

Exposure Draft Human Rights and Anti-Discrimination Bill 2012
Options to address concerns raised in relation to paragraph 19(2)(b)

Current subsections 19(1) and (2) of the draft Bill:

- (1) A person (the *first person*) *discriminates* against another person if the first person treats, or proposes to treat, the other person unfavourably because the other person has a particular protected attribute, or a particular combination of 2 or more protected attributes.

Note: This subsection has effect subject to section 21.

- (2) To avoid doubt, *unfavourable* treatment of the other person includes (but is not limited to) the following:
- (a) harassing the other person;
 - (b) other conduct that offends, insults or intimidates the other person.

Government's policy intention

The Government's policy intention in including subsection 19(2) was to clarify that, as courts have found, discrimination on the basis of an attribute can include harassment because of that attribute. For this reason, the provision states that, to avoid doubt, unfavourable treatment of a person can include harassing that person.

There was no intention to attempt to comprehensively define 'harassment', which can take many different forms. However, the inclusion of paragraph 19(2)(b) sought to provide guidance on the type of conduct that might constitute harassment. For example, harassment could include conduct which was offensive, insulting or intimidating towards another person (such as offensive remarks based on the person's race or insulting language about that person's disability). Ultimately, the concepts of harassment and discrimination are limited by the requirement that such treatment be based on another person's protected attributes.

As the Government has previously stated, there was no intention to broaden the meaning of harassment or discrimination beyond what courts have already found.

Options

In light of stakeholders concerns about an interpretation of paragraph 19(2)(b) which may inadvertently exceed the Government's intentions, the former Attorney-General asked the Department to develop options to address these concerns. Four options have been identified:

1. Remove paragraph 19(2)(b)
2. Remove subsection 19(2)
3. Use alternative words in paragraph 19(2)(b)
4. Clarify that the test is objective

Option 1: Remove paragraph 19(2)(b)

Option 1 is to simply remove paragraph 19(2)(b) from the draft Bill. Subsection 19(2) would provide that to avoid doubt, unfavourable treatment of a person can include harassing that person.

‘Harass’ would have its ordinary dictionary meaning. The Oxford English Dictionary defines ‘harass’ as ‘trouble by repeated attacks; ... subject to constant molesting or persecution’.

This would include the harassing behaviour outlined above and would therefore meet the Government’s policy intention, as well as maintain consistency with existing jurisprudence.

A key benefit of this approach would be to address concerns that paragraph 19(2)(b), as drafted, seeks to dramatically expand the concept of discrimination and make a wide range of conduct unlawful.

The only disadvantage of this approach is that no further guidance would be provided to people as to what conduct might constitute harassment. However, the dictionary definition is one that would be reasonably clear, as most people would understand harassment as having this meaning. Further, it would be generally agreed that such behaviour is not acceptable and is already unlawful.

Option 2: Remove subsection 19(2)

Option 2 is to remove subsection 19(2) in its entirety from the draft Bill. This would leave the draft Bill silent on the subject of whether discrimination can include harassment.

As courts have found that discrimination can include harassment without express reference in legislation to this effect, this option should not alter this interpretation. In particular, subsection 19(2) is drafted as an ‘avoidance of doubt’ provision, on the basis that ‘unfavourable treatment’ in subsection 19(1) could include harassment regardless of whether it was separately stated or not.

This option would have the benefit of simplicity, while addressing any concerns that subsection 19(2) seeks to extend existing law.

One disadvantage of this approach is that it does not provide the clarity currently provided by paragraph 19(2)(a), to clearly state that discrimination includes harassment. A key aim of the consolidated legislation is to provide clarity and removing this clarifying clause may not achieve this aim.

In addition, there may be a risk that removing this clause could alter future jurisprudence on discrimination, with courts drawing an inference from the absence of a clarifying statement to this effect. In particular, a number of stakeholders welcomed the express inclusion of this clause and may be concerned that its removal would reintroduce uncertainty in this area.

Option 3: Use alternative words in paragraph 19(2)(b)

Most of the concerns about paragraph 19(2)(b) relate to the word ‘offend’ (and, to a lesser extent, the word ‘insults’). A number of stakeholders considered that conduct which merely ‘offends’ or ‘insults’ a person would impose too low a bar and erode freedom of speech. This is particularly the case given the absence of a clearly express objective test (see option 4).

Option 3 would seek to address these concerns by removing the words ‘offend’ and ‘insult’ and replacing them with alternative words, such as all, or some combination, of ‘degrade’, ‘denigrate’, ‘humiliate’ and ‘intimidate’. These words have been suggested by some stakeholders.

Under this option, ‘harassment’ would continue to have its dictionary meaning as outlined above. In addition, the dictionary meanings of any other words included would also apply:

degrade: lower in estimation; bring into dishonour or contempt;

denigrate: blacken the reputation of (a person, etc); defame, decry

humiliate: make humble in position, state or feeling; injure the dignity or self-respect

intimidate: terrify, overawe, cow; force to or deter from some action by threats or violence

A definition of discrimination based on these definitions would likely set a standard of conduct which would be considered unacceptable in society.

However, ‘degrade’ and ‘denigrate’ in particular would be new concepts in anti-discrimination law. The use of these new phrases could create further uncertainty, undermining the purpose of including any further guidance in addition to ‘harassment’.

In particular, such new concepts may have the effect of inadvertently expanding the operation of the provision, as these have not previously been the subject of jurisprudence in this context.

Option 4: clarify that the test is objective

Paragraph 19(2)(b) is drafted to be read together with paragraph 19(2)(a) – that is, that unfavourable treatment includes harassment or other conduct which offends, insults or intimidates a person. Read in this way, the intention is that paragraph 19(2)(b) provides guidance as to what might constitute harassment, but does not otherwise extend its meaning.

From this context, it is considered that the test is objective. That is, conduct at which a person took offence, but no reasonable person would have, would not meet the legal standard for ‘harassment’ and therefore unfavourable treatment would not be made out. However, in light of the express inclusion of a reasonable person standard in relation to both sexual harassment (clause 49) and racial vilification (clause 51), the absence of a similar standard in paragraph 19(2)(b) has understandably caused some confusion.

Option 4 would seek to address this confusion by including an express objective test in relation to the conduct in paragraph 19(2)(b). This option could be in place of, or in addition to, Option 3 (that is, it could involve the introduction of an objective test to the paragraph as drafted, or it could involve the introduction of an objective test *and* replacement of the words ‘offend’ and ‘insult’ with other concepts that seek to impose a higher standard).

The key benefit of this option is that it would remove any doubt that the standard to be met is to be objectively determined, rather than whether an individual merely *felt* offended or insulted. This would clarify the Government’s policy intention and maintain existing jurisprudence on the meaning of harassment.

However, this option could inadvertently create further confusion about other aspects of the meaning of discrimination, which do not have express objective tests.