

Equality and Human Rights Commission

Closing the gap:

Enforcing the gender pay gap regulations



Equality and
Human Rights
Commission

Contents

Introduction	2
What does this policy cover?	3
What falls outside this policy?	3
Principles underpinning this policy	4
How will we achieve compliance?.....	5
Range of activities to encourage compliance	5
Purpose of taking enforcement action	6
Means of enforcement	6
Initial resolution.....	7
Section 20 Investigations.....	7
Section 23 Agreements	8
Section 24 Orders.....	8
Section 21 Unlawful Act Notices and Section 22 Action Plans	9
Section 31 Public Sector Duty Assessment and 32 Public Sector Duty Compliance Notice	10
Enforcement flowchart: Private/voluntary sector	12
Enforcement flowchart: Public sector	13
Further information	14
Requesting a review of one of our regulatory decisions	14
Complaints about operation of policy	14
Contacts	15

Introduction

The Equality and Human Rights Commission ('the Commission') is the equality regulator with responsibility for enforcing the Equality Act 2010 (EA 2010) in accordance with its statutory duties as set out in the Equality Act 2006 (EA 2006). We are also a National Human Rights Institution and our remit covers the whole of Great Britain (England, Wales and Scotland), though we share our human rights remit in Scotland with the Scottish Commission for Human Rights. Our duties include reducing inequality, eliminating discrimination, promoting and protecting human rights.

All private and voluntary sector employers with 250 or more employees in England, Wales and Scotland must now publish information on their gender pay gap under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017.

Public sector employers that are listed in the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 with 250 or more employees must also publish information on their gender pay gap.

Both sets of regulations are collectively referred to in this policy as the GPGR.

Private and voluntary sector employers must report the required pay gap information by 4 April 2018 and annually thereafter. Public sector employers must publish the required information by 30 March 2018 and annually thereafter.

This policy summarises our intended approach to enforcement in order to bring about compliance with the GPGR.

The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended) and the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 place different duties on public sector employers in Scotland and Wales respectively. This policy does not apply to the enforcement of these specific duties.

What does this policy cover?

This policy covers the whole of Great Britain.

It applies to the use of the following statutory powers by the Commission under the EA 2006 and EA 2010 in order to enforce the GPGR:

- Investigations (s20 EA 2006)
- Unlawful Act Notices (s21 EA 2006)
- Action Plans (s22 EA 2006)
- Agreements (s23 EA 2006)
- Orders (s24 EA 2006)
- Public Sector Duty Assessments (s31 EA 2006)
- Public Sector Duty Compliance Notices (s32 EA 2006)

You can find a general explanation of our statutory powers on our website.

All references to sections and schedules in this policy are to sections and schedules of the EA 2006.

What falls outside this policy?

This policy does not:

- apply to enforcement of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended) or the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011
- apply to the use of the above powers in relation to enforcement action outside of the scope of the GPGR
- cover the enforcement powers available to us but which we will not use in the context of enforcing the GPGR. For details of our general approach to enforcement, please see our [compliance and enforcement policy](#)
- apply to the use of any of our litigation powers, such as legal proceedings in relation to judicial review, injunctions or interventions
- set out the reporting obligations under the GPGR. For a summary of the requirements under the GPGR and links to further sources of information, please see the [guidance on our website](#)
- apply to the laws on equal pay, which make it unlawful to pay men and women differently for carrying out the same jobs, similar jobs or work of equal value.

Principles underpinning this policy

We have a range of powers and tools at our disposal. We will always choose the ones that will best fulfil our duties and effect change in a particular circumstance. The nature of the GPGR and the system for reporting GPGR information mean that we can reasonably anticipate the form that non-compliance will take and therefore outline the approach we will take to enforcement in certain scenarios.

We undertake our regulatory activities firmly and fairly. We have developed our own regulatory principles to guide our work. We are also subject to the provisions of the Regulators' Code and the Legislative and Regulatory Reform Act 2006. Details of how these principles and provisions are exercised can be found in our [compliance and enforcement policy](#).

In the context of the GPGR, we have adopted the following principles:

- We will seek to ensure high levels of compliance by raising awareness of the GPGR. Before the end of the first GPGR reporting year, in association with the Government Equalities Office (GEO), we will promote awareness, consulting with stakeholders on this policy and signposting employers to sources of information so that they develop an understanding of what is required under the GPGR and the benefits of compliance.
- We will act consistently and aim to secure compliance by all employers subject to the GPGR.
- We are committed to openness and transparency, and aim in this policy to provide a detailed outline of the action that may be taken if employers do not comply with the GPGR.
- We will use our enforcement powers firmly, promptly and effectively in the enforcement of the GPGR. In doing so we will act proportionately by corresponding with non-compliant employers before taking formal enforcement action. We have adopted timeframes within which we expect non-compliance to be resolved and which we believe all employers should be able to comply with.
- If we need to take enforcement action, we will inform employers why we are doing so, why we have chosen any particular course of action and what the next steps in the process will be. We will only use the more serious of our enforcement

powers where employers fail to engage with us following our initial correspondence.

- We will maintain consistency in our approach to enforcement of the GPGR by requiring all staff members who make decisions about regulatory action to follow this policy.
- We will publish details of enforcement action that we take where we are obliged to do so under the EA 2006, and when it is lawful and appropriate to do so.

How will we achieve compliance?

‘Compliance’ in this context is defined as compliance with the provisions of the GPGR. We aim to promote compliance without the need for formal enforcement action. However, we will take action in accordance with our powers set out in the EA 2006 where employers do not comply, despite our encouragement to do so.

Range of activities to encourage compliance

We will encourage compliance through a range of activities including:

Promoting awareness: This will be achieved through a communications campaign targeted at employers, input into correspondence from the GEO to employers, and promotion of our consultation on this policy.

Education: This will be achieved by providing [information on our website](#) on what is required under the GPGR, signposting to other sources of information and advice, and providing guidance to employers during the initial resolution stage prior to taking enforcement action. We will educate employers on the benefits of compliance by publicising work we have done with those employers who have found gaps in gender pay through complying with the GPGR, and as a result have taken steps to reduce the disparities in pay.

Monitoring compliance: Working with the GEO, we will monitor which employers have published the information required under the GPGR and the accuracy of such information, with a view to holding non-compliant employers to account.

Promotion of enforcement work: We will promote the results of our enforcement work in order to encourage other employers to comply with the GPGR.

Purpose of taking enforcement action

The purpose of the GPGR was to introduce greater transparency on gender pay differences in order to help employers and others to tackle the drivers of the gender pay gap. Enforcement action will help the GPGR to fulfil this purpose by:

- encouraging non-compliant employers to publish the information required by the GPGR and promoting sustained compliance with the GPGR in future reporting years, and
- ensuring that employers who breach the GPGR are held to account in order to deter non-compliance by other employers.

Means of enforcement

In the first instance, we will aim to resolve non-compliance through correspondence with non-compliant employers intended to achieve resolution without the need to use our statutory powers. Where formal enforcement action is required, we will take action as set out below.

We will take a staged approach to enforcement by dividing employers by industry and initiating enforcement action against them in tranches. In order to ensure fairness and promote compliance, each tranche will comprise employers selected at random from within that industry, meaning that it will not be possible for a particular employer to predict when they will be selected for enforcement.

In 2018/19, we will aim to initiate enforcement action against all employers who have not reported their pay gap data.

Employers who submit data that has not been calculated in accordance with the GPGR will be in breach of the regulations and subject to enforcement action in the same way as those who publish no data at all. While we initially intend to drive up reporting by focusing on employers who do not publish any data, we have the means to identify employers who submit statistically improbable data and will consider taking action against them where it is reasonable and proportionate to do so.

We have set out indicative timescales below, within which we will aim to take certain actions once we commence enforcement action. These timescales are provided as a guide and may be shortened or lengthened dependent on factors such as the overall numbers of employers who do not comply. All specified timescales are in calendar days.

Initial resolution

When an employer (whether they are in the public, private or voluntary sector) has not complied with the GPGR, we will seek to resolve the issue without resorting to our enforcement powers in the first instance.

Where an employer does not comply with the GPGR by the relevant reporting date, we will write to them after that reporting date. The letter will:

- draw their attention to their obligations under the GPGR
- require them to comply with the GPGR retrospectively for the past reporting year within 28 days of our letter, and
- require them to comply with the GPGR on or before the relevant reporting date in the current reporting year.

We will then monitor the employer's compliance for both the past reporting year and the current reporting year. Where the employer complies, no further enforcement action will be taken in respect of those reporting years.

Section 20 Investigations

If a private or voluntary sector employer does not comply after our initial correspondence, we will carry out an investigation into whether they have committed the suspected unlawful act (breach of the GPGR) in accordance with our power under section 20. The steps required in a section 20 investigation are set out in Schedule 2 EA 2006.

We will:

- provide the employer with draft terms of reference for the investigation and allow the employer or their nominated legal representative 14 days to make written representations about the drafts terms of reference
- consider any representations and aim to publish the final terms of reference within a further 14 days
- gather and analyse any relevant evidence, including representations from third parties, within 14 days
- aim to provide the employer with a draft report within 14 days, then allow them a further 28 days to make representations on it, and

- consider those representations and aim to publish the final report within a further 14 days.

In seeking to gather evidence, we may give the employer a notice under paragraph 9 Schedule 2, requiring them to provide information and documents in their possession or to provide oral evidence. An employer may apply to the county or sheriff court under paragraph 11 Schedule 2 to have the notice set aside on the grounds that it is unnecessary or unreasonable.

We may apply to the court for an order requiring the employer to take the steps necessary to comply with the notice. An employer will commit an offence if it fails to comply with a notice or court order, falsifies anything provided in accordance with a notice or court order, or gives false oral evidence in response to a notice or court order and does not have a reasonable excuse for doing so. An employer who is convicted of such an offence will be liable to a 'level 5' fine, which means that there is no maximum limit on the amount that they may be fined.

Section 23 Agreements

Where any employer has failed to report their pay gap data in accordance with the GPGR, we would expect them to commit to publishing their data for the current reporting year on time. We may at any time offer the employer the opportunity to enter into an agreement under section 23 in which the employer undertakes to comply with the GPGR:

- retrospectively for the past reporting year within an agreed period, and
- for the current reporting year on time.

If an employer enters into a section 23 agreement, we will monitor for compliance within the agreed timescales for both reporting years. Where the employer complies with the agreed timescales, no further enforcement action will be taken in respect of those reporting years.

Section 24 Orders

If a private or voluntary sector employer enters a section 23 agreement but does not comply with it, we will apply to the county court in England and Wales or the sheriff

court in Scotland for an order under section 24 requiring the employer to comply with the undertakings given in the section 23 agreement.

We may decide not to seek an order if there are exceptional circumstances requiring a variation to the agreement. In the majority of circumstances, we will expect employers to anticipate their non-compliance with a section 23 agreement and to seek a variation with us in advance.

Section 21 Unlawful Act Notices and Section 22 Action Plans

If we conclude that the employer has breached the GPGR, we will issue an unlawful act notice in accordance with our power under section 21.

An unlawful act notice will require the employer to prepare a draft action plan under section 22 within 14 days, setting out how they will remedy their continuing breach of the GPGR and prevent future breaches.

If we do not receive a draft action plan, we will apply to the county court in England and Wales or the sheriff court in Scotland for an order requiring the employer to provide an action plan under section 22(6)(a) within a specified timeframe.

Within six weeks of receipt of a draft plan, we will either approve it or issue a further notice stating that the action plan is inadequate. Such a notice will require a further draft to be provided, and we will require receipt of the revised draft within 21 days of the notice.

An employer can make an appeal to the county court in England and Wales or the sheriff court in Scotland against the unlawful act notice within six weeks of the notice being issued, either on the basis that they deny they have committed an unlawful act or that they contend the requirement to prepare an action plan is unreasonable. On appeal, the court may affirm, annul or vary a notice or a requirement in the notice and make an order for costs or expenses.

The action plan will come into force after six weeks from our receipt of the draft if we do not ask for a revised draft and we have not applied to court for an order to require the employer to provide a further draft.

If an employer does not comply with an action plan, we will apply to the county court in England and Wales or the sheriff court in Scotland for an order requiring the employer to comply with it under section 22(6)(c), unless in the circumstances it would not be appropriate to do so.

An employer will commit an offence if it fails to comply with an order made against it under section 22(6) and does not have a reasonable excuse for doing so. An employer who is convicted of such an offence will be liable to a 'level 5' fine, which means that there is no maximum limit on the amount that they may be fined.

Section 31 Public Sector Duty Assessment and 32 Public Sector Duty Compliance Notice

When public sector employers in England have not published the information required by the GPGR, we will carry out an assessment of whether they have complied with a specific public sector duty in accordance with section 31. In this context, the specific public sector duty is to publish the information required by the GPGR.

The section 31 assessment will take the same format as a section 20 investigation, as set out above. This may include giving the employer a notice under paragraph 9 Schedule 2 EA 2006, requiring them to provide information and documents in their possession or to give oral evidence. An employer may apply to the county court in England and Wales or sheriff court in Scotland under paragraph 11 Schedule 2 to have the notice set aside on the grounds that it is unnecessary or unreasonable.

We may apply to the court for an order requiring the employer to take the necessary steps to comply with the notice. An employer will commit an offence if it fails to comply with a notice or court order, falsifies anything provided in accordance with a notice or court order, or gives false oral evidence in response to a notice or court order, and does not have a reasonable excuse for doing so. An employer who is convicted of such an offence will be liable to a 'level 5' fine, which means that there is no maximum limit on the amount that they may be fined.

If the conclusion reached following the assessment is that the employer has complied with the public sector duty, we will take no further action.

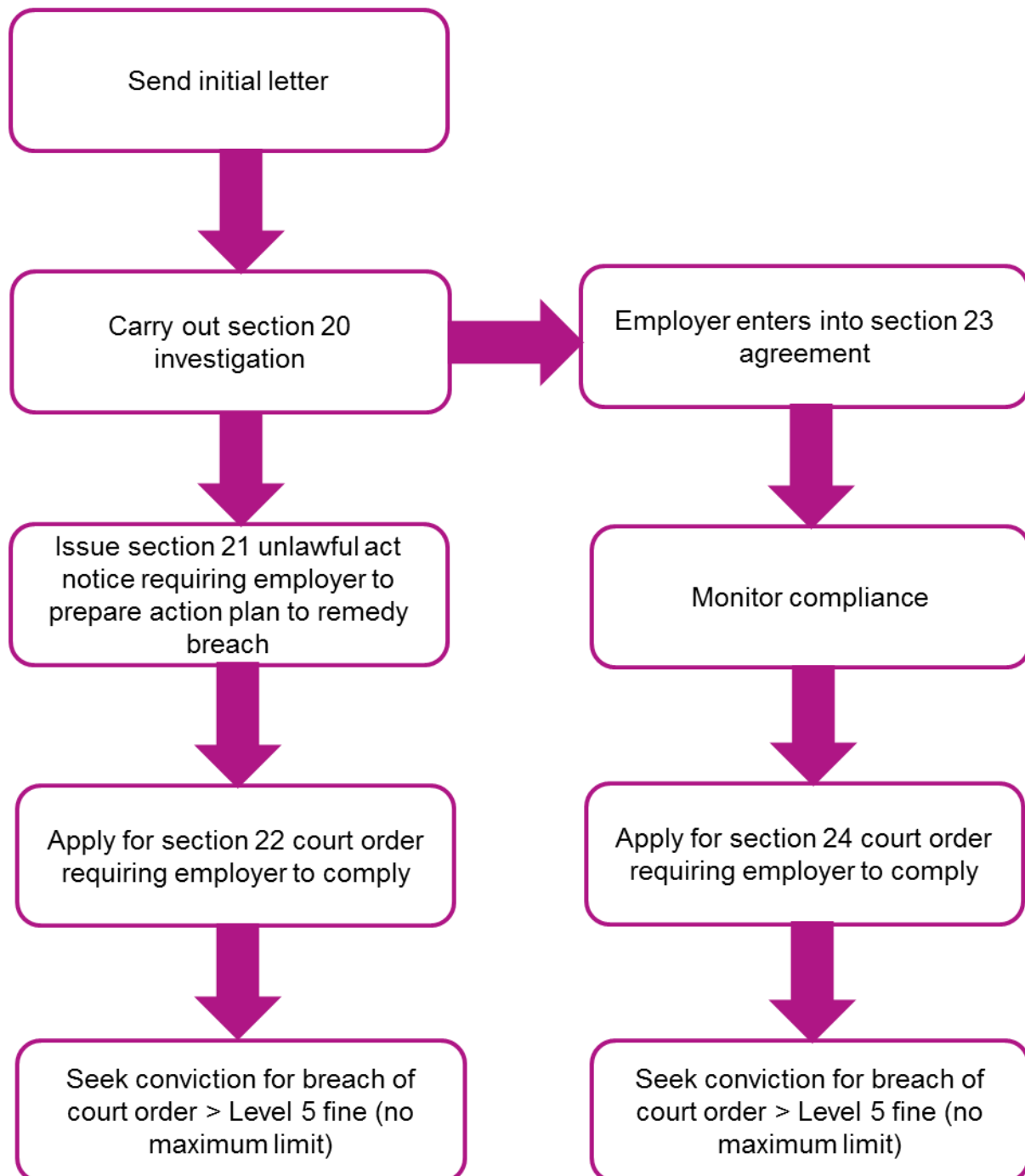
If the conclusion reached following assessment is that the employer has failed to comply, we will issue a notice under section 32. The notice will require the employer to comply with the duty to publish and to provide us, within 14 days of the notice, with written information of steps taken or proposed for the purpose of complying with the duty.

Where we think that an employer has failed to comply with a notice given under section 32, we will apply to the county court in England and Wales or the sheriff court in Scotland for an order requiring the employer to comply under section 32(8).

Public sector employers may be offered the opportunity to enter into a section 23 agreement as an alternative to our issuing a section 32 compliance notice, as set out above.

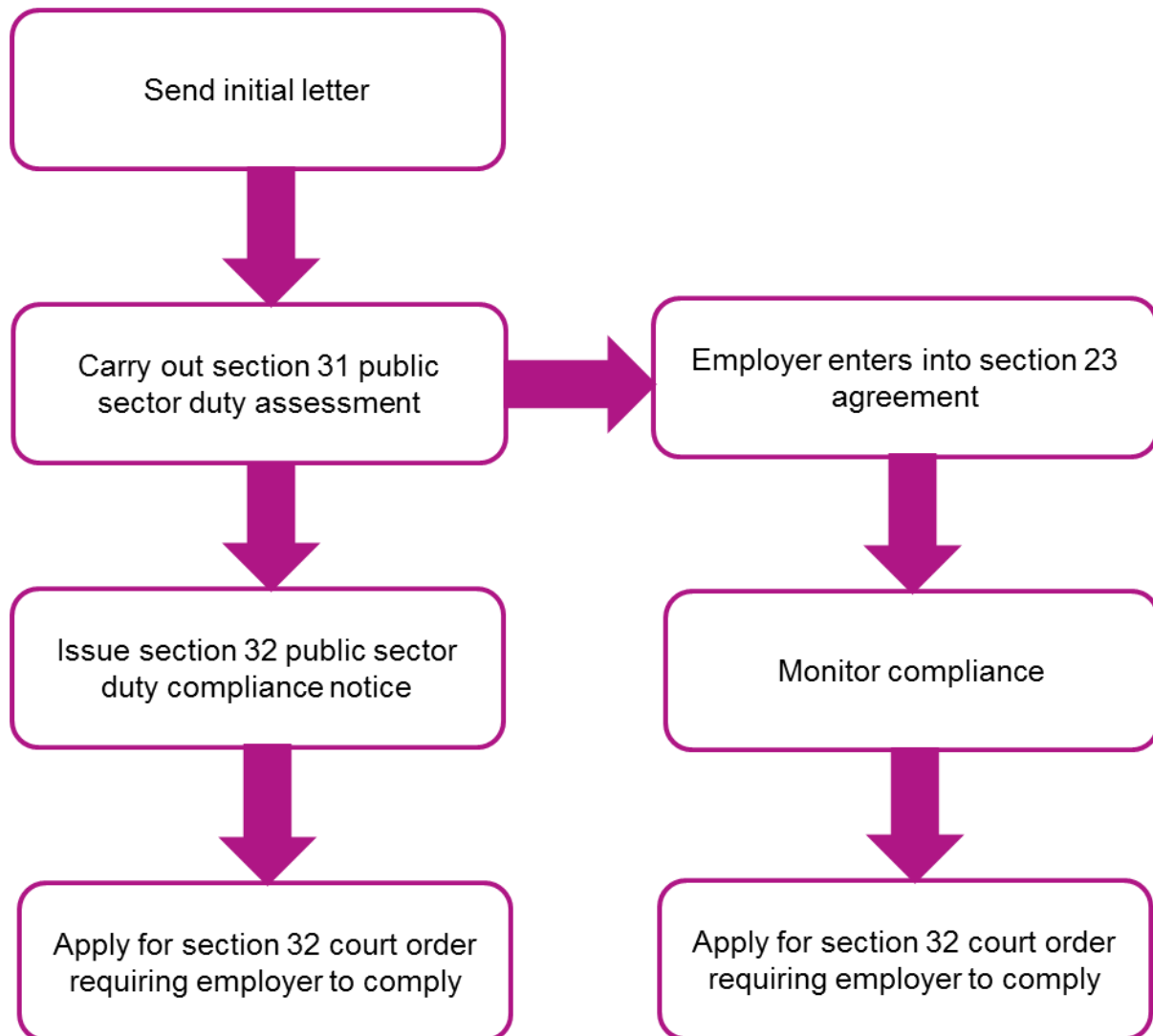
Enforcement flowchart: Private/voluntary sector

This chart illustrates key steps in the enforcement process in the event of continued non-compliance with the GPGR.



Enforcement flowchart: Public sector

This chart illustrates key steps in the enforcement process in the event of continued non-compliance with the GPGR.



Further information

Further information on our compliance and enforcement work can be found on [our website](#).

Requesting a review of one of our regulatory decisions

When deciding to take enforcement action in respect of the GPGR, we will make every effort to comply with this policy and with the Regulators' Code.

If your organisation is directly affected by one of our decisions relating to the use of our enforcement powers and you think that we have got it wrong, you can ask us to carry out a review. The review procedure can be found on [our website](#).

Complaints about operation of policy

We will strive to ensure that this policy is applied fairly and consistently. Please read our [complaint policy and procedure](#) if you wish to make a complaint about the operation of this policy.

This policy will be reviewed regularly.

Contacts

This publication and related equality and human rights resources are available from the Commission's [website](#).

Questions and comments regarding this publication may be addressed to: correspondence@equalityhumanrights.com. The Commission welcomes your feedback.

Alternative formats

This publication is also available as a Microsoft Word file from the Commission's [website](#). For information on accessing a Commission publication in an alternative format, please contact: correspondence@equalityhumanrights.com.

© 2018 Equality and Human Rights Commission

Published: March 2018

You can download this publication from

www.equalityhumanrights.com

© 2018 Equality and Human Rights Commission

Published: March 2018