

EQUALITY ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: The Commission for Equality and Human Rights

Section 1: Establishment

17. *Section 1* establishes the CEHR.

Section 2: Constitution, &c.

18. *Section 2* introduces *Schedule 1* which sets out provisions relating to the constitution of the CEHR; its members (the Commissioners); their appointment criteria; and their tenure of office; the tenure of office of the Chairman and the deputy Chairman; regulation of its proceedings; appointment of its staff; appointment of its Investigating Commissioners; its powers of delegation and the committees to which certain functions must be delegated; preparation of its annual report; remuneration of Commissioners and staff; its financial arrangements; and its status.

Section 3: General duty

19. *Section 3* sets out the outcomes for society that the CEHR is required to work towards. It explains the rationale for the CEHR, combining work in equality, human rights and good relations between different groups in society. The CEHR is required to exercise its functions in Part 1 in order to work towards the outcomes set out in this section.

Section 4: Strategic plan

20. *Section 4* places the CEHR under a duty to publish and lay before Parliament, a strategic plan setting out the activities or types of activity it plans to carry out, the timetable for these activities, and the priorities for these activities (or the principles on how these priorities should be determined).
21. *Subsection (2)* requires the CEHR to review its strategic plan at least once every three years from publication, although it does not have to revise the plan after each review if it does not think it appropriate to do so. The CEHR must publish the original plan and each revision of it, and ensure that the plan and each revision is sent to the Secretary of State to lay before Parliament.

Section 5: Strategic plan: consultation

22. *Section 5* places the CEHR under a duty to consult on the preparation and review of its strategic plan. The CEHR is required to consult with those who have knowledge or experience relevant to the CEHR's functions and others the CEHR considers appropriate. The CEHR is also required to issue a general invitation to make representations, to ensure it is able to consult with as large a group of people as possible.

23. The CEHR will be required to take account of any representations it receives in the course of its consultation.

Section 6: Disclosure

24. *Section 6* creates a summary criminal offence of unauthorised disclosure by a former or current Commissioner, Investigating Commissioner, employee, or member of a committee established by the Commission, of information provided to the CEHR by third parties in the course of an inquiry, investigation, assessment, compliance notice process, or a negotiation to obtain an agreement. Information obtained through the exercise of its other functions will be subject to disclosure in accordance with the Freedom of Information Act 2000. Subsection (3) provides an exhaustive list of categories for which a disclosure can be authorised. They are disclosure made: for the purpose of the exercise of a function of the CEHR under any of sections 16, 20, 21, 24, 25, 31 and 32; in a report of an inquiry, investigation, or assessment published by the CEHR; in pursuance of an order of a court or tribunal; with the consent of each person to whom the disclosed information relates; in a manner that ensures that no person to whom the disclosed information relates can be identified; for the purpose of civil or criminal proceedings to which the CEHR is party, or; if the information was acquired by the CEHR more than 70 years before the date of the disclosure. Subsection (3) does not permit disclosure of information provided by, or relating to, an intelligence service. Such material can only be disclosed under subsection (4) where the intelligence service has given its consent. Subsection (6) provides that the penalty for a summary conviction shall be a fine up to the statutory maximum i.e. £5,000.

Section 7: Scotland: human rights

25. *Section 7* provides that the CEHR may not take human rights action in relation to matters falling within the devolved competence of the Scottish Parliament, except with the consent of a person established by Act of the Scottish Parliament whose principal duties relate to human rights (for example a Human Rights Commissioner). “Human rights action” is defined in *subsection (2)*.

Section 8: Equality and diversity

26. *Sections 8 to 12* set out the duties of the CEHR. Later sections in Part 1 set out the general powers the CEHR has to meet its obligations under these duties.
27. *Section 8* sets out the CEHR’s duties in relation to equality and diversity. The provisions require the CEHR to promote understanding of, and encourage good practice in relation to, equality and diversity (whether or not this relates to compliance with the equality enactments (as listed in section 33)), promote equality of opportunity, promote awareness and understanding of rights under the equality enactments and to work towards the elimination of unlawful discrimination and harassment, including through using its enforcement powers.
28. *Subsection (3)* clarifies that the Commission may promote the favourable treatment of disabled persons in carrying out its equality and diversity duties. This provision ensures the Commission’s work is consistent with the requirements of the Disability Discrimination Act 1995. *Subsection (4)* defines disabled persons for the purposes of this Act.

Section 9: Human rights

29. *Section 9* sets out the CEHR’s duties in relation to human rights. The provisions require the CEHR to promote understanding of the importance of human rights, encourage good practice in relation to human rights, and promote awareness, understanding and protection of human rights. In addition, the CEHR will be required to encourage public authorities to comply with section 6 of the Human Rights Act 1998 (c.42) (HRA) (which

prohibits them from acting in a way which is incompatible with the Convention rights as defined in section 1 of the HRA).

30. The latter duty applies only in relation to public authorities (“public authority” is defined in section 6 of the HRA). However, in relation to the more general duties under this section, the CEHR will not be limited to dealing with public authorities. It will, for example, also be able to provide encouragement to the voluntary and commercial sectors to adopt appropriate human rights standards as the basis of the relationship with their clients and customers in the provision of their services.
31. *Subsection (2)* makes clear that the CEHR may take action under this section in respect of human rights other than the “Convention rights” set out in Schedule 1 to the HRA. However, *subsection (3)* requires the CEHR to have particular regard to the importance of exercising its powers in relation to the Convention rights.
32. *Subsection (4)* requires the CEHR to take account of relevant human rights when fulfilling its duties under sections 8 and 10.

Section 10: Groups

33. *Section 10* sets out the CEHR’s duties in relation to promoting good relations between members of different groups, within different groups, and between members of different groups and wider society. It also requires the CEHR to work towards eliminating prejudice against members of groups and enabling members of groups to participate in society, for example in challenging racism in the media, or enabling disabled people to become involved in civic activities.
34. *Subsections (2) and (3)* define groups as people who share one of the attributes listed in subsection (2), including smaller groups who may share an attribute in addition to the one by which that group is defined, such as Muslim women, or Black and minority ethnic lesbians and gay men, or young disabled people. Groups may or may not consider themselves to be “communities”. The Commission’s work with groups can apply to communities as well as groups.
35. *Subsection (4)* ensures that, in carrying out its duties under this section, the CEHR should have particular regard to the need to exercise its powers in relation to groups defined by reference to race, religion or belief.
36. *Subsection (5)* ensures that in carrying out its duties in relation to working with groups, the Commission may promote or encourage the favourable treatment of disabled people, to ensure consistency with the general approach of the Disability Discrimination Act.

Section 11: Monitoring the law

37. *Section 11* sets out the obligations and powers of the CEHR to keep the equality and human rights enactments under review and provide advice and recommendations on the law and proposed changes to the law.
38. *Subsection (1)* requires the CEHR to monitor the effectiveness of the equality and human rights enactments. The equality and human rights enactments are listed in section 33 and, for the purposes of this section, include the whole of this Act (subsection (3)(c)). *Subsections (2)(a) and (b)* enable but do not require the CEHR to advise the Government about the effectiveness of the equality and human rights enactments and to recommend changes. *Subsections (2)(c) and (d)* enable the CEHR to give advice to the Government or the devolved administrations in Scotland or Wales about the effect of legislation (not limited to the equality and human rights enactments) or the likely effect of any proposed changes to the law.

Section 12: Monitoring progress

39. *Section 12* places the CEHR under a duty to publish reports on what progress has been made towards the achievement of desirable outcomes i.e. the results to aim for in encouraging and supporting the development of the society described in section 3. To meet its obligations under this duty, the CEHR will need to evaluate available evidence in order to identify desired outcomes for society and the indicators by reference to which progress can be measured. The CEHR will be required to consult widely on which of these should be priorities for the CEHR to monitor.
40. Once the CEHR has determined what outcomes and indicators are priorities, it will use the indicators to monitor progress towards the outcomes over a period of time. The CEHR is required to publish a report within three years of this section coming into force, and every three years thereafter. The Secretary of State must lay the progress report before Parliament.

Section 13: Information, advice, &c.

41. *Section 13* sets out the general powers available to the CEHR, and the general activities it can undertake, to carry out any or all of its duties. These activities are publishing or disseminating ideas and information, giving advice and guidance, undertaking research and providing education or training.
42. *Subsections (1)(e) and (f)* permit the CEHR to work in partnership with others, or to arrange for others to carry out any of the listed activities. This may include contractual or grant-based partnerships.
43. *Subsection (2)* confirms that advice given under this section does not include the preparation of documents to be used for the purpose of legal proceedings. The CEHR has separate powers to provide such advice in respect of particular types of legal proceedings, as laid down in section 28.

Section 14: Codes of practice

44. *Section 14* enables the CEHR to issue a code of practice in respect of specified areas of discrimination legislation, to assist in compliance with the legislation and to promote equality of opportunity. Additionally, the CEHR may issue a code of practice on specified provisions of landlord and tenant and housing legislation.
45. *Subsection (1)* lists the areas in the equality enactments (as defined in section 33) in relation to which the CEHR is to be able to issue codes of practice.
46. *Subsections (3) and (4)* set out the circumstances and the areas of landlord and tenant and housing legislation on which a code can be issued giving practical guidance to landlords and tenants in England or Wales (*subsection (2)*) and in Scotland (*subsection (3)*).
47. *Subsection (5)* places an obligation upon the CEHR to comply with a direction of the Secretary of State to prepare a code of practice in respect of a matter not currently covered by this section but which the Secretary of State expects to add by means of the order-making power provided in section 15(6) to vary the range of matters on which the CEHR may prepare a code of practice.
48. *Subsection (6)* requires the CEHR to publish for consultation proposals for any code of practice.
49. *Subsection (7)* prevents the CEHR from issuing a code of practice unless it has been approved in draft by the Secretary of State and then laid before Parliament. Either House of Parliament may pass a resolution disapproving the draft code within 40 days of it being laid. If no such resolution is passed, *subsection (8)* provides that the code of practice will come into force on a day specified by order by the Secretary of State.

50. *Subsection (9)* requires the Secretary of State to consult Scottish Ministers and the National Assembly for Wales prior to approving a draft code of practice or commencing a code of practice which relates to the duties on the public sector regarding the general and specific duties for race, gender or disability under the RRA, SDA and DDA, respectively.
51. *Subsection (10)* requires the Secretary of State to consult the Scottish Ministers prior to approving a draft code of practice or commencing a code of practice issued under *subsection (4)* which gives practical guidance to landlords and tenants of houses in Scotland.

Section 15: Codes of practice: supplemental

52. *Subsection (1)* of this section makes provision for the codes of practice issued under section 14 to be revised. *Subsection (3)* provides for any code to be revoked by an order made by the Secretary of State at the request of the CEHR. An order to revoke a code will be subject to the negative resolution Parliamentary procedure.
53. *Subsection (4)* describes the legal effect of a code of practice. It provides that a failure to comply with a provision of a code of practice does not itself give rise to criminal or civil proceedings, but a code of practice is admissible in such proceedings and must be taken into account by a court or tribunal if the court or tribunal considers the code to be relevant.
54. *Subsection (5)* disapplies the requirement in subsection (4)(b) for a court or tribunal to take account of a code of practice issued under section 14(4). However, the Housing (Scotland) Act 2006 provides for the Scottish courts and tribunals to take account of such codes.
55. *Subsection (6)* provides for an order-making power to allow the Secretary of State to vary the range of matters that codes of practice may address. In accordance with section 39(4), any such order will be subject to the affirmative resolution procedure.

Section 16: Inquiries

56. *Section 16* gives the CEHR a power to conduct inquiries into matters relating to its duties in respect of equality and diversity, human rights and groups. These could be thematic (for example into the causes of unequal outcomes), sectoral (looking at inequality in, for example, the uptake of health screening services or at the employment of disabled people in particular sectors, e.g. the retail sector) or relate to one or more named parties.
57. *Subsection (2)* provides that if the CEHR begins to suspect that a person who is the subject of an inquiry may have committed an unlawful act (i.e. a breach of the equality enactments, as set out in sections 33 & 34), it should not continue to consider that act as part of the inquiry. The CEHR can, however, use the information acquired in the course of an inquiry as the basis on which to launch an investigation. The CEHR is under a duty to ensure that so far as possible, those aspects of an inquiry which concern the person being investigated or which require his involvement are not pursued while the investigation is in progress.
58. *Subsection (3)* provides that the report of an inquiry may not conclude, expressly or by necessary implication, that a specified or identifiable person has committed an unlawful act. Nor may the report refer to the activities of a person in terms that will harm the person unless it is necessary in order that the report adequately reflect the results of the inquiry.
59. *Subsection (4)* provides that restrictions on the CEHR considering unlawful acts under the equality enactments should not impact on the CEHR's consideration and reporting of human rights matters in the course of an inquiry.

60. *Subsection (5)* provides that the CEHR, in circumstances where the findings are in the opinion of the CEHR of an adverse nature, must allow a specified or identifiable person at least 28 days in which to make written representations on the draft of a report which records findings which relate to that person, and requires the CEHR to consider any such representations.
61. *Schedule 2* sets out the provisions relating to terms of reference, representations, evidence, reports and recommendations and effects of reports in relation to inquiries, investigations and assessments. Commentary on Schedule 2 can be found below.

Section 17: Grants

62. *Section 17* provides the CEHR with a power to make grants to others, in pursuance of any of its duties under sections 8 to 10. This is a power currently available only to the CRE under section 44 of the RRA.
63. *Subsection (2)* allows the CEHR to attach conditions, including as to repayment, to the financial assistance that it provides.
64. *Subsection (3)* provides that, where the CEHR provides financial assistance in the exercise of its powers to co-operate with or assist others under Part 1 of the Act, it may do so only in accordance with the provisions of section 17.

Section 18: Human rights

65. *Section 18* allows the CEHR to co-operate with other people or organisations within the United Kingdom and abroad when undertaking its human rights duties as set out in section 9. Section 13 permits the CEHR to co-operate with others in respect of the activities set out in that section; section 18 allows co-operation to extend beyond those activities in relation to human rights. In particular, this will allow the CEHR to co-operate with human rights commissions or commissioners in other parts of the United Kingdom, and to give its opinion to international bodies about the compliance of the United Kingdom with its international human rights obligations.

Section 19: Groups

66. *Section 19* provides the CEHR with powers additional to the general powers set out in section 13, to fulfil its duties in respect of groups set out in section 10.
67. The provisions of section 19 enable the CEHR to monitor crimes affecting members of certain groups and undertake activities to reduce crime within or affecting members of those groups. The CEHR can also arrange social, recreational, sporting, civic, educational or other activities designed to involve members of groups.
68. The CEHR can undertake these activities itself, or can arrange to assist or cooperate with others in making such arrangements.

Section 20: Investigations

69. *Section 20* gives the CEHR a power to conduct investigations into persons (both natural and legal). Such an investigation may be into the commission of an unlawful act under the equality enactments, compliance with a requirement of an unlawful act notice issued under section 21 or compliance with the terms of an agreement entered into under section 23.
70. *Undersubsection (2)*, the CEHR may only carry out an investigation under *subsection (1)(a)* if it suspects that the person concerned may have committed an unlawful act.
71. *Subsection (3)* provides that a belief of unlawful discrimination or harassment, sufficient to satisfy the requirement in *subsection (2)*, may have been acquired by the

CEHR in the course of an inquiry, but need not be. The CEHR may carry out an investigation without having first carried out an inquiry.

72. *Subsection (4)* sets out the requirements which must be met before the CEHR can settle a report which records a finding that the person concerned has: committed an unlawful act; failed to comply with a requirement imposed by an unlawful act notice under section 21; or failed to comply with an undertaking given under section 23. The CEHR must send the person concerned a draft of the report and allow him at least 28 days in which to make written representations and consider any representations made.
73. *Schedule 2* sets out the provisions relating to terms of reference, representations, evidence, reports and recommendations and effects of recommendations in respect of inquiries, investigation and assessments. Commentary on Schedule 2 can be found below.

Section 21: Unlawful act notice

74. *Section 21* makes provision for the CEHR to issue an unlawful act notice after an investigation confirming an unlawful act has taken place.
75. *Subsection (1)* permits the CEHR to issue an unlawful act notice in circumstances where it has conducted an investigation and is satisfied that the party investigated has committed an unlawful act, as defined in section 34. Under *subsection (2)* an unlawful act notice must set out the unlawful act and the legislative provision by virtue of which the act is unlawful. *Subsection (3)* requires the CEHR to include in the notice details of the appeal procedure against the notice, the scope for a subsequent investigation into the subject's compliance with the notice and the scope for the CEHR to apply to a court for an injunction or interdict under section 24 if it thinks the unlawful act is continuing. Under *subsection (4)* the CEHR may include within the notice a provision requiring the recipient to prepare an action plan (as provided for in section 22) setting out how the unlawful act will cease or not be repeated. It allows the CEHR to recommend action that the person served the notice should take. *Subsection (5)* sets out the basis on which a person may appeal against an unlawful act notice and *subsection (6)* enables a court or tribunal to affirm, annul or vary a notice or requirement under it and includes the power to make an order for costs.

Section 22: Action plans

76. *Section 22* sets out the arrangements for an action plan that section 21 enables the CEHR to require of a person on whom it has served an unlawful act notice.
77. *Subsection (2)* requires that the unlawful act notice must specify a deadline for the first draft action plan.
78. *Subsections (3) and (4)* require the CEHR to either approve the first or any subsequent draft plan or give notice to the person that it is not adequate, specify a time for a revised draft and make recommendations as to the content of the revised draft.
79. *Subsection (5)* provides that, unless the CEHR gives the person notice that the draft plan is inadequate or applies to a court for an order (under *subsection (6)* below) to provide a revised draft, the action plan shall come into force within six weeks.
80. *Subsection (6)* enables the CEHR to apply to a county court (and the Scottish equivalent) for an order requiring a person to submit a draft or revised action plan by a deadline specified by the court. The court may also make a direction as to the plan's content. *Subsection (6)(c)* enables the CEHR to apply to a court for an order within five years of an action plan coming into force to require the person to comply with the action plan or to take specific action for a similar purpose. *Subsection (9)* provides that a person not complying with a court order commits a criminal offence.
81. *Subsection (7)* allows for an action plan to be varied by agreement.

82. *Subsection (8)* applies paragraphs 10 to 14 of Schedule 2 to consideration by the CEHR of the adequacy of a draft action plan.

Section 23: Agreements

83. *Section 23* makes provision for the CEHR to enter into an agreement with a person who it has reason to believe has committed an unlawful act, as defined in section 34. Agreements are enforceable through the courts. The CEHR is able to enter into an agreement where the other party undertakes not to commit a specified unlawful act, and to take or refrain from taking specified action. In return, the CEHR undertakes not to proceed under section 20 or 21 with an investigation or the issue of an unlawful act notice in respect of the act specified in the agreement.
84. Under *subsection (4)* an agreement may contain supplementary matters, such as action that may be taken in the event of a breakdown of the agreement or the circumstances in which either party may terminate the agreement. It also allows the parties to consensually vary or terminate the agreement.
85. *Subsection (5)* provides that the CEHR can enter into an agreement with a public authority in respect of a breach of any of the public sector duties set out in section 34(2) in lieu of issuing a public sector duty compliance notice, as provided for in section 32.

Section 24: Applications to court

86. *Section 24* gives the CEHR the power to apply for an injunction (and an interdict in Scotland) against a person who it believes that, unless restrained, is likely to commit an unlawful act. It also provides for the CEHR to apply to a court when the other party to an agreement provided for in section 23 has failed to comply, or the CEHR thinks is unlikely to comply, with an undertaking under the agreement. The court can order the other party to comply with his undertaking and take any such other action as the court may specify.

Section 25: Application to restrain unlawful advertising, pressure, &c.

87. *Section 25* sets out the CEHR's powers to bring legal proceedings (in its own name) in respect of the relevant provisions in the SDA, RRA, DDA and this Act that prohibit unlawful advertising, instructions and pressure to discriminate in respect of race, sex, disability and religion or belief.
88. *Subsection (2)* provides that the CEHR alone is entitled to bring proceedings in respect of these provisions of the equality legislation set out in *subsection (1)*.
89. Under *subsection (3)* the CEHR can apply to an employment tribunal or county court (or to a sheriff in Scotland) for a finding that an act of unlawful advertising, pressure or instructions to discriminate has taken place.
90. *Subsection (4)* provides for a court or tribunal to which a complaint has been made by the CEHR to determine whether the allegation is correct.
91. *Subsection (5)* gives the CEHR the power to apply to a county court for an injunction and under *subsection (6)* to a sheriff in Scotland for an interdict, where it considers that, unless restrained, the person concerned may commit further acts of unlawful advertising or instructions or pressure to discriminate. The CEHR may apply for such an injunction in one of two circumstances: either where a court or tribunal has determined that such an act has been committed or where the CEHR believes that such an act has been committed.
92. *Subsection (7)* provides that the CEHR's enforcement powers in this section do not apply to the criminal offences in the SDA, RRA, DDA or this Act of making false or misleading statements about whether an advertisement is unlawful.

Section 26: Section 25: supplemental

93. *Section 26* sets out the procedural rules governing the exercise of the CEHR's powers in relation to unlawful advertising, and instructions or pressure to discriminate under section 25.
94. *Subsection (1)* provides that the CEHR can only make an application to a court or tribunal under section 25(3) for a determination that an act covered by section 25 has taken place:
- within six months of the alleged unlawful act; or
 - with the permission of the employment tribunal or court if after that six month time limit.
95. *Subsection (2)* prevents the CEHR, when applying for an injunction under section 25(5) or (6), from relying on the ruling of a court or tribunal under section 25(4) if there is an appeal pending against that ruling, or if it would still be possible for an appeal to be brought within the normal time limits.
96. *Subsection (3)* provides that the CEHR can only apply to a county court for an injunction or to the sheriff in Scotland for an interdict under section 25(5) or (6) restraining a person from doing an act covered by section 25:
- within five years of the date on which the act last occurred; or
 - with the permission of the court (or sheriff in Scotland) if after that five year time limit.

Section 27: Conciliation

97. *Section 27* gives the CEHR the power to make arrangements for the provision of conciliation services (as defined in *subsection (9)*).
98. Conciliation services can be provided in relation to disputes where proceedings have been or could be brought under specified sections of the equality enactments (listed in *subsection (1)*). These are civil proceedings in respect of:
- goods, facilities and services, premises, public functions and education under the SDA;
 - goods, facilities and services, premises, public functions and education under the RRA;
 - goods, facilities and services, premises, public functions and education under the DDA (except for proceedings about admissions and exclusions);
 - goods, facilities and services, premises, public functions and education under the provisions for religion and belief in this Act;
 - activities covered by the Sexual Orientation Regulations that can be made under Part 3 of this Act, and;
 - further and higher education under the Employment Equality (Sexual Orientation) Regulations and the Employment Equality (Religion or Belief) Regulations.
99. Conciliation services can also be provided (*subsection (2)*) in relation to disputes about a landlord's reasonableness in relation to consent to the making of disability related improvements to let residential property in England or Wales. *Subsection (3)* makes similar provision in respect of consent to the making of disability related works in Scotland.
100. *Subsection (4)* requires the CEHR to exercise this power to ensure that, so far as reasonably practicable, the conciliation services are available to those who want them.

*These notes refer to the Equality Act 2006 (c.3)
which received Royal Assent on 16 February 2006*

101. *Subsection (5)* prevents information communicated to a person providing conciliation services from being used in litigation without the consent of the party who provided the information.
102. *Subsection (6)* excludes Commissioners, CEHR staff, Committee members and Investigating Commissioners from providing conciliation services.
103. *Subsections (7) and (8)* require the CEHR to make administrative arrangements to prevent information connected with a conciliation case from being passed to a member of the CEHR or its staff, except in the following circumstances: where the parties to the dispute agree; where the information does not make the individuals identifiable (e.g. where information is provided in aggregate form); or where the information is necessary for conciliation arrangements to be made.
104. *Subsection (10)* provides the Secretary of State with an order-making power (specified in section 39(4) as subject to an affirmative resolution procedure) to amend this section so as to vary the range of disputes in respect of which the CEHR can arrange conciliation services.

Section 28: Legal assistance

105. *Subsection (1)* enables the CEHR to give assistance to an individual who alleges that he is a victim of behaviour contrary to the equality enactments (defined in section 33) and who is or may become a party to legal proceedings which relate to the alleged breach of the equality enactments. The CEHR will determine the criteria on which legal assistance is granted.
106. *Subsection (2)* enables the CEHR to give assistance to an individual who is or may become a party to legal proceedings in England or Wales insofar as the proceedings concern or may concern the question of a landlord's reasonableness in relation to consent to the making of disability related improvements to let residential property.
107Subsection (3) makes similar provision in respect of legal proceedings in Scotland about consent to the making of disability related works in Scotland.
108. *Under subsection (4)* the types of legal assistance which the CEHR may provide or arrange are legal advice, legal representation, and facilities to settle the dispute or any other form of assistance. Such assistance may also include securing an arrangement to avert legal proceedings. This is distinguishable from the provision of formal conciliation services in section 27 where both sides are able to meet with a conciliator to resolve a dispute about discrimination and harassment in relation to the provision of goods, facilities and services, education and the exercise of public functions.
109. *Subsection (5)* prevents the CEHR from providing legal assistance in respect of the provisions of Part V of the DDA (public transport).
110. *Subsection (6)* allows the CEHR to provide legal assistance in respect of any aspect of any proceedings which relate in part to a provision of the equality enactments. However such assistance must end if the proceedings cease to relate to a provision of the equality enactments.
111. *Subsection (7)* gives the Lord Chancellor an order-making power to enable the CEHR to provide assistance in respect of proceedings which have ceased to relate to the equality enactments, but which relate wholly or partly to any of the Convention rights (as defined in section 1 of the Human Rights Act 1998).
112. *Subsection (8)* gives the Secretary of State an order-making power to enable the CEHR to provide assistance in other proceedings (under legislation other than the equality enactments) where a disabled person seeks to rely on a matter relating to his disability. This could not, however, be used to permit assistance in respect of Part V of the DDA, which is expressly excluded under *subsection (5)* above.

113. *Subsection (9)* provides that the powers in *subsections (7) and (8)* may be exercised either in general terms, or in relation to particular types of proceedings or particular circumstances.
114. *Subsection (11)* disapplies any requirement in legislation for the CEHR, in providing legal assistance under this section to have in place a contract of insurance or indemnity in order for it to advise on compromise agreements.
115. *Subsection (12)* provides that the CEHR may support legal proceedings brought under domestic legislation (outside the equality enactments) that is either incompatible with or has failed to give effect to Community law on discrimination on the grounds listed (sex, (including reassignment of gender) racial origin, ethnic origin, religion, belief, disability, age or sexual orientation).

Section 29: Legal assistance: costs

116. When a person who has been assisted by the CEHR becomes entitled to have his costs/ expenses repaid to him by another party, this section entitles the CEHR to recover its expenses (the amount of which may be determined by regulations made by the Secretary of State) out of costs awarded or paid by agreement.
117. Under *subsections (2) and (3)* the CEHR is able to enforce the reimbursement as a debt, although the debt ranks after any obligation on the person to pay money to the Legal Services Commission in England or Wales and to the Scottish Legal Aid Board in Scotland.

Section 30: Judicial review and other legal proceedings

118. *Section 30* confirms that the CEHR has capacity to institute or intervene in legal proceedings where the proceedings are relevant to any of the CEHR's functions, subject to any limitations imposed under legislation or by rules of court, except that it makes provision to override the "victim test" in section 7 of the Human Rights Act.
119. *Subsection (2)* deems the CEHR to have the necessary title and interest in relation to any such legal proceedings in Scotland.
120. *Subsection (3)* enables the CEHR to rely on a breach of the Convention rights in any legal proceedings which it has instituted (or in which it has intervened) even if it is not itself a victim of the breach. However it may only do so if there are one or more persons who are (or, for a potential future breach, would be) victims. Were it not for this provision, the "victim" test in section 7 of the Human Rights Act would prevent the CEHR from relying on the Convention rights. No award of damages may be made to the CEHR in relation to a breach of the Convention rights. The terms "legal proceedings", "unlawful act" and "victim" used in this subsection are defined in section 7 of the HRA.
121. *Subsection (4)* ensures that, apart from *subsection (3)*, this section does not create any cause of action or override any other limitation or restriction on who may bring proceedings.

Section 31: Public sector duties: assessment

122. *Section 31* enables the CEHR to assess a public authority's compliance with the public sector duties for gender, race and disability.
123. *Schedule 2* sets out the provisions relating to terms of reference, representations, evidence, reports and recommendations and effects of recommendations. Commentary on Schedule 2 can be found below.

Section 32: Public sector duties: compliance notice

124. *Section 32* enables the CEHR to require a public authority to comply with its public sector duties for gender, race and disability.
125. *Subsection (2)* enables the CEHR to issue a notice requiring a public authority to comply and to provide within 28 days written information of steps taken or proposed to comply with the duty.
126. *Subsection (3)* provides that a notice issued under this section requiring information relevant to the CEHR for assessing compliance shall specify when and the manner and form in which the information is to be provided.
127. *Subsection (4)* requires the CEHR to have conducted an assessment provided for under section 31 before it can issue a compliance notice in respect of a breach of a public sector general duty.
128. *Subsection (5)* obliges the recipient of a compliance notice to comply with it.
129. *Subsection (8)* enables the CEHR to apply to a court for an order requiring the public authority to comply with the notice. *Subsection (9)* provides that the court referred to in *subsection (8)* is the High Court or Court of Session in respect of a general duty and a county or Sheriff's court in respect of specific duties.
130. *Subsection (10)* requires a compliance notice to specify a time limit before which the CEHR will not apply to a court for enforcement of a compliance notice.
131. *Subsection (11)* provides that enforcement of a breach of a public sector specific duty shall be by no other party than the CEHR and solely by means of a compliance notice.

Section 33: Equality and human rights enactments

132. *Subsection (1)* defines “the equality enactments” which are referred to in sections 8(1)(d) and (e), 21(2), 28 and 34 as the existing pieces of legislation dealing with promoting equality and combating discrimination on the grounds of sex (including, in the field of employment, married status and gender reassignment), race, disability, sexual orientation and religion or belief, together with Part 2 of this Act and the regulations to be made under Part 3. The Secretary of State may add to, remove from or vary the list of equality enactments by using the power contained in *subsection (3)* – which, in accordance with section 39(4), is subject to the affirmative resolution procedure.
133. *Subsection (2)* defines the “equality and human rights enactments” which are referred to in sections 11(1) and 11(2)(a) and (b). The enactments falling within this definition are the equality enactments defined in subsection (1) and the HRA.

Section 34: Unlawful

134. *Section 34* defines “unlawful” as used in sections 8, 16, 20, 21, 23 and 24, as contrary to provisions of the equality enactments listed in section 33.
135. *Subsection (2)* excludes certain activities which would otherwise meet the definition of unlawful in *subsection (1)*. This includes breach of the public sector duties under the SDA, RRA and the DDA and breach of the public transport provisions in Part V of the DDA.

Section 35: General

136. *Section 35* sets out various definitions of terms used in Part 1 of the Act. The section provides that “act” includes deliberate omission. This is the definition used in the existing equality enactments.

137. “Race” includes colour, nationality, ethnic origin and national origin. This follows the definition of racial grounds, racial group etc in section 3(1) of the RRA.

Section 36: Dissolution

138. *Section 36* provides for the Secretary of State, by order, to dissolve the EOC, CRE and DRC (collectively referred to in relevant subsequent sections as “the former Commissions”) or to remove specified functions from them.
139. *Subsection (3)* requires the Secretary of State to have exercised the order-making power in *subsection (1)* to ensure that all the former Commissions cease to exist by 31st March 2009.

Section 37: Transfer of property, &c.

140. *Subsection (1)* enables the Secretary of State, by an order under section 36(1), to provide for the transfer of specified property, rights and liabilities from the former Commissions to the CEHR.
141. *Subsection (2)* empowers the Secretary of State to direct any of the former Commissions to provide information in respect of property, rights and liabilities and in relation to the exercise of any of their functions. It also provides for the Secretary of State to direct that a former Commission should transfer specified property, rights and liabilities to a specified person. The former Commissions can also be directed to make staff, property or facilities available to the CEHR. The Secretary of State can also direct the former Commissions to stop taking certain specified action.
142. Under *subsection (3)* the Secretary of State may direct a former Commission to prepare a scheme for the transfer of specified property, rights and liabilities to the CEHR or to any other person.
143. In preparing a scheme to transfer property, rights and liabilities, *subsection (4)* provides that the former Commissions must consult with either the CEHR or the person to whom the transfer is to be made. The transfer will come into effect once approved by the Secretary of State, subject to any modifications made.

Section 38: Transfer of property: supplemental

144. *Section 38* is linked to the direction-making power in section 37. It stipulates that any direction by the Secretary of State under section 37 must be made in writing, and only following consultation with the relevant former Commission and, if appropriate, the CEHR.
145. The direction can only be varied or revoked by a further direction.
146. *Subsection (2)* ensures that any action taken or in the process of being taken by a former Commission immediately prior to the transfer shall have the same effect after the transfer as if done by the CEHR (including any legal action).
147. Any references to the former Commissions in agreements or other documents shall be taken as a reference to the CEHR after transfer.
148. *Subsection (4)* allows for property, rights and liabilities to be automatically transferred irrespective of any requirement for consent or agreement that would ordinarily apply.
149. *Subsection (5)* provides for the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) to apply to the transfer of staff from the former Commissions to the CEHR. The regulations safeguard the terms and conditions of staff. Subsection (5) provides that any scheme or order made under section 37 must provide that continuity of employment is preserved for any purpose relating to an employee of a former Commission. This will protect existing pension arrangements.

Section 39: Orders and regulations

150. *Section 39* sets conditions under which a Minister of the Crown may make secondary legislation under Part 1 of the Act. *Subsection (1)* requires all orders and regulations to be made by statutory instrument, and *subsection (2)* provides that any order or regulations may make provision generally or for specified purposes, may make different provision for different purposes, and may include transitional, incidental or consequential provisions.
151. *Subsection (3)* provides that certain orders and regulations are subject to the negative resolution procedure, namely:
- any order revoking a code of practice issued by the CEHR (under section 15(3));
 - any order extending the range of proceedings in which the CEHR may provide assistance (under section 28);
 - regulations concerning the calculation of the CEHR's expenses in legal proceedings (under section 29(5));
 - any order dissolving an existing Commission (under section 36(1));
 - an order dissolving the Disability Committee (under Part 5 of Schedule 1).
152. *Subsection (4)* lists the order-making powers which are to be subject to the affirmative resolution procedure, namely those which
- add or vary any entry in the list defining groups for the purposes of section 10 (under section 10(6));
 - add, remove or vary any entry in the list of enactments in connection with which the CEHR can issue a code of practice (under section 15(6));
 - add, remove or vary any entry in the list of enactments in relation to which the CEHR can provide conciliation services (under section 27(10));
 - add, remove or vary any entry in the list of equality enactments (under section 33(3)).
153. These orders may make consequential amendments to any enactment, including an enactment in or under an Act of the Scottish Parliament.

Section 40: Consequential amendments

154. *Section 40* gives effect to the consequential amendments set out in Schedule 3.

Section 41: Transitional: the Commission

155. *Section 41* creates a transitional period during which time only selected provisions dealing with the formation of the CEHR will take effect. The transitional period starts from the commencement of any of the establishment sections (sections 1 to 3) and Schedule 1. The transitional period ends when any of the CEHR's duties and powers in sections 8 to 32 comes into effect.
156. During the transitional period, the minimum number of Commissioners will be five, instead of ten as stated in paragraph 1 of Schedule 1. This will allow the CEHR to begin making decisions, at an early stage, in respect of establishing the CEHR.
157. As soon as possible after the first appointments to the CEHR Board, the Secretary of State is required to appoint the three transitional Commissioners, as nominated by each chair of the former Commissions. The conditions of appointment of the three transitional Commissioners will mirror other Commissioners, although their positions

will cease to exist not more than two years after the relevant former Commission loses its principal functions or ceases to exist.

158. The purpose of these transition appointments is to provide a link between the former Commissions and the nascent CEHR to ensure the smooth transition of functions, duties and staff from the former Commissions to the CEHR.

Section 42: Transitional: functions of the dissolved Commissions

159. Under *section 42*, the order making power in section 36(1) can also provide for a former Commission to continue an action (referred to as a ‘transitional case’) it has started (for example, a consultation exercise, code of practice, guidance etc) when the relevant related function transfers to the CEHR, or for the CEHR to exercise a function of a former Commission in relation to the transitional case, as specified in the order.
160. *Subsection (2)* ensures that a commencement order made to bring into force a provision of Schedule 3 or 4 may include any provision applying, disapplying or modifying a provision in this Act or any another enactment to ensure that a provision in *subsection (1)* relating to an order made under section 36(1) is able to take effect.
161. *Subsection (3)* ensures that codes of practice issued by a Commission that ceases to exist under section 36(1) or where the function that relates to a specific code has been removed shall continue to have effect until the code is revoked, by order, subject to the negative resolution procedure, by the Secretary of State, at the request of the CEHR.
Any codes prepared by the former commissions can be revised by the CEHR as if they had been issued by the CEHR under section 14.
162. Any consultation exercises already undertaken by a former Commission in respect of revising or issuing a code of practice will still apply as if undertaken by the CEHR under section 14.

Section 43: Transitional: rented housing in Scotland

163. *Section 43* enables the DRC to provide conciliation services and legal assistance and to issue codes of practice in relation to the making of disability related works in Scotland. This will ensure that the DRC can exercise these powers pending the establishment of the CEHR.
164. *Subsection (1)* inserts a new section 49I in the DDA, which gives the DRC powers to make provision for conciliation services to be provided in respect of disputes about the making of disability related works in Scotland.
165. *Subsection (2)(a)* inserts a new section 53A(1F) in the DDA. This gives the DRC powers to issue a code of practice giving practical guidance about the making of disability related works in Scotland.
166. *Subsection (2)(b)* inserts a new section 53A(4B) in the DDA. This requires the Secretary of State to consult the Scottish Ministers before deciding whether to approve a DRC code prepared under new section 53A(1F).
167. *Subsection (2)(c)* inserts a new section 53A(6B) in the DDA. This requires the Secretary of State to consult the Scottish Ministers before appointing a day for the coming into effect of a DRC code prepared under new section 53A(1F).
168. *Subsection (2)(d)* inserts a new section 53A(8B) in the DDA. In the case of a code issued under new section 53A(1F), this amendment disapplies the requirement in section 53A(8A) for a court, tribunal or other body to take account of a DRC code where it considers it relevant in certain proceedings, including those concerning improvements. However, the Housing (Scotland) Act 2006 provides for the Scottish courts and tribunals to take account of DRC codes on the making of disability related works.

169. *Subsection (3)* inserts a new section 7(1)(ab) in the DRCA. This gives the DRC powers to provide legal assistance in respect of proceedings in Scotland about the making of disability related works.

Part 2: Discrimination on Grounds of Religion or Belief

Section 44: Religion and belief

170. *Section 44* defines what is meant by “religion or belief” for the purposes of this Act. *Section 44(a)* defines “religion” as “any religion”, a broad definition in line with the freedom of religion guaranteed by Article 9 of the ECHR. It includes those religions widely recognised in this country such as Christianity, Islam, Hinduism, Judaism, Buddhism, Sikhism, Rastafarianism, Baha’is, Zoroastrians and Jains. Equally, denominations or sects within a religion can be considered as a religion or religious belief, such as Catholics or Protestants within Christianity. The main limitation on what constitutes a “religion” for the purposes of Article 9 of the ECHR is that it must have a clear structure and belief system.
171. *Section 44(b)* defines “belief” as “any religious or philosophical belief”.
172. *Section 44(c)* and *(d)* state that “lack of religion” and “lack of belief” are also covered by the phrase “religion or belief”.

Section 45: Discrimination

173. *Section 45* defines discrimination on the grounds of religion or belief for the purposes of this Part. *Subsections (1) & (2)* define **direct discrimination**. This occurs where, on grounds of religion or belief, person A treats person B less favourably than he would treat others. For the purposes of the comparison which has to be made to determine whether one person has been treated less favourably than another, the relevant circumstances in each case must not be materially different. *Subsection (1)* provides that direct discrimination can occur even if it is not person B’s religion or belief, but another person’s religion or belief, which constitutes the grounds for discrimination. For example, it would apply if a shopkeeper refuses to serve a customer, not because of the customer’s religion, but because of the religion of his friend who is in the shop with him. However, it does not apply where the less favourable treatment occurs solely on grounds of A’s religion or belief – for example where A feels motivated to take particular action because of what his religion or belief requires. Additionally, *subsection (1)* clarifies that person A will still have unlawfully discriminated, even if they subscribe to the same religion or belief as that of the victim of discrimination. *Subsection (2)* indicates that discrimination can also occur even if A is mistaken as to B’s religion: i.e. if person B is not of the religion presumed by person A. So if a shopkeeper refuses to serve a customer because he believes that he belongs to a certain religion, it is irrelevant whether or not the customer is actually of that religion, he could still use this Part to bring a case of religious discrimination against the shopkeeper.
174. *Subsection (3)* defines **indirect discrimination**. This occurs where person A applies to person B a provision, criterion or practice, which he applies equally to other people, but which puts people of person B’s religion or belief at a disadvantage compared with some or all other people. Person B must also have personally suffered a disadvantage compared to some or all persons not of his religion or belief. It would not be unlawful however if the action causing disadvantage to person B could be reasonably justified by reference to matters other than B’s religion or belief: for example, if it was performed to meet security or health and safety concerns, or if the efficiency of a business would be seriously jeopardised by failure to take the action complained about.
175. *Subsections (4) and (5)* define **victimisation**. This occurs where person A treats person B less favourably than others because person B: has brought, or intends to bring, proceedings under these religious discrimination provisions; has given or provided, or intends to give or provide, evidence or information in connection with

such proceedings; or has done, or intends to do, any other thing in connection with this Part (including an allegation that a person has contravened it). Victimisation will also have taken place if person A treats person B less favourably than others because he *suspects* that person B has done any of these things. It will not be victimisation however, if person A's treatment of person B relates to B's making, other than in good faith, a false allegation.

Section 46: Goods, facilities and services

176. Under [section 46](#), discrimination on the grounds of religion or belief in the provision of goods, facilities and services (by a person whose business or concern it is to provide them to the public or a section of the public) is made unlawful. Thus it will be unlawful for such a person, on the grounds of religion or belief, to:
- refuse to provide goods, facilities or services to a person who seeks to obtain or use them;
 - provide such a person with goods, facilities or services of inferior quality to those which would normally be provided to members of the public or to a section of the public to which the recipient belongs;
 - provide goods, facilities or services in a different manner (for example more hostile or less courteous) than they would normally be provided to members of the public or to a section of the public to which the recipient belongs; or
 - provide goods, facilities or services on different terms (for example less favourable) than those on which they would normally be provided to members of the public or to a section of the public to which the recipient belongs.
177. *Subsection (2)* lists examples of the types of facilities and services in relation to which discrimination under subsection (1) would be unlawful.
178. *Subsection (3)* ensures that, where a person exercises a skill in a particular way for the purposes of a particular religion (for example the preparation of food), he will not be compelled by this section to exercise it in a different manner for the purposes of another religion.
179. *Subsection (4)* ensures that this section will not apply in relation to the provision of goods, facilities and services by a person exercising a public function (these are covered in a later section) or where discrimination in the provision of goods, facilities and services is addressed by another provision of Part 2 or the Employment Equality (Religion or Belief) Regulations 2003, which prohibit discrimination on the grounds of religion or belief in the fields of employment and vocational training.
180. *Subsection (5)* clarifies that the provision of goods, facilities and services will be caught by this Part irrespective of whether or not the recipient has to pay for them.

Section 47: Premises

181. [Section 47](#) covers the disposal and management of premises, making it unlawful for anyone selling or letting premises to discriminate against potential buyers or tenants because of their religion or belief and for landlords or other managers of premises to discriminate against tenants or other occupiers. This would include refusing to dispose of premises to people of a certain religion or belief; offering less generous terms to people of a certain religion or belief; or deliberately discriminating against people of a certain religion or belief on a list of those requiring housing.
182. *Subsection (2)* refers specifically to managers of premises (which would include landlords) and their treatment of tenants. It makes unlawful any discriminatory behaviour by a manager of premises on account of the religion or belief of a tenant or other occupier (for example a licensee). This would cover all aspects of a manager's

duties towards a tenant or other occupier, including the facilities he would provide and the terms under which he would evict a person.

183. *Subsection (3)* relates to a situation where a person's permission is required for the disposal of someone else's interest in a property – the executor of someone's will for example – and it ensures that such permission cannot be withheld in a discriminatory way.
184. *Subsection (4)* restricts the operation of this section to premises in Great Britain. It does not extend to premises abroad, even if the actual sale or letting of the property takes place in this country.

Section 48: Section 47: exceptions

185. *Section 48* creates an exception to the provisions in section 47. *Subsection (1)* provides that it will not be unlawful for a landlord to discriminate in who he rents out a part of his premises to, if:
- he or a near relative lives in another part of the same premises (and intends to continue to do so);
 - the premises include parts that he or a near relative would share with the tenant such as a bathroom or kitchen; and
 - the premises are of a size where no more than two households, or six individuals, can live in the premises in addition to the landlord or a near relative.
186. *Subsection (2)* defines what “near relative” means for the purposes of *subsection (1)*.
187. *Subsection (3)* lists other circumstances where the provisions in section 47 will not apply, and religious discrimination in the disposal of premises will not be unlawful: namely, where a person owns an estate or interest in the premises, or occupies the whole of the premises, and does not use an estate agent to dispose of the premises and does not arrange for publication of an advertisement for the purposes of disposing of the premises.

Section 49: Educational establishments

188. *Section 49* extends the prohibition against discrimination on the ground of religion or belief to the educational establishments listed in the Table set out in the section. This Table also indicates who is the responsible body for the purposes of this Part of the Act, in relation to each educational establishment listed. The Table does not extend to educational institutions or establishments in the further or higher education sectors as these are covered by existing secondary legislation.¹
189. The section makes it unlawful for an educational institution to discriminate against a person in respect of the terms on which it offers him/her admission as a pupil or by refusing to accept an application to admit him/her as a pupil. Where a person is already a pupil of the establishment it is unlawful to discriminate against him/her in the way the establishment affords him/her access to any benefit, facility or service or by refusing such access. It is also unlawful to exclude a pupil or subject him/her to any other detriment. A pupil of the establishment includes any person who receives education at the establishment.
190. *Subsection (2)* requires that, for England and Wales, the terminology used in any of the Education Acts would have the same meaning in this Part. *Subsection (3)* requires that, for Scotland, the terminology used in the [Education \(Scotland\) Act 1980 \(c.44\)](#) would have the same meaning in this Part.

¹ SI 2003/1660 *Employment Equality (Religion or Belief) Regulations 2003*

Section 50: Section 49: exceptions

191. *Subsection (1)* of this section exempts maintained schools which have a religious character (often referred to as faith schools) from the prohibition on discrimination in subsection (1) of the previous section (apart from two subsections: (1)(c)(iii) which makes exclusion from a school unlawful, and (1)(c)(iv) which prohibits the subjection of a pupil to any other detriment). It also exempts to the same extent independent schools if such schools have a religious ethos, schools conducted in the interest of a church or denominational body, and, in Scotland, independent schools that admit only pupils who belong – or whose parents belong – to one or more particular denominations. The provision will therefore allow all such schools with a religious ethos to admit pupils or set admission terms for pupils based on the religious character or religious ethos of the school. It will also allow such schools to conduct themselves in a way which is compatible with their religious character or ethos.
192. *Subsection (2)* provides that the discrimination provisions in section 49 that relate to pupils' access to benefits, facilities and services will not apply to anything done in connection with the school curriculum or to acts of worship or other religious observance organised by or on behalf of an educational establishment. The reference to curriculum bears its ordinary English meaning and accordingly is to the basic curriculum as delivered in educational establishments, which includes the National Curriculum, together with elements such as Religious Education which is not part of the National Curriculum but is required by legislation to be taught in state schools. It also includes elements such as the provision of school library books, which are aimed at the delivery of a broad-based and balanced education to pupils. This particular exemption reflects the need to avoid any conflict with the existing legislative framework in respect of the content of the curriculum and religious worship. Existing education legislation allows for parents to withdraw their children from sex education and religious education, but not from other parts of the curriculum covered by *subsection (2) (a)*. While parents can remove their children from collective worship, educational institutions are under no obligation to provide opportunities for separate worship of different religions and beliefs represented among its pupils. The exception in *subsection (2)(b)* maintains that position.
193. *Subsection (3)* provides for an order-making power by which the Secretary of State for Education and Skills can amend or repeal an exception set out in this section, or can create a new exception from the prohibitions in section 49. The subsection also permits the Secretary of State to make provision about the construction or application of the defence of objective justification to a charge of indirect discrimination. *Subsection (4)* specifies the conditions required for the Secretary of State to make any such order, including the need for consultation with appropriate bodies and the approval of both Houses of Parliament.

Section 51: Local education authorities and education authorities

194. *Section 51* makes unlawful discrimination by Local Education Authorities (LEAs) in England and Wales, and Education Authorities in Scotland, except in the areas listed in *subsections (2)*, (England and Wales) and *(3)* (Scotland), namely:
- **The provision of schools** – section 14 of the Education Act 1996 (and, for Scotland, section 17 of the Education (Scotland) Act 1980) defines the LEA function of providing primary and secondary schools for children in a given catchment area. *Section 51, subsection (2)(a)(3)(a)* for Scotland) allows discrimination in this area, to prevent an LEA being bound to provide schools for pupils of different faiths, or of no faith, in the catchment area.
 - **Transport** – LEAs often provide subsidised transport for pupils of a particular (often faith) school that is located outside the local area although it is not the nearest suitable school. This may be because a parent wishes a child to attend a school of their own faith, or because the nearest school has a religious ethos which a parent

thinks is inappropriate for their child. *Subsection (2)(b) ((3)(b) for Scotland)* allows discrimination in this area so that LEAs do not have to provide subsidised transport for all children attending faith or non-faith schools.

- **General responsibilities** – section 13 of the Education Act 1996 (and equivalent provision in legislation for education in Scotland) describes the responsibilities incumbent on LEAs to contribute to the spiritual, moral, mental and physical development of the community through their provision of education to children. *Section 51, subsection (2)(c) ((3)(c) for Scotland)* allows discrimination in the exercise of these responsibilities in so far as they relate to the two previous points: provision of schools and transport.

195. *Subsection (2)(d)((3)(e) for Scotland)* refers to the Table featured in section 49. It means that section 51(1) does not apply to discrimination by LEAs and EAs in the exercising of their specific functions as responsible bodies for the educational establishments listed in the Table, as section 50 covers them in that respect.

Section 52: Public authorities: general

196. *Subsection (1)* prohibits discrimination on grounds of religion or belief in the exercise of the functions of all public authorities.

197. *Subsection (2)* defines “public authority” as including any person who has functions of a public nature and “function” as any function of a public nature.

198. Exceptions to these provisions are set out in *subsections (3) and (4)*. *Subsection (3)* follows the pattern of similar legislation and excepts a list of bodies, such as the Houses of Parliament, the Security Services and GCHQ.

199. *Subsections (4)(a) to (e)* exclude the exercise of judicial functions and legislative processes (including those of the General Synod of the Church of England). *Subsection (4)(f)* excepts a decision to prevent someone entering the country, or to deport someone from the country, where this decision is made on the grounds that it is conducive to the public good, or that it is undesirable to permit the person to remain in the United Kingdom. *Subsection (4)(g)* extends the exception on immigration matters to cover people entering the country to provide services in connection with a religion or belief, such as a minister or clergyman. This exception is required because the immigration services necessarily discriminate against certain religious groups for the purposes of recognising people as entering the country to provide religious services.

200. *Subsection (4)(j)* excepts a decision related to criminal proceedings, where a decision has been taken not to prosecute.

201. *Subsections (4)(k) (i), (iii), (v) and (vi)* except from the prohibition on discrimination (insofar as it is not excepted elsewhere), the exercise of any public functions in a number of areas that relate to faith and non-faith educational institutions. Those areas are:

- **The Curriculum** – the prohibitions in this section will not apply to action in relation to the school curriculum. See the note for section 50(2)(a).
- **Collective worship** – the prohibitions in this section will not apply to acts of worship or other religious observance organised by or on behalf of an educational institution. See the note for section 50(2)(b).
- **Transport** – an LEA or other responsible body can provide subsidised transport to a faith or non-faith school for those pupils who live a distance away and whose parents wish them to attend such a school for reasons related to belief or non-belief. They will not be obliged by this legislation to provide a similar service for pupils who choose for other reasons to attend a school which is not close to their home.

- **Establishment, alteration or closure** – a public authority will not have to answer discrimination charges as a result of its decision to establish, alter or close any particular school.
202. *Subsections (4)(k)(ii) and (iv)* except further exercises of public functions from the prohibition on discrimination in this section, but only in respect of those schools which have a religious ethos. Those functions are:
- **Admissions** – faith schools can operate a selective admissions policy, prioritising those children of a specific religion or belief.
 - **Governing bodies** – religion or belief can be legitimate criteria in the selection of governors for schools with a religious ethos, and places on the governing body may be restricted to or reserved for people of that religion or belief.
203. *Subsection (4)(l)* excepts from the effect of this section the exercising of the power under section 2 of the Local Government Act 2000 which provides for local authorities to promote the economic, social and environmental well-being of their area.
204. *Subsection 4(m)* excepts from this section actions which are provided for by the provisions in the *Employment Equality (Religion or Belief) Regulations 2003* or by another provision of this Part. Where actions would be unlawful by virtue of section 46 but for an express exemption, those actions are not excepted from section 50 by subsection (4)(m). This ensures that goods, facilities and services provided by public authorities will be covered by section 50 if they are exempted under section 46 but not covered by any of the exemptions in relation to section 51.
205. When the court is hearing a case brought in respect of section 52, it cannot grant an injunction unless it is satisfied that to do so will not prejudice any criminal proceedings or a criminal investigation. Similarly, a court must stay or desist proceedings brought in respect of section 52 when there is a risk that criminal proceedings or a criminal investigation could be prejudiced by the case continuing.
206. *Subsection (6)* refers to section 70(4). It relates to the answers that a person, accused of an unlawful act under this Part, may give to a questionnaire prescribed by the Secretary of State, and the inferences that can be drawn from a failure to answer, or from an evasive or equivocal answer. Under *subsection (6)*, inferences cannot be drawn from an absent or evasive answer if:
- the person questioned reasonably asserts that there was a risk of prejudicing criminal proceedings or a criminal investigation, or of revealing the reason for not instituting or not continuing criminal proceedings; or
 - the reply is of a kind, or is given or withheld in circumstances specified, in an order by the Secretary of State.

Section 53: Discriminatory practices

207. *Section 53* makes it unlawful to operate a practice which results in unlawful discrimination, or which is likely to result in unlawful discrimination if applied to persons of any religion or belief. *Subsection (2)* also makes it unlawful to adopt or maintain a practice or arrangement which has the potential to result in a practice which is unlawful under this section.
208. *Subsection (3)* makes clear that the unlawful discrimination referred to in this section is that which is unlawful under the preceding provisions of this Part.
209. *Subsection (4)* provides that the CEHR is to be the only body entitled to bring proceedings in respect of discriminatory practices, and must do so by means of its powers in sections 20 to 24 of the Act (investigations, unlawful act notices and action plans, agreements and applications to court to enforce these).

Section 54: Discriminatory advertisements

210. *Section 54* makes it unlawful to publish or cause to be published an advertisement which indicates an intention to discriminate unlawfully. For example an advertisement for a car for sale in which it was expressed that persons of a certain religion would not be welcome to respond. The unlawful discrimination referred to in this section is that which is unlawful under the preceding provisions of sections 46 to 52.
211. *Subsection (3)* makes it clear that only the CEHR is to be entitled to bring proceedings in respect of unlawful advertisements and must do so in accordance with its powers set out in section 25. *Subsection (4)* provides a defence for the publisher of an unlawful advertisement, where it was reasonable for him to rely on a statement by the person causing the advertisement to be published, that the prohibition in *subsection (1)* would not apply.

Section 55: Instructing or causing discrimination

212. *Section 55* makes it unlawful to instruct, cause or induce, or attempt to cause or induce, another person to discriminate unlawfully.
213. *Subsection (5)* makes clear that the discrimination referred to in this section is that under earlier sections in this Part.
214. *Subsection (6)* provides that only the CEHR is entitled to bring proceedings in respect of a contravention of this section and must do so in accordance with its powers set out in section 25.

Section 56: Statutory requirements

215. *Section 56* provides a general exception from this Part for anything done for the purpose of complying with legislation made by Parliament, Ministers or other bodies in Great Britain empowered to make legislation.

Section 57: Organisations relating to religion or belief

216. *Section 57* creates an exception from this Part for organisations whose purpose is to practice, advance or teach a religion or belief, to enable people of a certain religion or belief to benefit from or engage in religious activities, or to improve relations, or maintain good relations, between people of different religions or beliefs. This does not include an organisation whose sole or main purpose is commercial.
217. *Subsection (3)* provides that it is not unlawful under this Part for an organisation, or anyone acting on behalf of or under the auspices of an organisation;
- to restrict membership of the organisation;
 - to restrict participation in activities undertaken by the organisation or on its behalf or under its auspices;
 - to restrict the provision of goods, facilities and services in the course of its activities or on its behalf or under its auspices; or
 - to restrict the use or disposal of premises.
218. *Subsection (4)* provides that it is not unlawful under this section for a minister of religion (as defined in *subsection (6)*), acting in connection with an organisation to which this section relates:
- to restrict participation in activities carried on in the performance of his functions in relation to that organisation; or
 - to restrict the provision of goods, facilities or services in the course of such activities,

219. *Subsection (5)* limits the restrictions described in *subsections (3) and (4)* to those imposed (a) by reason of or on the grounds of the organisation's purposes, or (b) in order to avoid causing offence on grounds of that organisation's religion or belief, to persons of that religion or belief.

Section 58: Charities relating to religion or belief

220. *Section 58* provides an exception from this Part, where benefits are conferred on persons of a particular religion or belief in pursuance of a charitable instrument, and where restricting the benefit in this way is imposed by reason of or on the grounds of the provisions of the charitable instrument.
221. *Subsection (2)* creates an exception from the provisions of Part 2 for the Charity Commissioners (and, in Scotland, the Office of the Scottish Charity Regulator), which exempts these regulators from the provisions of Part 2 when they are exercising a function in relation to a charity in a manner which appears to them expedient in the interests of the charity.

Section 59: Faith schools, etc

222. *Section 59* provides that it will not be unlawful under this Part for schools with a religious ethos to restrict the provision of goods, facilities or services or to restrict the use or disposal of their premises, to ensure that the purpose for which the premises would be used does not conflict with the tenets of the school's faith (or faiths).
223. *Subsection (3)* provides that references in this Part to the provision of facilities or services (for example in section 46) do not apply to the provision of educational facilities and services to students attending an educational institution.

Section 60: Membership requirement

224. *Section 60* creates an exception from this Part, for charities that ask members, or prospective members, to assert their acceptance of a religion or belief as a requirement of membership of the charity.
225. *Subsection (2)* provides that this exception is only valid for charities which first imposed this requirement before 18 May 2005 and have continued to do so ever since.

Section 61: Education, training and welfare

226. *Section 61* provides an exception from Part 2 for anything done to meet the special needs of people of particular religions or beliefs in relation to their education, training or welfare, or the provision of ancillary benefits in connection with meeting such needs.

Section 62: Care within family

227. *Section 62* provides an exception from Part 2 where a person takes into his home, and treats as a member of his family, a person requiring a special degree of care and attention. An example would be the fostering of a child. The welfare of the child would take precedence over any question of religious discrimination.

Section 63: National security

228. Anything done for the purpose of safeguarding national security will be exempt from the prohibitions introduced by this Part, providing that the national security requirement justifies the action in question.

Section 64: Amendment of exceptions

229. *Section 64* provides an order-making power by which the Secretary of State can add a new exception to the prohibitions against public authorities (*section 52(1)*) or change

an existing exception in Part 2. *Subsection (2)* requires that the Secretary of State consult with the CEHR before making such an order, which is subject to the affirmative resolution procedure.

Section 65: Restriction of proceedings

230. *Section 65* provides that proceedings in respect of an act which will be unlawful under this Part, can only be brought in accordance with the provisions in this Act. This restriction will not however, prevent an application for judicial review; proceedings under any of the Immigration Acts, or the Special Immigration Appeals Commission Act 1997; or, in Scotland, the Court of Session exercising its jurisdiction with regard to an order or determination.

Section 66: Claim of unlawful action

231. *Section 66* relates to the mechanism for bringing a claim against someone in respect of an act made unlawful by this Part.
232. The claim is to be brought in a county court (in Scotland, a sheriff court) by way of proceedings in tort (or in Scotland for reparation) for breach of statutory duty.
233. In England and Wales, where a claim is brought against a local education authority or the responsible body of an educational establishment (as listed in the Table in section 49) by virtue of section 49 or 51 the claimant must give written notice to the Secretary of State.
234. In Scotland where a claim is brought against an education authority or the responsible body of an educational establishment (as listed in the Table in section 49) by virtue of section 49 or 51 the claimant must give written notice to the Scottish Ministers.
235. If the claimant provides the court with evidence from which the court could conclude, in the absence of a reasonable alternative explanation, that an unlawful act has been committed, the court is to assume that the act was unlawful unless the respondent can prove otherwise.

Section 67: Immigration

236. *Section 67* provides that proceedings may not be brought under *section 66* in a county or sheriff court in respect of an act of a public authority, if the lawfulness of the act could be raised in immigration proceedings – that is, proceedings under any of the Immigration Acts or the [Special Immigration Appeals Commission Act 1997 \(c.68\)](#).
237. If, during immigration proceedings, a court or tribunal finds that an unlawful act has been committed by a public authority under section 52, then a county or sheriff court hearing proceedings, as per section 68, must accept that finding.

Section 68: Remedies

238. *Section 68* sets out the remedies available to a county court (the sheriff in Scotland) hearing proceedings as described under section 66:
- The court can, in addition to any remedy in tort, grant any remedy that the High Court (Court of Session in Scotland) can grant in proceedings for judicial review.
 - The court cannot award damages to a claimant (a pursuer in Scotland) in a case of indirect discrimination (see section 45(3)), if the respondent (the defender in Scotland) proves that there was no intention to treat the claimant unfavourably on grounds of religion or belief.
 - The court can award damages, by way of compensation, for injury to feelings.

- When the court is hearing a case brought in respect of section 52, it cannot grant an injunction unless it is satisfied that to do so will not prejudice any criminal proceedings or a criminal investigation. Similarly, a court must stay or desist proceedings brought in respect of section 52 when there is a risk that criminal proceedings or a criminal investigation could be prejudiced by the case continuing.

Section 69: Timing

239. Proceedings under section 66, must be brought either within six months of the alleged unlawful act, or if later, with the permission of the court.
240. *Subsection (2)* specifies that for immigration cases – that is, proceedings brought under any of the Immigration Acts or the [Special Immigration Appeals Commission Act 1997 \(c.68\)](#) – the six month period starts from the first possible date that proceedings could begin under *section 66*.

Section 70: Information

241. *Section 70* indicates the way that information can be obtained by someone (a “claimant or potential claimant” in England and Wales and a “pursuer or potential pursuer” in Scotland), from the person who he thinks has acted unlawfully against him under this Part (a “respondent or potential respondent” in England and Wales and a “defender or potential defender” in Scotland), so as to assist in his decision about whether or not to take proceedings.
242. *Subsection (2)* refers to the question forms prescribed by the Secretary of State which a claimant (or pursuer) can use to question a respondent (or defender), and by which the respondent (or defender) can reply.
243. Under *subsection (3)*, both the claimant’s (or pursuer’s) questions and the respondent’s (or defender’s) answers, will only be admissible as evidence in a case brought, if the questions were put within six months of the alleged unlawful act taking place and in a manner prescribed by an order of the Secretary of State (subject to negative resolution). The Secretary of State can amend that time period by an order, which is subject to the negative resolution procedure.
244. Under *subsection (4)*, a court may draw an inference from a respondent’s failure to reply within eight weeks, at all or unequivocally, to questions put to him by a potential claimant. See section 52(6) for exceptions to this in relation to questions which could affect criminal investigations or prosecutions.

Section 71: National security

245. *Section 71* provides for rules of court to make provision permitting a court to take various forms of action which are considered expedient in the interests of national security. This is equivalent to section 67A of the Race Relations Act 1976 (as inserted by the [Race Relations \(Amendment\) Act 2000 \(c. 34\)](#)). The power in this section will make it possible to make rules enabling the court, when considering proceedings brought under this Part of the Act:
- to exclude the claimant, the claimant's representatives or any assessors from part or all of the proceedings;
 - to permit a claimant or representative who has been excluded to make a statement prior to any part of the proceedings from which they are excluded; and
 - to ensure that part or all of the reasons for a decision are kept secret.
246. Where the claimant or representatives are excluded from part or all of proceedings under such rules, this section provides for the Attorney General or Advocate General for Scotland to appoint a special advocate to represent the interests of the claimant.

Section 72: Validity and revision of contracts

247. *Section 72* provides that the term of a contract will be void where its inclusion would make the contract unlawful under this Part, where it is included in furtherance of an act that is unlawful under this Part, or where it provides for the doing of an act which would be unlawful under this Part.
248. *Subsection (2)* protects a person who is party to a contract and who would have been the victim of discrimination as a result of a term of that contract. It provides that the term will not be void in such a situation, as this would further disadvantage the person. However the offending term would not be enforceable against that person.
249. Under *Subsection (3)*, a term purporting to exclude or limit a provision of Part 2 of the Act will be unenforceable by a party in whose favour it would operate.
250. *Subsections (5) and (6)* allow the courts to resolve disputes by removing or modifying a term to which *subsection (1)* applies.

Section 73: Aiding unlawful acts

251. *Section 73* makes it unlawful knowingly to help someone (whether or not as his employee or agent) to do an act that is unlawful under this Part. *Subsection (2)* makes it an offence (punishable by a fine not exceeding level 5 on the standard scale) when requesting assistance from another person, to falsely state that a proposed act is lawful under Part 2.

Section 74: Employers' and principals' liability

252. *Section 74* has the effect that an employer is liable for the acts of his employees, whether or not he knew or approved of those acts. Similarly, a principal will be liable for the acts of his agent.
253. An employer will not be liable if he can prove that he took all reasonable steps to ensure that the employee could not perform the discriminatory act.
254. This section will not apply to the offence of making a false statement in relation to a discriminatory advertisement under *section 54*.

Section 75: Police, &c.

255. *Section 75* applies to members of police forces under the [Police Act 1996 \(c.16\)](#) or the [Police \(Scotland\) Act 1967 \(c.77\)](#), and special constables and police cadets appointed in accordance with either of those Acts.
256. Under *subsection (2)*, such a person is treated as an employee of his chief officer of police for the purposes of this Part, and anything done by him in the course of his duties is to be treated as done in the course of that employment.
257. Under *subsection (3)*, compensation, costs or expenses awarded against or incurred by a chief officer of police, in proceedings brought against him under this Part, will be paid out of the police fund. The police fund will also provide for any sums required by a chief officer of police for the settlement of a claim made against him under this Part.
258. *Subsection (5)* provides that a reference to the Equality Act will be included in the list of discrimination legislation at section 57 of the [Serious Organised Crime and Police Act 2005 \(c. 15\)](#). This list specifies the anti-discrimination legislation which applies to the Serious Organised Crime Agency.

Section 76: Indirect provision of benefit, &c.

259. *Section 76* means that someone who has the power to facilitate access to a service, facility or benefit of any kind is subject to the prohibition in this Part as much

as the actual provider of these things. An example would be a social worker who facilitates access to various counselling or welfare services. This provision would make it unlawful for such a person to refuse to facilitate this access to a particular family because of their religion or belief.

Section 77: Employment Equality Regulations

260. *Section 77* is intended to ensure consistency, with regard to the definition of "religion or belief", between this Part and the [Employment Equality \(Religion or Belief\) Regulations 2003 \(S.I. 2003/1660\)](#). It remains in accordance with the wording in Council Directive [2000/78/EC](#) of 27th November 2000 establishing a general framework for equal treatment in employment, as implemented by those regulations.

Section 78: Crown application

261. *Section 78* provides that the provisions of Part 2 are to apply to acts done on behalf of the Crown as they apply to acts done by a private person. In addition, section 52 binds the Crown whatever the nature of the acts. *Subsection (3)* indicates that acts are to be treated as done on behalf of the Crown, if done by – or on behalf of:

- a government minister or department (or, in Scotland, Scottish Ministers);
- a statutory body acting on behalf of the Crown;
- a statutory office holder acting on behalf of the Crown; or
- a statutory office holder in the Scottish Administration (within the meaning of section 126(7) of the [Scotland Act 1998 \(c.46\)](#)).

262. *Subsections (4)* and *(5)* provide that proceedings under the provisions of this Part cannot be brought against the Queen acting in her personal or private capacity.

Section 79: Interpretation

263. *Subsection (1)* defines "charity" for the purpose of this Part. It has the meaning given by the Charities Act 2005 and, for Scotland, it means a recognised body within the meaning given by section 1(7) of the [Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1990 \(c.40\)](#).

264. *Subsection (2)* indicates that in this Part, references to either action or refusal include a reference to deliberate omission.

Section 80: Territorial application

265. The provisions of this Part apply to anything done:

- in Great Britain; or
- on a British ship (a ship registered in Great Britain or owned or used for Crown purposes), hovercraft (a hovercraft registered in Great Britain), or aircraft (and in relation to the provision of facilities to travel on these).

266. Under *subsection (3)*, section 52, which includes the function of granting someone entry into the UK, applies to anything done inside or outside the UK.

267. Under *subsection (5)*, the provisions of this Part will not apply to anything done in or over a country other than the UK, or in or over the territorial waters of a country other than the UK, if it is done to comply with the law of that country.

Part 3: Discrimination on Grounds of Sexual Orientation

Section 81: Regulations

268. *Section 81* provides a power under which the Secretary of State can make regulations that prohibit sexual orientation discrimination (including indirect discrimination, victimisation and harassment). The regulations may make provision similar to Part 2, which means that the regulations may prohibit – either generally or in specified circumstances – discrimination in the provision of goods, facilities and services; the exercise of public functions; education and the disposal of premises.
269. *Section 81* also makes clear that the regulations will be able to prohibit discriminatory advertisements and instructing or causing discrimination or harassment. It will also be possible to provide general or specific exceptions to the prohibition on sexual orientation discrimination in the areas covered by the Regulations.
270. The regulations will be subject to the affirmative procedure. They will set out the remedies available to those who consider that their rights have been breached and otherwise provide for enforcement. Regulations will be able to allow individuals to bring cases via the county courts in England and the sheriff court in Scotland. Judicial review could also be made available in appropriate cases. The regulations will also be able to create criminal offences corresponding to those in other enactments relating to discrimination or equality and with the same maximum penalties.

Section 82: Northern Ireland Regulations

271. *Section 82* provides a power under which the Office of the First Minister and deputy First Minister can make regulations that prohibit sexual orientation discrimination (including indirect discrimination, victimisation and harassment). The regulations may make provision similar to Part 3 of the [Race Relations \(Northern Ireland\) Order 1997 \(S.I. 1997/869 \(N.I. 6\)\)](#), which means that the regulations may prohibit – either generally or in specified circumstances – discrimination in the provision of goods, facilities and services; the exercise of public functions; education and the disposal of premises.
272. *Section 82* also makes clear that the regulations will be able to prohibit discriminatory advertisements and instructing or causing discrimination or harassment. It will also be possible to provide general or specific exceptions to the prohibition on sexual orientation discrimination in the areas covered by the regulations.
273. The regulations will be subject to the affirmative procedure in the Northern Ireland Assembly. They will set out the remedies available to those who consider that their rights have been breached and otherwise provide for enforcement. Regulations will be able to allow individuals to bring cases via the county courts in Northern Ireland. Judicial review could also be made available in appropriate cases. The regulations will also be able to create criminal offences corresponding to those in other enactments relating to discrimination or equality and with the same maximum penalties.

Part 4: Public Functions

Section 83: Prohibition of discrimination

274. *Section 83* inserts a new *section 21A* into Part III of the SDA. New section 21A will make it unlawful for a public authority to discriminate or commit acts of harassment on grounds of sex when carrying out its functions. In practice this will mean that Ministers, local authorities, the police, other governmental organisations and private bodies which have functions of a public nature are not permitted to discriminate or harass on the grounds of a person's sex when exercising their public functions. This prohibition of sex discrimination in public functions (“the prohibition”) will bring the SDA into line

*These notes refer to the Equality Act 2006 (c.3)
which received Royal Assent on 16 February 2006*

with section 19B of the RRA. The Disability Discrimination Act 2005 also similarly extends the DDA by inserting a new section 21B into the DDA.

275. An individual who has been discriminated against contrary to new section 21A will be able to bring proceedings in a county court (or a sheriff court in Scotland) in accordance with section 66 of the SDA.
276. *New subsection 21A(4)* and the table of exceptions in *subsection (9)* set out the functions and actions which are excluded from the general prohibition. The new subsection (4) includes a provision that none of these exceptions permits anything prohibited by European Community law on discrimination. *New subsection 21A(3)* excludes the Houses of Parliament and the intelligence services from the requirement not to discriminate.
277. The exempted functions and actions in new subsection 21A(4) and the Table of Exceptions in new subsection 21A(9) include:
- acts related to the preparation and making of primary and secondary legislation made by a Minister of the Crown, the Scottish Ministers, the National Assembly for Wales, the Privy Council or the General Synod of the Church of England;
 - acts which are necessary to comply with a statutory requirement;
 - judicial functions and acts done on behalf of or on the instructions of a person exercising a judicial function – for example, complying with a court order;
 - decisions related to criminal proceedings, where a decision has been taken not to prosecute;
 - services only required by one sex, services more beneficially provided on a single-sex basis and acts done to compensate for disadvantage related to sex; and
 - the Charity Commissioners for England and Wales (or, in Scotland, the holder of the Office of Scottish Charity Regulator) when they are exercising their functions in relation to such charities which, under existing exemptions in section 43 of the SDA, are allowed to discriminate on grounds of sex.
278. The exceptions for services that are provided separately (items 8 to 12 in the Table of Exceptions at new subsection 21A(9)) allow public authorities to provide services only to one sex, or to provide separate or different services for men and women when the circumstances or need are such that it would not be reasonably practicable to do otherwise.
279. New section 21A also contains provisions to prevent there being any overlap between the new provision and the existing provisions of the SDA.
280. An order-making power in *new subsection 21A(5)* allows the Secretary of State to make additional exemptions after consultation with the CEHR and subject to affirmative resolution of each House of Parliament. (The consultation will be with the EOC until the CEHR takes on responsibility for sex discrimination issues and thereafter with the CEHR.)
281. *New subsections 21A(6), (7) and (8)* introduce changes to the enforcement provisions in section 66 of the SDA to ensure that proceedings brought under new section 21A will not prejudice the outcome of a related criminal investigation or criminal proceeding. They also amend the questionnaire procedure in section 74 of the SDA, so that a court will not be able to draw inferences from a failure to respond to a questionnaire if that was necessary to avoid prejudice to a criminal investigation or criminal proceedings.

Section 84: General duty to promote equality, &c.

282. *Section 84* amends the SDA by inserting into that Act *new section 76A*. The effect of this provision is to impose on public authorities a duty to promote equality of opportunity that is similar to the duty imposed by section 71 of the RRA (as substituted by section 2 of the Race Relations (Amendment) Act 2000 (RRAA)) and the duty imposed by section 3 of the Disability Discrimination Act 2005 which inserts new section 49A into the DDA.
283. *Newsubsection 76A(1)* imposes a general duty on public authorities when carrying out their public functions, either as employers or service providers, to have due regard to the need to eliminate unlawful discrimination and harassment, and to promote equality of opportunity between men and women. This general duty will be enforceable through judicial review, rather than creating a cause of action for individuals in private law.
284. *Newsubsection 76A(2)* extends the definition of a public authority to include any person to the extent that he has functions of a public nature. This would include, for example, a private security firm contracted to provide a public function, for instance, to run a prison. It is only the public functions of private companies that are covered. Core public bodies like government departments, local authorities, the police and other governmental bodies are all public authorities. This subsection also confirms that the duty on public authorities to eliminate unlawful discrimination also covers contravention of the Equal Pay Act 1970.
285. *Newsubsection 76A(3)* excludes certain bodies from the definition of public authority, in particular the Houses of Parliament, Scottish Parliament, General Synod of the Church of England and the intelligence services. There is also a power for the Secretary of State, after consulting the Commission, to extend this list of bodies by order (subject to the negative resolution procedure).
286. *Subsection 76A(4)* exempts certain functions from the scope of the general duty: functions in connection with proceedings in the Houses of Parliament and the Scottish Parliament (though not the Scottish Parliamentary Corporate Body) and the exercise of judicial and related functions. There is also a power for the Secretary of State, after consulting the Commission, to extend this list of functions by order, also subject to the negative resolution procedure.
287. *Newsubsection 76A(5)* confirms that the general duty to promote equality of opportunity between men and women does not override any exception or limitation in law which permits sex discrimination.

Section 85: Specific duties

288. *Section 85* inserts new *sections 76B* and *76C* into the SDA.
289. *Newsection 76B* empowers the Secretary of State to impose by order, specific duties on public authorities, other than certain Scottish bodies, to ensure the better performance by them of the general duty in new section 76A(1). This order will be subject to the negative resolution procedure. The Secretary of State is obliged to consult the Commission before making such an order. The provision does not confer rights on individuals to complain about a failure by a public authority to comply with a specific duty.
290. In respect of specific duties being imposed in Wales, *newsubsection 76B(3)* confirms that the Secretary of State must (i) consult the National Assembly for Wales before imposing specific duties on any person exercising functions in relation to Wales; and (ii) gain the consent of the National Assembly for Wales before imposing specific duties on a person all of whose functions are public functions in relation to Wales.
291. *Newsection 76C* includes provisions empowering Scottish Ministers to set specific duties in respect of certain Scottish bodies, to ensure the better performance by them

of the general duty. In the case of cross-border public authorities (within the meaning of section 88(5) of the Scotland Act 1998), the Secretary of State may impose, by order, duties in respect of the functions which are not Scottish functions (i.e. those which are not devolved), and the Scottish Ministers may impose, by order, duties in respect of their Scottish functions (i.e. those which are devolved). New *section 76C(6)* also requires that, before placing cross-border public authorities under specific duties, the Secretary of State must consult Scottish Ministers. Similarly, new *section 76C(7)* requires that, before placing cross-border public authorities under specific duties, the Scottish Ministers must consult the Secretary of State.

292. New *section 76D* sets out the framework for the enforcement of specific duties imposed by order under 76B(1) or 76C. The Commission may serve a compliance notice on a public authority where it is satisfied that the authority is not complying with any specific duty. A compliance notice will require the public authority to (i) comply with the duty and (ii) inform the Commission within 28 days (beginning with the date on which the notice is given), of action it intends to comply with the duty. The notice could also require the public authority to provide the CEHR with information additionally specified in the notice in order to verify that the duty has or is being complied with. This new section also enables the Commission to apply to a county court for an order to require the public authority to comply with the notice, if the Commission thinks that the public authority has not done so.

Section 86: Codes of practice

293. *Section 86* inserts a new section 76E into the SDA
294. *New Section 76E* gives the Commission the power to draw up and issue a code of practice about performance of both the general duty in section 84 and the specific duties to be imposed by section 85. There is also a requirement for the Secretary of State to consult Scottish Ministers and the National Assembly for Wales before approving a draft code or commencing a code. Recognising that codes of practice on the gender duty will go beyond the employment field, provision is made in this section for a code of practice on the gender duty to be admissible in evidence in relevant proceedings before all courts and tribunals.
295. In respect of sections 84 and 85 (which introduce new sections 76A to 76D into the SDA), before the CEHR becomes operational, any requirement for the Secretary of State to consult the Commission will mean a requirement to consult the EOC. The EOC will also have responsibility for enforcing the general duty and the specific duties to be imposed by secondary legislation. During this interim period, the EOC will additionally be responsible for preparing and issuing codes of practice under new section 76E in relation to the general duty and the specific duties. The procedural requirements applying to codes of practice prepared under section 56A of the SDA are to apply with the adjustment made by section 86 to the issuing of codes whilst the EOC is responsible for issuing the codes of practice on the gender duty.

Section 87: National Security

296. *Section 87* inserts a new section 66B into the SDA.
297. *New Section 66B* allows for county and sheriff court rules to make provision permitting a court to take various forms of action which are considered expedient in the interests of national security. This is equivalent to section 67A of the RRA which was introduced by the RRAA. The power in section 66B will allow rules to be made to allow the court, when considering proceedings brought under this part of the SDA:
- to exclude the claimant, the claimant's representatives or any assessors from part or all of the proceedings;

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- to permit the claimant or representative to make a statement prior to the part of the proceedings from which they are excluded; and
 - to keep part or all of the reasons for a decision secret.
298. Where the claimant or representatives are excluded from part or all of proceedings under such rules, *new section 66B(2)* allows the Attorney General or Advocate General for Scotland to appoint a special advocate to represent the interests of the claimant.

Section 88: General duty: exceptions

299. *Section 88* makes a minor consequential amendment to the DDA.
300. Section 49C(4) of the DDA permits any or all of subsections (a) to (d) of the general duty to promote equality for disabled people to be disapplied from prescribed acts. This amendment would ensure that, should it be necessary to disapply subsections (e) or (f) of the duty, this could also be done – for example, to clarify the situation where there was doubt as to whether an act was covered or not, or to exclude particular types of act from those duties where there would be good policy reasons as to why they should not be covered.

Section 89: National Security

301. *Section 89* inserts a new section 59A into the DDA that is analogous to new section 66B of the SDA, inserted by section 87.

Section 90: National Security

302. *Section 90* makes an amendment to the equivalent provision in the RRA to ensure that a special advocate may be appointed where either the claimant or the representatives or both are excluded. As currently drafted, the RRA provision only allows for the appointment of a special advocate where both the claimant and the representatives are excluded.

Part 5: General

Section 91: Repeals

303. *Section 91* gives effect to the repeals set out in Schedule 4.

Section 92: Crown application

304. *Section 92* provides that Ministers of the Crown, government departments and other agents of the Crown are bound by the Act. The CEHR will therefore be able, inter alia, to investigate Government and other public bodies and use its powers to require them to give information. This Act will however not affect Her Majesty in Her private capacity or in right of Her Duchy of Lancaster or the Duke of Cornwall.

Schedule 1: The Commission: Constitution, &c.

305. *Schedule 1* sets out provisions relating to: the constitution of the CEHR; its members (the Commissioners) and their tenure of office; the tenure of office of the Chairman and the deputy Chairman; regulation of its proceedings; appointment of its Chief Executive and other staff; appointment of its Investigating Commissioners; its powers of delegation and committees (including the Scotland, Wales, and Disability Committees); preparation of its annual report; remuneration of Commissioners and staff; its financial arrangements; and its status. In particular:

Schedule 1, Part 1: Constitution

306. *Paragraph 1(1)* establishes that there shall be no less than 10, and no more than 15, members of the CEHR, who shall be known as Commissioners, and who shall be appointed by the Secretary of State. In addition to these Commissioners, the chief executive of the CEHR will also be a Commissioner by virtue of holding that office.
307. *Paragraph 2(1)* requires that the Secretary of State appoint only individuals who have knowledge or experience of a relevant matter, or who are suitable for some other special reason. When appointing Commissioners, the Secretary of State is required to have regard to the desirability of the Commissioners together having knowledge and experience of the relevant matters.
308. *Paragraph 2(2)* sets out the relevant matters to which the appointments refer. This includes the Commission's functions (including its work with business, employee organisations, and the public sector), in particular on discrimination and human rights.
309. *Paragraph 2(3)(a)* requires the Secretary of State to appoint at least one Commissioner who is or has been a disabled person.
310. *Paragraph 2(3)(b)* requires the Secretary of State to appoint, with the consent of Scottish Ministers, one Commissioner who knows about conditions in Scotland.
311. *Paragraph 2(3)(c)* requires the Secretary of State to appoint, with the consent of the National Assembly for Wales, one Commissioner who knows about conditions in Wales.
312. *Paragraph 3* provides that a Commissioner can be appointed for a specified period of between two and five years, and that reappointment can be made once this term has expired. It requires a Commissioner to give notice in writing to the Secretary of State if he or she wishes to resign, and enables the Secretary of State to dismiss any Commissioner who is unable, unfit or unwilling to fulfil his or her functions.
313. *Paragraph 4* provides for the terms of appointment of the Chairman and deputy Chairman. It sets out the functions of the Chairman, and deputy Chairman, and the procedures necessary should they vacate office or resign their post. It also specifies that the chief executive cannot be appointed Chairman or deputy Chairman of the CEHR.

Schedule 1, Part 2: Proceedings

314. *Paragraphs 5 and 6* allow the CEHR to regulate its own proceedings. A minimum of five Commissioners must be present when the procedure regarding quorum for meetings is established.
315. *Paragraphs 7 and 8* require the CEHR to appoint, with the approval of the Secretary of State, a chief executive and it may appoint other staff as appropriate. The Secretary of State must also approve the overall number of staff and terms and conditions of appointment.
316. *Paragraph 9* permits the CEHR to also appoint an Investigating Commissioner to carry out an investigation, other enforcement action, and inquiries.
317. The CEHR may delegate any of its functions to another Commissioner or to staff. The CEHR can also establish advisory or decision-making committees, which can be made up of Commissioners, staff and external members. Decision-making committees must be chaired by a Commissioner and can have any function delegated to them.
318. *Paragraphs 16 to 31* set out the requirements for the CEHR to establish a Scotland Committee and a Wales Committee. Each Committee shall be chaired by the relevant Commissioner with knowledge of conditions in Scotland or Wales. The Committees must be established before any of the general duties (sections 8 to 12) come into force. The Committees have an advisory role in respect of the CEHR's functions insofar

as they affect Scotland and Wales respectively. The CEHR is obliged to consult the Scotland or Wales Committee before undertaking a function that, in its opinion, may affect people in Scotland and Wales respectively.

319. The Committees have delegated decision-making powers in respect of the activities listed in section 13 in so far as the activities, in the opinion of the CEHR, affect Scotland and Wales. They will also have delegated power under section 11(2)(c) and section 11(2)(d) to provide advice to the devolved administrations in respect of law which, in the opinion of the CEHR, affects only Scotland or Wales respectively. The CEHR is unable, therefore, to undertake these activities to the extent that they are delegated to the Committees. The Scotland and Wales Committees are not able to exercise these decision-making powers where they have been delegated to the Disability Committee under Part 5 of Schedule 1: in those circumstances, the Disability Committee is obliged by *paragraph 52(4) and (5)* to consult the Scotland or Wales Committees before exercising the powers.
320. Notwithstanding the delegation of section 13, the CEHR may provide advice or guidance on a GB-wide basis, such as, for example, through a helpline or the publication of advice leaflets or contract with another party to provide this service.
321. *Paragraph 32* requires the CEHR to prepare and publish an annual report, including in relation to its activities in Scotland and Wales, and submit it to the Secretary of State. The Secretary of State must lay the annual report before Parliament. The annual report must also be sent to the Scottish Parliament and the National Assembly for Wales.
322. *Paragraphs 33 and 34* allow the CEHR to continue proceedings irrespective of whether there is an outstanding vacancy (including the Chair) or whether there is an irregularity in respect of an appointment on either the CEHR Board or a committee.

Schedule 1, Part 3: Money

323. *Paragraphs 35 to 37* set out the remuneration arrangements for the CEHR Board, staff members or members of an advisory or decision-making committee. It also allows for the CEHR to be listed as part of the Superannuation Act 1972 in respect of pension arrangements for staff.
324. *Paragraph 38* requires the Secretary of State to determine and provide funds that are reasonably sufficient to enable the CEHR to perform its functions 307. *Paragraph 39* allows the CEHR to charge for a service provided under section 13 (Information, advice etc), or section 27 (Conciliation).
325. *Paragraphs 40 and 41* requires the CEHR to prepare a statement of accounts on an annual basis which is examined, certified and reported on by the Comptroller and Auditor General. The first financial year to which this obligation relates begins when section 1 of the Act is brought into force and ends on the second following 31st March. Subsequent financial years run from 1st April to 31st March (as does the first financial year if section 1 is brought into force on 1st April).

Schedule 1, Part 4 – Status &c.

326. *Paragraph 42* establishes the status of the CEHR in relation to the Crown. It confirms that Commissioners and employees of the CEHR are not employed as civil servants.
327. *Paragraph 42(3)* requires the Secretary of State to have regard to the desirability of ensuring that the Commission is under as few constraints as reasonably possible in determining its activities, timetables and priorities.
328. This Part of Schedule 1 also amends a number of Acts of Parliament to ensure the CEHR is subject to them. These provisions ensure that the CEHR is subject to the requirements of the Parliamentary Commissioner Act 1967, relating to departments subject to investigation; the House of Commons Disqualification Act 1975 and similar

provisions barring members of the House of Commons, Northern Ireland Assembly, and National Assembly for Wales from being members of the CEHR, including as an Investigating Commissioner or member of a decision-making committee. It also subjects the CEHR to the provisions of the Public Records Act 1958 and the Freedom of Information Act 2000.

Schedule 1, Part 5 – Disability Committee

329. *Paragraph 49* requires the CEHR to establish a Disability Committee before either the equality and diversity duties set out in section 8 or the duties with regard to groups set out in section 10 of the Act comes into force, in either case in so far as they relate to disability
330. *Paragraph 50* sets out the requirements for the number of members of the Disability Committee. Members of the Committee may be Commissioners, staff or other non-Commissioners by virtue of *paragraph 12(2) of Schedule 1* to the Act. *Paragraphs 50(b)* and *(c)* require that the Chairman and at least half of the members of the Disability Committee are or have been disabled people. This reflects a requirement in the Disability Rights Commission Act concerning the composition of the DRC. By virtue of *paragraph 50(c) of Schedule 1* in conjunction with *paragraph 12(3) of Schedule 1* to the Act, the Chairman of the Committee must be a Commissioner who is or has been a disabled person. The Chairman need not be the same Commissioner appointed to give effect to the requirement in paragraph 2(3)(a) of Schedule 1. “Disabled person” for the purposes of paragraph 50 bears the same meaning as in section 8(4) of the Act. *Paragraph 50 (2)* provides that the DRC Transition Commissioner appointed under section 41 may not be a member (or Chairman) of the Committee.
331. *Paragraph 51* sets a period of two to five years as the term of office of members of the Disability Committee, subject to the possibility of reappointment, or dismissal, or in accordance with paragraph 51(c) lapsing of the appointment of members of the Committee when the Committee is dissolved following the process set out *in paragraphs 57 to 62*.
332. *Paragraph 52* sets out the functions of the CEHR which are delegated to the Disability Committee. These are the duties under section 8 of the Equality Act 2006 (equality and diversity) and duties under section 10 of the Equality Act 2006 (groups) in so far as they relate to “disability matters”. “Disability matters” is defined in *paragraph 52(3)* as matters provided for under Parts 1, 3, 4, 5 and 5B of the DDA, sections 8 and 10 Equality Act 2006 in so far as they relate to disability; and sections 14(3) and (4), 27(2) and (3) and 29(2) and (3) of the Equality Act 2006. Part 1 of the DDA sets out the meaning of “disabled person” and “disability”; Part 3 of the DDA sets out the duties on providers of goods, facilities, services and premises to the public, public authorities exercising their functions; and associations providing benefits, facilities and services to applicants for membership, members, associates and guests; Part 4 of the DDA sets out the duties in relation to education; and Part 5 of the DDA provides powers for the Secretary of State to make accessibility regulations in respect of taxis, public service vehicles, and rail vehicles; Part 5B of the DDA makes procedural and evidential provision with regard to consent to improvements to let dwelling houses in England and Wales; and sections 14(3) and (4), 27(2) and (3) and 29(2) and (3) of the Equality Act 2006 make provision for the CEHR to provide conciliation services and legal assistance and to issue codes of practice in relation to the making of disability related works in Scotland. Matters provided for in Part 2 of the DDA, which deals with discrimination and harassment in the employment field will not be delegated to the Disability Committee. The Committee’s remit with regard to Part 2 of the DDA is set out in *paragraphs 53 and 54*.
333. In carrying out the duties of the CEHR under sections 8 and 10, so far as they relate to disability, or in relation to disability matters generally (as defined in *paragraph 52(3)*), the Disability Committee may exercise any of the powers listed in *paragraph 52(1)(a)*.

334. For example, the Disability Committee will be able to issue codes of practice (delegated by virtue of *paragraph 52(1)(a)(ii)*) which deal with disability discrimination in the provision of goods, facilities, services and premises or education, as provided for in Parts 3 and 4 of the DDA respectively, as the latter fall within the definition of “disability matters” in paragraph 52(3) of Schedule 1.
335. *Paragraph 52(2)* allows the CEHR to exercise the powers and fulfil the duties delegated to the Disability Committee, where they relate partly to disability and partly to other matters. This would allow the CEHR, for instance, to establish a GB-wide helpline offering advice on all of the equality enactments listed at section 33. However, the CEHR is required under paragraph 53 to consult the Committee before doing so.
336. *Paragraph 53* imposes a duty on the CEHR to consult the Disability Committee before taking action on matters affecting disabled people, in particular where such action affects Part 2 of the DDA (employment field). This means that, for example, if the CEHR were to prepare a code of practice relating to discrimination in employment across all equality strands, it would be required to involve the Disability Committee by seeking their advice and expertise on all areas of the proposed code affecting disabled people, such as reasonable adjustments for disabled people in the workplace. Or, for example, if drawing up a programme of investigations and inquiries which would impact on disabled people, the CEHR would be required to consult the Disability Committee prior to doing so.
337. *Paragraph 54* imposes a corresponding duty on the Disability Committee to provide advice to the CEHR on the exercise of any of the CEHR’s functions affecting disabled people.
338. *Paragraph 55* requires the CEHR to allocate a sufficient share of its total allocated resources (which will include staff and funding) to the Disability Committee to enable it to carry out its delegated functions effectively.
339. *Paragraphs 57 to 59* make provision for a mandatory review of the Disability Committee to assess whether it is expedient for the Committee to continue. The review is to take place after the Disability Committee has been operating for five years.
340. *Paragraph 58* lists the persons who are excluded from participating in the review, to ensure that the review will be carried out independently of the CEHR.
341. *Paragraph 59* requires the CEHR to ensure that the review involves a consultation with disabled people and other interested parties, and that a report of the findings of the review is submitted to the CEHR and published. The report must include a recommendation by the reviewing body on how long the Committee should continue in existence.
342. *Paragraph 60* requires the CEHR, after receiving the report, to make a recommendation to the Secretary of State on how long the Disability Committee should continue in existence.
343. *Paragraph 61* requires the Secretary of State to make an order specifying the date on which the dissolution of the Disability Committee will take effect, which may be after a period of continuation. In accordance with section 39(3)(e) such an order is subject to the negative resolution procedure.
344. *Paragraph 62* provides that an order made by the Secretary of State under paragraph 59 may also make provision in relation to the Committee’s conduct of its business prior to dissolution. For example, this may include provision about activities the Committee must complete before it is dissolved. The order may also make provision as to how the CEHR will carry out functions that were previously delegated to the Committee before its dissolution.

*These notes refer to the Equality Act 2006 (c.3)
which received Royal Assent on 16 February 2006*

345. *Paragraph 63* clarifies that paragraphs 12-15 of *Schedule 1* to the Act allow the CEHR to create a subsequent committee with responsibility for disability issues, or to delegate to another committee any functions that were originally delegated to the Disability Committee, after the Disability Committee has been dissolved.
346. *Paragraph 64* ensures that the Disability Committee can only be dissolved following the review process set out in paragraphs 57 to 62.

Schedule 2: Inquiries, Investigations and Assessments

347. *Schedule 2* sets out the provisions relating to terms of reference, representations, evidence, adjournments, reports and recommendations and effects of recommendations relating to inquiries, investigations and assessments.
348. *Paragraph 9* allows the CEHR to give a notice to any person, in the course of an inquiry, investigation or assessment.
349. *Paragraph 10* provides that the notice may require a person to provide the CEHR with information or documents in his possession or to give oral evidence to it.
350. *Paragraph 11* provides the grounds on which a person served with a notice to provide information can apply to the court to overturn the notice.
351. *Paragraph 12* enables the CEHR to apply to a county court (or to a sheriff in Scotland) for an order requiring a person to provide the information required.
352. *Paragraph 13* creates three summary criminal offences: one of failing to provide information requested under paragraph 9 or ordered by a court under paragraph 12; second, falsifying such information and third, making a false statement in oral evidence to the CEHR, following a request to give oral evidence under paragraph 9. A person who is guilty of an offence under paragraph 13 shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.
353. *Paragraph 14* provides for a person to disregard a notice issued under *paragraph 9* if it would require the disclosure of information prejudicial to national security. It also provides that in the event of a person disregarding such a notice the CEHR may apply to the Investigatory Powers Tribunal which shall consider the application by applying the principles of judicial review.
354. *Paragraph 15* sets out the requirements on the CEHR to prepare and publish a report of an inquiry, investigation or assessment.
355. *Paragraph 16* sets out the powers of the CEHR to make recommendations and provides that these may be addressed to any class of person.
356. *Paragraph 17* sets out that a court or tribunal may have regard to the finding of an inquiry, investigation or assessment but shall not treat it as conclusive.
357. *Paragraph 19* sets out the exemption from the requirements by courts and tribunals.
358. *Paragraph 20* specifies that an inquiry may not consider whether an intelligence service is acting in a way that is incompatible with human rights or other matters concerning human rights in relation to an intelligence service.

Schedule 3: Amendments consequential on Part 1

359. *Schedule 3* makes a number of consequential amendments to legislation. These include substituting the CEHR for the existing equality Commissions where they have rights or obligations under existing legislation: for example, the CRE's right to be consulted in respect of codes made by the Secretary of State under the Asylum and Immigration Act 1996.

*These notes refer to the Equality Act 2006 (c.3)
which received Royal Assent on 16 February 2006*

Schedule 4: Repeals

360. *Schedule 4* lists the repeals made by the Act.