a review, the Equality Commission will send to each employer a pro-forma review template, together with guidance on how to complete it. This guidance will also set out the prescribed period for completing the review and information on how to contact the Commission to obtain further advice and assistance.
- 6.26 The precise way in which a particular employer carries out a review will depend on his or her own individual circumstances, although in both large and small organisations the review will have to be conducted in a formal manner with a written report being prepared. The pro-forma review template supplied by the Commission will assist most employers in this regard.
- 6.27 Unlike the annual monitoring returns there is no requirement on employers to submit their Article 55 review report to the Commission by a specific date. The Equality Commission has a duty to ensure that employers comply with their legal obligation to carry out Article 55 reviews and therefore requests employers to periodically submit their reviews to the Commission. It is therefore very important that employers complete their reviews within the required period and that it is made available on request to the Equality Commission.

THE DUTY TO HAVE REGARD TO THE FAIR EMPLOYMENT CODE OF PRACTICE

- 6.28 The fifth of the key duties that FETO imposes on employers is that when they carry out their Article 55 reviews, they must have regard to the advice contained in the *Fair Employment Code of Practice*. That advice is too lengthy to be set out in this Guide and the Commission recommends that employers consult the Code directly at the relevant time. The Code may be downloaded from the Commission's website.

Determine whether there is fair participation

- 6.29 The primary purpose of an Article 55 review is to enable the employer to determine whether he or she is providing, or is likely to continue to provide, *fair participation* in employment to members of the Protestant and Roman Catholic communities.
- 6.30 The term *fair participation* is not defined by FETO, but the Fair Employment Code of Practice provides the following descriptions of the factors that employers are required to consider-

Fair Employment Code of Practice (extracts)

“[a] determination of what is fair depends on the circumstances of each particular case i.e. each specific employment situation. The term means that employers should be working continuously, as an integral part of their personnel and management functions – and especially in consultation with the [Equality] Commission - to ensure that equality of opportunity in their employment is offered to [members of the Protestant and Roman Catholic] communities. It also means that where such equality of opportunity is not being provided employers should be making sustained efforts to promote it

through affirmative action measures and, if appropriate, the setting of goals and timetables. It does not mean that every job, occupation or position in every undertaking throughout Northern Ireland must reflect the proportionate distribution of Protestants and Roman Catholics in the province. That is unrealistic.” [see paragraph 1.3.1 of the Code]

“It is not possible to prescribe a rigid and predetermined level of participation which should be achieved generally by all employers. Obviously what is fair will depend very much on the circumstances of each particular and individual case. What is required is that you afford opportunities to both communities and, where a community is under-represented, you take affirmative action steps to remedy that under-representation. Accordingly you must ask yourself whether, in the light of all the factors known to you – and including advice from the [Equality] Commission – the composition of the workforce and of your recent recruits as revealed by monitoring is broadly in line with what might reasonably be expected. If it is out of line then you must ask yourself why this is so and what affirmative action is needed in order to bring about fair participation by both Protestants and Roman Catholics.” [see paragraph 6.5.7 of the Code]

- 6.31 In addition to examining whether one or other of the Protestant or Roman Catholic communities are under-represented amongst the employees in a workforce, another indicator that fair participation is not being provided to one particular community may be, for example, that the numbers of applications for employment from members of that community are regularly lower than the numbers that ought to be expected when compared to the community background composition of the available workforce in the appropriate catchment area. A *catchment area* refers to the geographical area from within which an employer would normally expect to recruit for the particular job in question and the proportionate distribution of the Protestant and Roman Catholic communities in that area.
- 6.32 Also, another indicator that fair participation may not exist may be that the proportion of appointees from a particular community are regularly lower than the proportion of applicants from that community. Or, in other words, the success rates for job applicants from that community are regularly lower than the success rates enjoyed by job applicants from the other community.
- 6.33 Furthermore, where an employer has, in addition to *community background* data, also collected monitoring data on the *racial groups* of his or her job applicants and employees, he or she should analyse all of this information to ensure that the review reaches valid conclusions about the provision of fair participation in the workforce and whether there is a need to take affirmative action.

THE DUTY TO TAKE AFFIRMATIVE ACTION

- 6.34 The sixth, and final, key duty is triggered when an employer’s Article 55 review indicates that he or she is not providing, or is not likely to continue to provide, fair participation.

- 6.35 In this situation, the employer must then determine what affirmative action, if any, would be reasonable or appropriate. The employer must also consider whether it is practicable to set goals and timetables for the progress towards fair participation that can reasonably be expected to be made by the under-represented community concerned. Goals and timetables are also a means of measuring any changes that occur as a result of the affirmative action that is taken. If it is practicable to set such goals and timetables, then the employer must do so.
- 6.36 Further information and guidance on taking affirmative action is provided in Chapter 8 of this Guide.

Introduction

7.1 This chapter is addressed to employers who are not public authorities (i.e. employers in the private, community and voluntary sectors). It is only concerned with equal opportunities monitoring in relation to the equality grounds other than *community background*. The latter subject was exclusively addressed in Chapter 6 of this Guide.

Public authority employers

7.2 The Equality Commission has published separate guidance for public authorities on the subject of monitoring for Section 75 purposes. Public authority employers should have primary regard to that publication. The guidance book is entitled **Monitoring Guidance for Use by Public Authorities** and may be downloaded from the Commission's website.

WHY SHOULD EMPLOYERS CONDUCT EQUAL OPPORTUNITIES MONITORING?

Duty to monitor the sex of employees and job applicants

7.3 Employers who are registered with the Equality Commission for the purposes of the *Fair Employment* legislation are already required by that law to monitor the sex of their job applicants and employees.

Monitoring other characteristics

7.4 Employers are not required by law to monitor the composition of their workforces on the remaining statutory equality grounds: namely, married or civil partnership status; race; disability; sexual orientation and age. However, the Equality Commission recommends that employers monitor these characteristics too, for the reasons given below.

The reasons for monitoring

7.5 Equal Opportunities monitoring is an important means of demonstrating and implementing a commitment to promoting equality of opportunity. Monitoring is the best way to determine the success or otherwise of policies and practices adopted for the purpose of maintaining or promoting equality or opportunity. Monitoring can assist employers to identify barriers that hinder access to employment and career development for certain groups of people. Furthermore, monitoring can assist employers to develop solutions, such as positive action plans, or alternative policies and practices, and can provide the evidential basis for justifying the taking of lawful positive action measures.

7.6 The codes of practice issued under the sex equality, race equality and disability equality legislation each recommend that employers should conduct equal

opportunities monitoring in these subject areas. The good practice guidance publications issued by the Equality Commission in respect of the equality grounds of sexual orientation equality and age equality also make the same recommendation in respect of those subject areas.

Draft a policy on monitoring

7.7 The Equality Commission recommends that employers should, for the reasons set out in the preceding paragraphs, develop and implement a policy on conducting equal opportunities monitoring.

Establish an environment of trust

7.8 Employers should note that particular sensitivities are associated with several of the equality grounds and that these can hinder the effective monitoring of those grounds. For example, some individuals may be reluctant to respond openly and honestly to questions which they perceive to be of an extremely personal nature. The grounds of *sexual orientation, civil partnership status and disability* are particularly affected by these sensitivities.

7.9 To address these concerns, an employer should establish and maintain an environment of trust which acknowledges that the collection of personal data is a highly sensitive issue and that it will be managed in a highly sensitive and secure way. Thus, an employer should openly explain his or her reasons for monitoring and should establish and maintain data protection safeguards.

7.10 It is good practice for employers to highlight the existence of their data protection safeguards as this may encourage individuals to answer equal opportunities questionnaires. For example, employers should assure individuals that:

- it is not compulsory for them to answer such questionnaires;
- that their answers to such questionnaires will not be used to make any unlawful decisions affecting them, such as decisions relating to recruitment and selection, or dismissal; and
- that their answers will be held in the strictest confidence.

7.11 Furthermore, employers should ensure that any information which they retain is accurate and, where necessary, kept up to date.

7.12 The Information Commissioner's Office ("ICO") is the public authority responsible for enforcing the *Data Protection Act* and is the best source of information and guidance about it and about taking steps to put in place data protection safeguards. The ICO has published a code of practice for employers called the *Employment Practices Code* together with supplementary guidance notes and employers should have regard to these. The publications can be downloaded from the website of the ICO.

Information Commissioner's website: www.ico.gov.uk

Monitoring methodology

7.13 It is open to employers to adopt a method of monitoring which is best suited to their needs and circumstances, but whichever method is adopted, it should be effective as a means of promoting equal opportunities. The following factors should be considered:

Which individuals should be monitored?

7.14 When monitoring their workforces as required by the *Fair Employment* legislation, all registered employers are already required to monitor the sex of their-

- employees;
- job applicants;
- appointees;
- apprentices.

In addition, registered employers who employ more than 250 employees are also required to monitor the sex of their

- promotees; and
- leavers.

7.15 Consequently, given that many employers will already have systems to collect gender data about these categories of persons, the Commission recommends that when monitoring the other equality grounds employers should collect information regarding each of these six categories too.

7.16 The Commission also recommends that employers consider monitoring other categories too; such as, employees who apply for and obtain training opportunities, or family-friendly working arrangements or who make requests to work beyond normal retirement age.

Monitoring the impacts of policies, practices and procedures

7.17 Some of the information described above, such as that for *employees*, is essentially a simple “head count” of the numbers of men and women who are employed in an organisation. It is useful information, but it also has limitations. For example, it does not fully assist employers to assess the impacts of particular policies, practices and procedures.

7.18 In comparison, information on *job applicants* and *appointees* and *promotees* is more than a mere “head count”. This information reveals the composition of particular groups at separate stages of the recruitment and selection process. It can, therefore, assist employers to assess the impacts of their recruitment and selection policies, practices and procedures.

7.19 Employers should note the limitations of “head count” information and in setting up their arrangements for monitoring should consider how they might also monitor processes and the impacts of particular policies, practices and procedures.

Use a monitoring questionnaire

- 7.20 Most employers, job applicants and employees will be familiar with the use of monitoring questionnaires for collecting information about *community background* and sex. A monitoring questionnaire is also a suitable and effective method of obtaining *quantitative* monitoring information about the other personal attributes of job applicants and employees.
- 7.21 The Equality Commission recommends that employers use the Model Equal Opportunities Monitoring Form which is set out in Appendix 10 as a template to draft their own questionnaires. This form incorporates questions that will satisfactorily enable employers to comply with their duties under the *Fair Employment* legislation, and will also assist employers to monitor the composition of their workforces in respect of other characteristics such as race, disability, age and sexual orientation.
- 7.22 The Model Monitoring Form also incorporates guidance notes that explain the rationale for monitoring and gives assurances about data protection safeguards and about how the information will be used. The Commission recommends that employers should incorporate similar guidance notes in their own forms.

Collect qualitative information

- 7.23 Using monitoring questionnaires of the kind set out in Appendix 10 is an appropriate method of collecting *quantitative* monitoring data about job applicants and employees. However, such questionnaires are unlikely to reveal any *qualitative* information about staff attitudes and opinions.
- 7.24 Such opinions can also be a useful source of information about the provision of equality of opportunity in workplaces. It is, therefore, good practice for employers to make arrangements to collect such information. A relatively easy method of doing this is through *exit interviews*; that is, interviewing staff before they leave their employment to obtain information about their reasons for leaving and for their views about the provision of equality of opportunity in the workplace. Another method of doing this is to conduct staff surveys of the entire workforce. This could be done periodically; for example, every three years, although it is ultimately up to each employer to decide what is appropriate for their own needs and circumstances.

Re-surveying

- 7.25 It was noted above at paragraph 7.11 that any monitoring information that is retained by employers must be accurate and, where necessary, kept up to date.
- 7.26 For many individuals, their personal or “equality” characteristics may change over time. For example, some employees may develop disabilities with the passage of time. Or, a married employee’s marriage may end due to divorce or the death of his or her spouse. Or, an employee’s dependant children will grow up and may cease to be dependants, or the employee may become a carer for a disabled spouse or relative.

7.27 Consequently, it is good practice for employers to re-survey employees periodically in order to maintain the accuracy of their monitoring databases. It will ultimately be up to each employer to determine when to re-survey.

Monitoring sex, marital status and dependency status

7.28 When collecting information about sex, it is also good practice if the employer can cross-reference the data to information about employees' marital status or whether they have dependents or not. This is a useful analytical tool. For example, an analysis may reveal that married women who have dependents are more likely to work in lower graded jobs than married men who have dependents.

Monitoring racial group

7.29 When monitoring the racial group of job applicants and employees, employers should also monitor nationality or national origins too. By doing so, they will obtain a more complete and meaningful profile of the racial composition of their workforces and applicant pools.

Monitoring disability

7.30 It is good practice to collect information about the nature of disabled persons' disabilities. The Model Monitoring Form in Appendix 10 includes a suitable list of categories.

7.31 On its own, this information may be of little use. Consequently, employers should also analyse the data by cross-referencing it with other information; such as data on job applicants and appointees, or data on requests for reasonable adjustments, or information from staff surveys or other consultations. Such analyses may help to reveal whether people with particular types of disability encounter more or different barriers to enjoying equality of opportunity than other persons.

7.32 It is also good practice to monitor the types of reasonable adjustments that the employer has made for disabled job applicants and employees and to review their effectiveness.

Monitoring sexual orientation and civil partnership status

7.33 These are particularly sensitive issues and employers should be particularly sensitive when collecting and handling relevant data.

7.34 Where employers ask for and collect data about *marital status*, they should also ask for and collect data about *civil partnership status*. The Model Monitoring Form in Appendix 10 includes a suitable question.

7.35 Employers may find that their initial attempt to monitor *sexual orientation* will produce little, or no, reliable quantitative data. Employers may find, however, that building an effective environment of trust will take time and that once established it will be possible to obtain more reliable data about sexual orientation. Therefore, employers should consider conducting periodic re-surveys of this category; for example, when carrying out the periodic re-surveys recommended in paragraphs 7.25 to 7.27 above.

Reviewing workforce composition and employment practices

7.36 Monitoring information should not be collected and then stored away without fully considering the data and taking appropriate action. Employers must use the information by analysing and reviewing it for the purpose of promoting equality of opportunity.

7.37 It is ultimately up to each employer to determine how and when he or she will conduct reviews. The precise way in which a particular employer will do this will depend on his or her own individual circumstances, but there are two general methods.

Reviewing the impacts of policies, practices and procedures

7.38 This type of review focuses on measuring the equality impacts of a particular set of policies, practices or procedures; for example, a recruitment and selection procedure, or a flexible working policy.

7.39 An employer can be flexible in how he or she conducts such a review. For example, a review could focus on examining how a policy or procedure affects persons under only one of the statutory equality grounds; for example, men and women. Alternatively, a wider review could examine how the same policy or procedure affects persons across more than one, or all, of the equality grounds.

Comprehensive and periodic equality reviews

7.40 The second type of review involves doing a comprehensive analysis of the composition of the employer's workforce and of his or her employment practices on a periodic basis; for example, every three years.

7.41 It is a useful method of making a comprehensive assessment of the provision of equal opportunities in a workforce at a particular point in time. When conducted periodically it is also useful as a means of measuring how the provision of equal opportunities has changed over time.

7.42 The methodology that is conventionally used by registered employers to comply with their periodic review duty, i.e. Article 55 reviews, under the *Fair Employment* legislation is an appropriate starting point for considering how to conduct this type of comprehensive review across the other equality grounds.

7.43 The Equality Commission has published a pro-forma review template for use by employers when conducting Article 55 reviews. The template gives guidance to employers on how to review the composition of job applicant pools and workforces. It gives guidance on how to review workforce flows for the entire recruitment process and for the employment process from appointments through to promotions, transfers, training and to termination of employment. It also, for example, provides blank tables relating to the *community background* of employees, applicants, appointees, promotees and leavers which employers can complete with relevant data and which are useful for identifying patterns and trends.

7.44 The Commission considers that this template, with appropriate modifications, could be a useful Guide to assist employers to review workforce compositions and employment practices across the other equality grounds.

Review findings: Equality of opportunity and positive action

7.45 The primary purpose of a review is to enable the employer to determine whether he or she is providing, or is likely to continue to provide, equality of opportunity in employment to members of the particular “equality groups” that are the subject of the review; for example, men and women.

7.46 Where an employer’s review indicates that he or she is not providing or is not likely to continue to provide equality of opportunity, the employer should determine what positive action, if any, would be reasonable or appropriate.

Further Information

7.47 Employers may obtain guidance from the Equality Commission when conducting equal opportunities monitoring and reviews. Further guidance on taking positive action is provided in Chapter 8 of this Guide.

Why should employers take Affirmative or Positive Action?

8.1 Taking lawful affirmative or positive action is necessary when implementing a commitment to promoting equality of opportunity or fair participation in employment. Such action is an important means by which an employer can remove the barriers that hinder access to employment and employment development for certain groups of people.

Taking action in practice

8.2 Taking affirmative or positive action entails the adoption of practices that promote equality of opportunity and which encourage fair participation. It may also entail the modification or abandonment of practices that act as barriers to the promotion of equality of opportunity or fair participation. Some measures are always lawful and may be taken at any time, whilst some other measures are only lawful if certain conditions apply. These distinctions are described further below.

8.3 It is good practice to begin the process by developing a written affirmative or positive action programme, or an Employment Equality Plan or Diversity Plan. This should describe the actions that the employer proposes to take. It will assist employers to set their priorities and to focus their attentions, resources and efforts. Further information about developing an Employment Equality Plan or Diversity Plan is provided in Chapter 4.

8.4 An employer should monitor and review the operation of his or her affirmative or positive action programme in the course of his or her wider equal opportunities monitoring and review practices.

General good practice measures

8.5 Many of the practices advocated in this Guide can be described as affirmative or positive action measures, even though they may have other uses and benefits too. Measures such as these can be taken at any time.

8.6 For example, having a systematic and objective recruitment procedure will assist an employer to find the best person for the job and it will also promote equality of opportunity generally. Furthermore, having flexible working practices may encourage staff retention and cut down on recruitment costs and it is also likely to promote equality of opportunity for women, people with dependents and disabled people.

Outreach measures

8.7 Some other forms of affirmative or positive action consist of taking proactive steps to reach out to under-represented groups, such as encouraging them to apply for job or training vacancies in a particular workplace through the use of “welcoming statements” in job advertisements.

- 8.8 There is a range of such “outreach” affirmative or positive action measures which employers may lawfully take so long as certain conditions are satisfied. Further information about these conditions is given in the equality codes of practice and other publications issued by the Equality Commission, and further advice may be obtained from the Commission directly.
- 8.9 A good time to determine whether these conditions apply is following the completion of an Article 55 review, or an equal opportunities review of the kind discussed in Chapter 7.
- 8.10 The range of the lawful “outreach” measures which employers may take is as follows:
- Adding “welcoming” statements to job or training advertisements to encourage members of particular under-represented groups to apply;
 - Providing access to facilities for training to members of particular under-represented groups;
 - An employer who applies this job criterion will have a statutory defence against any claims of discrimination on the grounds of religious or similar philosophical belief, political opinion or race that may arise from its use.
 - Placing job advertisements in specialist media which are associated with particular under-represented groups;
 - Developing links with influential individuals, community groups, schools, job clubs, voluntary organisations and other agencies associated with the particular under-represented groups;
 - Inviting the representatives of under-represented groups to promotional events;
 - Sponsoring community, sporting and youth events associated with particular under-represented groups;
 - Creating networks with other employers for the purpose of taking joint positive or affirmative action.

Setting goals and timetables

- 8.11 When taking affirmative action after completing an Article 55 review under the *Fair Employment* legislation, employers must consider whether it is practicable to set goals and timetables for the progress towards fair participation that can reasonably be expected to be made by the under-represented community concerned. If it is practicable to set such goals and timetables, then the employer must do so.
- 8.12 When taking positive action after completing an equal opportunities review of the kind discussed in Chapter 7, it is good practice for employers to set goals and timetables for the progress towards securing equality of opportunity that can reasonably be expected to be made by the under-represented group concerned.

Positive action and the Disability Discrimination Act 1995

- 8.13 The *Disability Discrimination Act 1995* allows employers to take a wider range of positive action measures than would be permissible under the other anti-discrimination laws.
- 8.14 Under the Disability Discrimination Act it is lawful to treat disabled persons in general more favourably than persons who are not disabled. Therefore, it would be lawful for an employer to reserve a job vacancy for disabled persons to the exclusion of persons who are not disabled. For the same reason, employers could lawfully operate a “guaranteed interview scheme” for disabled job applicants.
- 8.15 However, employers must still exercise some caution because it would be unlawful for an employer to treat persons with certain types of disability more favourably than persons who have other types of disability.
- 8.16 For example, it is likely to amount to unlawful disability discrimination for an employer to reserve a job vacancy for persons who have physical or sensory disabilities but to exclude from consideration persons who have mental health disabilities. There are exceptions to this rule in certain circumstances in regard to employment in charitable organisations and in organisations which provide “supported employment”. Employers who wish to rely on these exceptions should ensure that the statutory conditions for applying them are satisfied.

The reasonable adjustment duty

- 8.17 The Disability Discrimination Act imposes a reasonable adjustment duty on employers in certain circumstances. These circumstances normally occur where a disabled job applicant or employee has been placed, or would be placed, at a substantial disadvantage compared to other people who are not disabled by any provision, criterion or practice applied by an employer, or by the physical features of the employer’s premises.
- 8.18 For example, an employer makes all job applicants take a written selection test which lasts for 45 minutes. If a job applicant who is disabled due to dyslexia would be unable to complete the test within the 45 minutes as a result of his or her disability, then he or she would be placed at a substantial disadvantage compared to the other, non-disabled, job applicants who are taking the test.
- 8.19 In such a situation, the employer will be under a duty to make reasonable adjustments to the provision, criterion, practice or physical feature that is causing, or would cause, the substantial disadvantage. This may mean changing it in some way; or abandoning it in order to prevent the substantial disadvantage occurring.
- 8.20 In the example given in paragraph 8.18, the reasonable adjustment duty might require the employer to extend the time period for taking the test to 60 minutes, or to some other period. The extension of time only has to be made for the disabled person concerned and not for all job applicants in general. Moreover, the duty might conceivably require the employer to allow the disabled job applicant to proceed to the next stage of the selection process without taking

the selection test. The extent of the duty depends on what is reasonable in the context of the particular circumstances of the case.

8.21 It is important to note, however, that the reason the employer would be making the adjustments in cases such as these is to ensure that he or she complies with a statutory duty; namely the duty to make reasonable adjustments. A failure to comply with this duty constitutes an act of disability discrimination.

8.22 Strictly speaking, therefore, taking action to comply with the reasonable adjustment duty is not voluntary positive action. It is action that is required to avoid committing an act of disability discrimination.

8.23 On the other hand, and staying with the same example, an act of voluntary positive action would be where the employer makes all job applicants, except those who are disabled, take the selection test. In such a case, the employer does not enquire whether disabled applicants could take the test with or without difficulties related to their disabilities. The employer is merely giving all disabled applicants a pass through that stage of the selection process. This may not be, strictly speaking, a reasonable adjustment but it is lawful positive action because it does not unlawfully discriminate against persons who are not disabled.

8.24 A common example of a similar lawful positive action measure is a “guaranteed interview scheme” under which an employer guarantees a job interview to every disabled applicant who meets the essential job criteria.

Further Information

8.25 Where an employer needs advice about the legality of any proposed positive or affirmative action measures, he or she should contact the Equality Commission.

- 9.1 The conduct of an employer’s business or activity relies on communication between managers and employees and between employees. To function effectively, all businesses and other organisations require information and ideas to be shared and for instructions to be issued and received.
- 9.2 Having effective and inclusive communication practices will also help to promote equality of opportunity. Therefore, an employer who is committed to promoting equality of opportunity should endeavour to ensure that his or her communications practices are effective and inclusive.
- 9.3 If information about employment rights, employment opportunities and developments, or workplace policies and practices is provided in too narrow a range of media, formats or languages it may put job seekers and employees who cannot access that information or readily understand it, or can only do so with difficulty, at a substantial disadvantage compared to others and it may constitute discrimination on one or more of the equality grounds.
- 9.4 Some persons are particularly vulnerable to suffering disadvantages of this kind as a result of ineffective and exclusive communication practices. These persons are:
- individuals with sensory, communication or learning disabilities;
 - migrant workers and members of the ethnic minority communities for whom English is not their first language;
 - employees who are absent from work for health reasons or pregnancy or maternity leave
- 9.5 Employers should particularly take note that the duty under the *Disability Discrimination Act 1995* to make reasonable adjustments for disabled job applicants and employees frequently impinges on issues relating to communications.
- 9.6 To further illustrate the importance of this subject, Chapters 4 and 5 of this Guide cite case law examples in which the effectiveness of communications about important employment policies partially determined the outcome of the cases. In one case, the employer’s effective communication of its equal opportunities policy helped it to establish a “reasonably practicable steps” defence in order to successfully defend itself against a claim of sexual harassment.⁴ In another case, the employer’s failure to effectively communicate its anti-harassment policy was central to the Fair Employment Tribunal’s finding that the employer had failed to establish a “reasonably practicable steps” defence to a complaint of sectarian harassment.⁵

4 See the example on page 11 about the case of **A –v- B & C**.

5 See the example on pages 15 about the case of **Brannigan –v- Belfast City Council**.

- 9.7 Consequently, it is good practice for employers to review or audit their communications practices in order to identify actual or potential barriers to effective and inclusive communication and to take reasonable steps to remove them.
- 9.8 Employers should consider adopting measures which may, depending on the particular circumstances of the case, be appropriate and reasonable to take; examples may include:
- appointing a named individual(s) to deal with communications issues as they arise;
 - conducting meetings in rooms which are readily accessible for all attendees and which are fitted with suitable lighting and acoustics, including audio loop systems;
 - providing visually-impaired persons with important job-related documentation in a range of multimedia formats, font sizes or Braille;⁶
 - providing persons who have learning disabilities with important job-related documentation in “easy-to-read” formats, or to take the necessary time to verbally explain the meaning of such documents or to give instructions, and to do so in terms that they will find easier to understand;
 - providing persons for whom English is not their first language with important job-related documentation in their first language(s);
 - providing migrant workers with ‘welcome’ packs containing useful information in their first language(s); and
 - ensuring that workers who are absent from work, for whatever reason, are kept informed about workplace developments and employment, promotion and training opportunities.

⁶ Important documentation is likely to include written statements of terms and conditions of employment; employees’ handbooks; equal opportunities and harassment policies; other employment policies that confer benefits and entitlements; health and safety notices; advertisements for promotion and training opportunities.

Develop and implement a systematic, fair and objective recruitment and selection procedure

- 10.1 Recruiting and selecting staff is one of the most important activities in which an employer can demonstrate and implement a commitment to promoting equality of opportunity in employment. The most effective way in which an employer can consistently achieve this goal is by developing a systematic, fair and objective recruitment and selection procedure and by implementing it in practice.
- 10.2 Such procedures and practices will significantly help employers to reduce the possibility that unlawful discrimination may occur, and will increase the likelihood that the best and most suitable persons will be appointed. Such procedures are also a very effective method of taking affirmative or positive action.
- 10.3 When hearing discrimination complaints, the industrial tribunals and the Fair Employment Tribunal invariably attach significant weight to evidence which demonstrates that employers properly followed systematic and objective procedures. The following case law example illustrates this point:

Re Limavady Borough Council's application [High Court, 1993]

In this case the Fair Employment Tribunal upheld a complaint of religious discrimination in respect of the Council's conduct of a recruitment exercise for the post of Chief Technical Officer. The Council sought to appeal the decision but their application was dismissed by the High Court. In that Court, the judge made the following comments:

“Procedural incompetence does not necessarily connote discrimination, and it would be wrong for any Tribunal of fact to assume without examination that every defect in procedure is an indicator of bias...”

However, the judge added:

“An appointer who can show that he followed the appointing procedures specified in the Code [of Practice] puts himself in a better position to maintain that he appointed the successful candidate for the right reasons in a properly-conducted interview in which each candidate has a fair chance and so to rebut suggestions of discrimination. Conversely, if he neglects to follow procedures which are designed to further the object of achieving procedural fairness, it makes it more difficult for an appointer to demonstrate the equitable nature of his consideration of the candidates”.

Develop and implement a written policy and procedure

10.4 One of the best ways of ensuring that objective and systemic procedures and practices are applied fairly and consistently to all persons is to develop and implement a written recruitment and selection policy and procedure.

10.5 The actual policies, practices and procedures which employers may adopt and their degree of sophistication will vary from employer to employer, but in general all appropriate policies and practices are likely to consist of, or address, the issues listed in paragraph 10.7 below.

Provide appropriate training to key staff

10.6 An employer should provide appropriate training to all managers and any other persons who will, or may, have a role in implementing the recruitment and selection policy to ensure that they:

- understand their responsibilities under the employer's equal opportunities and recruitment and selection policies;
- understand their and the employer's responsibilities under current equality legislation;
- understand the guidance set out in the equality codes of practice and other guidance publications issued by the Equality Commission.

10.7 The remainder of this Chapter is split into sections reflecting the most common components of recruitment and selection processes. In each section good practice guidance on each of these topics is provided. The components are as follows-

Chapter section	Issue
10A	Job descriptions
10B	Personnel specifications
10C	Recruitment advertising
10D	The application process
10E	Shortlisting & Interviewing
10F	Selection testing
10G	Medical questionnaires & assessments
10H	References
10I	Migrant Workers
10J	Considering applications from former offenders
10K	Reserve lists

10A

Job Descriptions

Draft job descriptions for all jobs

10A.1 For every post employers should draft written job descriptions which accurately describe the genuine essential duties of the posts.

Consider flexible working arrangements

10A.2 The provision of flexible working arrangements will promote equality of opportunity for many employees, particularly for women, and will reduce the possibility that disability-related discrimination and indirect forms of discrimination might arise. Therefore, it is good practice for employers to consider how to allow for flexible working arrangements when determining how a job will be performed and in developing the corresponding job description. Further guidance on providing flexible working arrangements is set out in Chapter 14 of this Guide.

Consider making reasonable adjustments

10A.3 Some job-seekers and employees may be disabled persons. When considering how a particular job will be performed and when developing the corresponding job description, employers should ask themselves whether a proposed job performance method will be likely to result in some classes of disabled persons being unable to perform the job in question, or whether they will only be able to do it with difficulty. If this result appears likely, then the employers should consider whether there are alternative ways to perform the job. If it would be reasonable to make arrangements for the job to be performed in these alternative ways, then the employers should make them.

10A.4 By taking such considerations into account during the process of developing jobs and their corresponding job descriptions, and by making any relevant adjustments or arrangements at the early developmental stage, employers will significantly promote equality of opportunity for disabled job-seekers, and will significantly reduce the potential that disability discrimination might arise later.

Genuine occupational requirements

10A.5 Where the genuine nature of a particular job requires that it be carried out by a person who has a particular sex, or religious or similar philosophical belief, or political opinion, or race, or sexual orientation, or age then an employer may be able to rely on certain statutory exceptions in the anti-discrimination laws to reserve the job for persons who have that particular characteristic.

10A.6 Most general forms of employment cannot rely on these statutory exceptions. Some examples of jobs that may rely on them are: ministers of

religion; nurses in single-sex hospital wards, provided certain conditions are satisfied; waiting staff in ethnically-themed restaurants, again provided that certain conditions are satisfied.

- 10A.7 Employers should note that there is nothing arbitrary about making a determination to use a *genuine occupational requirement* exception. An employer who does so must ensure that the conditions laid down in the relevant statutory provisions have been satisfied. Employers who contemplate relying on these exceptions may seek advice from the Equality Commission.

Avoid using discriminatory language

- 10A.8 Job descriptions should be drafted in language that is clear, simple and non-discriminatory.
- 10A.9 Where possible, do not use job titles which have a distinctly male or female connotation. For example, do not use words such as the following:

<i>Waiter</i>	<i>Waitress</i>	<i>Salesman</i>	<i>Salesgirl</i>
<i>Stewardess</i>	<i>Handyman</i>	<i>Craftsman</i>	<i>Foreman</i>
<i>Manageress</i>	<i>Storeman</i>	<i>Matron</i>	<i>Postman</i>
<i>Chairman / Chairwoman</i>		<i>Head Master / Head Mistress</i>	

- 10A.10 Instead, where possible, use job titles that have a gender-neutral connotation. For example, the following words are appropriate:

<i>Waiting Staff</i>	<i>Sales Assistant</i>	<i>Postal Worker</i>
<i>Manager</i>	<i>Stores Person</i>	<i>Supervisor</i>
<i>Chairperson</i>	<i>Nurse Manager</i>	<i>Head Teacher</i>

- 10A.11 Where possible, do not use job titles which have an age-related connotation. The words *Junior* and *Senior* when used in job titles do not usually have an age-related connotation and are generally acceptable. However, there may be exceptions. For example, it may be reasonable to interpret the job title of *Office Junior* as having an age-related connotation as this could reasonably indicate that the employer intends to fill the post with a recent school leaver, or another young person. In this case it would be advisable for an employer to use an alternative job title such as *Office Clerk* or *Administrative Assistant*.

Insert a duty to comply with equality policies

- 10A.12 Employers should include in all job descriptions a duty which requires the post-holders to comply with their employers' equal opportunities and harassment policies and procedures.

Review job descriptions periodically

- 10A.13 Employers should not use the same job descriptions repeatedly year after year in every recruitment exercise for each job. It is good practice to review job descriptions prior to the commencement of recruitment exercises for the

respective posts. In addition, outside of the immediate concerns of particular recruitment exercises, it is good practice to conduct periodic reviews of the job descriptions of current employees.

- 10A.14 In conducting reviews, employers should seek to promote equality of opportunity by taking account of technical or other developments that affect the way the jobs may be performed; or, legal developments affecting employees' rights or which expand the scope of anti-discrimination law; and, to allow for organisational changes, flexible working arrangements and reasonable adjustments.
- 10A.15 Through such reviews, employers should make necessary changes to job descriptions to ensure that they continue to remain relevant to the corresponding jobs.

Draft personnel specifications for all jobs

- 10B.1 Employers should draft written personnel specifications for every post which accurately describe the relevant, non-discriminatory and objectively justifiable requirements to be met by the post-holder.
- 10B.2 When determining the content of a personnel specification, employers should have particular regard to the following matters:
- the contents of the relevant job description;
 - the life and occupational experiences, including those gained outside Northern Ireland, which are genuinely essential and desirable for effectively performing the duties of the post;
 - the educational standards and vocational and other qualifications, including those gained outside Northern Ireland, which are genuinely essential and desirable for effectively performing the duties of the post;
 - the skills which are genuinely essential and desirable for effectively performing the duties of the post;
 - the personal characteristics which are genuinely essential for effectively performing the duties of the post.

Do not set criteria that are unlawfully discriminatory

- 10B.3 Employers should exercise particular caution with criteria which might directly or disproportionately exclude persons who have certain characteristics, or which might discourage such persons from applying for work that they are actually suitably qualified to do. The following paragraphs, 10B.4 to 10B.8, outline some of the factors that employers should consider when setting the job selection criteria.
- 10B.4 Criteria that relate to physical characteristics, such as minimum height or physical fitness requirements, may disproportionately exclude women and disabled persons. If such criteria cannot be objectively justified then they should be abandoned.
- 10B.5 Criteria that consist of vague or abstract descriptions like “*dynamic*”, “*energetic*”, “*enthusiastic*” or “*youthful enthusiasm*” may reasonably be perceived as indicating that an employer is seeking to employ younger persons, rather than middle-aged or older persons. Consequently, they may give rise to inferences of unlawful age discrimination and may discourage older persons from applying for the jobs in question. For these reasons, such terms should be avoided.

- 10B.6 Criteria that are expressly age-related are even more likely to give rise to occurrences of unlawful age discrimination. For example, criteria such as “*young person*” or “*mature person*” may be directly discriminatory and, because of their vagueness and subjectiveness, may also be difficult to justify. Also, a criterion like “*recent graduates*” may be indirectly discriminatory against persons over the age of 22 or 23 years. If potential age discriminatory criteria cannot be objectively justified then they should be abandoned.
- 10B.7 Criteria that reflect an employer’s desire to recruit staff who are able to work to a traditional “9 to 5” work shift, or which seek to discourage applications from persons who have caring responsibilities; e.g. “*might not suit those with family commitments*”, are potentially indirectly discriminatory against women. If the need for such criteria cannot be objectively justified then they should be abandoned.
- 10B.8 Driving licence requirements may exclude some disabled persons for reasons related to their disabilities and should not be adopted unless they are genuinely essential for the performance of the job and where no reasonable alternative method of performing the travelling duties is available.

Academic qualifications and migrant workers

- 10B.9 Employers who require candidates to have academic qualifications should apply the same academic standards to all applicants. However, to avoid discriminating against migrant workers, employers should not simply specify that candidates must have qualifications that can only be obtained in the educational systems of Northern Ireland, Republic of Ireland or Great Britain (e.g. GCSE’s or A-Levels or Leaving Certificates).
- 10B.10 Instead, employers should make allowance for the fact that persons who have been educated elsewhere are unlikely to have these particular qualifications but may have corresponding qualifications of equivalent value gained in the educational systems of their home countries.
- 10B.11 Consequently, employers should have a procedure for evaluating the comparative value of qualifications gained overseas with those gained in Northern Ireland, Republic of Ireland and Great Britain.
- 10B.12 Employers can obtain advice on these matters from any of the following:
- **Council for the Curriculum, Examination and Assessment:**
www.ccea.org.uk
 - **UK National Recognition Information Centre**
www.naric.org.uk
 - **UK National Reference Point:**
www.uknrp.org.uk

Review personnel specifications periodically

- 10B.13 In paragraphs 10A.13 to 10A.15, it was recommended that employers should keep job descriptions under review. For the same reasons, they should also, at the same times, review and make necessary changes to the corresponding personnel specifications.

Introduction

- 10C.1 Employers should read and consider this section of the Guide in conjunction with the preceding sections, Chapters 10A and 10B. To minimise the possibility that there will be flaws with the contents of an advertisement, employers should primarily focus on ensuring that there are no flaws in the job descriptions and personnel specifications of the jobs in question.
- 10C.2 The following guidelines apply to all recruitment advertisements no matter which media are used to publish them; for example, newspapers, magazines, shop and office windows, Job Centres, staff notice boards, intranets or the internet.

Advertise widely

- 10C.3 Employers should advertise as widely as is practicable so that as many eligible and suitably qualified candidates as possible have an opportunity to apply.
- 10C.4 Where practicable, employers should use a variety of different media to publish their advertisements; for example, employers who advertise job vacancies on their own corporate websites should also concurrently advertise those vacancies in Job Centres, or in one or more newspapers, or on online recruitment websites.
- 10C.5 So long as they also advertise in accordance with the two preceding guidelines, employers who are taking affirmative or positive action may also lawfully place “targeted” job advertisements in specialist media which are associated with particular under-represented groups; for example, magazines or newspapers that are predominantly read by women, or persons of a particular ethnic or national origin, or which are published by particular representative groups, such as support groups for disabled people, or for persons who are gay or lesbian. For further information on the subject of taking affirmative or positive action, refer to Chapter 8 above.
- 10C.6 Employers should not publish job advertisements in locations or publications where they are likely to be read only by persons who share a particular community background, or sex, or race, or disability, or sexual orientation, or age. For example, do not advertise vacancies exclusively at “Milk Rounds” conducted in universities or exclusively in newspapers that are read wholly or mainly by persons from one community background or racial group.

Avoid discriminatory language

- 10C.7 The content of an advertisement should be expressed in language which is clear, simple and non-discriminatory. When citing job titles and selection criteria, employers should use those which were cited in the job descriptions and personnel specifications for the posts.

10C.8 When describing the working environment, do not use vague or abstract words, particularly ones which may allow inferences of age discrimination to be drawn, like:

Young Mature Dynamic Energetic Enthusiastic

10C.9 Where it is not possible to avoid using a job title or description which has a sexual connotation, then an employer should add a prominent equal opportunities statement to the advertisement to indicate that he or she welcomes applications from all suitably qualified men and women.

Exercise caution with photographs

10C.10 Ensure that the advertisement as a whole does not give the impression that the employer might be seeking to recruit a person with a particular “equality” characteristic: e.g. a man or a woman; a person of a particular colour; a young person; a person without a disability.

10C.11 Where there is a possibility that a photograph or drawing may give this impression, then a prominent equal opportunities statement should be added to the advertisement to indicate that the employer welcomes applications from all suitably qualified persons.

10C.12 Exercise particular caution with photographs in respect of jobs that are traditionally associated with one or other of the sexes: for example, nursing and women; airline stewarding and women; engineering and men.

10C.13 Where there is a possibility that a photograph or drawing may promote these stereotypes; for example, by only showing a woman doing a nursing job, or by only showing a man doing a mechanical or engineering job, then a prominent equal opportunities statement should be added to the advertisement to indicate that the employer welcomes applications from all suitably qualified men and women.

Use an equal opportunities statement

10C.14 In some circumstances; namely those described in paragraphs 10C.9 to 10C.13, it is necessary for the advertisement to contain an equal opportunities statement in order to negate any discriminatory inference that may otherwise be drawn from it.

10C.15 In all other circumstances, however, it is nonetheless good practice to place one in the advertisement. A range of statements may be used and the following are only examples of the kinds that employers typically use. Ultimately, the content of a statement is a matter for each employer to decide in the light of their own circumstances:

“We are an equal opportunities employer”; or

“We are an equal opportunities employer and we welcome applications from all suitably qualified persons”

Use a “welcoming statement”, where appropriate

10C.16 Where an employer has an affirmative or positive action programme which is designed to address an under-representation of a particular group of persons: for example, men or women: Roman Catholics or Protestants; disabled persons, then the employer’s job advertisements should complement that programme. For further information on the subject of taking affirmative or positive action, refer to Chapter 8.

10C.17 For example, in certain circumstances the following may be an appropriate positive action statement to include in an advertisement:

“We are an equal opportunities employer. We welcome applications from all suitably qualified persons. However, as women are currently under-represented in our workforce, we would particularly welcome applications from women.”

10C.18 Another option, which the Equality Commission also recommends, is to include a notice in job advertisements to promote particular working arrangements or benefits which might attract applications from an under-represented group. For example, a short sentence could be included to let potential applicants know that flexible working arrangements are available. This may help to attract applications from women who have caring responsibilities.

Declare genuine occupational requirements

10C.19 Where an employer intends to rely on a lawful “*genuine occupational requirement*” exception, then this fact should be declared in the advertisement. Further information on this complex subject is given above in paragraphs 10A.5 to 10A.7.

Composite advertisements and statutory exceptions

10C.20 Where an employer intends to publish a composite advertisement which advertises two or more different vacant posts, and also intends to rely on a *genuine occupational requirement* exception, or other exception, such as a positive action “welcoming statement”, in respect of one of those posts, the advertisement should clearly state to which post the exception applies. The advertisement should not give the impression that the exception applies to posts that cannot rely on it.

Do not accept speculative applications for employment

10D.1 Employers should only accept and consider applications that are made in response to planned and open recruitment competitions for clearly defined posts for which job descriptions and personnel specifications exist. Employers should not accept applications that are simply casual or speculative requests for employment.

Use structured application forms

10D.2 Employers should draft structured application forms for use in all recruitment exercises; subject to making appropriate reasonable adjustments for disabled applicants where necessary.

10D.3 It is good practice to draft a range of application forms that are each “tailored” for particular posts and which contain questions which are relevant to and necessary for assessing the selection criteria established for the respective posts.

10D.4 Applications forms should be reviewed and updated to take account of any changes that may periodically be made to job descriptions and personnel specifications.

Do not include “monitoring” questions on the application form

10D.5 It is good practice to omit from application forms questions relating to religious or similar philosophical belief or political opinion; race or ethnicity; nationality; marital, civil partnership or family status and sexual orientation.

10D.6 An exception to this recommendation might arise where the employer may lawfully rely on a “*genuine occupational requirement*” exception in order to recruit a job-holder who has a particular attribute or status. Further information on this complex subject is given above in paragraphs 10A.5 to 10A.7.

10D.7 It is also good practice to omit questions relating to age, date of birth and national insurance number, unless these are relevant to objectively justifiable job selection criteria.

10D.8 When employers collect “monitoring” information for equal opportunities monitoring purposes, then the relevant questions should be included in a separate equal opportunities monitoring form for which a separate envelope, marked ‘confidential’, should be provided for responses. Equal opportunities monitoring forms should never be provided to the members of the selection panel. Further guidance on equal opportunities monitoring is provided in Chapter 6, paragraphs 6.12 to 6.20, and in Chapter 7.

Information relating to disability and reasonable adjustments

10D.9 It is also recommended that employers invite disabled applicants to indicate any relevant effects of their disabilities and to suggest adjustments which might help them to overcome any disadvantages they might expect to encounter in the recruitment process; for example, particular arrangements they may need to participate at a job interview. Internal systems should be in place to enable the employer to consider and make any reasonable adjustments; and also to implement any positive action programmes for disabled persons that they are taking, such as a “guaranteed interview scheme”.

Information relating to health or medical history

10D.10 Questions about job applicants’ health or medical history should not be included in the application form. Employers may, however, seek and consider such information in appropriate circumstances. Further guidance on these matters is given below in Chapter 10G, which deals with the use of medical questionnaires and assessments in the recruitment and selection process.

Provide application forms in a range of formats

10D.11 Application forms should be made available, and should be accepted, in a variety of multimedia formats to meet the different needs of applicants, particularly disabled applicants.

Provide application packs

10D.12 It is good practice to provide application packs which include the following:

- the structured application form;
- a clear statement of the closing date for applications;
- the contact details of named individuals who will provide reasonable adjustments to applicants who may require them;
- copies of the relevant job description and personnel specification;
- a separate equal opportunities monitoring form.

Closing dates

10D.13 Employers should keep the “application period”; i.e. the period from the publication of the advertisement to the closing date for submitting applications, for each recruitment exercise open for a reasonable length of time. What is “reasonable” will depend on the particular circumstances of each exercise, but it is good practice to plan recruitment exercises so that the “application period” will be around 3 weeks long. Such a period will usually meet the needs of both the applicants and the employer.

Selection panel membership

- 10E.1 Where practicable, the shortlisting panel and interviewing panel for every recruitment exercise should be comprised of the same individuals. In the remainder of this Chapter, both panels will be called the “selection panel”.
- 10E.2 Every selection panel should be comprised of at least two persons and, as far as is practicable, they should be persons of different sex and community background.
- 10E.3 Employers should ensure that the individuals who are called to serve as selection panel members have received appropriate training in relation to the matters described in Chapter 10 at paragraph 10.6.

Making reasonable adjustments

- 10E.4 Employers should allow themselves sufficient time to plan and implement any reasonable adjustments which they may be under a duty to make for any disabled applicants who may need them in order that they may participate equally with others in the selection process, particularly at the interview and selection testing stages.
- 10E.5 An employer should, where practicable, consult with any disabled applicants who have indicated that they may need adjustments to facilitate their participation in the selection process. The purpose of such consultation is to obtain sufficient information in order to better inform and assist the employer to make appropriate reasonable adjustments at the appropriate time.
- 10E.6 If the employer cannot consult with the disabled applicants, he or she should nevertheless have regard to any information that the applicants have provided in or with their application forms and attempt to anticipate or assess whether any adjustments may be needed. The employer should make those adjustments, if it is reasonable to do so.
- 10E.7 The kinds of reasonable adjustments that need to be made will depend on the particular facts of each case, including the effects of the disabled person’s disability and the particular disadvantages that need to be overcome, but examples might include:
- Allowing the applicant additional time to deliver a presentation or to answer questions;
 - Conducting the interview in a different way, such as over a telephone or video link, or with the aid of a sign language interpreter;

- Postponing the interview where it is discovered on the designated day that the adjustments made at that time are inadequate, and inviting the applicant to attend again on another day when more appropriate reasonable adjustments can be made.

10E.8 Employers should also note that it may be necessary to make two or more different reasonable adjustments in order to adequately overcome the particular disadvantages in question.

SHORTLISTING

Shortlisting criteria should derive from the job documentation

10E.9 The selection panel should draft shortlisting criteria which are based on the essential and desirable criteria as described in the job description and the personnel specification.

Apply shortlisting criteria fairly and consistently

10E.10 The selection panel should apply the shortlisting criteria fairly and consistently to all applicants, subject to occasions when reasonable adjustments are being made for disabled applicants.

Decisions should be based on evidence

10E.11 The panel should be able to demonstrate how their decisions are objectively based on the evidence before them, and not, for example, on stereotypical or discriminatory assumptions.

Additional issues

10E.12 The selection panel should seek clarification from an appropriate authority where they have queries about the equivalences of academic or other qualifications, e.g. qualifications gained overseas. See paragraph 10B.12 for sources of further information about this issue.

10E.13 The selection panel should never consider applications which were submitted for one particular job for the purpose of filling a different job.

10E.14 Employers should establish standardised systems for recording shortlisting decisions and should retain all documentation for a period of at least twelve months.

INTERVIEWING

Conduct structured and systematic interviews

10E.15 Interviews should be conducted in a structured and systematic way. Therefore, prior to commencing the interview stage the selection panel should agree and set:

- Selection criteria, and relative weightings, which are objectively justifiable and which directly and clearly correspond to the criteria described in the job description and the personnel specification;
- Suitable interview questions which directly and clearly correspond to the selection criteria;
- A standardised system of scoring for use throughout the process.

Conduct interviews consistently and fairly

10E.16 All interviews should be conducted in a fair and consistent manner and, in particular, the panel:

- should give all applicants the same opportunity to demonstrate their abilities;
- should not apply different standards to any of the applicants, subject to occasions when reasonable adjustments are being made for disabled applicants;
- should assess each applicant in accordance with the selection criteria, and
- should record the scores and assessments.

Decisions should be based on evidence

10E.17 The panel should be able to demonstrate how their scores and assessments are objectively based on the evidence before them, and not, for example, on stereotypical or discriminatory assumptions.

10E.18 The employer should retain the interview documentation for at least twelve months.

- 10F.1 Employers should only use tests which provide relevant, reliable and valid assessments of the applicants' abilities to perform the duties of the job. The tests should be reviewed periodically to ensure that their relevance, reliability and validity are maintained.
- 10F.2 Employers should only use tests which have been assessed as having no discriminatory impact on any of the statutory equality grounds.
- 10F.3 Employers should ensure that all personnel who are involved in the administration of tests have received appropriate training in relation to the matters described in Chapter 10 at paragraph 10.6.
- 10F.4 In advance of the test date, where practicable, employers should consult with any disabled applicants who have indicated that they may need adjustments to facilitate their participation in the selection process. The purpose of consultation is to obtain sufficient information in order to facilitate the employer in making appropriate reasonable adjustments.
- 10F.5 The kinds of reasonable adjustments that may need to be made will depend on the particular facts of each case, including the effects of the disabled person's disability and the particular disadvantages that need to be overcome. Examples might include:
- allowing the applicant extra time to complete the test if his or her disability is such that he or she would otherwise be substantially disadvantaged. This example was described previously in Chapter 8 at paragraphs 8.18 to 8.20;
 - permitting the applicant the assistance of a reader or scribe during the test;
 - accepting a lower "pass rate" for an applicant whose disability inhibits his or her performance in such a test.

Only use questionnaires and assessments with good reason

10G.1 It is generally permissible for employers to seek information from job applicants and employees about their health, such as by asking them to complete medical questionnaires, or to undergo medical assessments; however employers who have a policy of seeking such information should only do so with good reason; i.e. a reason that is objectively justifiable.

Data protection safeguards

10G.2 Employers who collect such information should also put in place data protection safeguards, as required by the Data Protection Act. More detailed guidance on this subject was provided in Chapter 7, paragraphs 7.10 to 7.12. Those paragraphs are specifically concerned with the subject of equal opportunities monitoring, but the same general principles outlined there also apply where employers are collecting and using information about the health of job applicants and employees.

Other good practice recommendations

10G.3 Employers should not collect or use such information in an unlawfully discriminatory way. Employers should follow the good practice recommendations outlined below in order to reduce the possibility that unlawful discrimination may occur through the collection and use of health information.

10G.4 If employers have a policy of seeking such information, it is good practice only to seek it from those successful applicants who have been given conditional job offers. It is best not to ask all job applicants as a matter of course to complete a medical questionnaire, or to undergo a medical assessment. For example, do not require all applicants to submit a completed medical questionnaire together with their application forms for the job.

10G.5 Employers should apply their policies consistently and in a non-discriminatory manner. In particular, disabled applicants and migrant workers should not, without justification, be singled out to complete medical questionnaires, or to undergo medical examinations.

10G.6 Employers should inform applicants about how questionnaire responses, examination results and medical opinions will be used.

10G.7 Employers should provide their designated Medical Advisors with structured guidance as to the requirements of the jobs in question, including the job descriptions and personnel specifications and descriptions of the relevant working environments.

- 10G.8 Medical questionnaires and medical examinations should seek to elicit sufficient, relevant and reliable contemporaneous information:
- (a) about an applicant's ability to carry out the particular duties of the job; and
 - (b) in the case of disabled applicants, to assist the employer to make reasonable adjustments.
- 10G.9 A response to a medical questionnaire, the results of a medical examination or the opinion of a Medical Advisor should only be one of a number of factors that an employer should consider in reaching his or her final selection decision, and it should not, without justification, be treated in itself as determinative of the matter.
- 10G.10 In particular, in the case of disabled applicants, the employer should also consider what reasonable adjustments, if any, may be required, and should make their selection decision following an assessment of how the applicant would perform in the job if these reasonable adjustments were actually made.

References from current or former employers

- 10H.1 It is generally permissible for employers to seek references about job applicants. However, to seek and rely on references only from applicants' current or former employers is likely to place at a substantial disadvantage those persons who have been out of conventional employment for a long time, or who have intermittent employment records, or who have not yet developed an extensive employment record in the local economy.
- 10H.2 A range of people may be disadvantaged in this way; such as some disabled persons, some women with dependants, migrant workers who are recently arrived here, and young workers. Therefore, seeking and relying only on references from current or former employers could potentially give rise to disability discrimination and indirect sex, race and age discrimination.
- 10H.3 Consequently, employers who have a policy of seeking references only from current or former employers should only do so with good reason; i.e. a reason that is objectively justifiable.

Seek references from other sources too

- 10H.4 A better practice is to also accept and rely on references from other persons who know the applicants in a non-occupational context and who can provide information that is relevant to the job selection criteria, and which may help employers to assess the applicants against those criteria.

Other good practice recommendations

- 10H.5 A policy of seeking references should be applied to all applicants consistently and in a non-discriminatory manner.
- 10H.6 Employers should provide referees with the job descriptions and personnel specifications relevant to the jobs in question.
- 10H.7 Employers should ask referees, including those who are not former employers of the applicant, specific questions which seek to elicit information about an applicant's ability to carry out the particular requirements of the job.

Introduction

10I.1 The good practice recommendations set out in this Guide apply to the relationship between employers and their job applicants and employees, regardless of whether those persons are migrant workers or not.

10I.2 The purpose of this particular section of the Guide is to provide information on some additional issues that arise when employers consider job applications from migrant workers.

Equal opportunities monitoring

10I.3 Further guidance on this subject of relevance to employing migrant workers was provided in Chapter 6, paragraph 6.17, and in Chapter 7, paragraph 7.29.

Immigration rules

10I.4 Employers must comply with immigration laws. For example, it is unlawful for an employer to employ a person who is subject to immigration control, unless that person has current and valid permission to be in the United Kingdom, and has valid permission to do the type of work on offer.

10I.5 The Border and Immigration Agency is the public authority responsible for enforcing the immigration laws and is the best source of information and guidance about them. This information and guidance may be downloaded from the Border and Immigration Agency's website

Border & Immigration

Agency's website: www.bia.homeoffice.gov.uk

10I.6 The Border and Immigration Agency has produced a code of practice that advises employers how to comply with immigration law whilst also avoiding acts of unlawful racial discrimination. Employers who employ, or who contemplate employing, migrant workers should consider and apply this code of practice. It may be downloaded from the Border and Immigration Agency's website.

10J.1 The over-riding principle advocated in Chapter 10 of this Guide is that employers should develop recruitment and selection procedures that are systematic, fair and objective, and apply them fairly and consistently to every job applicant. Subject to some statutory exceptions in respect of certain occupations, this principle of equal treatment applies also to persons who have criminal convictions and who have not re-offended. The purpose of this Chapter is to direct employers to more appropriate sources of information and guidance on the legal requirements and good practice recommendations which they should consider when dealing with job applications from former offenders.

Seeking information about criminal history

10J.2 In Northern Ireland there is a single system in operation for the vetting of job applicants and for obtaining criminal history information. The system is a programme operated jointly by a number of public authorities and is named **AccessNI**.

10J.3 AccessNI is the official source of information and guidance about the legal duties that employers must comply with in relation to employing former offenders. Moreover, AccessNI has produced a code of practice for employers and other recipients of disclosed information which may be downloaded from the organisation's website:

AccessNI: www.accessni.gov.uk

NIACRO

10J.4 Another excellent source of information and good practice guidance is the Northern Ireland Association for the Care and Resettlement of Offenders ("NIACRO"). The web address of NIACRO is:

NIACRO: www.niacro.co.uk

Conflict-related convictions

10J.5 In addition to the sources named above, the Office of the First Minister and Deputy First Minister [OFMDFM] published guidance for employers in relation to recruiting people with conflict-related convictions. This guidance may be downloaded from the website of OFMDFM at the following web address. A shorter supplementary brief outlining the main principles of the Employers' Guidance is also available on the website.

www.ofmdfmi.gov.uk/conflict-transformation-news

- 10K.1 Employers who create reserve lists of successful applicants should normally keep them open for no longer than twelve months, unless there are cogent practical reasons for extending the period.

EQUAL OPPORTUNITIES TRAINING

11.1 Employers should, as far as is practicable, provide appropriate equal opportunities and anti-harassment training to all:

- new staff members in the course of their induction training;
- employees, periodically;
- Board members.

11.2 More than this, employers should ensure that all managers and individuals who are called to serve as recruitment and promotion selection panel members have received appropriate equal opportunities and anti-harassment training.

11.3 In the case of managers, employers should, as far as is practicable, provide practical skills training in promoting equal opportunities in the workplace and in dealing with occurrences of harassment.

11.4 The purpose of such training is to ensure that all relevant persons:

- understand their responsibilities under the employer's equal opportunities and anti-harassment policies, and any other policies which contain provisions that aim to promote equality of opportunity;
- understand their and the employer's responsibilities under current equality legislation;
- understand the guidance set out in the equality codes of practice and other guidance publications issued by the Equality Commission.

11.5 For these purposes, it is important for employers to keep the relevant policies up-to-date and in accordance with any changes in the equality laws and other associated laws. This means too, that training materials must be updated and that the training is provided again to all relevant persons when necessary to ensure that they understand their current responsibilities in the light of policy and legislative developments.

OCCUPATIONAL AND DEVELOPMENT TRAINING

11.6 Employers should ensure that occupational and development training, such as recruitment and selection training, contain equal opportunities components.

Advertise training opportunities widely

11.7 Employers should advertise all occupational and development training opportunities in a way that ensures, so far as is practicable, that the widest possible pool of potential applicants is given an opportunity to apply.

11.8 This includes also advising members of staff who are absent from work due

to illness, pregnancy or for any other reason, that they are welcome to attend, or apply to attend, the training, notwithstanding any health or safety issues.

Avoid unlawful discrimination in the provision of training

- 11.9 Employers should operate systematic, fair and objective procedures for allocating training opportunities. These procedures should be fairly and consistently applied.
- 11.10 Employers should provide appropriate occupational training to staff members who have returned from long-term disability-related or pregnancy-related absences, particularly where other staff members who were not absent received similar training opportunities.

Monitor the provision of training

- 11.11 Employers should conduct regular equality monitoring of their procedures for the provision of occupational and development training.

Develop and implement a systematic, fair and objective promotion procedure

12.1 In relation to practices concerning the selection of staff for promotion, employers should generally adhere to the principles and recommendations set out in Chapter 10 on *Recruitment and Selection*.

Internal trawls

12.2 Employers who restrict promotional opportunities to current employees only should be particularly mindful of the guidance given in paragraphs 10B.1 and 10B.3 in the chapter on *Personnel Specifications*. By way of reminder, these paragraphs state:

- An employer should draft a written personnel specification for every post which accurately describes the relevant, non-discriminatory and objectively justifiable requirements to be met by the post-holder; and
- Employers should exercise particular caution with criteria which might directly or disproportionately exclude persons who have certain characteristics.

12.3 A decision to restrict a promotional opportunity to internal candidates only is a job criterion that excludes from consideration a large class of persons, i.e. non-employees of the employer, who may be suitably qualified to do the job in question.

12.4 If that criterion is also likely to exclude a disproportionate number of persons who share a particular characteristic; e.g. men or women; Protestants or Roman Catholics, which is likely if persons belonging to those groups are under-represented in the employer's workforce compared to their numbers in the available labour pool in the appropriate *external* catchment area for the job in question, then that criterion has the potential to be indirectly discriminatory.

12.5 If such a situation occurs then the employer will have to objectively justify the criterion in question, otherwise the criterion will be indirectly discriminatory.

Notify all staff members of promotional opportunities

12.6 Employers should also notify and invite applications for promotional opportunities from members of staff who are absent from work due to illness, pregnancy or any other reason.

- 13.1 The *Sex Discrimination (NI) Order 1976 (as amended)* prohibits discrimination against women employees and job seekers on the grounds that they are pregnant or are exercising or seeking to exercise, or have exercised or sought to exercise a statutory right to maternity leave.
- 13.2 The general good practice recommendations of this Guide will significantly assist employers to comply with their duties under the *Sex Discrimination (NI) Order*, and employers may obtain additional advice and information about this legislation from the Equality Commission.
- 13.3 The purpose of the remainder of this Chapter is to recommend to employers that they take certain additional steps to specifically promote equality of opportunity for expectant or new mothers. Some of these steps, such as those discussed in paragraphs 13.4 to 13.11, are concerned with legal rights that cannot be adequately addressed in this Guide. Instead, employers will be directed to more appropriate sources of information and guidance about these matters.

Statutory Employment Rights

- 13.4 In addition to their rights under the *Sex Discrimination (NI) Order*, many women employees who are pregnant or who are taking maternity leave have a number of other separate statutory employment rights that complement and enhance their rights not to be discriminated against. These rights considerably promote their equality of opportunity in employment.
- 13.5 For example, qualifying employees have a right to take paid time-off for antenatal care; a right to take maternity leave; a right to receive Statutory Maternity Pay, or Maternity Allowance; and, rights to employment protection. These rights are set out in the *Employment Rights (NI) Order 1996 (as amended)* and associated legislation, such as the *Maternity and Parental Leave etc. Regulations (NI) 1999*.
- 13.6 The examples cited in the preceding paragraph are merely summaries of the kinds of employment rights that expectant and new mothers may have. The summaries do not set out the full list or extent of the rights available. Nor do they describe the various qualifying criteria and exceptions that apply. Furthermore, the qualifying criteria and exceptions and the meanings of some of the relevant concepts are prone to change over time due to legislative changes or judicial interpretation. The best sources of information about these rights and developments are described in paragraphs 13.9 to 13.11.
- 13.7 These employment rights set the minimum levels of protection that employees are entitled to receive. Employers are free to provide their employees with contractual terms and conditions of employment that are more favourable than those provided by statute.

- 13.8 A series of corresponding rights are also available for employees who are adoptive parents.

Labour Relations Agency

- 13.9 Another good source of information about these employment rights is the Labour Relations Agency. The Agency can provide employers with advice on these matters and, in addition, runs a programme of awareness raising seminars and workshops on a variety of employment rights subjects, including the maternity and adoption rights legislation.

- 13.10 Further information can be obtained from the Agency's website:

Labour Relations Agency: www.lra.org.uk

Develop and implement a policy to promote equality of opportunity for expectant and new mothers

- 13.11 The network of legal rights highlighted above is substantial and complex and employers should take reasonable steps to raise their own and their managers' levels of awareness about them. It is, therefore, good practice for employers to do the following:

- Develop a policy which acknowledges the employer's commitment to providing fair and non-discriminatory employment policies and practices for employees in relation to pregnancy, maternity and adoption;
- Include in the policy a summary statement of the statutory and contractual employment rights of employees in respect of pregnancy, maternity and Adoption;
- Publicise the policy; for example, by including it in the employees' handbook, if there is one;
- Provide pregnancy, maternity and adoption rights awareness training to all managers so that they understand the employer's responsibilities in relation to providing these rights;
- Review the policy regularly to ensure that it keeps pace with legislative and other legal developments.

14 Flexible Working Arrangements

- 14.1 Employers who operate inflexible working practices, such as requiring all employees to work to traditional “9 to 5” working patterns, may deny equality of opportunity to some employees. This will most likely occur where the employees’ particular personal, caring, family, medical, cultural or religious needs conflict with the strict work patterns laid down by their employers.
- 14.2 The persons who are most likely to suffer particular disadvantages compared to other people because of these conflicts are:
- persons, particularly women, who require time off to attend to their parental and caring responsibilities;
 - some disabled persons, if they need particular reasonable adjustments, such as time-off for rest periods or to attend for medical treatment;
 - persons with strong religious beliefs, if they are required to work on their sabbath days, or on other days of religious significance to them.
- 14.3 Such practices may even, depending on the particular circumstances of each case, cause unlawful disability discrimination, or indirect sex or religious or race discrimination.
- 14.4 By taking reasonably practicable steps to provide flexible working arrangements employers can significantly promote equality of opportunity and reduce the possibility that unlawful discrimination may occur.

Do not discriminate against employees who avail of flexible working arrangements

- 14.5 When providing flexible working arrangements, it is also extremely important that employers ensure that employees who avail of such arrangements, or who seek to do so, will continue to be treated fairly and without unlawful discrimination when compared to employees who have not availed of those rights. To do otherwise would be to undermine an employer’s commitment to promoting equality of opportunity, and is likely to cause unlawful disability discrimination, or indirect sex or religious or race discrimination.
- 14.6 Employers should also note that some employees who work part-time may have a complementary legal right to receive equal treatment with comparable full time workers under a law named the *Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000*. The purpose of these regulations is to ensure that part-time workers are not treated less favourably in their contractual terms and conditions than comparable full-time workers, unless different treatment is justified on objective grounds.
- 14.7 It is not within the scope of this Guide to discuss these regulations further. Further information and guidance about them may be obtained from the Labour Relations Agency, whose website addresses are provided in paragraph 14.14.

- 14.8 The purpose of the remainder of this Chapter is to recommend to employers that they take certain additional steps to specifically promote equality of opportunity by providing flexible working arrangements. Some of these steps, such as those discussed in paragraphs 14.9 to 14.15, are concerned with legal rights that cannot be adequately addressed in this Guide. Instead, employers will be directed to more appropriate sources of information and guidance about these matters.

Statutory Employment Rights

- 14.9 In addition to their rights under the anti-discrimination laws, many employees have a number of statutory employment rights which aim to promote their equality of opportunity by assisting them to reconcile the demands of their work and family lives. For example, qualifying employees have a *right to request flexible working arrangements; or, a right to take parental leave or time off for dependants*.
- 14.10 These rights are set out in various laws such as the *Employment Rights (NI) Order 1996 (as amended)* and associated legislation.
- 14.11 The examples cited in paragraph 14.9 are merely brief summaries of the kinds of employment rights that employees may have. The summaries do not set out the full list or extent of the rights available. Nor do they describe the various qualifying criteria and exceptions that apply. Furthermore, the qualifying criteria and exceptions and the meanings of some of the relevant concepts are prone to change over time due to legislative changes or judicial interpretation. The best sources of information about these rights and developments are described in paragraphs 14.13 to 14.15.
- 14.12 These rights set the minimum level of protection that employees are entitled to receive. Employers are, however, free to provide their employees with contractual terms and conditions of employment that are more favourable than those provided by statute.

Labour Relations Agency

- 14.13 Another good source of information about these employment rights is the Labour Relations Agency. The Agency can provide employers with advice on these matters and, in addition, runs a programme of awareness raising seminars and workshops on a variety of employment rights subjects, including the legislation relating to work and families.
- 14.14 Further information can be obtained from the Agency's website, where there is a specific section on work-life balance issues:

Labour Relations Agency: www.lra.org.uk

Flexible Working Arbitration Scheme

- 14.15 The Agency also operates an arbitration scheme for resolving disputes about flexible working. Further information may be obtained from the Agency directly.

Develop and implement a flexible working policy

- 14.16 The network of rights concerned with flexible working arrangements is substantial and complex. The objective of upholding and respecting these rights can best be achieved if employers and managers understand their responsibilities. It is, therefore, good practice for employers to do the following:
- Develop and implement a policy on flexible working which acknowledges the employer's commitment to providing flexible working arrangements, and to providing fair and non-discriminatory treatment to those who avail of them, or wish to avail of them;
 - Publicise the policy; for example, by including it in the employees' handbook;
 - Provide "flexible working rights" awareness training to all managers so that they understand the employer's responsibilities in relation to these rights;
 - Establish a systematic and objective procedure for considering requests by workers for adjustments to working arrangements and for implementing the decisions which are made.

- 14.17 At the very least, employers should have a procedure that satisfies the minimum statutory requirements as set down in *Article 112F, Employment Rights (NI) Order 1996 and in its associated regulations*.
- 14.18 Finally, an employer should monitor and review the operation of the policy in the course of the employer's wider equal opportunities monitoring and review practices.

15 Pay and Benefits

- 15.1 This subject matter is complex and it is not possible to address it adequately in this Guide. Instead, this Chapter provides an introduction to the subject and makes references to more detailed sources of information and guidance.
- 15.2 The first point to note is that there are significant differences in the legal provisions that apply to sex discrimination in pay compared to discrimination in pay based on the other equality grounds.

SEX DISCRIMINATION

- 15.3 Sex discrimination in pay is prohibited by European law and by three separate, but related, domestic statutes. The latter are as follows:

Equal Pay Act (NI) 1970

- 15.4 *The Equal Pay Act (NI) 1970* requires employers to pay men and women employees equal pay for equal work. It prohibits sex discrimination between men and women employees in respect of their contractual pay and terms and conditions of employment.
- 15.5 For the purposes of the *Equal Pay Act (NI) 1970*, an employee has a right to equal pay with any employee of the opposite sex who is doing:
- work that is the same or broadly similar (i.e. “*like work*”); or
 - work which is different, but which is of equal value in terms of the demands of the jobs (i.e. “*work of equal value*”); or
 - work which has been rated as equivalent under a job evaluation scheme (i.e. “*work rated as equivalent*”).

Sex Discrimination (NI) Order 1976

- 15.6 Whereas the *Equal Pay Act (NI) 1970* prohibits sex discrimination in relation to contractual pay and benefits, the *Sex Discrimination (NI) Order 1976* prohibits sex discrimination in relation to non-contractual entitlements to benefits. Thus, for example, the *Sex Discrimination (NI) Order 1976* prohibits sex discrimination in relation to the payment of discretionary bonuses.

Pensions (NI) Order 1995

- 15.7 The *Pensions (NI) Order 1995* prohibits sex discrimination in relation to employees’ access to pension schemes, and in the way they are treated under the rules of such schemes.

Guidance materials

15.8 The Equality Commission has issued two important publications which provide good practice guidance and recommendations to assist employers to implement their responsibilities to provide equal pay for equal work for men and women.

These publications, which may be downloaded from the Commission's website, are:

- Equal Pay Code of Practice⁷
- Equal Pay Review Kit

15.9 The Equal Pay Code of Practice is a statutory code. While there is no legal requirement on employers to follow its provisions, in any industrial tribunal proceedings under the *Equal Pay Act (NI) 1970* the Code shall be admissible in evidence and a tribunal shall take into account any of its provisions which appear to be relevant to any question arising in those proceedings.

15.10 The Commission has also published a Model Equal Pay Policy, and a series of Equal Pay Factsheets which provide information and guidance about particular aspects of good practice in relation to Equal Pay. These publications may be downloaded from the Publications section of the Commission's website.

PAY DISCRIMINATION ON THE OTHER EQUALITY GROUNDS

15.11 The other anti-discrimination laws, as listed in Chapter 2, prohibit discrimination in relation to contractual and non-contractual pay, benefits and other terms and conditions of employment, including access to and treatment under occupational pension schemes.

15.12 However, these laws only permit claims of direct or indirect discrimination where the basis of the comparison is that the circumstances in the one case are the same, or not materially different, to the circumstances in the other.

15.13 Therefore, employers should at the very least ensure that where employees are doing work that is the same or broadly similar (i.e. "*like work*") that they do not discriminate against any of those employees in the payment of wages and benefits on the grounds of religious or similar philosophical belief; political opinion; race; age; sexual orientation; or whether they are married or are in a civil partnership; or whether they are disabled; or whether they have undergone, are undergoing or intend to undergo gender reassignment.

⁷ The current version of the Equal Pay Code of Practice (dated May 1999) was under review at the time of publication of this Guide. It is expected that a revised version of the Code will be published in 2009. Until the new version is published employers should continue to refer to the current version which may be downloaded from the Commission's website.

Disability discrimination

- 15.14 The reasonable adjustment duty under the *Disability Discrimination Act 1995* applies, in principle, to pay and benefits. The Disability Code of Practice, particularly in Chapter 8, gives some specific examples of how the reasonable adjustment duty can have an impact on a disabled employee's entitlement to pay and benefits. The Code may be downloaded from the Commission's website.

Age discrimination

- 15.15 Age discrimination in employment is prohibited by the *Employment Equality (Age) Regulations (NI) 2006* ("the Age Regulations"). This prohibition applies in general to contractual and non-contractual pay and benefits. However, in certain exceptional circumstances the Age Regulations permit employers to award pay and benefits in ways that are, or may be, age discriminatory. The two main exceptions are described below.

National Minimum Wage

- 15.16 The Age Regulations do not alter the provisions of the *National Minimum Wage 1998* and its associated regulations. An exception to the Age Regulations permits employers to pay their employees the national minimum wage at the relevant going rates for their respective ages in accordance with the age bands set out in the National Minimum Wage legislation
- 15.17 Nevertheless, it is a consistent theme of this Guide that employers should seek to promote equality of opportunity in employment for all persons and across all of the statutory equality grounds, including the age ground.
- 15.18 Consequently, the Equality Commission recommends that employers should, notwithstanding the provisions of the National Minimum Wage legislation and the exception contained in the Age Regulations, pay all employees, regardless of their ages, the same salary or wage for doing the same work.

Provision of certain benefits based on length-of-service

- 15.19 Awarding work-related benefits, such as holiday entitlement or incremental pay rises, on the basis of length-of-service has the potential to be indirectly age discriminatory; i.e. as longer serving employees may be, on average, older than employees with shorter service records.
- 15.20 The Age Regulations permit employers to award benefits on this basis so long as certain conditions are satisfied. Further information about this exception and the conditions that must be satisfied can be found in the Equality Commission's publication: *Age Discrimination in Northern Ireland – A Guide for Employers*. This publication may be downloaded from the Commission's website.

Develop and implement a policy on Equal Pay

- 15.21 Employers should demonstrate that they are committed to promoting equality of opportunity in regard to the provision of pay and benefits by developing and implementing a policy on equal pay. Further guidance on how to develop such a policy is given in the Equal Pay Code of Practice, which also contains a Model Equal Pay Policy.
- 15.22 Employers should also develop objective and systematic procedures to implement their equal pay policies. Further guidance on how to develop such procedures is given in the Equal Pay Code of Practice and the Equal Pay Review Kit. The procedures outlined in these publications were primarily developed to assist employers to eliminate sex discrimination. However, the guidance which they provide, particularly on the subject of “like work” comparisons, can be applied, with appropriate amendments, to differences based on the other equality grounds.

Other factors to consider

- 15.23 As part of their equal pay procedures, employers should also try to determine whether any differences in entitlements to pay and benefits stem not merely from the immediate terms and conditions relating to pay and benefits directly, but from other institutional or historical factors.
- 15.24 For example, one of the reasons that certain groups of people may be earning less than others is because members of that group tend to work predominantly in the lower job grades within organisations. For example, women, or migrant workers, may be predominantly employed in clerical or shop-floor jobs; whereas men, or local employees, may be predominantly employed in the higher paid managerial or supervisory positions.
- 15.25 Patterns such as this are also likely to be revealed through conventional equal opportunities monitoring of the kinds described in Chapters 6 and 7. If such patterns are revealed, it would be appropriate for employers to attempt to address this kind of inequality through recruitment and selection, training and development and promotional procedures of the kinds described in Chapters 10, 11 and 12.

Introduction

- 16.1 Many employers have specific procedures to deal with grievances and disciplinary matters. Indeed, employers are under a statutory duty to adhere to prescribed minimum disciplinary procedures when taking certain types of disciplinary action against their employees, including action that may result in dismissal.
- 16.2 It is not the primary purpose of this Chapter to advise employers about their responsibilities under the *Employment (NI) Order 2003* and other employment rights legislation. The best and most appropriate source of information and guidance about these matters is the Labour Relations Agency. Their website is a particularly useful resource.
- LRA: www.lra.org.uk**
- 16.3 Of particular relevance and importance is a code of practice that the Labour Relations Agency has published: *Code of Practice: Disciplinary and Grievance Procedures*. The Equality Commission recommends that employers should follow the recommendations set out in this Code, for they are invariably good practice for the purpose of promoting equality of opportunity too. The Code may be downloaded from the Labour Relations Agency website.
- 16.4 The primary purpose of this Chapter is to highlight some aspects of these matters which are particularly relevant to good equality practice. These are discussed below.

Deal effectively with complaints and grievances

- 16.5 Employers should ensure that employees' grievances will be addressed seriously, promptly and confidentially and with consistency and fairness. This is particularly important where those grievances relate to allegations of discrimination or harassment.

- 16.6 A failure to do this is likely to be viewed by an industrial tribunal, or the Fair Employment Tribunal, as evidence of a failure to take “reasonably practicable steps” to prevent discrimination or harassment from occurring. Furthermore, in harassment cases especially, if an employer habitually ignores complaints from employees, such inaction could be viewed as more than a mere failure to take “reasonably practicable steps” to prevent harassment occurring. In such cases, an employer’s inaction could actually be deemed to be harassment too, in the sense that the employer’s attitude could be deemed to create an environment in which harassing conduct is permitted to exist.

Monitoring Grievances

- 16.7 Employers should also monitor the operation of their grievance procedures, as part of their wider equal opportunities monitoring policies. For example, employers should consider whether employees who share a particular attribute, such as community background, or sex, or race are lodging grievances more often than would otherwise be expected. If this is the case, then employers should try to determine the reasons for it and take reasonably practicable steps to address the problem.

Disciplinary action as a response to discriminatory conduct or harassment

- 16.8 Employers may be required to take disciplinary action against those employees who perpetrate acts of unlawful discrimination and harassment. It is highly recommended that employers should make allowance for this in their disciplinary procedures by expressly indicating that unlawful discriminatory conduct and harassment will constitute misconduct that may lead to disciplinary proceedings.

Avoid discrimination when taking disciplinary action

- 16.9 Employers should apply their disciplinary standards, rules and procedures fairly and consistently to all employees regardless of their sex; religious or similar philosophical belief; political opinion; race; age; sexual orientation; or, whether they are married or are in a civil partnership; or, whether they are disabled; or whether they have undergone, are undergoing or intend to undergo gender reassignment. To do otherwise, on any of these grounds, is likely to amount to an act of unlawful discrimination.

Disability discrimination and the reasonable adjustment duty

- 16.10 If an employer subjects a disabled employee to a disciplinary procedure, he or she should consider whether any reasonable adjustments need to be made to the procedure.
- 16.11 For example, take a situation where the employee has a learning disability and she asks if she can bring a friend, rather than a work colleague, to a disciplinary hearing. It might be a reasonable adjustment for the employer to allow this, especially if the employee is likely to experience difficulty understanding the process and the friend, rather than a colleague, would more effectively help her to understand what is happening.

- 16.6 In addition, if the conduct in question is related to an employee's disability, this may be relevant to determining the sanction which it would be appropriate to impose.

Victimisation

- 16.7 It will also amount to unlawful discrimination, in this case *victimisation*, if an employer subjects an employee to disciplinary action or otherwise treats him or her unfairly under such procedures in retaliation for that person having exercised, or for having assisted other persons to exercise, their rights under the anti-discrimination laws.

Monitoring Disciplinary Action

- 16.8 Employers should monitor the operation of their disciplinary policies and procedures, as part of their wider equal opportunities monitoring policies. For example, employers should consider whether employees who share a particular attribute, such as community background, or sex, or race are being subjected to disciplinary procedures more often than would otherwise be expected. If this is the case, then employers should try to determine the reasons for it and take reasonably practicable steps to address the problem.

Introduction

17.1 It is not the primary purpose of this Chapter to advise employers how to manage staff absences. There are better and more appropriate sources of information and guidance about this. In particular, the Labour Relations Agency provides employers with advice on this subject and, in addition, runs seminars and workshops too. Furthermore, the Agency has published two publications that are particularly relevant to the subject. These are:

- *Advice on managing absence from work;*
- *Code of Practice: Disciplinary and Grievance Procedures*

17.2 These publications and further information can be obtained from the Agency's website:

Labour Relations Agency: www.lra.org.uk

17.3 It is worth highlighting the following primary principle of good practice which the Agency's publication "*Advice on managing absence from work*" promotes:

"To reduce the effect of absence, an organisation should develop a policy and procedure for managing absence. This will:

- *make sure that employees are aware of what the organisation considers to be acceptable and unacceptable levels of absence;*
- *define authorised, unauthorised and sickness absences; and*
- *make sure that line managers are trained in dealing with certain types of absence and have guidelines for dealing with those absences fairly and consistently."*

17.4 The Equality Commission fully endorses this principle and recommends that employers should follow it and the other good practice recommendations set out in the Agency's publications, for they also provide general good practice for the purpose of promoting equality of opportunity too.

Avoid unlawful discrimination

17.5 The remainder of this Chapter addresses certain aspects of this subject where there is a higher risk that unlawful discrimination may occur, and which call for particular attention from employers.

17.6 Employers should apply their absence management procedures fairly and consistently to all employees regardless of their sex; religious or similar philosophical belief; political opinion; race; age; sexual orientation;

or, whether they are married or are in a civil partnership; or, whether they are disabled; or whether they have undergone, are undergoing or intend to undergo gender reassignment. To do otherwise, on any of these grounds, is likely to amount to an act of unlawful discrimination. However, employers should also note the following-

Disability-related absences

- 17.7 If a disabled employee is or has been absent, or needs to take a leave of absence, for a reason related to his or her disability, then the employer should always consider whether any reasonable adjustments need to be made, either to the absence management procedure itself, and/or to other aspects or features of the workplace or to the working arrangements. A failure to comply with the duty to make reasonable adjustments is an act of disability discrimination.
- 17.8 The Disability Code of Practice, particularly in Chapters 5 and 8, gives some guidance about how the reasonable adjustment duty will apply in circumstances such as these. Employers should have particular regard to the Code in these circumstances. The Code may be downloaded from the Equality Commission's website.

Pregnancy-related absence and maternity leave

- 17.9 In managing absences that are related to pregnancy or maternity leave, employers must avoid committing acts of pregnancy or maternity leave discrimination. The definitions of these forms of discrimination are set out in Appendix 2.

Monitoring

- 17.10 Employers should monitor the impact of their absence management procedures, as part of their wider equal opportunities monitoring policies.

Introduction

- 18.1 As with the (sometimes related) subjects covered in the two preceding Chapters, this subject – Termination of Employment – does not only have implications under the anti-discrimination laws. There are wider organisational, human resources and legal implications too. For example, there are the complex areas of law relating to *unfair dismissals* and *redundancies*. It is not the primary purpose of this Chapter to advise employers about the wider implications of this complex subject. Once again, a better and more appropriate source of information and guidance is the Labour Relations Agency.
- 18.2 Employers should have particular regard to the Agency's publications that are relevant to this subject. These are:
- *Advice on managing absence from work;*
 - *Code of Practice: Disciplinary and Grievance Procedures;*
 - *Advice on handling redundancies.*
- 18.3 The Equality Commission recommends that employers should follow the good practice recommendations set out in these publications, for they also provide general good practice for the purpose of promoting equality of opportunity too.

Equality of opportunity and discrimination

- 18.4 The remainder of this Chapter addresses aspects of this subject where there are particular issues relating to the promotion of equality of opportunity, or a higher risk that unlawful discrimination may occur, and which call for particular attention from employers.

Apply procedures fairly and consistently

- 18.5 Employers should develop and implement appropriate policies and procedures to deal with disciplinary issues, managing absence and handling redundancies.
- 18.6 Employers should apply these policies and procedures fairly and consistently to all employees regardless of their sex; religious or similar philosophical belief; political opinion; race; age; sexual orientation; or, whether they are married or are in a civil partnership; or, whether they are disabled; or whether they have undergone, are undergoing or intend to undergo gender reassignment. To do otherwise, on any of these grounds, is likely to amount to an act of unlawful discrimination. However, employers should also note the following:

Disability discrimination and the reasonable adjustment duty

- 18.7 If an employer contemplates dismissing a disabled employee, whether under a disciplinary, absence management or redundancy procedure, the employer should always consider whether any reasonable adjustments need to be made, either to the relevant procedure itself, and/or to other aspects or features of the workplace or to the working arrangements. A failure to comply with the duty to make reasonable adjustments is an act of disability discrimination.
- 18.8 The Disability Code of Practice, particularly in Chapters 5 and 8, gives some guidance about how the reasonable adjustment duty will apply in circumstances such as these. Employers should have particular regard to the Code in these circumstances. The Code may be downloaded from the Equality Commission's website.

Pregnancy-related absence and maternity leave

- 18.9 If an employer contemplates dismissing a female employee, whether under a disciplinary, absence management or redundancy procedure, the employer must avoid committing acts of pregnancy or maternity leave discrimination. The definitions of these forms of discrimination are set out in Appendix 2.

REDUNDANCIES – SOME ADDITIONAL ISSUES TO CONSIDER

- 18.10 On the subject of redundancies and redundancy policies, employers should generally follow the guidance recommended by the Labour Relations Agency in its publication: *Advice on handling redundancies*, and the general principles outlined in paragraphs 18.6 to 18.9. In addition, employers should also have regard to the following:

Selection criteria - discriminatory impact of length-of-service criteria

- 18.11 Where an employer contemplates making compulsory redundancies, he or she should be aware that using length-of-service as a selection criterion may place younger employees at a substantial disadvantage compared to older ones, and that it may thus be unlawfully age discriminatory. If age discrimination is likely to occur then the criterion should be objectively justified, or should otherwise be abandoned.
- 18.12 A length-of-service selection criterion may also have a discriminatory impact on other equality grounds in workplaces where an employer has been using lawful affirmative or positive action measures to successfully increase the level of representation in the workforce of groups who have been historically under-represented. Where such a criterion is likely to have a disproportionate impact of this kind, then again it should be objectively justified, or should otherwise be abandoned.

Selection criteria - employees who are taking maternity leave

- 18.13 When an employer is considering which employees to make redundant, he or she is under a particular statutory duty in respect of any employee who is at that time taking ordinary or additional maternity leave. If this situation arises, and where it would not be practicable by reason of redundancy for the employer to continue to employ that employee under her existing contract of employment, then the employer must offer her any suitable alternative vacant post, if one exists.⁹

Calculation of notice periods and redundancy payments – discriminatory impact of age and length-of-service factors

- 18.14 Many employers operate redundancy schemes under which notice periods and redundancy payments are calculated with reference to employees' ages and/or lengths-of-service. Such schemes may have age discriminatory impacts; although they may not necessarily be unlawful. If a particular scheme is likely to have an age discriminatory impact, either directly or indirectly, then the crucial question which an employer must determine is whether the scheme is lawful or not. Clearly an employer should not adopt or implement a scheme which is unlawful. When making this assessment, an employer should consider the following issues.
- 18.15 Firstly, a scheme will be lawful if it strictly adheres to the statutory redundancy scheme.
- 18.16 Secondly, an “enhanced” redundancy scheme which provides employees with greater notice periods or redundancy payments than those required by the statutory scheme, will be lawful if it satisfies the conditions laid down in *Regulation 35 of the Employment Equality (Age) Regulations (NI) 2006* [i.e. “the Age Regulations”]. For further information about *Regulation 35*, employers should consult the Equality Commission’s publication *Age Discrimination in Northern Ireland: A Guide for Employers*; copies of which may be obtained from the Commission.
- 18.17 Thirdly, even if an “enhanced” redundancy scheme does not satisfy the conditions laid down in *Regulation 35*, it may still be lawful so long as the employer can objectively justify it. To do this the employer will have to demonstrate that the scheme is a proportionate means of achieving a legitimate aim.

⁹ This is an obligation that is imposed on employers by Regulation 10 of the Maternity and Parental Leave, etc. Regulations (NI) 1999.

- 18.18 When they were initially passed, the Age Regulations introduced a National Default Retirement Age ("NDRA") of 65 years and a set of special retirement procedures (i.e. *"the duty to consider working beyond retirement"* procedures) that, when properly followed, protected employers from claims of age discrimination and unfair dismissal if they dismissed employees aged 65 years or over on grounds of age. In effect, employers did not have to justify the decisions they made to retire on grounds of age employees who were at or over that age. However, those provisions were repealed entirely in April 2011.
- 18.19 Since then, employers may no longer avoid having to justify the decisions they might make to retire on grounds of age employees who are aged 65 years or over; or who are over any other age for that matter; e.g. 55, 60, 65, 70, etc.. Aggrieved employees now have the right to go an industrial tribunal to complain of age discrimination and/or unfair dismissal.
- 18.20 The implications of this are that employers now have a choice – they may:
- (a) allow their employees to continue to work beyond the age of 65 (or, whatever the employer's normal retirement age previously was) until such time as-
 - their employees choose to voluntarily resign, or they die in service; or
 - the employers are compelled to dismiss the employees on grounds of incapacity, misconduct, or redundancy [i.e. the usual kinds of grounds that might justify the dismissal of any employee regardless of their age], or
 - (b) operate a compulsory retirement age for all of employees, or for a particular group of employees. But, if this is done, the employer will be required to objectively justify the retirement age policy. If the policy cannot be justified, it will be unlawful.
- 18.21 The principles for justifying retirement ages are discussed in further detail in our associated publications *Age Discrimination in Northern Ireland: A Guide for Employers*.
- 18.22 When retiring an employee on grounds of age, employers will also, in addition to having to justify the policy, be obliged to follow a fair dismissal procedure. There no longer exists, however, a special procedure for use only in retirement cases. Instead, employers must follow the same minimum procedure that applies in all other cases to which the statutory disciplinary and dismissal procedure applies. This is the procedure outlined in the *Employment (NI) Order 2003* and in *Section 1 of the Labour Relations Agency's Code of Practice on Disciplinary and Grievance Procedures (April 2011)*.

Monitoring and exit interviews

- 18.23 As part of their general equal opportunities monitoring policies, employers should monitor leavers and conduct exit interviews to record the reasons why workers leave their employment and to obtain their general views on the provision of equal opportunities in the workplace.

- 19.1 This Chapter is not concerned with the regulation of employment agencies. However, as employers themselves, the Guide is applicable to the relationships between employment agencies and their own employees. Consequently, employment agencies should take reasonably practicable steps to follow the guidance and recommendations throughout the Guide.
- 19.2 The main purpose of this Chapter is to make two recommendations to employers who use the services of employment agencies to recruit staff or contract workers.
- 19.3 It is good practice for employers to ensure that in the contract between them and any employment agency there is a term:
- which binds the agency in its dealings with the employer's workforce to comply with the employer's equal opportunities policies, the equality legislation, the equality Codes of Practice and guidance publications issued by the Equality Commission; and,
 - which compels the agency to provide the employer with equal opportunities monitoring data in respect of agency workers who are placed with the employer, subject to the laws which regulate disclosure of personal data.

APPENDIX 1

Important Equality Commission Publications

1. The employment-related equality codes of practice are:

- *Fair Employment in Northern Ireland – Code of Practice*
- *Removing Sex Bias from Recruitment and Selection – A Code of Practice*
- *Code of Practice on Equal Pay*¹⁰
- *Code of Practice for Employers for the Elimination of Racial Discrimination and the Promotion of Equality of Opportunity in Employment*
- *Disability Code of Practice – Employment and Occupation*

2. Other employment-related good practice guidance publications are:

- *Sexual Orientation Discrimination in Northern Ireland – The Law and Good Practice*
- *Age Discrimination in Northern Ireland – The Law and Good Practice for Employers*
- *Harassment & Bullying in the Workplace*
- *Equal Pay Review Kit*
- *Recruitment Advertising – A Good Practice Guide*
- *A Step by Step Guide to Monitoring – Monitoring your workforce and applicants in line with fair employment regulations*
- *Recruitment from those not in employment: A good practice Guide for promoting equality of opportunity*

¹⁰ The current version of the Equal Pay Code of Practice (dated May 1999) was under review at the time of publication of this Guide. It is expected that a revised version of the Code will be published in 2009. Until the new version is published employers should continue to refer to the current version which may be downloaded from the Commission's website.

APPENDIX 2

Definitions of Discrimination

Direct Discrimination

(Sex / Religious or similar philosophical belief / Political Opinion / Race / Sexual Orientation)

A person ('X') directly discriminates against another person ('Y') if, on the ground of Y's sex or on the grounds of religious or similar philosophical belief or political opinion or race or sexual orientation, X treats Y less favourably than he/she treats or would treat other persons.

When making the comparison between how X treats Y and other persons, it is necessary to compare situations in which the relevant circumstances are the same or not materially different.

Direct Discrimination

(against married persons or persons who are in Civil Partnerships)

A person ('X') directly discriminates against another person ('Y') if, on the ground that Y is married or is a civil partner, X treats Y less favourably than he/she treats or would treat a person who is not married or who is not a civil partner.

When making the comparison between how X treats Y and other persons, it is necessary to compare situations in which the relevant circumstances are the same or not materially different.

Direct Discrimination

(Pregnancy)

A person ('X') directly discriminates against a woman ('Y') if during a "*protected period*" X treats Y less favourably on the ground that Y is pregnant.

A "*protected period*" is generally the period that commences when Y becomes pregnant and ends when her entitlement to ordinary or, where applicable, additional maternity leave ends or, if earlier, when she returns to work. For a woman who is not entitled to ordinary maternity leave, the protected period ends at the end of a period of two weeks after the end of the pregnancy.

Direct Discrimination

(Maternity Leave)

A person ('X') directly discriminates against a woman ('Y') if he/she treats her less favourably on the ground that Y is exercising or seeking to exercise, or has exercised or sought to exercise, a statutory right to maternity leave.

Direct Discrimination

(Gender Reassignment)

A person ('X') directly discriminates against another person ('Y') if, on the ground that Y intends to undergo, is undergoing or has undergone gender reassignment, X treats Y less favourably than he/she treats or would treat other persons.

When making the comparison between how X treats Y and other persons, it is necessary to compare situations in which the relevant circumstances are the same or not materially different.

Direct Discrimination (Age)

A person ('X') directly discriminates against another person ('Y') if on the ground of Y's age, or Y's apparent age, X treats Y less favourably than he/she treats or would treat other persons, and X cannot show the treatment to be a proportionate means of achieving a legitimate aim.

When making the comparison between how X treats Y and other persons, it is necessary to compare situations in which the relevant circumstances are the same or not materially different.

Direct Disability Discrimination

A person ('X') directly discriminates against a disabled person ('Y') if, on the ground of Y's disability, he/she treats Y less favourably than he/she treats or would treat a person not having Y's particular disability whose relevant circumstances, including his/her abilities, are the same as, or not materially different from, those of Y.

Disability-Related Discrimination

A person ('X') discriminates against a disabled person ('Y') if, for a reason which relates to Y's disability, he/she treats Y less favourably than he/she treats or would treat other persons to whom that reason does not or would not apply and he/she cannot show that the treatment in question is justified.

To be able to justify the treatment in question, X must show that the reason for it is both material to the circumstances of the particular case and substantial. But, X will be unable to justify the treatment if it amounts to *direct disability discrimination*. In addition, X will be unable to justify the treatment if he/she has also failed to comply with the *reasonable adjustment duty* (see next paragraph) unless the treatment would have been justified even if X had complied with the duty.

Failure to comply with the Reasonable Adjustment Duty ¹¹ (Disability)

An employer ('X') discriminates against a disabled person ('Y') if he/she fails to comply with a duty to make reasonable adjustments imposed on him/her in relation to Y. A failure to comply with the duty cannot be justified.

The reasonable adjustment duty is imposed on X where:

- (a) a provision, criterion or practice applied by or on behalf of X; or
- (b) any physical feature of premises occupied by X,

¹¹ This definition applies only in relation to employment, occupation and employment-related training. A different definition applies in relation to the provision of goods, facilities and services to the public.

places Y at a substantial disadvantage in comparison with persons who are not disabled. But, the duty will not be imposed where X does not know, and could not reasonably be expected to know, that Y is disabled and is likely to be placed at a substantial disadvantage by the provision, criterion, practice or physical feature in question.

The duty requires X to take such steps as are reasonable, in all the circumstances of the case, to take in order to prevent Y being placed at a substantial disadvantage by the provision, criterion, practice or physical feature in question.

Indirect Discrimination ¹²

(Sex / Religious or similar philosophical belief / Political Opinion / Race / Sexual Orientation / Age ¹³

A person ('X') indirectly discriminates against another person ('Y') if he/she applies to Y a provision, criterion or practice which he/she applies, or would apply, equally to persons not of the same sex or religious or similar philosophical belief or political opinion or race or sexual orientation or age group as Y but:

- (a) which puts, or would put, persons of the same sex or religious or similar philosophical belief or political opinion or race or sexual orientation or age group as Y at a particular disadvantage when compared to other persons; and
- (b) which puts Y at that disadvantage; and
- (c) which X cannot show to be a proportionate means of achieving a legitimate aim.

When making the comparison between how X treats persons who share the same equality characteristics as Y and other persons, it is necessary to compare situations in which the relevant circumstances are the same or not materially different.

Indirect Discrimination

(Against married persons or persons who are in Civil Partnerships)

A person ('X') indirectly discriminates against another person who is married or who is a civil partner ('Y') if he/she applies to Y a provision, criterion or practice which he/she applies, or would apply, equally to persons who are not married or who are not civil partners but:

- (a) which puts, or would put, persons who are married or who are civil partners at a particular disadvantage when compared to other persons; and
- (b) which puts Y at that disadvantage; and
- (c) which X cannot show to be a proportionate means of achieving a legitimate aim.

When making the comparison between how X treats persons who are married, or who are civil partners, and other persons, it is necessary to compare situations in which the relevant circumstances are the same or not materially different.

¹² This definition applies only in relation to employment, occupation and employment-related training. A different definition applies in relation to the provision of goods, facilities and services to the public.

¹³ In respect of indirect race discrimination, this definition only applies to the race categories of race and

APPENDIX 3

Definition of Victimisation (all equality categories)

A person (“X”) discriminates by way of victimisation against another person (“Y”) if he treats Y less favourably than he treats or would treat other persons and he does so for one or more of the following reasons:

- Y has brought proceedings under the equality statutes against X or another person; or
- Y has given evidence or information in connection with such proceedings brought by another person; or
- Y has alleged that X or another person has contravened the equality statutes; or
- Y has otherwise done anything under, or by reference to the equality statutes; or
- X knows, or suspects, that Y has done or intends to do any of the things listed above.

This protection against victimisation in respect of any allegation made by Y does not apply if the allegation was false and not made in good faith.

APPENDIX 4

Definitions of Harassment

Definition of Harassment

(Religious or similar philosophical belief / Political Opinion / Race / Sexual Orientation / Age)

A person (“X”) subjects another person (“Y”) to harassment if, on grounds of:

- Religious or similar philosophical belief; or
- Political opinion; or
- Race; or
- Sexual Orientation; or
- Age

X engages in unwanted conduct which has the purpose or effect of:

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

Conduct shall be regarded as having the effect specified above only if, having regard to all the circumstances, including in particular the perception of Y, it should reasonably be considered as having that effect.

Definition of harassment against disabled persons

A person (“X”) subjects a disabled person (“Y”) to harassment if, for a reason which relates to Y’s disability, X engages in unwanted conduct which has the purpose or effect of:

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

Conduct shall be regarded as having the effect specified above only if, having regard to all the circumstances, including in particular the perception of Y, it should reasonably be considered as having that effect.

Definition of sex harassment

A person (“X”) subjects a person (“Y”) to harassment if:

- (1) X engages in unwanted conduct that is related to Y’s sex or that of another person and which has the purpose or effect of:
 - (a) violating Y’s dignity; or
 - (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for Y; or
- (2) X engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of:
 - (a) violating Y’s dignity; or
 - (b) creating an intimidating, hostile, degrading, humiliating or offensive

- (3) on the ground of Y's rejection of or submission to unwanted conduct of a kind mentioned at (1) or (2) above, X treats Y less favourably than X would treat Y had Y not rejected, or submitted to, the conduct.

Conduct shall be regarded as having the effect specified above only if, having regard to all the circumstances, including in particular the perception of Y, it should reasonably be considered as having that effect.

Definition of gender reassignment harassment

A person ("X") subjects a person ("Y") to harassment if-

- (1) on the ground that Y intends to undergo, is undergoing or has undergone gender reassignment, X engages in unwanted conduct which has the purpose or effect of:
 - (a) violating Y's dignity; or
 - (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for Y; or
- (2) on the ground of Y's rejection of or submission to unwanted conduct of a kind mentioned at (1) above, X treats Y less favourably than X would treat Y had Y not rejected, or submitted to, the conduct.

Conduct shall be regarded as having the effect specified above only if, having regard to all the circumstances, including in particular the perception of Y, it should reasonably be considered as having that effect.

Harassment of persons who are married or who are civil partners

In this context there is no special statutory definition of harassment comparable to those which apply in the other equality areas and which are described above. Nevertheless, offensive behaviour which is directed at persons who are married, or who are civil partners, is likely to constitute direct discrimination (i.e. A person ('X') directly discriminates against another person ('Y') if, on the ground that Y is married or is a civil partner, X treats Y less favourably than he treats or would treat a person who is not married or who is not a civil partner). Furthermore, offensive behaviour which is directed at persons who are civil partners is likely to constitute harassment on the grounds of sexual orientation.

APPENDIX 5

Model Equal Opportunities Policy

Download Policy

The latest version of the Model Policy is available to download from our website.

- www.equalityni.org/ModelPolicies

APPENDIX 6

Model Harassment Policy

Download Policy

The latest version of the Model Policy is available to download from our website.

- www.equalityni.org/ModelPolicies

APPENDIX 7

Model procedure for dealing with complaints of harassment

Download Model Procedure

The latest version of the Model procedure (now called a model grievance procedure) is available to download from our website.

- www.equalityni.org/ModelPolicies

APPENDIX 8

Model Joint Declaration of Protection

Download Model Declaration

The latest version of the Model declaration is available to download from our website.

- www.equalityni.org/ModelPolicies

Policy Statement

The Company is committed to the promotion of equality of opportunity in employment for all persons regardless of their sex; religious or similar philosophical belief; political opinion; race; age; sexual orientation; or, whether they are married or are in a civil partnership; or, whether they are disabled; or whether they have undergone, are undergoing or intend to undergo gender reassignment.

In order to take practical action to implement this commitment we have developed an Employment Equality Plan [or, Diversity Plan] with the support of the Equality Commission for Northern Ireland. This plan is a voluntary initiative designed to build on other policies and practices adopted by the Company previously for the purpose of promoting equality of opportunity. The plan has been developed in accordance with the requirements of each of the equality and anti-discrimination laws in Northern Ireland and with the good practice recommendations of the Equality Codes of Practice and with other good practice guidance issued by the Equality Commission.

The plan will be implemented over the course of the next three years.

Objectives

The objectives of the plan are as follows:

1. To develop an Equal Opportunities Policy [*or, review and update an existing policy*];
2. To develop a Harassment Policy and Procedure [*or, review and update an existing policy and procedure*];
3. To review the Company's equal opportunities monitoring strategy and review the Company's equal opportunities monitoring questionnaire;
4. To conduct a triennial review of the community background composition of the Company's workforce and employment practices as required by *Article 55 of the Fair Employment and Treatment (NI) Order 1998*;
5. To review the Company's recruitment and selection policies and procedures;
6. To review all of the Company's other employment policies and practices to ensure that they comply with the requirements of the *Disability Discrimination Act 1995* and the good practice recommendations of the *Disability Code of Practice – Employment and Occupation*; ²⁰ (See page 108 for footnote.)
7. To conduct a staff survey on attitudes to equality opportunities;
8. To develop and implement a programme of equal opportunities and harassment training for all staff.

¹⁹ This is merely an example of how an employment equality plan might be drafted. Employers who base their plans on this template should make appropriate amendments to suit their own particular circumstances, needs and objectives.

Action Plan

In order to achieve the above objectives, the Company has adopted the following action plan-

Time Period		Actions
1st Year	28th February	To have developed an Equal Opportunities Policy <i>[or, to have reviewed and updated an existing policy]</i>
	31st March	To have developed a Harassment Policy and Procedure <i>[or, to have reviewed and updated an existing policy]</i>
	30th June	To have developed a programme of equal opportunities and harassment training for all staff.
	31st December	To have delivered the programme of equal opportunities and harassment training to all staff.
2nd Year	31st March	To have completed and analysed the staff survey on attitudes to equal opportunities.
	30th June	To have completed the review of the Company's recruitment and selection policies and procedures.
	30th September	To have completed the amendment and update of the recruitment and selection policies in the light of the review.
	31st December	To have completed the review all of the Company's other employment policies and practices to ensure that they comply with the requirements of the <i>Disability Discrimination Act 1995</i> and the good practice recommendations of the <i>Disability Code of Practice – Employment and Occupation</i>
3rd Year	31st March	To have completed the amendment and update of the employment policies in the light of the "disability" review.
	31st December	To have completed the triennial review of the community background composition of the Company's workforce and employment practices as required by Article 55 of the <i>Fair Employment and Treatment (NI) Order 1998</i>

20 This example of an objective would be appropriate for an employer who has decided to concentrate on promoting equality of opportunity between disabled persons and those who are not. Other employers, or the same employer at a different time, might develop other employment equality, or diversity, plans which focus on promoting equality of opportunity between other persons; for example, men and women; or, persons with dependants and those without, or between the members of different racial groups. The decision is ultimately for each employer to make and will depend on their own particular circumstances, needs and objectives.

APPENDIX 10

Model Equal Opportunities Monitoring Form

Confidential

Reference no: _____

Monitoring Questionnaire

Guidance Notes:

We are an Equal Opportunities Employer. We aim to provide equality of opportunity to all persons regardless of their religious or similar philosophical belief; political opinion; sex; race; age; sexual orientation; or, whether they are married or are in a civil partnership; or, whether they are disabled; or whether they have undergone, are undergoing or intend to undergo gender reassignment.

We do not discriminate against our job applicants or employees on any of the grounds listed above. We aim to select the best person for the job and all recruitment decisions will be made objectively.

In this questionnaire we will ask you to provide us with some personal information about yourself. We are doing this for two reasons.

Firstly, we are doing this to demonstrate our commitment to promoting equality of opportunity in employment. The information that you provide us will assist us to measure the effectiveness of our equal opportunity policies and to develop affirmative or positive action policies.

Secondly, we also monitor the community background and sex of our job applicants and employees in order to comply with our duties under the *Fair Employment & Treatment (NI) Order 1998*.

You are not obliged to answer the questions on this form and you will not suffer any penalty if you choose not to do so.

Nevertheless, we encourage you to answer the questions below. Your identity will be kept anonymous and your answers will be treated with the strictest confidence. We assure you that your answers will not be used by us to make any unlawful decisions affecting you, whether in a recruitment exercise or during the course of any employment with us. To protect your privacy, you should not write your name on this questionnaire. The form will carry a unique identification number and only our Monitoring Officer will be able to match this to your name.

Community Background:

Regardless of whether they actually practice a particular religion, most people in Northern Ireland are perceived to be members of either the Protestant or Roman Catholic communities.

Please indicate the community to which you belong by ticking the appropriate box below:

I am a member of the Protestant community:

I am a member of the Roman Catholic community:

I am not a member of either the Protestant or the Roman Catholic communities:

If you do not answer the above question, we are encouraged to use the residuary method of making a determination, which means that we can make a determination as to your community background on the basis of the personal information supplied by you in your application form/personnel file.

Sex:

Please indicate your sex by ticking the appropriate box below:

Male:

Female:

Note: If you answer these questions about community background and sex you are obliged to do so truthfully, as it is a criminal offence under the Fair Employment (Monitoring) Regulations (NI) 1999 to knowingly give false answers to these questions.

Age:

Please state your date of birth:

Date of Birth: _____

Racial Group:

Please state your nationality:

My Nationality is: _____

Please indicate your race or colour or ethnic or national origins:

White	<input type="checkbox"/>	Chinese	<input type="checkbox"/>
Irish Traveller	<input type="checkbox"/>	Indian	<input type="checkbox"/>
Pakistani	<input type="checkbox"/>	Bangladeshi	<input type="checkbox"/>
Black Caribbean	<input type="checkbox"/>	Black African	<input type="checkbox"/>
Black Other	<input type="checkbox"/>		

Mixed ethnic group (please state which): _____

Any other ethnic group (please state which): _____

Disability:

Under the *Disability Discrimination Act 1995* a person is deemed to be a disabled person if he or she has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Please note that it is the effect of the impairment without treatment which determines whether an individual meets this definition.

Do you consider that you are a disabled person?

Yes: No:

If you answered “yes”, please indicate the nature of your impairment by ticking the appropriate box or boxes below:

Physical impairment, such as difficulty using your arms, or mobility issues requiring you to use a wheelchair or crutches:

Sensory impairment, such as being blind or having a serious visual impairment, or being deaf or having a serious hearing impairment:

Mental health condition, such as depression or schizophrenia:

Learning disability or difficulty, such as Down’s Syndrome or dyslexia, or **Cognitive impairment**, such as autistic spectrum disorder:

Long-standing or progressive illness or health condition, such as cancer, HIV infection, diabetes, epilepsy or chronic heart disease:

Other (please specify):

Sexual Orientation:

Please indicate your sexual orientation by ticking the appropriate box below:

My Sexual Orientation is towards:

Persons of a different sex to me:
(i.e. I am a heterosexual man or woman)

Persons of the same sex as me:
(i.e. I am a gay man or a lesbian)

Persons of both sexes:
(i.e. I am a bisexual man or woman)

Marital Status / Civil Partnership Status:

Please indicate whether you are married or in a civil partnership by ticking the appropriate box below:

Are you married or in a civil partnership?

Yes: No:

Dependants / Caring Responsibilities:

Do you have dependants, or caring responsibilities for family members or other persons?

Yes: No:

If you answered “yes”, please indicate whether your dependants or the people you look after are:

(Please tick the appropriate box or boxes):

A child or children:

A disabled person or persons:

An elderly person or persons:

Other:

If “Other”, please specify: _____

APPENDIX 11

Model Fair Employment Monitoring Questionnaire

Ref No:

Private & Confidential

Monitoring Questionnaire

Introduction:

We are an Equal Opportunities Employer. We do not discriminate against our job applicants or employees and we aim to select the best person for the job.

We monitor the community background and sex of our job applicants and employees in order to demonstrate our commitment to promoting equality of opportunity in employment and to comply with our duties under the *Fair Employment & Treatment (NI) Order 1998*.

You are not obliged to answer the questions on this form and you will not suffer any penalty if you choose not to do so. Nevertheless, we encourage you to answer these questions. Your answers will be used by us to prepare and submit a monitoring return to the Equality Commission, but your identity will be kept anonymous. In all other regards your answers will be treated with the strictest confidence. We assure you that your answers will not be used by us to make any decisions affecting you, whether in a recruitment exercise or during the course of any employment with us.

Community Background:

Regardless of whether they actually practice a religion, most people in Northern Ireland are perceived to be members of either the Protestant or Roman Catholic communities.

Please indicate the community to which you belong by ticking the appropriate box below:

I am a member of the Protestant community:

I am a member of the Roman Catholic community:

I am not a member of either the Protestant or the Roman Catholic communities:

If you do not answer the above question, we are encouraged to use the residuary method of making a determination, which means that we can make a determination as to your community background on the basis of the personal information supplied by you in your application form/personnel file.

Sex

Please indicate your sex by ticking the appropriate box below:

Male:

Female:

Note: If you answer this questionnaire you are obliged to do so truthfully as it is a criminal offence under the Fair Employment (Monitoring) Regulations (NI) 1999 to knowingly give false answers to these questions.

Further information and advice

For further information and advice on any equality issues or if you would like to find out more about the Equality Commission and its work, contact us at:



Equality Commission for NI
Equality House
7-9 Shaftesbury Square
Belfast BT2 7DP



Telephone: 028 90 890 890 (Enquiry Line)



Fax: 028 90 331 544



Textphone: 028 90 500 589



Email: information@equalityni.org



Website: www.equalityni.org

You can also use Typetalk to contact us.

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