GUIDE TO EQUALITY PROOFING
Dear Colleagues,

This booklet on equality proofing is intended to help negotiators at all levels to understand how equality legislation and good practice impacts on negotiations and how to guard against decision, which will disadvantage particular groups. Some of the most difficult areas of negotiation are carried out at branch level.

Issues such as patterns of attendance and hours of work can be minefields for equality legislation. Although this booklet will not answer all your questions, it will hopefully raise awareness for all negotiators and highlight some of the likely problem areas.

Over the years we have seen a number of positive developments to the equality agenda in terms of legislation. One of the most positive is the introduction of the Equality Act 2010. Under this legislation, we have seen some noticeable improvements to employment rights, particularly for disabled workers and the law is also much clearer in relation to rights for transgender people.

My vision and hope is to see equality adopted as a mainstream part of all our activists’ work. This booklet should provide invaluable assistance to any rep dealing with an equality related enquiry.

Once again, the Equal Opportunities Department would like to thank Pauline Granstan for her work in researching some of the information for this booklet.

Yours sincerely,

Linda Roy
National Equality Officer
Chapter 1
This section gives the overall policy aims and objectives of the CWU, e.g. to “provide an excellent service for all its members” and “...to protect, advance and serve the interests of its members throughout the communications industry”. In carrying out its policy aims and objectives, the CWU is fully committed to Equality of Opportunities. In demonstrating its commitment to equality both the General Secretary and Linda Roy, the National Equality Officer, have put a number of measures in place e.g. consultation, review of the CWU structure and the Equality toolkit which should go some way to overcoming inherent bias in the system.

Chapter 2
After laying the principle of equality proofing, the chapter gives examples of how to equality proof agreements. It suggests pertinent questions that the negotiator/s need to bear in mind when entering into agreements, e.g. the impact that such an agreement could have on a disadvantaged group. Such questions include: “Will it be possible for each of the disadvantaged groups to comply with the requirements of the agreement?” and, “Does the signing of this agreement impact adversely on some individuals from a racial minority Group? What is the adverse impact, if any?”

Chapter 3
This chapter briefly outlines some of the many positive steps taken by the CWU to raise equality awareness throughout its structure e.g. “Harassment and Bullying Helpline” and equality training targeted at under represented groups.

Chapter 4
Chapter 4 is a brief outline of equality law as set out in the Equality Act 2010. It gives a synopsis of the 9 protected characteristics together with examples of direct and indirect discrimination, harassment and less favourable treatment which amounts to discrimination.
YOUR union
The Communication Workers Union (CWU) represents approximately 200,000 members from a diverse range of cultures, religions, societies and family structure. In attempting to provide an excellent service for all its members, the CWU is conscious of the need to have policies and practices in place that reflect and represent its diverse membership base and its core values.

CWU OBJECTIVES
The CWU’s main objectives are:

To protect, advance and serve the interests of its members throughout the communications industry. In pursuit of its aims, the union will seek:

➤ To provide first class collective and individual representation for all its members;
➤ To offer security of employment for all members;
➤ To offer individual membership services of the highest quality;
➤ To expand trade union membership services throughout the Communications Industry;
➤ To promote, by industrial and political means, the success of the industries in which our members work;
➤ To campaign against all forms of discrimination;
➤ To further these objectives by promoting the influence of the union throughout the National and International community.

CWU RULE
Central to the main objectives of the CWU is the issue of equality. The CWU is committed to:

1. Actively oppose all forms of discrimination based on race, creed, religion, age, political affiliation, disability, marital status, sex, sexual or gender orientation in industry, the union and society in general. To this end the CWU shall actively oppose any organisation, political or otherwise, whose aims are racist or fascist in accordance to our Rules and in particular Rule 2.1.4. This will include taking positive action (positive discrimination is unlawful) in favour of women and racial minorities until such time as the union is satisfied that its structure reflects and supports the gender and racial balance of the members which it represents”. This list is not intended to be exhaustive.

2. Promotion of policies designed to ensure that any barriers or disadvantages arising intentionally or unintentionally from items listed in (1) above are overcome as far as possible. This will apply equally to physical and non-physical causes of the barriers or disadvantages.

Like many unions who are working towards achieving equality throughout its structure, the CWU is conscious that well-intentioned policies do not always translate into best practices. As a consequence the drive towards achieving greater equality within and throughout the CWU structure is a continually developing process. Those processes are integral to union policies, driven from the highest level downwards.
Chapter 2: Equality Proofing

Introduction
The principal objective of equality proofing is to bring equality issues to the centre by raising negotiators awareness that by carrying out certain simple checks, the impact of inequality can be greatly lessened. By carrying out good equality proofing negotiators can promote equality and diversity.

Equality proofing is considered best practice by all good employers in bringing equality to the forefront of any agreement. Equality proofing requires a commitment to equality from the highest level of the organisation or workplace; goes beyond a consciousness of established legislative requirements; is about how agreements are going to impact on groups susceptible to inequality of treatment and, seeks to assess, monitor and redress if necessary, any perceived inequality of treatment for all the disadvantaged groups.

Negotiators and policy developers must ensure that disadvantaged groups, as outlined in the Equality Act, are not marginalised or discriminated against as a result of a policy, criterion or practice that is put in place. Therefore policy developers must be aware of where discrimination is likely to occur and which groups are likely to be marginalised. Negotiators and policy developers must ensure that such groups are provided with the means and resources to participate in the workplace and in society as equal citizens.

Why the need for equality proofing?
We are more conscious than ever that having good equality policies does not always result in best practice. Hidden barriers such as the glass ceiling for women and the concrete block for black members prevent equal access. Nevertheless we have clear policies, as outlined in our Rules and in motions put to the Annual General Conference \(^1\) that commit us to the equality proofing of agreements. This booklet is produced as an aid in bringing about equality of access via equality proofing of major agreements.

Equality proofing defined
Equality proofing involves incorporating an equality perspective in all aspects of policy development. For this to happen, all the people involved in policy development must be aware of and committed to equality. The main aspects of equality proofing involve:

- The development of equality proofing mechanisms
- The training of negotiators to implement an equality proofing process. Tools that can be used to implement equality proofing include:
  - Equality audit and monitoring mechanisms
  - Policy proofing procedures

\(^1\) Motion No. 138, Annual Conference 2000; Motion No. 92, Annual Conference 2001; Motion No. 146, Annual Conference 2002 and Motion No. 34, Annual Conference 2009
How to equality proof
This guide is not intended to be determinative but should go a long way in raising awareness of equality issues in major agreements. The guide is also intended to act as a manual that negotiators can use when the need arise. Moreover, all negotiators should feel free to contact the Equal Opportunities Department if they require assistance in equality proofing.

In producing this guide it is hoped negotiators will use it to:
■ Eliminate any possible disadvantages or discrimination that could occur during the bargaining agenda against individuals and groups because of their identity;
■ Promote full and effective equality by ensuring that groups experiencing inequality are given the necessary resources to participate equally;
■ Be conscious of equality of access to all members in terms of equal rights to participate;
■ Value rather than discriminate against differences.

An important principle of equality proofing is that the needs and interests of target groups are taken into account in the policy-making process and in the ongoing evaluation and implementation of policy.

Thus, at the start of negotiating an agreement, equality proofing will seek to assess, monitor and redress if necessary, any perceived inequality of outcome for all the disadvantaged groups. To assist in carrying out that task, listed below are a number of possible problem areas:

■ Selection for job interview
■ Eligibility and application for promotion
■ Payment of performance related pay and bonus payment
■ Career development
■ Filling of new vacancies
■ Changes to terms and conditions of employment
■ Personal review (including appraisals)
■ Selection for redundancy
■ Resignation rates
■ Staffing arrangements
■ Transfer terms
■ Seniority lists
■ Shift working patterns
■ Hours of work
■ Flexibility of working arrangements
■ Treatment of pregnant workers

Having considered the above list, negotiators now assess what is the likely impact of the agreement on:

■ People with a disability
■ Older and younger workers
■ Gender (including maternity)
■ Racial groups

■ Religious groups
■ Part Time workers
■ Same sex partnership
■ Transsexual
If the result is a disproportionate impact or results in a difference in treatment of any of the above, then it is possible that discrimination is taking place. The key word is “difference” in treatment and can that difference be objectively justified. In attempting to ascertain whether or not there is a difference in treatment which results in an adverse impact that cannot be objectively justified, listed below are a number of questions to consider:

**Impact**

(a) What impact will this agreement have on each disadvantaged group?

(b) Will it be possible for each of the disadvantaged groups to comply with the requirements of the agreement? For example, will it be possible for a disabled person or a woman to comply with the requirements of the agreement?

(c) Does the signing of this agreement impact adversely on someone from a racial minority group? For example, engineering duties requiring the wearing of a helmet. Will it be possible for a Sikh – due to religious practices of having to wear a turban – to comply with the requirement?

(d) What, if any, is the adverse impact? For example, are fewer women able to comply with the agreement compared to the number of men affected? Are persons from a racial minority or religion able to comply with the requirements?

(e) Is a pregnant worker likely to be able to comply with the requirement or condition(s) laid down in the agreement?

(f) Does the agreement impact adversely on someone because of his or her sexuality? For example, does the agreement expressly provide for CWU members to nominate their same-sex partner as a recipient of the benefits available under the Pension Scheme?

(g) Will it be possible for a part time worker to comply with the agreement? For example, are part-time workers excluded from participating in training schemes which are otherwise open to full time workers and which lead to opportunities for promotion to a higher grade?

(h) Where the agreement covers recruitment and selection, does the wording of a job advert effectively exclude younger workers? For example, by requiring that candidates be able to demonstrate “several years’ experience” and if so, can this be objectively justified?

(i) Does the agreement provide for candidates to undertake practical tests which might deter older workers from applying for promotional roles? For example, written tests involving a certain level of computer competency. Does a recruitment and selection agreement use wording such as, “dynamic”, “graduate” or “energetic” to attract candidates when what is required is a certain level of skill or competency? Could the wording contained in such an agreement have an adverse impact on women, those with disabilities or certain racial groups?
Are reasonable adjustments necessary?
For example will it be possible for a disabled person to access the building or work area to carry out his or her duties without being put at a disadvantage?

If work is being transferred from one office to another what is the likely impact of the move on workers from racial minority groups? For example if work is being transferred from an office/area where there are a large number of ethnic minority staff to one which is predominantly white, will those from racial minority groups benefit from similar opportunities for promotion and training? If the resulting impact is detrimental, how can the detriment be addressed? Will it be necessary to consult the members concerned or will Headquarters be able to assist? Is assistance available from an outside organisation such as the Equality & Human Rights Commission (EHRC)?

Equality proofing of agreements – possible pitfalls!
It is the aim of the CWU to establish a process whereby each outcome can be measured and assessed for any possible pitfalls. In practical terms, a list of possible problem areas is given with examples of how these can be avoided. However, it is worth bearing in mind that the list is not exhaustive.

1. Personnel or Human Resources procedures
Personnel procedures or Human Resources (HR) procedures should be carefully examined for any likely adverse impact on disadvantaged groups.

(a) Attendance procedure
When consulted by employers seeking to agree the Attendance Procedure, union negotiators should ensure that the agreement provides for flexibility when applying the procedure to workers with disabilities (as defined in the EA 2010). The Equality Act 2010 protects employees from discrimination with regard to time off for rehabilitation and treatment which is disability related. An employer’s failure to treat disability-related absence as distinct from non disability-related absence when following the Attendance Procedure could give rise to Tribunal claims for discrimination arising from disability, indirect disability discrimination or failure to make reasonable adjustments.

Employers must have regard to disability-related sick absence when applying any sickness absence procedure. Thus, it may be possible to make ‘reasonable adjustments’ by:

- Making adjustments to the physical premises
- Allocating some of the duties to another colleague
- Transferring the individual to an existing vacancy in another department
- Altering the individual’s working hours
- Moving the individual to a different place of work
- Allowing the individual to be absent during working hours for rehabilitation, assessment or treatment
- Giving the individual training to do another job
- Acquiring and modifying equipment
- Modifying instruction/reference manuals
- Modifying procedure, suggestion or assessment
- Providing a reader interpreter
- Providing supervision
**(b) Pregnant Workers**

Pregnant workers are also protected in that they should not suffer discrimination because of a pregnancy-related absence. Since pregnancy is not one of the potentially fair reasons for dismissal, employers should not take any periods of sick leave incurred as a result of pregnancy into account when applying the attendance procedure. Similarly a pregnant worker should not receive a warning because of sickness absence which is pregnancy related. In addition, an employer must carry out a risk assessment and where appropriate, consider the possibility of transferring a pregnant worker to less hazardous duties, which may include a move away from shift working, without loss of pay.

***(c) Appraisals***

When negotiating the appraisal procedure, reps should make sure that employers use objective criteria for assessing performance. The criteria should be clear and easy to understand. The procedure ought not to impact adversely on disadvantaged groups. Such adverse impact could take the form of:

- Assessing the person on the basis of their accent and not on their ability to do the work;
- Setting the requirement for English language skills at a higher level than is required to do the job;
- Withholding access to a sign language interpreter in the case of a profoundly deaf person who requires this.

**(d) Promotion**

Selection for promotion should be based on clearly defined criteria resulting in the selection of “the best person” for the job. Selection for promotion to a higher grade should include:

- Short-listing should be done anonymously without names to avoid bias.
- The interviewers should assess against objective criteria.
- Test papers should have been evaluated for any inherent bias against disadvantaged groups.
- Clear feedback to all unsuccessful candidates.

**(e) Recruitment and selection**

The recruitment and selection process should be based on objective criteria and not on the employer’s subjective view as to who should be appointed. Such objective criteria could include skills, relevant qualifications and aptitude for undertaking the job under consideration. The concept of a preferred candidate should be avoided, as should promotion on the basis of social contact. The concept of friends and family recruitment is always potentially discriminatory.

An employer may be able to justify discriminating between candidates where it is a Genuine Occupational Requirement (GOR) that the successful candidate has a particular protected characteristic, e.g. appointing a woman to work in a women’s refuge. Criteria that should be avoided include:

- A specific age range (as this could exclude younger and older workers capable of doing the job)
- Friends and family (this may debar people from an ethnic minority or women)
- Seniority – this could adversely impact on women and ethnic minorities because of a disproportionate number not having the required length of service to comply.
(f) Retention
Negotiators need to consider retention agreements for their potential adverse impact on disadvantaged groups. For example, a worker becomes disabled as a result of a road accident but could undertake their normal job with some reasonable adjustments such as working from home, modifying the existing work environment or a possible transfer to another job. This may be less costly than retiring the worker on medical grounds. Similarly, selection for redundancy, where this is necessary, should always be based on objective criteria. A manager who has a dislike for gay or lesbian workers ought not to be permitted to select for redundancy on the basis of sexual orientation. Negotiators can protect such members by making sure that where redundancy agreements exist, they contain objective criteria.

(g) Seniority
It is still a practice within the CWU to operate a seniority rota resulting in preference being given to the most senior member in the allocation of annual leave; overtime; duty rota and many other related areas. Seniority taken singularly is not in itself discriminatory but it may impact adversely when other considerations are taken into account. The negotiator needs to ascertain whether for example, a requirement for seniority impacts adversely on women, disabled persons or ethnic minorities. Will it be possible for them to comply or will a disproportionate number of women or ethnic minority members suffer a disadvantage? If the answer is yes, then it is possible that discrimination is taking place as a result of operating a seniority rota. It is essential; therefore, that flexibility is used where seniority lists apply. Ability to do the job must be a key factor in the filling of all posts. It is particularly important that the need for family friendly policies is recognised.

(h) Training
Negotiators need to ensure that the way in which training is provided does not unjustifiably deprive disadvantaged groups of basic job skills, training or suitable opportunities for development. For example negotiators can take the following steps when making agreements:

- Specific training is available e.g. for part time workers or someone with a disability;
- Provision of course material is made in a format that is accessible to those attending the course;
- Provision of an interpreter is available, if necessary, for persons with a disability or language difficulty;
- Additional training, if necessary, is provided for a disabled person or older workers unfamiliar with technology.

2. Other related terms and conditions

(a) Pension Schemes
Pension scheme rules and their effect on workers in civil partnerships remain problematic notwithstanding the coming into force of the Equality Act 2010. A pension scheme which pays out to surviving married partners must also pay out to surviving civil partners in respect of any employee’s service since 5 December 2005 (when the Civil Partnership Act 2004 came into force). However, an exemption in the Equality Act 2010 allows the employer to (directly or indirectly) discriminate by paying out only to married partners for service before that date. Following legal action brought by Liberty, a major multi-national company relying on the exemption, has agreed to give the civil partners of its employees the same pension
benefits as spouses. There are some good schemes operating in some parts of the postal sector and BT. Negotiators should ensure that agreements do not discriminate against:

- Same sex partnership
- Co-habiting partners
- Unmarried relationship

(b) The Wearing of Uniform
People who observe different religious practices often have different dress codes. Most businesses for which CWU has trade union recognition employ workers from diverse cultures and religious practices. It is important then, that agreements accommodate dress codes. For example, some Muslim women are required to wear a hijab when they are in the public arena. Sikhs are required to wear a turban. Muslim and Hindu women may be required to cover their legs. Negotiators should be mindful of these differences so that agreements involving certain dress codes do not discriminate against other groups within our membership. Most problems can be easily resolved by consulting with the members concerned.

(c) Prayer Rooms
Due to religious diversity, negotiators should be aware that each religion will have its discrete religious days and practices: for example the Chinese have a different new year’s day to that practised in most parts of the Western world. Under the Human Rights Act and Equality Act individuals have the right not to be discriminated against in the workplace. Where an employer operates a policy of permitting no-one time off for religious purposes this may expose them to a potential Tribunal claim.

The CWU and its negotiators should strive to accommodate members with different holy days by negotiating holy days off. It is also generally acknowledged as good practice for larger employers to provide access to a prayer room for faiths requiring such a facility.

3. Family-friendly policies
There are a number of family friendly policies which exist under current UK legislation. These include: parental leave, time off for dependants, carers’ leave, maternity, paternity and adoptive leave and the right to request flexible working arrangements. All of the aforementioned arrangements are documented elsewhere. This section will therefore, examine Special Leave and how discrimination could work against disadvantaged groups.

In negotiating agreements involving special leave, it is essential that no group is disadvantaged as a result of an agreement. For example, negotiators should assess the agreement to ascertain whether:

(a) Same sex partners are included
(b) Unmarried partners are included
(c) Lone parents are included

If some groups are likely to be disadvantaged then, before an agreement is reached, it is important that the agreement specifies how such disadvantage will be tackled, reduced and if possible, eliminated.
4. What diversity is not
Having looked at equality proofing and equality of opportunity, it is paramount to make clear that diversity and equality involves more than simply using the right language or getting the words right in an agreement. Equality proofing is about improving (not reducing) standards and about challenging the stereotypes and prejudices that serve to disadvantage some groups in the workplace. It is also about thinking through how each decision taken in the workplace may impact (adversely or otherwise) on protected groups.
CHAPTER 3: THE BARGAINING AGENDA

For almost a decade the CWU has sought to address a number of equality issues. Some have resulted in publications, while others have taken different forms such as training and the setting up of helplines. Listed below is a sample of current publications:

Publications List
- Maternity Packs
- Various harassment & bullying leaflets
- LGBT rights at Work
- LGBT coming out leaflet
- Is the CWU representative of its ethnic minorities?
- Family Friendly Policies
- Domestic Violence
- Equality Officers Toolkit
- Women in British Trade Unions
- Parental Rights
- Harassment advice to Representatives on Handling Cases

Activity List
- Training Schools on Equality of Opportunity
- Women’s Schools
- Black Activist Schools
- Equality & Diversity Mandatory Training

Mainstreaming Equality
Mainstreaming equality into all aspects of negotiations by means of equality proofing will help to identify needed change. It will act as a catalyst for the future and will signal to members that the CWU is committed to its objective of equality of opportunity for all.

Equality Proofing of agreements has been a CWU policy since 2000 ³. At the heart of delivering equality is the principle of fairness. Fairness is not always easy to deliver because of hidden barriers. These are hurdles which require committed negotiators to fully assess and evaluate the likely impact they will have on CWU members and in particular disadvantaged groups. Time, energy and effort are prerequisites if the CWU is to succeed.

Good, high quality service providers recognise the diversity of its members and customers and responds to their needs. Therefore equality proofing and equality strategy is about recognising diversity and acting to ensure fair treatment; providing appropriate services to members and end users and meeting real needs.

³ Motion No. 138, Annual General Conference 2000.
CHAPTER 4: EQUAL OPPORTUNITIES AND ANTI-DISCRIMINATION LEGISLATION

1. Equal Opportunities

One of the CWU’s main objectives is to “protect, advance and serve the interests of its members throughout the communications industry”. Putting that objective into practice is intended to send a message to all members that the CWU sees each person as a valued individual, with his/her own unique personality contributing to the workplace and consequently to the wider society. Therefore, whether or not there is legislation outlawing unjustified discrimination, all CWU negotiators and policy makers should be conscious of the need to provide a service which results in equal and fair access to all.

2. Types of Discrimination and how to lessen its adverse impact

Protected characteristics
The Equality Act 2010 prohibits discrimination because of age, disability, gender reassignment, marriage & civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Conduct which is prohibited under the Act (known as ‘prohibited conduct’) includes:
- Direct discrimination
- Indirect discrimination
- Discrimination arising from disability (disability only)
- Failure to make reasonable adjustments (disability only)
- Harassment
- Victimisation

Discrimination is not always discrete but can be inter-related. For example, it is possible for someone who is subjected to unfavourable treatment at work to fall within more than one protected group, e.g. to be of a certain gender, suffer with a disability and come from a particular racial group. In such cases, it may be difficult to identify whether the less favourable treatment suffered relates to the individual’s gender, disability or race. Negotiators may wish to obtain advice from Headquarters before pursuing matters further.

The following may be if assistance to negotiators:

DIRECT DISCRIMINATION: Under the EA direct discrimination occurs when a person treats another less favourably than they treat or would treat others because of a protected characteristic. Direct discrimination is generally unlawful however it may be lawful in the following circumstances:

4 The list is not exhaustive
Where the protected characteristic is age and the less favourable treatment can be justified as a proportionate means of achieving a legitimate aim (this is called the objective justification test). It is important to distinguish a rule or practice affecting workers in a particular age group from a neutral provision, criterion or practice applied equally to everyone that may give rise to indirect discrimination;

In relation to the protected characteristic of disability, there will be no discrimination where a disabled person is treated more favourably than a non-disabled person;

Where the Act provides an express exception which permits directly discriminatory treatment that would otherwise be unlawful

Another form of direct discrimination is ‘Discrimination by Association’. If an employer treats a worker less favourably because of the worker’s association with another person who has a protected characteristic, (this does not apply to marriage and civil partnership or pregnancy and maternity). A worker is treated less favourably because of association with a pregnant woman, or a woman who has recently given birth, may have a claim for sex discrimination.

**Example:** A mother caring for a disabled daughter has to take time off work whenever her daughter is sick or has medical appointments. The employer appears to resent the fact that the worker needs to care for her daughter and eventually dismisses her. The dismissal may amount to direct disability discrimination against the worker by association with her daughter.

Discrimination by perception is direct discrimination and may occur if an employer treats a worker less favourably because the employer mistakenly thinks that the worker has a protected characteristic. This does not apply to pregnancy and maternity or marriage and civil partnership.

**Example:** A masculine-looking woman applies for a job as a sales representative. The sales manager thinks that she is a transsexual because of her appearance and does not offer her the job even though she performed the best at the interview. The woman would have a claim for direct discrimination because of perceived gender reassignment, even though she is not in fact transsexual.

**INDIRECT DISCRIMINATION:** Indirect discrimination may occur when an employer applies an apparently neutral provision, criterion or practice which puts workers sharing a protected characteristic at a particular disadvantage. For indirect discrimination to take place, four requirements must be met:

- The employer applies (or would apply) the provision, criterion or practice equally to everyone within the relevant group including a particular worker;
- The provision, criterion or practice puts, or would put, people who share the worker’s protected characteristic at a particular disadvantage when compared with people who do not have that characteristic;
- The provision, criterion or practice puts, or would put, the worker at that disadvantage, and
- The employer cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.
The phrase ‘provision, criterion or practice’ is not defined within the EA, however it is widely construed to include: formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future.

Example: A catering manager announces that from next month staff cannot wear their hair in dreadlocks, even if the locks are tied back and covered. This is an example of a policy that has not yet been implemented but which still amounts to a provision, criterion or practice. The decision to introduce the policy could be indirectly discriminatory because of religion or belief, as it puts the employer’s Rastafarian workers at a particular disadvantage. The employer must show that the provision, criterion or practice can be objectively justified.

Harassment – the EA protects you against three types of harassment:

- Harassment related to a ‘relevant protected characteristic’;
- Sexual harassment and
- Less favourable treatment of a worker because they submit to, or reject, sexual harassment or harassment related to sex or gender reassignment (s.26 (1-3, 5)). A person is harassed when it is unwanted, unwelcome or uninvited conduct related to a relevant protected characteristic and which has the purpose or the effect of:
  - Violating the worker’s dignity; or
  - Creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

Unwanted conduct covers a wide range of behaviour including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, imagery, jokes, pranks, acts affecting a person’s surroundings or other physical behaviour.

Victimisation: Is another form of discrimination and is prohibited under the EA. Where an employer subjects a worker to a detriment because the worker has done a ‘protected act’ or because the employer believes that the worker has done or may do a protected act in the future, the employer is victimising the worker. A detriment is not defined by the Act however it could take many forms. Generally it could be a change in position for the individual, rejection for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train or the individual is put at a disadvantage. A protected act is any of the following:

- Bringing proceedings under the Act (s.27(a));
- Giving evidence or information in connection with proceedings brought under the Act (s.27(2)(b));
- Doing anything which is related to the provisions of the Act (s.27(2)(c));
- Making an allegation (whether or not express) that another person has done something in breach of the Act (s.27(2)(d));
- Making or seeking a ‘relevant pay disclosure’ to or from a colleague (including a former colleague) (s.77 (3)).
A synopsis of the protected strands under the Equality Act is outlined below:

(A) AGE
Within the meaning of the EA, age is defined in relation to a person’s age group or people who share a protected characteristic. S.5 (1) An age group is people of the same age or people of a range of ages (for example, people: ‘under 50; ‘under 18’s; ‘in their mid-40s’; ‘older than me’; ‘older than us’ ‘younger than we’). (s.5 (2)

Example of direct age discrimination: An employer believes that someone’s memory deteriorates with age. He/she assumes – wrongly – that a 60-year-old manager in his team can no longer be relied on to undertake her role competently. An opportunity for promotion arises, which he does not mention to the manager. The employer’s conduct is influenced by a stereotyped view of the competence of 60 year olds. This is likely to amount to less favourable treatment because of age.

Example of indirect age discrimination: An employer offers team leading training for staff who wish to develop management skills. Staff must have been with the company for over seven years to apply for a place on this course. This could be indirectly discriminatory because of age, as older staff is likely to have longer service than younger staff. The employer will have to show that the age criterion is objectively justifiable.

(B) DISABILITY
A person is disabled under the Equality Act if he or she has a “physical or mental impairment, and the impairment has a substantial and long term adverse effect on his/her ability to carry out normal day to day activities” (S6(1)). This means in general:

- The person must have an impairment that is either physical or mental;
- The impairment must have adverse effects which are substantial;
- The substantial adverse effects must be long term and the long-term substantial adverse effects must be effects on normal day-to-day activities.

In other words if you are suffering from a medically recognised condition which has lasted 12 months or more or is likely to last for 12 months or more, which is serious and affects your daily life in more than a minor way, you are likely to have a disability for the purposes of the EA. Persons diagnosed as having HIV, MS, cancer, some visual impairments and severe disfigurement are also covered under the EA.

Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect the impairment has on that person’s ability to carry out normal day-to-day duties. The exception is in the case of a person with severe disfigurement.

Physical impairments affect the senses, such as sight and hearing. The question to ask is does the impairment affect the applicant’s ability to carry out normal day to day activities and does it have an adverse effect? In other words the Act is concerned with a person’s ability to carry out activities but the fact that a person can carry out such activities does not mean that his/her ability to carry them out has not been impaired.
Mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions, eating disorders, bipolar affective disorders, obsessive compulsive disorders, personality disorders, post-traumatic stress disorder and some self-harming behaviour; mental illnesses such as depression, schizophrenia are within the scope of the meaning of disability within the Equality Act. However some underlying cause of the impairment may be hard to establish. The important point to consider is not how the impairment was caused but the effect of the impairment (provided the impairment is included within the meaning of disability) on the person’s ability to carry out normal day to day activities.

**Example of unfavourable treatment:** An employer dismisses a worker because he has had three months’ sick leave. The employer is aware that the worker has a mental condition and most of his sick leave is disability-related. The employer’s decision to dismiss is not because of the worker’s disability itself. However, the worker has been treated unfavourably because of something arising in consequence of his disability (namely, the need to take a period of disability-related sick leave).

Whether it is direct or indirect discrimination, it is important to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability. Therefore for discrimination arising from disability to occur, a disabled person must have been treated unfavourably – he/she must have been put at a disadvantage.

**Example of ‘something arising in consequence of disability’:** A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker’s disability, namely her loss of temper. There is a connection between the ‘something’ (that is, the loss of temper) that led to the treatment and her disability. If the employer cannot objectively justify the decision to discipline the worker, it will be discrimination arising from her disability.

**Reasonable adjustments:** Employers can prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments for disabled workers. Employers are required to take reasonable steps to:

- Avoid the substantial disadvantage where a provision, criterion or practice applied by or on behalf of the employer puts a disabled person at a substantial disadvantage compared to those who are not disabled (s. 20(3)).

- Remove or alter a physical feature or provide a reasonable means of avoiding such a feature where it puts a disabled person at a substantial disadvantage compared to those who are not disabled (s. 20(4)).

- Provide an auxiliary aid (which includes an auxiliary service) where a disabled person would but for the provision of that auxiliary aid, be put at a substantial disadvantage compared to those who are not disabled. (s.20 (5)).
**Section 158, Positive Action:** The introduction of the Equality Act also saw the principle of Positive Action introduced to both employment and recruitment. For the purposes of this proofing booklet we will focus on Section 158, which concentrates on Positive Action linked to Employment and specifically people with disabilities.

An employer now has the ability to treat a disabled worker more favourably than a non-disabled worker. This has the potential to be a very powerful piece of protection and will be an ideal opportunity for Union Reps to give disabled workers real hope that their conditions will not be an excuse for employers to manage them out of the business.

An example of how positive action can be used in the workplace is to use it in conjunction with the principle of reasonable adjustments. Reps should be encouraged to use the positive action arguments in any case where additional pressure is needed to be placed on the employer.

One of the other aspects to bear in mind with positive action is the impact it can have on the workforce who may struggle to understand why a disabled person should be treated more favourably than a non-disabled person. Local reps will need to be cognisant of this potential scenario arising and have in place suitable arguments which explain the benefits of the positive action and what the potential downfalls are for individuals who in theory, depending on scenarios could face themselves being managed out of employment, if positive action is not put in place.

**(C) GENDER REASSIGNMENT**

Gender reassignment is a protected characteristic for people who are proposing to undergo, are undergoing, or have undergone a process (or part of a process) to reassign their sex by changing physiological or other attributes of sex. Gender reassignment is a personal process that is moving away from one’s birth sex to the preferred gender, rather than a medical one. Gender reassignment does not require someone to undergo medical treatment in order to be protected under the EA.

The Gender Recognition Act 2004 (GRA) provides that where a person holds a gender recognition certificate they must be treated according to their acquired gender (see GRA and Data Protection Act 1998).

**Example of direct gender reassignment discrimination:** A saleswoman informs her employer that she intends to spend the rest of her life living as a man. As a result of this, she is demoted to a role without client contact. The employer increases her salary to make up for the loss of job status. Despite the increase in pay, the demotion will constitute less favourable treatment because of gender reassignment.

**Example of indirect gender reassignment discrimination:** At an induction session each worker is asked to provide a picture of themselves as a toddler. One worker is a transsexual woman but does not wish her colleagues to know she was brought up as a boy. When she doesn’t bring the photo her employer criticises her in front of the group for not joining in. The fact that it did not occur to the employer that this worker may feel disadvantaged by the requirement to disclose such information would be no defence for the employer’s behaviour.
(D) MARRIAGE & CIVIL PARTNERSHIP
Marriage is any formal union of a man and woman which is legally recognised in the UK as a marriage. A civil partnership is a registered civil partnership under the Civil Partnership Act 2004, including those registered outside the UK. s.8 (1) People who are married or in a civil partnership share the same protected characteristic s.8 (2) (b) Only people who are married or in a civil partnership are protected against discrimination on this ground s.13(4).

Example of what is not discrimination in marriage and civil partnership: An employer offers ‘death in service’ benefits to the spouses and civil partners of their staff members. A worker who lives with her partner but is not married to him, wants to nominate him for death in service benefits. She is told she cannot do this as she is not married. Because being a cohabite is not a protected characteristic, she would be unable to make a claim for discrimination.

(E) PREGNANCY & MATERNITY
The EA (s.18 (1-4), Pregnant Workers Directive (92/85/EEC) and the recast Equal Treatment Directive 2006/54/EC) gives specific provisions to women from discrimination at work ‘because of’ pregnancy or a related illness or because she is exercising, has exercised or is seeking or has sought to exercise her right to maternity leave. A woman under those circumstances should not be treated unfavourably by her employer during ‘the protected period’ as this would amount to discrimination s.18 (6-7). In some cases, employers have to treat workers who are pregnant or have recently given birth more favourably than other workers s.13 (6b).

The job applicant or employee is under no obligation to inform the employer she is pregnant until 15 weeks before the baby is due. Telling the employer of her pregnancy triggers the legal protection, including the employer’s health and safety obligations.

Example of pregnancy & maternity discrimination: An employer dismisses an employee on maternity leave before she is due to return to work because the locum covering her absence is regarded as a better performer. Had the employee not been absent on maternity leave she would not have been sacked. Her dismissal is therefore unlawful, even if performance was a factor in the employer’s decision making.

If an employer fails to consult a woman about threatened redundancy because she is absent on maternity leave, this will be unlawful discrimination.

Example of discrimination in pay and conditions during maternity leave: A woman on maternity leave is receiving contractual maternity pay, which is worked out as a percentage of her salary. The date of her employer’s annual review of staff pay falls while she is on maternity leave. All other staff is awarded a 2% pay rise with immediate effect. If the woman on maternity leave does not receive the increase, this would be unlawful discrimination.
(F) RACE
The Equality Act applies to Great Britain (England, Scotland and Wales). There is a Separate Equality Commission for Northern Ireland). The Act defines ‘race’ as colour, nationality and ethnic or national groups. (s.9 (3-4))

(i) Direct Racial Discrimination. This occurs when you are able to show that you have been treated less favourably on racial grounds than others were in similar circumstances. To prove this, it will help if you can give an example of someone from a different racial group who, in similar circumstances, has been treated more favourably than you. Racist abuse and harassment are forms of direct discrimination. An example where direct race discrimination could occur is in pay systems where white employees are doing exactly the same job as black members but black members are being paid considerably less than their white counter-parts for doing the same job.

(ii) Indirect Racial Discrimination. This occurs when you or people from your racial group are less likely to be able to comply with a requirement or condition and the requirement cannot be objectively justified. For example, a requirement that all female employees wear a dress/skirt in the carrying out of their duties would exclude practising Muslim women, who are required to have their legs covered.

Example of racial victimisation: The Director instructs his manager not to short list anyone for a job interview with an Asian name. The manager would have a claim against the Director if the manager experienced a detriment as a result of not following the Director’s instruction. A potential employer would also have a claim against the Director if he/she discovered the instruction had been given and was put off from applying for the job.

Example of racial direct discrimination: A British marketing company which employs predominantly British staff recruits Polish nationals and seats them in a separate room nicknamed ‘Little Poland’. The company argues that they have an unofficial policy of seating the Polish staff separately from British staff so that they can speak amongst themselves in their native language without disturbing the staff who speaks English. This is segregation, as the company has a deliberate policy of segregating staff because of race.

(G) RELIGION OR BELIEF
The EA covers any religion and any religious or philosophical belief. It also includes a lack of any such belief. S.10 (1&2) Religion includes those more commonly recognised in the UK such as Baha’i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism. The ‘religion’ should have a clear structure and belief system to gain protection within the Act.

The ‘religious belief’ goes beyond beliefs about adherence to a religion or its central articles of faith and may vary from one person to another within the same religion. A ‘philosophical belief includes humanism and atheism, however for a philosophical belief to be covered under the Act:

- It must be genuinely held;
- It must be a belief and not an opinion or viewpoint based on the present state of information available;
It must be a belief as to a weighty and substantial aspect of human life and behaviour;
It must attain a certain level of cogency, seriousness, cohesion and importance;
It must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others.

Under Article 9 of the European Convention of Human Rights people have an absolute right to hold a particular religion or belief, manifestation of that religion or belief is a qualified right which may in certain circumstances be limited.

**Example of indirect religious discrimination:** An employer has ‘a no headwear’ policy for his staff. Unless this policy can be objectively justified, this will be indirect discrimination against Sikh men who wear the turban, Muslim women who wear a headscarf and observant Jewish men who wear a skullcap as manifestations of their religion.

**Example of harassment:** A Sikh worker wears a turban to work. His manager wrongly assumes he is a Muslim and subjects him to Islamaphobic abuse. The worker could have a claim for harassment related to religion or belief because of his manager’s perception of his religion.

(H) SEX

Under the EA ‘sex’ discrimination refers to a male or female of any age. In relation to a group of people it refers to men and/or boys, or women or/girls. (s.11 (a-b) S.212 (1)) A comparator for sex discrimination is someone of the opposite sex.

**Example of direct sex discrimination:** An in-house magazine produced by an all-male team does not recruit a female writer. They are genuinely concerned that she would feel unhappy and uncomfortable in an all-male environment. Although they appear to be well-intentioned in their decision not to recruit her, it is likely to amount to direct sex discrimination.

**Example of sexual harassment:** In front of his all-female colleagues, a male call centre worker is told by his female manager that his work is below standard and that, as a man, he will never be competent to carry out his work. The manager goes on to suggest that he should instead work as an electrician. This could amount to harassment related to sex as such a statement would be self-evidently unwanted and the male call centre worker would not have to object to it before it was deemed to be unlawful harassment.

**Example of indirect sexual discrimination:** A trade union equality representative obtains statistics which show that the best scores for appraisals are disproportionately awarded to white male workers. As a result, this group is more likely to receive an increase in pay and annual bonuses. The statistics suggest that the policy could be indirectly discriminatory, either through the criteria that have been selected or the way that these criteria are applied.
(F) SEXUAL ORIENTATION
A person’s sexual orientation is their sexual preference. It is about how they feel as well as their action towards:

- Persons of the same sex (that is, the person is a gay man or a lesbian);
- Persons of the opposite sex (that is, the person is heterosexual); or
- Persons of either sex (that is, the person is bisexual (s.12 (1))).

The EA does not extend full protection in some areas:

- In relation to marriage and civil partnership there is no protection from discrimination if a person is unmarried or single (s.33)
- For marriage/civil partnership, there is no protection from direct discrimination by association or perception or harassment but harassment related to civil partnership would amount to harassment related to sexual orientation.

Example of harassment: A worker is subjected to homophobic banter and name calling, even though his colleagues know he is not gay. Because the form of the abuse relates to sexual orientation, this could amount to harassment related to sexual orientation. The main thing to keep in mind is that the unwanted conduct relates to a protected characteristic which was not directed at a particular worker.

Example of less favourable treatment: At job interview, an applicant mentions she has a same sex partner. Although she is the most qualified candidate, the employer decides not to offer her the job. This decision treats her less favourably than the successful candidate, who is a heterosexual woman. If the less favourable treatment of the unsuccessful applicant is because of her sexual orientation, this would amount to direct discrimination.

(G) PART TIME WORKERS
The UK Government uses two definitions to describe a part timer as follows:

(i) Someone who works less than 30 hours a week. This is the standard used by the Government to calculate the number of part time workers in the UK labour force.

(ii) Someone working less than the standard hours for that particular workplace.

The Regulation aim to ensure that part time workers are treated no less favourably in their employment conditions than comparable full-timers, unless this is justified on objective grounds. This means that part timers must receive (pro rata where appropriate) the same treatment as comparable full-timers. This will include no less favourable:

- Rates of pay (including overtime pay, once they have worked more than the normal full time hours);
- Access to pension schemes and pension scheme benefits;
- Access to training and career development;
- Holiday entitlement
- Entitlement to career break schemes, contractual sick pay, contractual maternity, parental pay; and
- Treatment in the selection criteria for promotion and transfer and for redundancy.
An example where discrimination occurs to part-time workers is when meeting and training times are outside part-timers normal working hours. If accommodation is not made to make meeting and training times accessible to part timers’, then discrimination could possibly be taking place.

(D) Northern Ireland
The Equality Act 2010 does not apply to Northern Ireland. However, comparable legislation prohibits direct and indirect discrimination, harassment and victimisation because of age, disability, gender reassignment, marriage, race (including racial segregation), sex and sexual orientation. The legislation covers employment; training and related matters; transport (disability) education; the disposal and management of premises; and the provision of goods, facilities and services.

Separate legislation, the Fair Employment and Treatment (Northern Ireland) Order 1998 or FETO, specifically protects individuals against direct and indirect discrimination, harassment and victimisation on the grounds of religious belief and/or political opinion and covers the areas of employment, the provision of goods facilities and services, the sale or management of land or property and further and higher education. Further information on Equality Law in Northern Ireland can be obtained from the Equality Commission for Northern Ireland. See the website:

http://www.equalityni.org/sections/default.asp?secid=0

A booklet on the Fair Employment Tribunal is obtainable from the Office of Industrial Tribunals and Fair Employment Tribunal at:

www.employmenttribunalsni.co.uk
CONCLUSION

The CWU is conscious that policy measures alone do not always translate into equality of opportunity or fairness. Other measures are sometimes needed to bring about the required change in outcome. Some of these measures include the required tools to do the job. Therefore, from the outset the bargaining agenda must be examined to give “real” examples of where discrimination is likely to occur.

Therefore, equality proofing is asking people involved in policy development to question all agreements that are being reached. The aim is to have a fair and inclusive workplace where members are valued as individuals. Whilst, the CWU is aware that this takes time and effort, the objective is to develop an understanding and awareness of possible barriers and act to eliminate them.
LINDA’S BLOG:

Equality for All

TUESDAY, 24 JANUARY 2012

Employment Law Reforms 2012

Thanks to Linda Baylott at Simpson Miller for supplying this following.

News from 365 Brief - Employment law reforms – clarifications and findings

The Department for Business, Innovation and Skills (BIS) has confirmed in 365 Brief that the increase in the qualifying period for unfair dismissal claims to two years will only apply to those starting a new job on or after 5 April 2012. Employees whose employment started before 5 April will remain subject to the one-year qualifying period. Thus, someone with 10 months’ continuous employment on 4 April will not lose their right to claim unfair dismissal, and an employee with 12 months’ service on that date will still only have to wait one month before being able to claim. The regulations to extend the qualifying period will be brought shortly and will be subject to Parliamentary debate.

BIS also stated that it will not implement the revised 365 Brief on Universal Credit. In March 2012, instead. Due to the ongoing Modern Apprenticeships policy development, the Government will use the additional week’s benefit allowed by the Act (365 Brief on the clarification and implementation of the changes in March 2013). Consequently, the number of weeks of non-pecuniary leave will increase by 10 per cent per child ahead of the other changes proposed in the consultation for 2013, such as a new flexible system of shared parental leave and an extension of the right to request flexible working. Further details on the intended data for a number of reforms announced last year as part of the Employment Law Reforms were given by the Employment Relations Minister Andrewarsley in a written answer to Parliament on 17 January. Subject to parliamentary approval, changes to the scheme in secondary legislation – such as statements being made as needed, the removal of women’s hours and the role of arbitration in unfair dismissal cases and changes to limits for costs awards and deposit orders – will come into force on 6 April 2012. Measures requiring primary legislation, including equal

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