

The Faculty of Advocates



Equality & Diversity Code

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Foreword

The Faculty of Advocates is pleased to deliver this Code which builds on earlier work by the Committee on Equality and Diversity. Its aim is to promote a clear statement of expectations on equality and diversity for members of Faculty in practice, and to engender increased confidence that the Faculty is meeting the duties and commitments incumbent on it in the context of the delivery of legal services within our diverse society in the 21st. century.

The Code provides practical guidance on good equal opportunities practices in areas where equality and diversity issues are likely to arise. Its Appendix provides references to relevant legal provisions, further guidance on specific areas and links to related organisations.

The Code is presented as part of the Faculty's commitment to the fostering of increased awareness of equality and diversity issues and to its continuing development of good practice where these issues arise.

Introduction

The purpose of the Code

- [1] The Faculty of Advocates is required as a professional body not to discriminate on the grounds of sex, race, disability, age, sexual orientation, religion or belief.
- [2] All Advocates, and any society or group of Advocates, who
- (a) represent;
 - (b) put themselves forward as representing; or
 - (c) are reasonably capable of being perceived as representing,
- the profession of Advocate, are required to comply with the broad obligations not to discriminate as set out in paragraphs 8.3.4 and 15 of the Guide to Professional Conduct of Advocates and in the discrimination statutes.

Why does equality of opportunity matter?

- [3] Equality of opportunity is fair, commercially advantageous, necessary for compliance with non-discrimination law and constitutionally important.
- [4] The Faculty of Advocates has a constitutional role in ensuring the independence of Advocates before the Courts and in order to maintain confidence in that role its own practices must be and be seen to be fair.
- [5] The furtherance of equal opportunity objectives and the potential for discrimination should be considered in relation to all policies, practices and decisions where equal opportunities issues may arise: for example, not just in admissions but also matters such as the location and timing of meetings.

- [6] This book is intended to be a practical guide rather than a legal handbook but seeks to reflect and give effect to the requirements of the law.
- [7] We gratefully acknowledge the help which we derived from the Bar Council of England & Wales materials on equality and diversity, which we have modified and customised to suit our Scottish requirements

Section A

Legal and Regulatory Framework

[A1] Discrimination by the Faculty of Advocates (hereinafter referred to as the 'Faculty') or by Advocates on the ground of sex, race, disability, age, sexual orientation and religion or belief is unlawful.

[A2] The relevant statutory provisions for the Faculty and Advocates are detailed in Appendices 1 and 2.

[A3] Advocates are governed by paragraphs 8.3.4 and 15 of the Guide to the Professional Conduct of Advocates , viz.,

' **8.3.4** An Advocate should not refuse to accept instructions on :-

- (i) unacceptable discriminatory grounds such as race, religion, gender or sexual orientation; or
- (ii) grounds of mere personal preference or personal dislike of the potential client or his views; or
- (iii) grounds that do not have some other reasonable justification.

15. Advocates should have due regard to

- (a) the need to eliminate unlawful discrimination
- (b) the need to promote equality of opportunity and
- (c) the need to promote good relations between persons of different groups; and
- (d) any Faculty Code on Equality and Diversity.'

[A4] Failure of an advocate to comply with their statutory obligations in relation to regulation of the legal profession is a disciplinary matter in terms of paragraph 11.1 of the Guide to the Professional Conduct of Advocates, viz.,

'11.1 Matters of discipline in respect of the conduct of Advocates are governed by the Faculty of Advocates Disciplinary Rules, which are published separately. Advocates must adhere to any statutory obligations enacted in legislation in relation to regulation of the legal profession.'

Key Concepts

[A5] Unlawful discrimination generally falls into one of three categories:

- (a) Direct discrimination: where one person is treated less favourably than another was or would be treated in the same or similar circumstances because of a particular characteristic identified in the anti-discrimination legislation (gender, race, disability, sexual orientation or religion or belief);
- (b) Indirect discrimination: where an apparently neutral provision, criterion or practice has a disadvantageous impact upon a particular group and where the provision, criterion or practice is not a proportionate means of achieving a legitimate aim (for example, holding an internal Chambers training seminar at a time when a particular group of members will find it difficult to attend and when the meeting could reasonably be held at some other time which would not exclude any particular group);
- (c) Victimisation: where a person is treated less favourably because he or she has brought proceedings under the anti-discrimination

legislation, given evidence or information relating to proceedings or has alleged that unlawful discrimination has occurred (or is suspected of intending to do any of the above).

[A6] It is not a defence to claims for direct discrimination and victimisation that there was no intention to discriminate or that the discrimination was justified, save that discrimination for a reason related to disability can be justified if the reason for the treatment is substantial and material. This defence of justification has been applied very narrowly by the courts. In relation to indirect discrimination, treatment may be justified if it can be shown that it is a proportionate means of achieving a legitimate aim but the lack of an intention to discriminate is not a defence.

[A7] Discriminatory treatment may amount to harassment. Harassment is any form of unwanted conduct which is intended to, or which creates the effect of, violating a person's dignity or which creates an intimidating, hostile, degrading, humiliating or offensive environment for that person. The fact that one person may be able to ignore or deal comfortably with certain behaviour does not mean that it is acceptable if directed at another. A single incident may constitute harassment if it is sufficiently serious. The motive or intention of the perpetrator may be (but is not invariably) relevant. Where harassment is on a ground identified in the anti-discrimination legislation, it will be unlawful. There is a new free-standing definition of harassment contained in various regulations the relevant provisions are the Race Relations Act 1976 (Amendment) Regulations 2003; the Employment Equality (Sexual Orientation) Regulations 2003; the Employment Equality (Religion or Belief) Regulations 2003; and the Disability Discrimination Act 1995 (Amendment) Regulations 2003.

[A8] Any "detriment" on a prohibited ground and in a protected area (e.g. employment and provision of services) will amount to unlawful

discrimination. Detrimental treatment includes any treatment which the complainant reasonably perceives as disadvantageous.

[A9] The concepts applicable under the Disability Discrimination Act 1995 (“the DDA”) are in some respects different from other discrimination legislation. The DDA covers claims for direct discrimination which cannot be justified. Advocates have a further duty under the DDA to make reasonable adjustments to ensure that a disabled person is not placed at a disadvantage.

Clarifying Some Common Misconceptions

[A10] Proof of discrimination does not depend on showing motive or bad faith. It is possible to discriminate without intending to discriminate. Even treatment which is well-intentioned may amount to discrimination.

[A11] There is no defence of “joke” or “banter”. Jokes and banter which cause offence may be discriminatory even though there was no intention to cause offence.

[A12] Discrimination which involves the more favourable treatment of a member of a disadvantaged group (“positive discrimination”) is unlawful in relation to persons encompassed within the anti-discrimination legislation, save that a form of positive discrimination may be exercised in relation to disabled persons who may require particular adjustments to be made.

How Does an Individual Prove Discrimination?

[A13] If there is a difference in treatment and a difference in the relevant identifying characteristic (e.g. gender) of two persons in the same or similar circumstances, an inference of unlawful discrimination may be drawn. It is rare for discriminatory attitudes to be expressed overtly and

unlawful discrimination may take place without the perpetrator being conscious that he or she is discriminating. The inference drawing process is the method by which Courts and tribunals test whether there has been unlawful discrimination.

[A14] In looking at whether inferences should be drawn, Courts and tribunals look at factors such as whether there have been assumptions or stereotyping which have influenced the complainant's treatment.

[A15] An explanation for the difference in treatment which is objectively adequate will usually prevent any inference arising. Good practice gives a large measure of protection

[A16] In the employment tribunal and the Courts and employment tribunal in race, sex, religion or belief and sexual orientation discrimination cases, the burden of proof shifts to the employer/ respondent/ defender where an employee/applicant/pursuer establishes facts from which unlawful discrimination could be inferred in the absence of an adequate explanation.

Guidance

[A17] Guidance on Reasonable Adjustments for Disabled Persons is provided in Appendix 3.

[A18] Guidance on Age Discrimination is provided in Appendix 4.

Advice relating to best practice in relation to age discrimination as it affects the Faculty and Advocates is similar to that provided for sex, race, religion, sexual orientation and disability discrimination.

[A19] Guidance on Service Provision to Disabled Clients is provided in Appendix 5

[A20] A list of Useful Websites and Contact Addresses is given in Appendix 6.

Section B

Admission to the Faculty of Advocates

- [B1] The admission process is governed by the Regulations as to Intrants. The process consists of four stages. A person must:-
- (a) be admitted as an Intrans to the Faculty of Advocates (the process of “matriculation”);
 - (b) satisfy the educational requirements of the Faculty;
 - (c) satisfy the professional training and pupillage (devilling) requirements of the Faculty ; and
 - (d) be admitted as an Advocate.
- [B2] The Faculty is committed to:
- (a) ensuring equality of opportunity for all candidates;
 - (b) making any adjustment which it is reasonable to make in order to prevent a substantial disadvantage from occurring;
 - (c) ensuring that practices and procedures are as accessible as possible by design but also to responding to the requirements of individual candidates; and
 - (d) to responding to individual disability-related requests for adjustments in a timely manner.
- [B3] In the event that any of the Regulations have an unintended effect of creating barriers Faculty will endeavour to apply the Regulations so as to ensure equality of opportunity for all candidates.
- [B4] Where any required 'reasonable adjustment' relates to the admission process for Faculty, or to the practice of an Advocate, the contact person at the Faculty is the Clerk of Faculty who will ensure arrangements are in place for responding to such requests.

Section C

Fair Access to Work

[C1] The Faculty is committed to a policy of fostering equal opportunities.

[C2] Advocates are governed by paragraph 8.7 of the Guide to the Professional Conduct of Advocates, viz.,

'8.7 In principle, an Advocate is not entitled, without the prior concurrence of the instructing solicitor, to pass on instructions to another Advocate. It is for the solicitor, acting on behalf of the client, to choose whom he wishes to instruct. Counsel is not entitled to fetter that choice.'

[C2] Counsel are divided for administrative convenience into groups or 'Stables'. Each Stable has a Clerk and usually at least one deputy Clerk who are the normal points of administrative contact between an instructing practitioner and Counsel.

[C3] Instructions to Counsel, both in civil and criminal work, are usually sent to a named Advocate selected by the instructing agent. The choice of Counsel may depend upon many factors such as prior involvement in the same matter, expertise in a field, previous analogous experience and so on. Thus, in the majority of cases a Stable will have no input into the choice of Counsel instructed.

- [C4] There are circumstances in which Advocates' Clerks may have communication with a solicitor (or others with direct access rights) on which Counsel to instruct. For example:
- (a) when the instructing solicitor has little experience of instructing Counsel and wishes guidance;
 - (b) when named Counsel does not accept instructions sent to him/her;
 - (c) when named Counsel returns previously accepted instructions;
 - (d) or when instructions are withdrawn from named Counsel.
- [C5] Solicitors will also occasionally send a letter of instruction addressed to " 'Blank', Advocate". A separate letter will request that the Stable allocates the instruction to an appropriate Counsel of their choice.
- [C6] It is not possible to give definitive advice as to what is 'fair and equitable' in every situation but the Faculty recommends that each Stable should have in place effective procedures for ensuring the fair distribution of work, particularly un-named work.

Section D

Absence for Maternity, Paternity, Adoption, Parental, Compassionate, or Other Personal Circumstances

[D1] All Advocates are self-employed and are not subject to any contract of employment. Advocates are required to comply with the broad obligations to accept instruction, as set out in paragraphs 8.3.4 and 8.3.5 of the Guide to Professional Conduct of Advocates, viz.,

8.3.4 An Advocate should not refuse to accept instructions on :-

- (i) unacceptable discriminatory grounds such as race, religion, gender or sexual orientation; or
- (ii) grounds of mere personal preference or personal dislike of the potential client or his views; or
- (iii) grounds that do not have some other reasonable justification

8.3.5 An Advocate would normally be expected to be available to accept instructions to appear before Scottish Courts at times when the Court of Session is not in recess or vacation. It is however accepted that there may be circumstances such as maternity, paternity, vacation, illness or other personal circumstances which mean that an Advocate may not be available to accept any or some instructions'

[D2] The Dean of Faculty, on receipt of an application from an Advocate for absence for maternity, paternity, adoption, parental, compassionate, and other personal circumstances, as to such matters as the place or time in which s/he is available to accept instructions (hereinafter referred to as

an 'exempted absence'), may grant an exemption, or partial exemption, in terms of the said paragraph 8.3.5 of the Guide to Professional Conduct of Advocates (hereinafter referred to as an 'exempted absence').

Maternity Absence

[D3] An Advocate who is pregnant or has given birth to a child may elect to work at a reduced level or cease to work entirely, during her maternity absence.

Reduced work

[D4] If the Advocate elects to work at a reduced level for all or part of her maternity absence:

- (a) she will obtain an exempted absence;
- (b) she will continue to be treated as a fully practising member during such absence;
- (c) she may apply to the Director of Training and Education for an extension of time to complete any requirements of Continuing Professional Development; and
- (d) she will be exempt from any requirement of minimum financial contribution for that period.

Cessation of work

[D5] If the Advocate elects to cease to work entirely for all or part of her maternity absence:

- (a) she will obtain an exempted absence;
- (b) the fact that she has ceased to work during such absence shall be published on the Faculty website or in such other manner as the Dean may direct;
- (c) she will neither be
 - (i) entitled to carry out any work as an Advocate during such absence nor

- (ii) to submit any fee for such work carried out during such absence;
- (d) she will be treated as a fully practising member during such absence;
- (e) she will only pay Annual Faculty Dues for that year pro rata, so that dues shall be payable at non-practising rates during such absence and at practising rates for the remainder of the year;
- (f) she will not be required to hold professional indemnity insurance covering such absence;
- (g) she will pay the full percentage levy on fees collected by Faculty Services Limited during such absence;
- (h) she may make an application, in respect of any requirement to carry out Continuing Professional Development, in accordance with Regulations 7 and 8 of the Continuing Professional Development Regulations 2010, which provide as follows:-

- “7** (1) a member may apply to the Director of Training and Education for an extension of time or waiver in relation to:-
- (a) the mandatory requirement; and/or
 - (b) the time limit for forwarding a record of performance in Regulation 5(2); and/or
 - (c) any extension of time previously granted.

(2) the Director of Training and Education may in exceptional circumstances grant an extension of time in respect of any application under subparagraph (1) of this regulation.

- 8** Any application under Regulation 7 shall be made to the Director of Training and Education on the form prescribed by him from time to time and must be accompanied by an administration fee of £125 or such other sum as the Faculty Council may from time to time

determine. The Director of Training and Education shall have discretion to waive the administration fee”.

[D6] The Advocate shall give intimation in writing to the Clerk of Faculty of the date she intends to:

(a) commence a period of exempted maternity absence at least one week prior to commencement, unless it is not reasonably practicable to do so in which case she must give intimation as soon as reasonably practicable;

(b) terminate a period of exempted maternity absence at least one week prior to termination.

Absence for Paternity, Adoption, Parental, Compassionate Leave, or Other Personal Circumstances

[D7] Similarly, any Advocate wishing to be absent for paternity, adoption, parental, compassionate, or other personal circumstances may obtain an exempted absence from the Dean, but subject to modification in respect of any or all of the matters set out in paragraphs [D3] and [D4] above.

Appendix 1

Extracts of relevant Discrimination statutory provisions relating to the Faculty of Advocates as a Trade Organisation, Qualification Body and Vocational Training

Disability Discrimination Act 1995 (DDA)

In terms of the DDA 1995 under section 13 the Faculty qualifies as a Trade Organisation and under section 14A the Faculty qualifies as a Qualification Body. Sections 13 to 14B place a positive duty on the Faculty to make 'reasonable adjustments' which would enable a disabled person to be admitted as an Intransit, undertake devilling and to practice as an Advocate. The DDA 1995 provides, viz.,

s13 Trade organisations: discrimination and harassment

- (1) It is unlawful for a trade organisation to discriminate against a disabled person—
 - (a) in the arrangements which it makes for the purpose of determining who should be offered membership of the organisation;
 - (b) in the terms on which it is prepared to admit him to membership of the organisation; or
 - (c) by refusing to accept, or deliberately not accepting, his application for membership.
- (2) It is unlawful for a trade organisation, in the case of a disabled person who is a member of the organisation, to discriminate against him—

- (a) in the way it affords him access to any benefits or by refusing or deliberately omitting to afford him access to them;
 - (b) by depriving him of membership, or varying the terms on which he is a member; or
 - (c) by subjecting him to any other detriment.
- (3) It is also unlawful for a trade organisation, in relation to membership of that organisation, to subject to harassment a disabled person who—
- (a) is a member of the organisation; or
 - (b) has applied for membership of the organisation.
- (4) In this section and section 14 “trade organisation” means—
- (a) an organisation of workers;
 - (b) an organisation of employers; or
 - (c) any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists.

s14 Trade organisations: duty to make adjustments

- (1) Where—
- (a) a provision, criterion or practice applied by or on behalf of a trade organisation, or
 - (b) any physical feature of premises occupied by the organisation, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the organisation to take such steps as it is reasonable, in all the circumstances of the case, for it to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.
- (2) In this section “the disabled person concerned” means—

- (a) in the case of a provision, criterion or practice for determining to whom membership should be offered, any disabled person who is, or has notified the organisation that he may be, an applicant for membership;
 - (b) in any other case, a disabled person who is—
 - (i) a member of the organisation, or
 - (ii) an applicant for membership of the organisation.
- (3) Nothing in this section imposes any duty on an organisation in relation to a disabled person if the organisation does not know, and could not reasonably be expected to know—
- (a) in the case of an applicant or potential applicant, that the disabled person concerned is, or may be, an applicant for membership of the organisation; or
 - (b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1).

s14A Qualifications bodies: discrimination and harassment

- (1) It is unlawful for a qualifications body to discriminate against a disabled person—
- (a) in the arrangements which it makes for the purpose of determining upon whom to confer a professional or trade qualification;
 - (b) in the terms on which it is prepared to confer a professional or trade qualification on him;
 - (c) by refusing or deliberately omitting to grant any application by him for such a qualification; or
 - (d) by withdrawing such a qualification from him or varying the terms on which he holds it.
- (2) It is also unlawful for a qualifications body, in relation to a professional or trade qualification conferred by it, to subject to

harassment a disabled person who holds or applies for such a qualification.

(3) In determining for the purposes of subsection (1) whether the application by a qualifications body of a competence standard to a disabled person constitutes discrimination within the meaning of section 3A, the application of the standard is justified for the purposes of section 3A(1)(b) if, but only if, the qualifications body can show that—

(a) the standard is, or would be, applied equally to persons who do not have his particular disability; and

(b) its application is a proportionate means of achieving a legitimate aim.

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

(a) section 3A(2) (and (6)) does not apply; and

(b) section 3A(4) has effect as if the reference to section 3A(3) were a reference to subsection (3) of this section.

(5) In this section and section 14B—

“qualifications body” means any authority or body which can confer a professional or trade qualification, but it does not include—

(a) a responsible body (within the meaning of Chapter 1 or 2 of Part 4),

(b) a local education authority in England or Wales, or

(c) an education authority (within the meaning of section 135(1) of the Education (Scotland) Act 1980);

“confer” includes renew or extend;

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

“competence standard” means an academic, medical or other standard applied by or on behalf of a qualifications body for the purpose of determining whether or not a person has a particular level of competence or ability.

s14B Qualifications bodies: duty to make adjustments

- (1) Where—
 - (a) a provision, criterion or practice, other than a competence standard, applied by or on behalf of a qualifications body; or
 - (b) any physical feature of premises occupied by a qualifications body,places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the qualifications body to take such steps as it is reasonable, in all the circumstances of the case, for it to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.
- (2) In this section “the disabled person concerned” means—
 - (a) in the case of a provision, criterion or practice for determining on whom a professional or trade qualification is to be conferred, any disabled person who is, or has notified the qualifications body that he may be, an applicant for the conferment of that qualification;
 - (b) in any other case, a disabled person who—
 - (i) holds a professional or trade qualification conferred by the qualifications body, or
 - (ii) applies for a professional or trade qualification which it confers.
- (3) Nothing in this section imposes a duty on a qualifications body in relation to a disabled person if the body does not know, and could not reasonably be expected to know—

- (a) in the case of an applicant or potential applicant, that the disabled person concerned is, or may be, an applicant for the conferment of a professional or trade qualification; or
- (b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1).”

Employment Equality (Age) Regulations 2006 (EE(A)R)

In terms of the EE(A)R 2006 under regulation 18 the Faculty qualifies as a Trade Organisation, under regulation 19 the Faculty qualifies as a Qualification Body and under regulation 20 the Faculty provides Vocational Training. The EEAR 2006 provides, viz.,

r18.— Trade organisations

- (1) It is unlawful for a trade organisation to discriminate against a person—
 - (a) in the terms on which it is prepared to admit him to membership of the organisation; or
 - (b) by refusing to accept, or deliberately not accepting, his application for membership.
- (2) It is unlawful for a trade organisation, in relation to a member of the organisation, to discriminate against him—
 - (a) in the way it affords him access to any benefits or by refusing or deliberately omitting to afford him access to them;
 - (b) by depriving him of membership, or varying the terms on which he is a member; or
 - (c) by subjecting him to any other detriment.
- (3) It is unlawful for a trade organisation, in relation to a person's membership or application for membership of that organisation, to subject that person to harassment.
- (4) In this regulation—

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

“profession” includes any vocation or occupation; and

“trade” includes any business.

r19.— Qualifications bodies

(1) It is unlawful for a qualifications body to discriminate against a person—

(a) in the terms on which it is prepared to confer a professional or trade qualification on him;

(b) by refusing or deliberately not granting any application by him for such a qualification; or

(c) by withdrawing such a qualification from him or varying the terms on which he holds it.

(2) It is unlawful for a qualifications body, in relation to a professional or trade qualification conferred by it, to subject to harassment a person who holds or applies for such a qualification.

(3) In this regulation—

“qualifications body” means any authority or body which can confer a professional or trade qualification, but it does not include—

(a) a governing body of an educational establishment to which regulation 23 (institutions of further and higher education) applies, or would apply but for the operation of any other provision of these Regulations, or

(b) a proprietor of a school;

“confer” includes renew or extend;

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

“profession” and “trade” have the same meaning as in regulation 18

r20.— The provision of vocational training

- (1) It is unlawful, in relation to a person seeking or undergoing training, for any training provider to discriminate against him—
 - (a) in the arrangements he makes for the purpose of determining to whom he should offer training;
 - (b) in the terms on which the training provider affords him access to any training;
 - (c) by refusing or deliberately not affording him such access;
 - (d) by terminating his training; or
 - (e) by subjecting him to any other detriment during his training.
- (2) It is unlawful for a training provider, in relation to a person seeking or undergoing training, to subject him to harassment.
- (3) Paragraph (1) does not apply if the discrimination concerns training that would only fit a person for employment which, by virtue of regulation 8 (exception for genuine occupational requirement etc), the employer could lawfully refuse to offer the person seeking training.
- (4) In this regulation—

“professional or trade qualification” has the same meaning as in regulation 19;

“registered pupil” has the meaning given by section 434 of the Education Act 1996;

“training” means—

 - (a) all types and all levels of training which would help fit a person for any employment;

- (b) vocational guidance;
 - (c) facilities for training;
 - (d) practical work experience provided by an employer to a person whom he does not employ; and
 - (e) any assessment related to the award of any professional or trade qualification;
- “training provider” means any person who provides, or makes arrangements for the provision of, training, but it does not include—
- (a) an employer in relation to training for persons employed by him;
 - (b) a governing body of an educational establishment to which regulation 23 (institutions of further and higher education) applies, or would apply but for the operation of any other provision of these Regulations; or
 - (c) a proprietor of a school in relation to any registered pupil.

Employment Equality (Religion or Belief) Regulations 2003 (EE(RB)R)

In terms of the EERBR 2003 under regulation 15 the Faculty qualifies as a Trade Organisation, under regulation 16 the Faculty qualifies as a Qualification Body. The EE(RB)R provides, viz.,

r15.— Trade organisations

- (1) It is unlawful for a trade organisation to discriminate against a person—
 - (a) in the terms on which it is prepared to admit him to membership of the organisation; or
 - (b) by refusing to accept, or deliberately not accepting, his application for membership.
- (2) It is unlawful for a trade organisation, in relation to a member of the organisation, to discriminate against him—

- (a) in the way it affords him access to any benefits or by refusing or deliberately omitting to afford him access to them;
 - (b) by depriving him of membership, or varying the terms on which he is a member; or
 - (c) by subjecting him to any other detriment.
- (3) It is unlawful for a trade organisation, in relation to a person's membership or application for membership of that organisation, to subject that person to harassment.
- (4) In this regulation—
- “trade organisation” means an organisation of workers, an organisation of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists;
 - “profession” includes any vocation or occupation; and
 - “trade” includes any business.

r16.— Qualifications bodies

- (1) It is unlawful for a qualifications body to discriminate against a person—
- (a) in the terms on which it is prepared to confer a professional or trade qualification on him;
 - (b) by refusing or deliberately not granting any application by him for such a qualification; or
 - (c) by withdrawing such a qualification from him or varying the terms on which he holds it.
- (2) It is unlawful for a qualifications body, in relation to a professional or trade qualification conferred by it, to subject to harassment a person who holds or applies for such a qualification.
- (3) In this regulation—

“qualifications body” means any authority or body which can confer a professional or trade qualification, but it does not include—

(a) a governing body of an educational establishment to which regulation 20 (institutions of further and higher education) applies, or would apply but for the operation of any other provision of these Regulations, or

(b) a proprietor of a school;

“confer” includes renew or extend;

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

“profession” and “trade” have the same meaning as in regulation 15.

Employment Equality (Sexual Orientation) Regulations 2003 (EE(SO)R)

In terms of the EESOR 2003 under regulation 15 the Faculty qualifies as a Trade Organisation, under regulation 16 the Faculty qualifies as a Qualification Body. The EE(SO)R 2003 provides, viz.,

r15.— Trade organisations

(1) It is unlawful for a trade organisation to discriminate against a person—

(a) in the terms on which it is prepared to admit him to membership of the organisation; or

(b) by refusing to accept, or deliberately not accepting, his application for membership.

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

- (a) in the way it affords him access to any benefits or by refusing or deliberately omitting to afford him access to them;
 - (b) by depriving him of membership, or varying the terms on which he is a member; or
 - (c) by subjecting him to any other detriment.
- (3) It is unlawful for a trade organisation, in relation to a person's membership or application for membership of that organisation, to subject that person to harassment.
- (4) In this regulation—
- “trade organisation” means an organisation of workers, an organisation of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists;
 - “profession” includes any vocation or occupation; and
 - “trade” includes any business.

r16.— Qualifications bodies

- (1) It is unlawful for a qualifications body to discriminate against a person—
- (a) in the terms on which it is prepared to confer a professional or trade qualification on him;
 - (b) by refusing or deliberately not granting any application by him for such a qualification; or
 - (c) by withdrawing such a qualification from him or varying the terms on which he holds it.
- (2) It is unlawful for a qualifications body, in relation to a professional or trade qualification conferred by it, to subject to harassment a person who holds or applies for such a qualification.
- (3) Paragraph (1) does not apply to a professional or trade qualification for purposes of an organised religion where a

requirement related to sexual orientation is applied to the qualification so as to comply with the doctrines of the religion or avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

(4) In this regulation—

“qualifications body” means any authority or body which can confer a professional or trade qualification, but it does not include—

(a) a governing body of an educational establishment to which regulation 20 (institutions of further and higher education) applies, or would apply but for the operation of any other provision of these Regulations, or

(b) a proprietor of a school;

“confer” includes renew or extend;

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

“profession” and “trade” have the same meaning as in regulation 15.

Race Relations Act 1976 (RRA)

In terms of the RRA 1976 under section 11 the Faculty qualifies as an Organisation and under section 12 the Faculty qualifies as a Qualification Body. The RRA 1976 provides, viz.,

s11.— Trade unions etc.

(1) This section applies to an organisation of workers, an organisation of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists.

- (2) It is unlawful for an organisation to which this section applies, in the case of a person who is not a member of the organisation, to discriminate against him—
- (a) in the terms on which it is prepared to admit him to membership; or
 - (b) by refusing or deliberately omitting to accept, his application for membership.
- (3) It is unlawful for an organisation to which this section applies, in the case of a person who is a member of the organisation, to discriminate against him—
- (a) in the way it affords him access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or
 - (b) by depriving him of membership, or varying the terms on which he is a member; or
 - (c) by subjecting him to any other detriment.
- (4) It is unlawful for an organisation to which this section applies, in relation to a person's membership or application for membership of that organisation, to subject him to harassment.

s12.— Qualifying bodies.

- (1) It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against a person—
- (a) in the terms on which it is prepared to confer on him that authorisation or qualification; or
 - (b) by refusing, or deliberately omitting to grant, his application for it; or
 - (c) by withdrawing it from him or varying the terms on which he holds it.

- (1A) It is unlawful for an authority or body to which subsection (1) applies, in relation to an authorisation or qualification conferred by it, to subject to harassment a person who holds or applies for such an authorisation or qualification.
- (2) In this section—
- (a) “authorisation or qualification” includes recognition, registration, enrolment, approval and certification;
 - (b) “confer” includes renew or extend.
- (3) Subsections (1) and (1A) do not apply to discrimination or harassment which is rendered unlawful by section 17 or 18.

Sex Discrimination Act 1975 (SDA)

In terms of the SDA 1975 under section 12 the Faculty qualifies as a Trade Organisation and under section 13 the Faculty qualifies as a Qualification Body and under section 14 the Faculty provides Vocational Training. The SDA 1975 provides, *viz.*,

s12.— Trade unions etc.

- (1) This section applies to an organisation of workers, an organisation of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists.
- (2) It is unlawful for an organisation to which this section applies, in the case of a woman who is not a member of the organisation, to discriminate against her—
- (a) in the terms on which it is prepared to admit her to membership, or
 - (b) by refusing, or deliberately omitting to accept, her application for membership.

- (3) It is unlawful for an organisation to which this section applies, in the case of a woman who is a member of the organisation, to discriminate against her—
- (a) in the way it affords her access to any benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or
 - (b) by depriving her of membership, or varying the terms on which she is a member, or
 - (c) by subjecting her to any other detriment.
- (3A) It is unlawful for an organisation to which this section applies, in relation to membership of that organisation, to subject to harassment a woman who—
- (a) is a member of the organisation, or
 - (b) has applied for membership of the organisation.

s13.— Qualifying bodies.

- (1) It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against a woman—
- (a) in the terms on which it is prepared to confer on her that authorisation or qualification, or
 - (b) by refusing or deliberately omitting to grant her application for it, or
 - (c) by withdrawing it from her or varying the terms on which she holds it.
- (1A) It is unlawful for a body to which this section applies, in relation to an authorisation or qualification of a kind mentioned in subsection (1), to subject to harassment a woman who holds or applies for such an authorisation or qualification.

- (2) Where an authority or body is required by law to satisfy itself as to his good character before conferring on a person an authorisation or qualification which is needed for, or facilitates, his engagement in any profession or trade then, without prejudice to any other duty to which it is subject, that requirement shall be taken to impose on the authority or body a duty to have regard to any evidence tending to show that he, or any of his employees, or agents (whether past or present), has practised unlawful discrimination in, or in connection with, the carrying on of any profession or trade.
- (3) In this section—
- (a) “authorisation or qualification” includes recognition, registration, enrolment, approval and certification,
 - (b) “confer” includes renew or extend.
- (4) Subsection (1) does not apply to discrimination which is rendered unlawful by section 22 or 23.
- (5) Subsection (1A) does not apply to harassment which is rendered unlawful by section 22 or 23.

s14.— Persons concerned with provision of vocational training.

- (1) It is unlawful, in the case of a woman seeking or receiving vocational training, for any person who provides, or makes arrangements for the provision of, facilities for vocational training to discriminate against her—
- (a) in the arrangements that person makes for the purpose of selecting people to receive vocational training,
 - (b) in the terms on which that person affords her access to any vocational training or facilities concerned with vocational training,
 - (c) by refusing or deliberately omitting to afford her such access,

- (d) by terminating her vocational training, or
- (e) by subjecting her to any detriment during the course of her vocational training.

(1A) It is unlawful for a provider of vocational training, in relation to such training, to subject to harassment a woman—

- (a) to whom he is providing such training, or
- (b) who has asked him to provide such training.

(1B) In this section “vocational training”, in relation to a woman, includes (if it would not otherwise do so) any training which would help fit her for any employment.

(2) Subsection (1) does not apply to—

- (a) discrimination which is rendered unlawful by section 6(1) or (2) or section 22 or 23, or
- (b) discrimination which would be rendered unlawful by any of those provisions but for the operation of any other provision of this Act.

Appendix 2

Extracts of relevant Discrimination statutory provisions relating to Advocates

Disability Discrimination Act 1995 (DDA)

DDA 1995 under sections 7C and 7D positive duties are placed on Advocates to make 'reasonable adjustments' which would enable a disabled person to avail of them. Under sections 19 to 21 positive duties are placed on Advocates to make 'reasonable adjustments' to enable disabled persons to utilise the services they provide. The DDA 1995 provides viz.,

s7C Advocates: discrimination and harassment

- (1) It is unlawful for an advocate, in relation to taking any person as his pupil, to discriminate against a disabled person—
 - (a) in the arrangements which he makes for the purpose of determining whom he will take as his pupil;
 - (b) in respect of any terms on which he offers to take the disabled person as his pupil; or
 - (c) by refusing, or deliberately omitting, to take the disabled person as his pupil.
- (2) It is unlawful for an advocate, in relation to a disabled person who is a pupil, to discriminate against him—
 - (a) in respect of any terms applicable to him as a pupil;
 - (b) in the opportunities for training, or gaining experience, which are afforded or denied to him;
 - (c) in the benefits which are afforded or denied to him;
 - (d) by terminating the relationship or by subjecting him to any pressure to leave; or
 - (e) by subjecting him to any other detriment.

- (3) It is unlawful for an advocate, in relation to taking any person as his pupil, to subject to harassment a disabled person who is, or has applied to be taken as, his pupil.
- (4) It is also unlawful for any person, in relation to the giving, withholding or acceptance of instructions to an advocate, to discriminate against a disabled person or to subject him to harassment.
- (5) In this section and section 7D–
 - “advocate” means a member of the Faculty of Advocates practising as such; and
 - “pupil” has the meaning commonly associated with its use in the context of a person training to be an advocate.

s7D Advocates: duty to make adjustments

- (1) Where–
 - (a) a provision, criterion or practice applied by or on behalf of an advocate, or
 - (b) any physical feature of premises occupied by, and under the control of, an advocate, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the advocate to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.
- (2) In this section, “the disabled person concerned” means–
 - (a) in the case of a provision, criterion or practice for determining whom he will take as his pupil, any disabled person who has applied, or has notified the advocate that he may apply, to be taken as a pupil;
 - (b) in any other case, a disabled person who is–
 - (i) an applicant to be taken as the advocate's pupil, or

(ii) a pupil.

(1) Nothing in this section imposes any duty on an advocate in relation to a disabled person if he does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that the disabled person concerned is, or may be, applying to be taken as his pupil; or

(b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1).

s19.— Discrimination in relation to goods, facilities and services.

(1) It is unlawful for a provider of services to discriminate against a disabled person—

(a) in refusing to provide, or deliberately not providing, to the disabled person any service which he provides, or is prepared to provide, to members of the public;

(b) in failing to comply with any duty imposed on him by section 21 in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service;

(c) in the standard of service which he provides to the disabled person or the manner in which he provides it to him; or

(d) in the terms on which he provides a service to the disabled person.

(2) For the purposes of this section and sections 20 to 21ZA—

(a) the provision of services includes the provision of any goods or facilities;

(b) a person is “a provider of services” if he is concerned with the provision, in the United Kingdom, of services to the public or to a section of the public; and

- (c) it is irrelevant whether a service is provided on payment or without payment.
- (3) The following are examples of services to which this section and sections 20 and 21 apply—
- (a) access to and use of any place which members of the public are permitted to enter;
 - (b) access to and use of means of communication;
 - (c) access to and use of information services;
 - (d) accommodation in a hotel, boarding house or other similar establishment;
 - (e) facilities by way of banking or insurance or for grants, loans, credit or finance;
 - (f) facilities for entertainment, recreation or refreshment;
 - (g) facilities provided by employment agencies or under section 2 of the Employment and Training Act 1973;
 - (h) the services of any profession or trade, or any local or other public authority.
- (4) In the case of an act which constitutes discrimination by virtue of section 55, this section also applies to discrimination against a person who is not disabled.
- (4A) Subsection (1) does not apply to anything that is governed by Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.
- (5) Regulations may provide for subsection (1) and section 21(1), (2) and (4) not to apply, or to apply only to a prescribed extent, in relation to a service of a prescribed description.
- (5A) Nothing in this section or sections 20 to 21A applies to the provision of a service in relation to which discrimination is unlawful under Part 4.

s20.— Meaning of “discrimination”.

- (1) For the purposes of section 19, a provider of services discriminates against a disabled person if—
 - (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and
 - (b) he cannot show that the treatment in question is justified.
- (2) For the purposes of section 19, a provider of services also discriminates against a disabled person if—
 - (a) he fails to comply with a section 21 duty imposed on him in relation to the disabled person; and
 - (b) he cannot show that his failure to comply with that duty is justified.
- (3) For the purposes of this section, treatment is justified only if—
 - (a) in the opinion of the provider of services, one or more of the conditions mentioned in subsection (4) are satisfied; and
 - (b) it is reasonable, in all the circumstances of the case, for him to hold that opinion.
- (4) The conditions are that—
 - (a) in any case, the treatment is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person);
 - (b) in any case, the disabled person is incapable of entering into an enforceable agreement, or of giving an informed consent, and for that reason the treatment is reasonable in that case;
 - (c) in a case falling within section 19(1)(a), the treatment is necessary because the provider of services would otherwise be unable to provide the service to members of the public;
 - (d) in a case falling within section 19(1)(c) or (d), the treatment is necessary in order for the provider of services to be able to

provide the service to the disabled person or to other members of the public;

(e) in a case falling within section 19(1)(d), the difference in the terms on which the service is provided to the disabled person and those on which it is provided to other members of the public reflects the greater cost to the provider of services in providing the service to the disabled person.

(5) Any increase in the cost of providing a service to a disabled person which results from compliance by a provider of services with a section 21 duty shall be disregarded for the purposes of subsection (4)(e).

(6) Regulations may make provision, for purposes of this section, as to circumstances in which—

(a) it is reasonable for a provider of services to hold the opinion mentioned in subsection (3)(a);

(b) it is not reasonable for a provider of services to hold that opinion.

(7) Regulations may make provision for subsection (4)(b) not to apply in prescribed circumstances where—

(a) a person is acting for a disabled person under a power of attorney;

(b) functions conferred by or under the Mental Capacity Act 2005 re exercisable in relation to a disabled person's property or affairs; or

(c) powers are exercisable in relation to a disabled person's property or affairs in consequence of the appointment, under the law of Scotland, of a guardian, tutor or judicial factor.

(8) Regulations may make provision, for purposes of this section, as to circumstances (other than those mentioned in subsection (4)) in which treatment is to be taken to be justified.

- (9) In subsections (3), (4) and (8) “treatment” includes failure to comply with a section 21 duty.

s21.— Duty of providers of services to make adjustments.

- (1) Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which he provides, or is prepared to provide, to other members of the public, it is his duty to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect.
- (2) Where a physical feature (for example, one arising from the design or construction of a building or the approach or access to premises) makes it impossible or unreasonably difficult for disabled persons to make use of such a service, it is the duty of the provider of that service to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to—
- (a) remove the feature;
 - (b) alter it so that it no longer has that effect;
 - (c) provide a reasonable means of avoiding the feature; or
 - (d) provide a reasonable alternative method of making the service in question available to disabled persons.
- (3) Regulations may prescribe—
- (a) matters which are to be taken into account in determining whether any provision of a kind mentioned in subsection (2)(c) or (d) is reasonable; and
 - (b) categories of providers of services to whom subsection (2) does not apply.

- (4) Where an auxiliary aid or service (for example, the provision of information on audio tape or of a sign language interpreter) would—
- (a) enable disabled persons to make use of a service which a provider of services provides, or is prepared to provide, to members of the public, or
 - (b) facilitate the use by disabled persons of such a service, it is the duty of the provider of that service to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to provide that auxiliary aid or service.
- (5) Regulations may make provision, for the purposes of this section—
- (a) as to circumstances in which it is reasonable for a provider of services to have to take steps of a prescribed description;
 - (b) as to circumstances in which it is not reasonable for a provider of services to have to take steps of a prescribed description;
 - (c) as to what is to be included within the meaning of “practice, policy or procedure”;
 - (d) as to what is not to be included within the meaning of that expression;
 - (e) as to things which are to be treated as physical features;
 - (f) as to things which are not to be treated as such features;
 - (g) as to things which are to be treated as auxiliary aids or services;
 - (h) as to things which are not to be treated as auxiliary aids or services.
- (6) Nothing in this section requires a provider of services to take any steps which would fundamentally alter the nature of the service in question or the nature of his trade, profession or business.

- (7) Nothing in this section requires a provider of services to take any steps which would cause him to incur expenditure exceeding the prescribed maximum.
- (8) Regulations under subsection (7) may provide for the prescribed maximum to be calculated by reference to—
 - (a) aggregate amounts of expenditure incurred in relation to different cases;
 - (b) prescribed periods;
 - (c) services of a prescribed description;
 - (d) premises of a prescribed description; or
 - (e) such other criteria as may be prescribed.
- (9) Regulations may provide, for the purposes of subsection (7), for expenditure incurred by one provider of services to be treated as incurred by another.
- (10) This section imposes duties only for the purposes of determining whether a provider of services has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such.

Employment Equality (Age) Regulations 2006 (EE(A)R)

The EE(A)R 2006 provides, viz.,

r16.— Advocates

- (1) It is unlawful for an advocate, in relation to taking any person as his pupil, to discriminate against a person—
 - (a) in the arrangements which he makes for the purpose of determining whom he will take as his pupil;
 - (b) in respect of any terms on which he offers to take any person as his pupil; or

- (c) by refusing to take, or deliberately not taking, a person as his pupil.
- (2) It is unlawful for an advocate, in relation to a person who is his pupil, to discriminate against him—
 - (a) in respect of any terms applicable to him as a pupil;
 - (b) in the opportunities for training, or gaining experience, which are afforded or denied to him;
 - (c) in the benefits which are afforded or denied to him; or
 - (d) by terminating the relationship, or by subjecting him to any pressure to terminate the relationship or other detriment.
- (3) It is unlawful for an advocate, in relation to a person who is his pupil or taking any person as his pupil, to subject such a person to harassment.
- (4) It is unlawful for any person, in relation to the giving, withholding or acceptance of instructions to an advocate, to discriminate against any person by subjecting him to a detriment, or to subject him to harassment.
- (5) In this regulation—
 - “advocate” means a member of the Faculty of Advocates practising as such; and
 - “pupil” has the meaning commonly associated with its use in the context of a person training to be an advocate.
- (6) This regulation extends to Scotland only.

Employment Equality (Religion or Belief) Regulations 2003 (EE(RB)R)

The EE(RB)R 2003 provides, viz.,

r13.— Advocates

- (1) It is unlawful for an advocate, in relation to taking any person as his pupil, to discriminate against a person—

- (a) in the arrangements which he makes for the purpose of determining whom he will take as his pupil;
 - (b) in respect of any terms on which he offers to take any person as his pupil; or
 - (c) by refusing to take, or deliberately not taking, a person as his pupil.
- (2) It is unlawful for an advocate, in relation to a person who is his pupil, to discriminate against him—
- (a) in respect of any terms applicable to him as a pupil;
 - (b) in the opportunities for training, or gaining experience, which are afforded or denied to him;
 - (c) in the benefits which are afforded or denied to him; or
 - (d) by terminating the relationship, or by subjecting him to any pressure to terminate the relationship or other detriment.
- (3) It is unlawful for an advocate, in relation to a person who is his pupil or taking any person as his pupil, to subject such a person to harassment.
- (4) It is unlawful for any person, in relation to the giving, withholding or acceptance of instructions to an advocate, to discriminate against any person by subjecting him to a detriment, or to subject him to harassment.
- (5) In this regulation—
- “advocate” means a member of the Faculty of Advocates practising as such; and
 - “pupil” has the meaning commonly associated with its use in the context of a person training to be an advocate.
- (6) This regulation extends to Scotland only.

Employment Equality (Sexual Orientation) Regulations 2003 (EE(SO)R)

The EE(SO)R 2003 provides, viz.,

r13.— Advocates

- (1) It is unlawful for an advocate, in relation to taking any person as his pupil, to discriminate against a person—
 - (a) in the arrangements which he makes for the purpose of determining whom he will take as his pupil;
 - (b) in respect of any terms on which he offers to take any person as his pupil; or
 - (c) by refusing to take, or deliberately not taking, a person as his pupil.
- (2) It is unlawful for an advocate, in relation to a person who is his pupil, to discriminate against him—
 - (a) in respect of any terms applicable to him as a pupil;
 - (b) in the opportunities for training, or gaining experience, which are afforded or denied to him;
 - (c) in the benefits which are afforded or denied to him; or
 - (d) by terminating the relationship, or by subjecting him to any pressure to terminate the relationship or other detriment.
- (3) It is unlawful for an advocate, in relation to a person who is his pupil or taking any person as his pupil, to subject such a person to harassment.
- (4) It is unlawful for any person, in relation to the giving, withholding or acceptance of instructions to an advocate, to discriminate against any person by subjecting him to a detriment, or to subject him to harassment.
- (5) In this regulation—

“advocate” means a member of the Faculty of Advocate practising as such; and

“pupil” has the meaning commonly associated with its use in the context of a person training to be an advocate.

(6) This regulation extends to Scotland only.

Race Relations Act 1976 (RRA)

The RRA 1976 provides, viz.,

s26B.— Advocate.

- (1) It is unlawful for an advocate, in relation to taking any person as his pupil, to discriminate against a person—
 - (a) in the arrangements which he makes for the purpose of determining whom he will take as his pupil;
 - (b) in respect of any terms on which he offers to take any person as his pupil; or
 - (c) by refusing, or deliberately omitting, to take a person as his pupil.
- (2) It is unlawful for an advocate, in relation to a person who is a pupil, to discriminate against him—
 - (a) in respect of any terms applicable to him as a pupil;
 - (b) in the opportunities for training, or gaining experience, which are afforded or denied to him;
 - (c) in the benefits, facilities or services which are afforded or denied to him; or
 - (d) by terminating the relationship or by subjecting him to any pressure to terminate the relationship or other detriment.
- (3) It is unlawful for any person, in relation to the giving, withholding or acceptance of instructions to an advocate, to discriminate against any person or to subject any person to harassment .

(3A) It is unlawful for an advocate, in relation to taking any person as his pupil, to subject to harassment a person who has applied to be, or is, a pupil.

(4) In this section—

“advocate” means a member of the Faculty of Advocate practising as such; and

“pupil” has the meaning commonly associated with its use in the context of a person training to be an advocate.

(5) This section does not apply to England and Wales.

Sex Discrimination Act 1975 (SDA)

The SDA 1975 provides, *viz.*,

s35B.— Advocate

(1) It is unlawful for an advocate, in relation to taking any person as his pupil, to discriminate against a woman—

(a) in the arrangements which he makes for the purpose of determining whom he will take as his pupil;

(b) in respect of any terms on which he offers to take her as his pupil; or

(c) by refusing, or deliberately omitting, to take her as his pupil.

(2) It is unlawful for an advocate, in relation to a woman who is a pupil, to discriminate against her—

(a) in respect of any terms applicable to her as a pupil;

(b) in the opportunities for training, or gaining experience, which are afforded or denied to her;

(c) in the benefits, facilities or services which are afforded or denied to her; or

(d) by terminating the relationship or by subjecting her to any pressure to terminate the relationship or other detriment.

- (2A) It is unlawful for an advocate, in relation to taking any person as that advocate's pupil, to subject to harassment a person who is, or who has applied to be taken as, his pupil.
- (3) It is unlawful for any person, in relation to the giving, withholding or acceptance of instructions to an advocate, to discriminate against a woman by subjecting her to a detriment or to subject her to harassment
- (4) In this section—
“advocate” means a member of the Faculty of Advocates practising as such; and
‘pupil’ has the meaning commonly associated with its use in the context of a person training to be an advocate.
- (5) Section 3 applies for the purposes of this section as it applies for the purposes of any provision of Part II.
- (6) This section does not apply to England and Wales.

Appendix 3

Guidance on Reasonable Adjustments in Devilling, Admission, and Membership

- [1] In terms of the Disability Discrimination Act 1995 (DDA) under section 13 the Faculty qualifies as a Trade Organisation and under section 14A the Faculty qualifies as a Qualification Body. Sections 13 to 14B place a positive duty on the Faculty to make 'reasonable adjustments' which would enable a disabled person to be admitted as an Intransit, undertake devilling and to practice as an Advocate. (See Appendix 1 for details)
- [2] In terms of the DDA 1995 under sections 7C and 7D positive duties are placed on Advocates to make 'reasonable adjustments' which would enable a disabled person to devill to them. (See Appendix 2 for details)
- [3] Faculty brochures, entry literature and policy documents will advise that a request for a 'reasonable adjustment' will be fully considered. A failure to consider a 'reasonable adjustment' in the case of a disabled person will be a breach of the DDA.
- [4] Where a person identifies themselves as disabled the Faculty and its member will consult them on their needs and how these can be addressed.
- [5] In determining whether an adjustment is reasonable the Faculty will take the following into account:
- (a) the effectiveness of the adjustment in overcoming the disability;
 - (b) how practicable is the adjustment;

(c) the cost of the adjustment.

[6] The resources of Faculty are relevant but the following are examples of some 'reasonable adjustments' :

- (a) applications submitted in alternative formats to the standard written application form such as on cassette tape or electronically;
- (b) accessible venue provided for examinations and devilling;
- (c) alteration of normal examination and training hours;
- (d) alterations to the physical features of premises such as widening of doors to enable wheel chair entry, lift installation or changing of colour schemes that may restrict visibility;
- (e) purchase of specialist equipment such as mini-com or enlarged VDU;
- (f) accessible place of work.

[7] The Access to Work programme run through the Job Centre Plus, part of the Department of Work and Pensions, provides practical advice and support to disabled people to help overcome work related obstacles resulting from disability. Advocates, as self-employed practitioners, can contact the programme through Job Centre Plus offices. The application process can be lengthy and devils are recommended to apply, as soon as they pass all the necessary assessments, prior to their admission date. It can provide, for example, a sign language interpreter for interviewing a person who is deaf or has a hearing impairment, a reader if a person is blind or has a visual impairment, specialist equipment to suit a disabled person's particular needs in work, adaptations to premises or existing equipment and help to travel to work if a disability prevents the use of public transport.

[8] Faculty will arrange an access audit to indicate general disability access requirements. In relation to Intrants/devils and Advocates adjustments specific to the individual maybe required. Intrants/devils invited to attend

will be asked to specify what kind of adjustment, if any, they require. Existing Intrans/advocates and Advocates, who are or become disabled, will similarly be asked to specify any adjustments.

[9] Expert advice can be obtained from the Equality and Human Rights Commission and the relevant specialist charities such as the RNIB, RNID and MIND. Website information is provided at Appendix 6

[10] Further examples of reasonable adjustments are given in Appendix 5 Practical Guidance on Service Provision for Disabled Clients

Appendix 4

Guidance on Avoidance of Age Discrimination

- [1] In terms of the Employment Equality (Age) Regulations 2006 (EEAR) under regulation 18 the Faculty qualifies as a Trade Organisation, under regulation 19 the Faculty qualifies as a Qualification Body and under regulation 20 the Faculty qualifies as providing Vocational Training. The EEAR prohibits discrimination, victimization and harassment on the grounds of age. (See Appendix 1 for details).
- [2] In terms of the EEAR 2006 under regulation 16 it is unlawful for an Advocate to discriminate against, or harass, a devils on the grounds of age. (See Appendix 2 for details)

Direct Discrimination

- [3] Direct discrimination occurs simply where the decision-maker treats person A less favourably than he or she treats, or would treat, person B, on the grounds of A's age.
- [4] Where A shows that he or she has been treated less favourably than B, and there is reasonable evidence that this may be on the grounds of age, the alleged discriminator will be found to have committed an act of unlawful discrimination unless the decision-maker can show that age played no part at all in the treatment afforded to A (or if he or she can justify the part that age played in the treatment). A person's age includes their perceived age.

[5] An example of direct age discrimination would include refusing to allow any person over the age of 60 to commence devilling. This is direct discrimination on the grounds of the applicant's age. This is a decision that may be difficult to justify.

[6] In cases of direct age discrimination the age (or age group) will be an explicit factor.

This is not the case in cases of indirect age discrimination.

Indirect Discrimination

[7] Indirect discrimination occurs where the decision-maker applies to person A a "provision, criterion or practice" which he would or does apply equally to people of a different age group to A, but which has the consequence of placing those in the same age group as A at a particular disadvantage, and A is personally disadvantaged because of it. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.

[8] An examples of indirect age discrimination would include, where year of call is used as an indicator of experience and as securing a balance of experience. This may well be a legitimate aim and it would probably be justifiable to have regard to year of call when selecting an Advocate.

Justification

[9] An act of direct or indirect age discrimination can be justified (and so will not be unlawful) if the decision-maker (whether the Faculty or an Advocate) can prove that the action taken, or the provision, criterion, or practice used, is a "proportionate means of achieving a legitimate aim." This means the Faculty or Advocates ("the decision makers") would need to be able to show that there is a legitimate reason not tainted by age discrimination for the decision taken, and that the decision-makers'

legitimate aim could not be achieved by treatment or a policy that has a smaller discriminatory effect. The decision-makers must balance the discriminatory effects of the treatment or policy against the importance of the aim pursued by them, and if the disadvantage to the devil or Advocate subject to discrimination is not outweighed by the aims of the decision-makers, the decision will not be justified.

- [10] It is difficult to give guidance on examples of where discrimination might be justified (as authoritative guidance will only come from the employment tribunals and courts).

Harassment

- [11] The 2006 Regulations prohibit the Faculty and Advocates from harassing a person on the ground of their age. Age-based harassment is unlawful if it has the purpose, or effect, of violating the complainant's dignity; or if it creates an intimidating, hostile, degrading, humiliating or offensive environment for the complainant ("the Effect.").
- [12] The test applied in deciding whether or not such harassment has taken place is, having regard to all the circumstances (including in particular the perception of the alleged complainant) could the action of the alleged discriminator reasonably be considered to have had the Effect?
- [13] Examples of harassment on the grounds of age would include targeting a person in a bullying fashion because of prejudices the discriminator may have about the ailments/attitudes of older or younger people. It will also cover making jokes about a person's age, by reference to appearance, or using age-related expressions such as "granny" or "baby".

Victimisation

- [14] The 2006 Regulations also prohibit victimisation. Unlawful victimisation on the grounds of age occurs when person A discriminates against person B by treating B less favourably than he treats or would treat others in the same circumstances, and does so by reason that:
- (a) B has made a complaint or brought legal proceedings in the past about age discrimination; or
 - (b) B has given evidence or information in any age discrimination related legal proceedings; or
 - (c) B has otherwise done anything under or by reference to the Regulations – for example, pursued an internal grievance relating to age; or
 - (d) B has alleged that A or another person has committed an act which does or would amount to unlawful age discrimination; or
 - (e) A knows that B intends to do any of the above or suspects B may have done any of these things.
- [15] The victimisation provisions apply even where the allegations made by B are false provided that they are not made in bad faith.
- [16] Unlawful victimisation, as defined above, cannot, unlike other forms of age discrimination, be justified.

Instructions to Discriminate

- [17] It is unlawful to give instructions to a person to discriminate unjustifiably. It is also unlawful to penalise a person for refusing to carry out a discriminatory instruction or for complaining about the instruction. Such discrimination cannot be justified.

Other matters

[18] The terms of EEAR 2006 regulation 16(4) prevent a solicitor discriminating against an Advocate on the grounds of his or her age, where the solicitor is involved in giving or withholding instructions to an Advocate.

[19] Further, it is not just the front line decision-maker who can unlawfully discriminate on the grounds of age – the Faculty or an Advocate will also act unlawfully if they instruct someone else to treat a devil or another Advocate less favourably on the grounds of his or her age.

Practical Advice

[20] Advice relating to best practice in relation to age discrimination as it affects the Faculty and Advocates is similar to that provided for sex, race, religion, sexual orientation and disability discrimination. (See Appendices 1 and 2 for details of the legislative provisions)

Appendix 5

Guidance on Service Provision to Disabled Clients

Introduction

- [1] This section will focus on the practical issues connected with service delivery, as it relates to disability, within the context of the legislative framework. It is designed to assist Advocates to comply with the disability legislation and generally to improve the services offered to disabled people by the Faculty of Advocates.
- [2] Disability is not always visible and many disabled people choose not to disclose their disability. Disability encompasses, for example, certain musculo-skeletal problems, circulatory conditions and mental illness.
- [3] Advocates are likely to come into professional contact with many disabled people including lay and professional clients, colleagues, devils, members of the judiciary, witnesses and staff within the judicial system.

Obligations Under the Disability Discrimination Act 1995 (“DDA”)

Who are the Clients to Whom Duties are Owed?

- [4] Obligations are owed to "disabled" persons. The term "disabled" has a statutory definition in section 1 of the DDA, viz, .
- ‘1(1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

(2) In this Act “disabled person” means a person who has a disability.’

The disabled person may be the lay client or any person from the instructing solicitors. The duties under this code will also apply to other persons to whom the Advocate provides services or come into contact (such as witnesses in a case).

Who Owes the Duties?

[5] An Advocate will be a "service provider" for the purposes of the provisions of the DDA dealing with discrimination in the provision of services. An Advocate will therefore owe duties under section 19 of the DDA both to the lay client and to the professional client.

What are the Duties?

- [6] The DDA makes it is unlawful for an Advocate to discriminate against a disabled person:
- (a) by refusing to provide (or deliberately not providing) any service which it provides (or is prepared to provide) to members of the public; or
 - (b) in the standard of service which it provides to the disabled person or the manner in which it provides that service; or
 - (c) in the terms on which it provides a service to the disabled person.
- [7] *Pro bono* work remain part of service provision and are subject to exactly the same duties as paid cases. Providing consultation facilities is also deemed to be the provision of a service.
- [8] It is also unlawful for service providers to discriminate in failing to comply with a duty to make reasonable adjustments.
- [9] The following are the duties owed by a service provider to a disabled person:

- (a) not to discriminate against the disabled person by treating the disabled person less favourably for a reason related to the disabled person's disability (section 20 (1));
- (b) not to discriminate against the disabled person by failing to comply with a duty to make a reasonable adjustment causing the disabled person to find it either impossible or unreasonably difficult to use the service provider's services;
- (c) not to victimise any person (whether disabled or not) by treating them less favourably because they brought proceedings, gave evidence or information or made allegations relating to the DDA.

[10] It is possible to justify discrimination against a disabled person but only in certain limited circumstances, defined in the DDA.

Less Favourable Treatment

[11] A service provider discriminates against a disabled person if, for a reason which relates to the disabled person's disability, it treats the disabled person less favourably than it treats (or would treat) others to whom the reason does not (or would not) apply and it cannot show that the treatment in question is justified.

[12] It is necessary that an Advocate knows (or ought to know) that the person is a disabled person for less favourable treatment to occur.

[13] It is unlawful to refuse to serve a disabled person or deliberately not serve the disabled person for a reason relating to the disabled person's disability.

[14] It is unlawful to provide service of a lower standard or in a worse manner to a person for a reason relating to or the disabled person's disability.

[15] It is unlawful to provide a disabled person with a service on worse terms (for example by charging more) for a reason relating to that person's disability.

[16] The DDA does not prohibit positive action in favour of disabled people. The protection of the DDA confers positive advantages on disabled people in certain respects.

The Duty to Make Reasonable Adjustments

[17] As a service provider, an Advocate is required to make reasonable adjustments in several areas unless it can show that the failure to make a reasonable adjustment is justified.

[18] The duty to make reasonable adjustments is owed to disabled people at large and not just individual disabled people. Advocates should not wait until a disabled person wants to use their services before investigating the need to make reasonable adjustments. It is recommended that Advocates should look at adjustments that they can make on an ongoing basis (whether or not they currently provide services to disabled people). The idea is to anticipate the requirements of disabled people.

[19] The law requires reasonable adjustments to be made in the following areas:

- (a) changing practices, policies and procedures;
- (b) providing auxiliary aids and services;
- (c) to take steps as it is reasonable, in all the circumstances of the case, to adjust a physical feature, or provide services by alternative means.

- [20] The service provider has a duty to take reasonable steps to change the policy, practice or procedure which makes it impossible or unreasonably difficult for disabled people to make use of its services.
- [21] When considering whether the services of a Advocate are unreasonably difficult for disabled people to use, account should be taken of whether the time, inconvenience, effort, discomfort or loss of dignity entailed in using the service would be considered unreasonable by other people if they had to endure similar difficulties. There may be unreasonable difficulty, for example, where a client in a wheelchair has to be carried up three steps to a conference room.
- [22] It is sensible to try to anticipate the needs of disabled clients rather than acting in a wholly reactive way. An Advocate should consider consulting with organisations of disabled people if he or she anticipates working with a disabled person on a particular case. Advocates should indicate that reasonable adjustments will be made on request if this will assist disabled people to use their services.
- [23] An Advocate may discriminate unlawfully even if he does not know that a client is disabled. It is worthwhile remembering that not all disabilities are visible. What is important is not to act on assumptions, but to be prepared to ask in advance what reasonable adjustments can be made to ensure that the service of the Advocate can be used without the disabled person being put to unreasonable difficulty. If it is not reasonable to anticipate a particular requirement the Advocate will not act unlawfully if he or she does not anticipate it.
- [24] The duty to make reasonable adjustments is a continuing duty, and it may be necessary to make more than one adjustment. The best approach is to consider what changes can be made in practical terms to ensure that the

disabled person can use the Advocate's' services without unreasonable difficulty. The disabled person should be consulted about what he or she believes is the best solution. That view is not going to be conclusive and the Advocate will have to consider what is a reasonable step to have to take in order to achieve this end.

[E25] In deciding whether it is reasonable to take any particular step, consideration could be given to whether it would be effective in overcoming the difficulty that disabled people face in accessing the services of the Advocate. Consider whether it would be practicable to take the step, and the financial and other costs of making the adjustment. Some steps which are suggested would cause disruption. A certain amount of disruption can be required but not a disproportionate amount. Advocates are entitled to take account of financial and other resources as well as the amount of resources already spent on making adjustments.

[26] What needs to be borne in mind is the ultimate aim of rendering services accessible without unreasonable difficulty. Making adjustments for one group of disabled people will not absolve the Advocate from making different adjustments for different disabled people.

[27] Providing access to consulting facilities is also covered. The Faculty may owe duties to members of the public attending for consultations.

[28] It will be exceptionally rare for an Advocate not to have to make any adjustments that would render services accessible to disabled persons.

[29] There is no obligation on an Advocate to take any steps which would fundamentally alter the nature of their service.

- [30] When an Advocate complies with a duty to make reasonable adjustments he is not entitled to pass on any additional costs of compliance solely to disabled clients.
- [31] The Advocate must take reasonable steps to provide auxiliary aids including equipment or services if these would facilitate disabled people using his services. An auxiliary aid may be the provision of a special piece of equipment but it is more likely, simply to be the provision of some extra assistance to disabled people.
- [32] The obligation is to take such steps as it is reasonable for the Advocate to take in all the circumstances of the case to make his services accessible to disabled people. Therefore consideration needs to be given to the size and resources of the Advocate as well as the cost of providing the auxiliary service.
- [33] The Disability Rights Commission (DRC) Code of Practice gives examples of the kind of auxiliary services or aids that may be appropriate for people with hearing disability (paragraph 5.23 and following) and visual impairments (paragraph 5.26 and following).

Justification

- [34] Both less favourable treatment and a failure to make reasonable adjustments may be justified on specific grounds which are set out in section 20 (4) of the DDA provided that the discrimination is not direct discrimination. The Advocate must reasonably believe that one or more of the following conditions are satisfied:
- (a) the service provider is not obliged to do anything which would endanger the health or safety of any person;

- (b) the disabled person is incapable of entering into an enforceable agreement, or of giving an informed consent, and for that reason the treatment is reasonable in that case;
- (c) (in relation to refusing to provide, or deliberately not providing, any service) the treatment is necessary because the Advocate would otherwise be unable to provide the service to members of the public;
- (d) (in relation to the standard of service or the terms on which it is provided) the treatment is necessary in order for the Advocate to be able to provide the service to the disabled person or to other members of the public; and
- (e) (In relation to the terms on which the service is provided) the difference in the terms on which the services provided to the disabled person and those on which it is provided to other members of the public reflects the greater cost to the provider of services in providing the service to the disabled person. However any increase in the cost of providing a service to the disabled person resulting from compliance with the duty to make reasonable adjustments disregarded for this purpose.

Other Areas of Potentially Discriminatory Service Provision

- [35] Discrimination by Advocates as service providers on the ground of race or sex is unlawful
- [36] Examples of discriminatory service provision include the following:
 - (a) the racial or sexual harassment of a professional or lay client;
 - (b) a refusal to accept instructions to act on behalf of individuals or groups defined by their race, sex, sexuality, religion or belief;
 - (c) providing a service that is inappropriate (e.g., timing of conferences with clients with childcare responsibilities)

- (d) failing to take account of the religious needs of clients in relation to dress, food and drink or religious observance;
- (e) asking irrelevant questions based upon assumptions about client's sexuality.

Appendix 6

Useful Web Sites and Contact Addresses

[1] Websites:

Equality and Human Rights Commission	http://www.equalityhumanrights.com
National Association for Mental Health (MIND)	www.mind.org.uk
Royal National Institute for deaf and hard of hearing people	http://www.rnid.org.uk/
Royal National Institute of the Blind	http://www.rnib.org.uk/
Centre for Accessible Environments	www.cae.org.uk
Judicial Studies Board	www.jsboard.co.uk/index.htm
Judicial Studies Board- Equal Treatment Bench Book	http://www.jsboard.co.uk/etac

[2] Codes of Practice:

1. Equality and Human Rights Commission – all codes of practice-
<http://www.equalityhumanrights.com/en/publicationsandresources/pages/publications.aspx?m=Codes+of+Practice>
2. Advisory and Conciliation and Arbitration Service- all codes of practice-
<http://www.ecacas.co.uk/cgi-bin/priamlnk.cgi?MP=CAT^GIN151&CNO=85&CAT=CP>
3. The Faculty of Advocates Guide to Professional Conduct –
<http://www.advocates.org.uk/profession/index.html>

[3] Relevant Benchmark Data may be found on the following Websites:

1. Office of National Statistics for census data by ethnic origin- from the 2001 Census
<http://www.statistics.gov.uk/cci/nugget.asp?id=395>
2. Department for Business Enterprise and Regulatory Reform (BERR)-
Resolving Disputes in the Workplace Consultation
<http://www.berr.gov.uk/consultations/page38508.html>

[4] Organisations

ORGANISATION	ADDRESS
Equality and Human Rights Commission	The Optima Building, 58 Robertson Street, Glasgow, G2 8DU scotland@equalityhumanrights.com
Department for Business Enterprise and Regulatory Reform (BERR)	Ministerial Correspondence Unit Department for Business, Enterprise & Regulatory Reform, 1 Victoria Street, London, SW1H 0ET enquiries@berr.gsi.gov.uk
Law Care for Advocates in Scotland	Law Care, PO Box 147, Benfleet, SS7 3WX help@lawcare.org.uk www.lawcare.org.uk