

2005 No. 2467

SEX DISCRIMINATION

**The Employment Equality (Sex Discrimination) Regulations
2005**

<i>Made</i> - - - -	<i>5th September 2005</i>
<i>Laid before Parliament</i>	<i>7th September 2005</i>
<i>Coming into force</i> - -	<i>1st October 2005</i>

The Secretary of State, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to discrimination(b), in exercise of the powers conferred upon him by that section, hereby makes the following Regulations:

Citation, commencement, extent and interpretation

1.—(1) These Regulations may be cited as the Employment Equality (Sex Discrimination) Regulations 2005 and shall come into force on 1st October 2005.

(2) These Regulations do not extend to Northern Ireland.

(3) The repeal made by regulation 20(2) does not extend to the Isle of Man or the Channel Islands.

(4) In these Regulations “the 1975 Act” means the Sex Discrimination Act 1975(c) and “the 1970 Act” means the Equal Pay Act 1970(d).

Transitional provisions

2.—(1) The amendments made by regulations 28(3), 29(3), 30(3) and 31(2) do not apply in relation to proceedings where the act complained of took place before 1st October 2005.

(2) The amendment made to section 74 of the 1975 Act by regulation 32 shall not apply in the case of a question served on a respondent before 1st October 2005.

(3) In paragraph (2) “question” and “respondent” shall be construed in accordance with section 74 of the 1975 Act.

Indirect discrimination

3.—(1) In the 1975 Act, in section 1(2), for paragraph (b) (definition of indirect discrimination) substitute—

“(b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but—

(a) 1972 c.68.

(b) See the European Communities (Designation) (No. 3) Order 2002 (S.I. 2002/1819).

(c) 1975 c.65.

(d) 1970 c.41.

- (i) which puts or would put women at a particular disadvantage when compared with men,
- (ii) which puts her at that disadvantage, and
- (iii) which he cannot show to be a proportionate means of achieving a legitimate aim.”.

(2) In the 1975 Act, in section 3(1), as substituted by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001(a), for paragraph (b) (definition of indirect discrimination against married people) substitute—

“(b) he applies to that person a provision, criterion or practice which he applies or would apply equally to an unmarried person, but—

- (i) which puts or would put married persons at a particular disadvantage when compared with unmarried persons of the same sex,
- (ii) which puts that person at that disadvantage, and
- (iii) which he cannot show to be a proportionate means of achieving a legitimate aim.”.

Discrimination on the ground of pregnancy or maternity leave

4. In the 1975 Act, after section 3 (discrimination against married persons in employment field), insert—

“Discrimination on the ground of pregnancy or maternity leave

3A.—(1) In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if—

- (a) at a time in a protected period, and on the ground of the woman’s pregnancy, the person treats her less favourably than he would treat her had she not become pregnant; or
- (b) on the ground that the woman is exercising or seeking to exercise, or has exercised or sought to exercise, a statutory right to maternity leave, the person treats her less favourably than he would treat her if she were neither exercising nor seeking to exercise, and had neither exercised nor sought to exercise, such a right.

(2) In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if, on the ground that section 72(1) of the Employment Rights Act 1996 (compulsory maternity leave) has to be complied with in respect of the woman, he treats her less favourably than he would treat her if that provision did not have to be complied with in respect of her.

(3) For the purposes of subsection (1)—

- (a) in relation to a woman, a protected period begins each time she becomes pregnant, and the protected period associated with any particular pregnancy of hers ends in accordance with the following rules—
 - (i) if she is entitled to ordinary but not additional maternity leave in connection with the pregnancy, the protected period ends at the end of her period of ordinary maternity leave connected with the pregnancy or, if earlier, when she returns to work after the end of her pregnancy;
 - (ii) if she is entitled to ordinary and additional maternity leave in connection with the pregnancy, the protected period ends at the end of her period of additional maternity leave connected with the pregnancy or, if earlier, when she returns to work after the end of her pregnancy;

(a) S.I. 2001/2660.

- (iii) if she is not entitled to ordinary maternity leave in respect of the pregnancy, the protected period ends at the end of the 2 weeks beginning with the end of the pregnancy;
 - (b) where a person's treatment of a woman is on grounds of illness suffered by the woman as a consequence of a pregnancy of hers, that treatment is to be taken to be on the ground of the pregnancy;
 - (c) a "statutory right to maternity leave" means a right conferred by section 71(1) or 73(1) of the Employment Rights Act 1996 (ordinary and additional maternity leave).
- (4) In subsection (3) "ordinary maternity leave" and "additional maternity leave" shall be construed in accordance with sections 71 and 73 of the Employment Rights Act 1996.
- (5) Subsections (1) and (2) apply to—
- (a) any provision of Part 2,
 - (b) sections 35A and 35B, and
 - (c) any other provision of Part 3, so far as it applies to vocational training."

Harassment and Sexual Harassment

5. In the 1975 Act, after section 4 (discrimination by way of victimisation), insert—

"Harassment, including sexual harassment

4A.—(1) For the purposes of this Act, a person subjects a woman to harassment if—

- (a) on the ground of her sex, he engages in unwanted conduct that has the purpose or effect—
 - (i) of violating her dignity, or
 - (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her,
- (b) he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect—
 - (i) of violating her dignity, or
 - (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or
- (c) on the ground of her rejection of or submission to unwanted conduct of a kind mentioned in paragraph (a) or (b), he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct.

(2) Conduct shall be regarded as having the effect mentioned in sub-paragraph (i) or (ii) of subsection (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of the woman, it should reasonably be considered as having that effect.

(3) For the purposes of this Act, a person ("A") subjects another person ("B") to harassment if—

- (a) A, on the ground that B intends to undergo, is undergoing or has undergone gender reassignment, engages in unwanted conduct that has the purpose or effect—
 - (i) of violating B's dignity, or
 - (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, or
- (b) A, on the ground of B's rejection of or submission to unwanted conduct of a kind mentioned in paragraph (a), treats B less favourably than A would treat B had B not rejected, or submitted to, the conduct.

(4) Conduct shall be regarded as having the effect mentioned in sub-paragraph (i) or (ii) of subsection (3)(a) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.

(5) Subsection (1) is to be read as applying equally to the harassment of men, and for that purpose shall have effect with such modifications as are requisite.

(6) For the purposes of subsections (1) and (3), a provision of Part 2 or 3 framed with reference to harassment of women shall be treated as applying equally to the harassment of men, and for that purpose will have effect with such modifications as are requisite.”.

Amendments to 1975 Act interpretation provisions

6. In section 5 of the 1975 Act (interpretation), in subsection (1)(b) (references to sex discrimination), for “section 1 or 2” substitute “section 1, 2 or 3A”.

Applicants and employees

7.—(1) In the heading to Part 2, for “DISCRIMINATION IN THE EMPLOYMENT FIELD” substitute “EMPLOYMENT FIELD”.

(2) Section 6 of the 1975 Act (discrimination against applicants and employees) is amended as follows.

(3) In the heading, omit “Discrimination against”.

(4) After subsection (2) insert—

“(2A) It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to subject to harassment—

(a) a woman whom he employs, or

(b) a woman who has applied to him for employment.”.

Terms and conditions of employment during maternity leave

8. In the 1975 Act, after section 6 (discrimination against applicants and employees), insert—

“Exception relating to terms and conditions during maternity leave

6A.—(1) Subject to subsections (2) and (5), section 6(1)(b) and (2) does not make it unlawful to deprive a woman who is on ordinary maternity leave of any benefit from the terms and conditions of her employment relating to remuneration.

(2) Subsection (1) does not apply to benefit by way of maternity-related remuneration.

(3) Subject to subsections (4) and (5), section 6(1)(b) and (2) does not make it unlawful to deprive a woman who is on additional maternity leave of any benefit from the terms and conditions of her employment.

(4) Subsection (3) does not apply to—

(a) benefit by way of maternity-related remuneration,

(b) the benefit of her employer’s implied obligation to her of trust and confidence, or

(c) any benefit of terms and conditions in respect of—

(i) notice of the termination by her employer of her contract of employment,

(ii) compensation in the event of redundancy,

(iii) disciplinary or grievance procedures, or

(iv) membership of a pension scheme.

(5) Neither of subsections (1) and (3) applies to—

- (a) benefit by way of remuneration in respect of times when the woman is neither on ordinary maternity leave nor on additional maternity leave, including increase-related remuneration in respect of such times; or
- (b) benefit by way of maternity-related remuneration that is increase-related.

(6) For the purposes of subsection (5), remuneration is increase-related so far as it falls to be calculated by reference to increases in remuneration that the woman would have received had she not been on ordinary or additional maternity leave.

(7) In this section—

“maternity-related remuneration”, in relation to a woman, means remuneration to which she is entitled as a result of being pregnant or being on ordinary or additional maternity leave;

“on additional maternity leave” means absent from work in exercise of the right conferred by section 73(1) of the Employment Rights Act 1996;

“on ordinary maternity leave” means absent from work in exercise of the right conferred by section 71(1) of that Act (ordinary maternity leave) or in consequence of the prohibition in section 72(1) of that Act (compulsory maternity leave);

“remuneration” means benefits—

- (a) that consist of the payment of money to an employee by way of wages or salary, and
- (b) that are not benefits whose provision is regulated by the employee’s contract of employment.”.

Genuine occupational qualifications

9. In section 7B of the 1975 Act (supplementary exceptions relating to gender reassignment), after subsection (3), insert—

“(4) Paragraph (a) of subsection (2) does not apply in relation to the filling of a vacancy at a time when the employer already has employees falling within subsection (5)—

- (a) who are capable of carrying out the duties falling within that paragraph, and
- (b) whom it would be reasonable to employ on those duties, and
- (c) whose numbers are sufficient to meet the employer’s likely requirements in respect of those duties without undue inconvenience.

(5) An employee falls within this subsection if the employee does not intend to undergo and is not undergoing gender reassignment and either—

- (a) the employee has not undergone gender reassignment; or
- (b) the employee’s gender has become the acquired gender under the Gender Recognition Act 2004(a).”.

Contract workers

10.—(1) Section 9 of the 1975 Act (discrimination against contract workers) is amended as follows.

(2) In the heading, omit “Discrimination against”.

(3) In subsection (1), after “work”, insert “at an establishment in Great Britain,”.

(a) 2004 c. 7.

(4) After subsection (2) insert—

“(2A) It is unlawful for a principal, in relation to contract work at an establishment in Great Britain, to subject a contract worker to harassment.”.

Territorial Extent

11.—(1) Section 10 of the 1975 Act (meaning of employment at an establishment in Great Britain) is amended as follows.

(2) For subsection (1) substitute—

“(1) For the purposes of this Part and section 1 of the Equal Pay Act 1970 (“the relevant purposes”), employment is to be regarded as being at an establishment in Great Britain if—

- (a) the employee does his work wholly or partly in Great Britain, or
- (b) the employee does his work wholly outside Great Britain and subsection (1A) applies.

(1A) This subsection applies if—

- (a) the employer has a place of business at an establishment in Great Britain,
- (b) the work is for the purposes of the business carried on at that establishment, and
- (c) the employee is ordinarily resident in Great Britain—
 - (i) at the time when he applies for or is offered the employment, or
 - (ii) at any time during the course of the employment.”.

(3) In subsection 2(a), after “ship”, insert “, only if the ship is”.

(4) In subsection 2(b), after the word “hovercraft”, insert “, only if the aircraft or hovercraft is”.

(5) In subsection (3), for “, and outside any area added under subsection (5)” substitute “and subsection (1A) does not apply”.

(6) In subsection (5), for “provide that subsections (1) and (2) shall each have effect as if the last reference to Great Britain included” substitute—

“provide that subsections (1) and (3) shall have effect as if—

- (a) the reference to Great Britain in each of paragraphs (a) and (b) of subsection (1), and
 - (b) each of the references to Great Britain in subsections (1A) to (3),
- included”.

(7) After subsection (7) insert—

“(8) Subsections (1) to (4) or, where an Order in Council under subsection (5) is in force, those subsections as modified by the Order, apply for the purposes of determining whether contract work, within the meaning given by section 9, is at an establishment in Great Britain, but so apply with the following modifications—

- (a) a reference to employment is to be read as a reference to work to which section 9 applies, and
- (b) “employee” and “employer” shall be read (respectively) as “contract worker” and “principal”, with “contract worker” and “principal” having the meaning given by section 9.”.

12.—(1) In article 2(1) of the Sex Discrimination and Equal Pay (Offshore Employment) Order 1987(a), for “subsections (1) and (2) of section 10 of the 1975 Act shall each have effect as if the last reference to Great Britain in each of those subsections included” substitute “subsections (1) and (3) of section 10 of the 1975 Act shall have effect as if the reference to Great Britain in each

(a) S.I. 1987/930.

of paragraphs (a) and (b) of subsection (1) of that section, and each of the references to Great Britain in subsections (1A) to (3) of that section, included”.

(2) For the purposes of any power to amend or revoke the Order, the amendment made by paragraph (1) shall be taken to have been made by Order in Council under section 10(5) of the 1975 Act.

Office holders

13.—(1) In the 1975 Act, after section 10 (meaning of employment at establishment in Great Britain), insert—

“Discrimination against office-holders etc.

Offices and posts to which section 10B applies

10A.—(1) Subject to subsections (2) and (3), section 10B applies to an office or post if—

- (a) the office or post is one—
 - (i) to which persons are appointed to discharge functions personally under the direction of another person, and
 - (ii) in respect of which they are entitled to remuneration,
- (b) the office or post is one to which appointments are made by a Minister of the Crown, a government department, the National Assembly for Wales or any part of the Scottish Administration, or
- (c) the office or post is one to which appointments are made on the recommendation of, or subject to the approval of, a person referred to in paragraph (b).

(2) Section 10B does not apply to an office or post if section 6 (employment), section 9 (contract work), section 11 (partnerships), section 35A (barristers) or section 35B (advocates)—

- (a) applies in relation to an appointment to the office or post, or
- (b) would apply in relation to an appointment to the office or post but for the operation of any other provision of this Act.

(3) Section 10B does not apply to—

- (a) any office of the House of Commons held by a member of it,
- (b) a life peerage within the meaning of the Life Peerages Act 1958, or any office of the House of Lords held by a member of it,
- (c) any office mentioned in Schedule 2 (Ministerial offices) to the House of Commons Disqualification Act 1975,
- (d) the offices of Leader of the Opposition, Chief Opposition Whip or Assistant Opposition Whip within the meaning of the Ministerial and other Salaries Act 1975,
- (e) any office of the Scottish Parliament held by a member of it,
- (f) a member of the Scottish Executive within the meaning of section 44 of the Scotland Act 1998, or a junior Scottish Minister within the meaning of section 49 of that Act,
- (g) any office of the National Assembly for Wales held by a member of it,
- (h) in England, any office of a county council, a London borough council, a district council or a parish council held by a member of it,
- (i) in Wales, any office of a county council, a county borough council or a community council held by a member of it,
- (j) in relation to a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994, or a community council established under section 51 of the

Local Government (Scotland) Act 1973, any office of such a council held by a member of it,

- (k) any office of the Greater London Authority held by a member of it,
- (l) any office of the Common Council of the City of London held by a member of it,
- (m) any office of the Council of the Isles of Scilly held by a member of it, or
- (n) any office of a political party.

(4) For the purposes of subsection (1)(a), the holder of an office or post—

- (a) is to be regarded as discharging her functions under the direction of another person if that other person is entitled to direct her as to when and where she discharges those functions;
- (b) is not to be regarded as entitled to remuneration merely because she is entitled to payments—
 - (i) in respect of expenses incurred by her in carrying out the functions of the office or post, or
 - (ii) by way of compensation for the loss of income or benefits she would or might have received from any person had she not been carrying out the functions of the office or post.

(5) In this section and section 10B, appointment to an office or post does not include election to an office or post.

Office-holders

10B.—(1) It is unlawful for a relevant person, in relation to an appointment to an office or post to which this section applies, to discriminate against a woman—

- (a) in the arrangements which he makes for the purpose of determining to whom the appointment should be offered,
- (b) in the terms on which he offers her the appointment, or
- (c) by refusing to offer her the appointment.

(2) It is unlawful, in relation to an appointment to an office or post to which this section applies and which is an office or post referred to in section 10A(1)(c), for a relevant person on whose recommendation, or subject to whose approval, appointments to the office or post are made, to discriminate against a woman—

- (a) in the arrangements which he makes for the purpose of determining who should be recommended or approved in relation to the appointment, or
- (b) in making or refusing to make a recommendation, or giving or refusing to give an approval, in relation to the appointment.

(3) It is unlawful for a relevant person, in relation to a woman who has been appointed to an office or post to which this section applies, to discriminate against her—

- (a) in the terms of the appointment,
- (b) in the opportunities which he affords her for promotion, a transfer, training or receiving any other benefit, or by refusing to afford her any such opportunity,
- (c) by terminating the appointment, or
- (d) by subjecting her to any other detriment in relation to the appointment.

(4) It is unlawful for a relevant person, in relation to an office or post to which this section applies, to subject to harassment a woman—

- (a) who has been appointed to the office or post,
- (b) who is seeking or being considered for appointment to the office or post, or
- (c) who, in relation to appointment to the office or post, is seeking or being considered for a recommendation or approval referred to in section 10A(1)(c).

(5) Subsections (1) and (3) do not apply to any act in relation to an office or post where, if holding the office or post constituted employment, that act would be lawful by virtue of section 7, 7A or 7B (exception where sex is a genuine occupational qualification etc.) or section 19 (ministers of religion etc.).

(6) Subsection (2) does not apply to any act in relation to an office or post where, if holding the office or post constituted employment, it would be lawful by virtue of section 7, 7A, 7B or 19 to refuse to offer the person such employment.

(7) Subsection (3) does not apply to benefits of any description if the relevant person is concerned with the provision (for payment or not) of benefits of that description to the public, or a section of the public to which the person appointed belongs, unless—

- (a) that provision differs in a material respect from the provision of the benefits to persons appointed to offices or posts which are the same as, or not materially different from, that which the person appointed holds,
- (b) the provision of the benefits to the person appointed is regulated by the terms and conditions of her appointment, or
- (c) the benefits relate to training.

(8) In subsection (3)(c), the reference to the termination of the appointment includes a reference—

- (a) to the termination of the appointment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the appointment is renewed on the same terms and conditions, and
- (b) to the termination of the appointment by any act of the person appointed (including the giving of notice) in circumstances such that she is entitled to terminate the appointment without notice by reason of the conduct of the relevant person.

(9) In this section “relevant person”, in relation to an office or post, means—

- (a) in a case relating to an appointment to an office or post, the person with power to make that appointment;
- (b) in a case relating to the making of a recommendation or the giving of an approval in relation to an appointment, a person or body referred to in section 10A(1)(b) with power to make that recommendation or (as the case may be) to give that approval;
- (c) in a case relating to a term of an appointment, the person with power to determine that term;
- (d) in a case relating to a working condition afforded in relation to an appointment—
 - (i) the person with power to determine that working condition, or
 - (ii) where there is no such person, the person with power to make the appointment;
- (e) in a case relating to the termination of an appointment, the person with power to terminate the appointment;
- (f) in a case relating to the subjection of a person to any other detriment or to harassment, any person or body falling within one or more of paragraphs (a) to (e) in relation to such cases as are there mentioned.

(10) In subsection (9)(d) “working condition” includes any opportunity for promotion, a transfer, training or receiving any other benefit.

(11) In this section—

- (a) references to making a recommendation include references to making a negative recommendation;
- (b) references to refusal include references to deliberate omission;
- (c) “benefits” includes facilities and services.”.

(2) In the 1975 Act, section 86 (Government appointments outside section 6) is repealed.

Partnerships

14.—(1) Section 11 of the 1975 Act (partnerships), is amended as follows.

(2) After subsection (2) insert—

“(2A) It is unlawful for a firm, in relation to a position as partner in the firm, to subject to harassment a woman who holds or has applied for that position.”.

(3) Omit subsection (4) (which restricts the prohibition on discrimination in relation to death and retirement benefits).

(4) In section 2 of the Sex Discrimination Act 1986(a), omit subsection (2).

Trade unions

15.—(1) Section 12 of the 1975 Act (trade unions etc.) is amended as follows.

(2) After subsection (3) insert—

“(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.”.

(3) Omit subsection (4) (which restricts the prohibition on discrimination in relation to death and retirement benefits).

Qualifying bodies

16.—(1) Section 13 of the 1975 Act (qualifying bodies) is amended as follows.

(2) After subsection (1) insert—

“(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.”.

(3) After subsection (4) insert—

“(5) Subsection (1A) does not apply to harassment which is rendered unlawful by section 22 or 23.”.

Vocational training

17.—(1) In section 14 of the 1975 Act (persons concerned with provision of vocational training), for subsection (1) substitute—

“(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.

(a) 1986 c. 59.

(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) In the 1975 Act, paragraph (a) of section 52A (construction of references to vocational training) is repealed.

Employment agencies

18.—(1) Section 15 of the 1975 Act (employment agencies) is amended as follows.

(2) After subsection (1) insert—

“(1A) It is unlawful for an employment agency, in relation to the provision of its services, to subject to harassment a woman—

- (a) to whom it provides such services, or
- (b) who has requested the provision of such services.”.

Assisting persons to obtain employment

19.—(1) Section 16 of the 1975 Act (Training Commission etc.) is amended as follows.

(2) In subsection (1), after “discriminate”, insert “, or subject a woman to harassment”.

(3) In subsection (1A), after “discriminate”, insert “, or subject a woman to harassment”.

Clergy

20.—(1) For section 19 of the 1975 Act (ministers of religion etc.) substitute—

“**19.**—(1) Nothing in this Part shall make it unlawful to apply a requirement in relation to employment where—

- (a) the employment is for purposes of an organised religion,
- (b) the requirement is one to which subsection (3) applies, and
- (c) the requirement is applied—
 - (i) so as to comply with the doctrines of the religion, or
 - (ii) because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly-held religious convictions of a significant number of the religion’s followers.

(2) Nothing in section 13 shall make it unlawful to apply a requirement in relation to an authorisation or qualification (as defined in that section) where—

- (a) the authorisation or qualification is for purposes of an organised religion,
- (b) the requirement is one to which subsection (3) applies, and
- (c) the requirement is applied—
 - (i) so as to comply with the doctrines of the religion, or
 - (ii) by the authority or body concerned, or by the person by whom the authority or body acts in a particular case, so as to avoid conflicting with the strongly-held religious convictions of a significant number of the religion’s followers.

(3) This subsection applies to—

- (a) a requirement to be of a particular sex,
- (b) a requirement not to be undergoing or to have undergone gender reassignment,

- (c) a requirement relating to not being married or to not being a civil partner,
- (d) a requirement, applied in relation to a person who is married, or is a civil partner, that relates—
 - (i) to the person, or the person’s spouse or civil partner, not having a living former spouse or a living former civil partner, or
 - (ii) to how the person, or the person’s spouse or civil partner, has at any time ceased to be married or ceased to be a civil partner.”.
- (2) Section 6 of the Priests (Ordination of Women) Measure 1993 (No. 2)(a) is repealed.
- (3) Regulation 5 of the Sex Discrimination (Gender Reassignment) Regulations 1999(b) is revoked.

Relationships which have come to an end: Part 2 of 1975 Act

21. In section 20A of the 1975 Act (relationships which have come to an end), after subsection (3), insert—

“(4) It is unlawful for the relevant person to subject a woman to harassment where that treatment arises out of or is closely connected to the relevant relationship.”.

Educational establishments

22.—(1) In the heading to section 22 of the 1975 Act (discrimination by bodies in charge of educational establishments), omit the words “Discrimination by”.

(2) The existing provisions of the section (including the table) shall become subsection (1) of the section.

(3) After the subsection (1) so formed insert—

“(2) It is unlawful for the governing body of an institution of further or higher education to discriminate against a woman in the arrangements it makes for the purpose of selecting people for admission to the institution.

(3) It is unlawful for the governing body of an institution of further or higher education to subject a woman to harassment if that woman is a student at the institution or has applied for admission to the institution.

(4) In subsections (2) and (3) “institution of further or higher education” means—

- (a) in England and Wales, an establishment falling within column 1 of paragraph 3B, 4 or 4A of the table in subsection (1);
- (b) in Scotland—
 - (i) a college of further education within the meaning given by section 36(1) of the Further and Higher Education (Scotland) Act 1992 under the management of a board of management within the meaning of Part I of that Act,
 - (ii) a college of further education managed by an education authority in the exercise of its functions in providing courses of further education within the meaning of section 1(5)(b)(ii) of the Education (Scotland) Act 1980,
 - (iii) any other educational establishment (not being a school) which provides further education within the meaning of section 1 of the Further and Higher Education (Scotland) Act 1992,
 - (iv) an institution within the higher education sector (within the meaning of Part II of the Further and Higher Education (Scotland) Act 1992), or
 - (v) a central institution (within the meaning of section 135 of the Education (Scotland) Act 1980).”.

(a) 1993 No. 2.
 (b) S.I. 1999/1102.

- (4) In section 26 of the 1975 Act (exception for single-sex establishments)—
- (a) in subsection (1), for “Section 22(a) and (b)” substitute “Section 22(1)(a) and (b)”;
 - (b) in subsection (2), for “sections 22(a) and (b)”, substitute “sections 22(1)(a) and (b)”, and for “sections 22(c)(i)”, substitute “sections 22(1)(c)(i)”.
- (5) In section 27 of the 1975 Act (exception for single-sex establishments turning co-educational), in subsection (1), for “section 22”, substitute “section 22(1)”.

Exception for physical training

- 23.**—(1) In the 1975 Act—
- (a) section 28 (exception for physical training) is repealed, and
 - (b) in section 35 (further exceptions from sections 29(1) and 30), in the table, for “Sections 26, 27 and 28” substitute “Sections 26 and 27”.
- (2) The following provisions are repealed—
- (a) paragraph 8 of Schedule 9 to the Learning and Skills Act 2000^(a); and
 - (b) paragraph 75 of Schedule 12 to the Education Reform Act 1988^(b).

Barristers

- 24.**—(1) Section 35A of the 1975 Act (discrimination by, or in relation to, barristers) is amended as follows.
- (2) In the heading omit “Discrimination by, or in relation to,”.
- (3) After subsection (2) insert—
- “(2A) It is unlawful for a barrister or barrister’s clerk, in relation to a pupillage or tenancy, to subject to harassment a person who is, or who has applied to be, a pupil or tenant in the set of chambers concerned.”.
- (4) In subsection (3), for “to discriminate against a woman” substitute—
- “to—
- (a) discriminate against a woman by subjecting her to a detriment, or
 - (b) subject a woman to harassment.”.
- (5) In subsection (4), after “chambers”, insert “, but “tenant” shall also include any barrister permitted to work in a set of chambers who is not a tenant (and “tenancy” shall be construed accordingly).”.

Advocates

- 25.**—(1) Section 35B of the 1975 Act (discrimination by, or in relation to advocates) is amended as follows.
- (2) In the heading, omit “Discrimination by, or in relation to,”.
- (3) After subsection (2) insert—
- “(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.”.
- (4) In subsection (3), after the word “woman”, insert “by subjecting her to a detriment or to subject her to harassment”.

(a) 2000 c. 21.
(b) 1988 c. 40.

Relationships which have come to an end: Part 3 of 1975 Act

26. In section 35C (relationships which have come to an end), after subsection (3), insert—

“(4) It is unlawful for the relevant person to subject a woman to harassment where that treatment arises out of or is closely connected to the relevant relationship.”.

Equal Opportunities Commission

27.—(1) In section 53 of the 1975 Act (establishment and duties of Commission), in subsection (1), after paragraph (a), insert—

“(aa) to work towards the elimination of harassment that is contrary to any of the provisions of this Act;”.

(2) In section 56A of the 1975 Act (codes of practice), in subsection (1), after paragraph (a), insert—

“(aa) the elimination in that field of harassment that is contrary to the provisions of this Act;”.

(3) In section 59 of the 1975 Act (power to obtain information), in subsection (2)(b)(i), for “discriminatory acts” substitute “acts of discrimination or harassment”.

Jurisdiction of employment tribunals

28.—(1) Section 63 of the 1975 Act (jurisdiction of employment tribunals) is amended as follows.

(2) In subsection (1), after “discrimination” in both places where it occurs, insert “or harassment”.

(3) In subsection (1)(a), after “Part II” insert “or section 35A or 35B”.

Burden of proof: employment tribunals

29.—(1) Section 63A of the 1975 Act (burden of proof: employment tribunals) is amended as follows.

(2) In subsection (2), after “discrimination” in both places where it occurs, insert “or harassment”.

(3) In subsection (2)(a), after “Part 2” insert “or section 35A or 35B”.

Enforcement of claims under Part 3 of 1975 Act

30.—(1) Section 66 of the 1975 Act (claims under Part 3) is amended as follows.

(2) In subsection (1), after “discrimination” in both places where it occurs, insert “or harassment”.

(3) In subsection (1)(a), after “Part III,” insert “other than section 35A or 35B,”

(4) In subsection (4), after “discrimination”, insert “or harassment”.

(5) In subsection (5), after “discriminated against”, insert “, or subjected to harassment,”.

Burden of proof: county and sheriff courts

31.—(1) Section 66A of the 1975 Act (burden of proof: county and sheriff courts) is amended as follows.

(2) For subsection (2)(a) substitute—

“(a) has committed an act of discrimination or harassment against the claimant which is unlawful by virtue of any provision of Part 3 so far as it applies to vocational training, or”.

(3) In subsection (2)(b), after “discrimination” insert “or harassment”.

Period within which respondent must reply

32.—(1) Section 74 of the 1975 Act (help for aggrieved persons in obtaining information, etc.) is amended as follows.

(2) In subsection (1), after “discriminated against”, insert “or subjected to harassment”.

(3) In subsection (2)(b) (inferences for failure to reply), for “a reasonable period” substitute “the period applicable under subsection (2A)”.

(4) After subsection (2) insert—

“(2A) The period applicable for the purposes of subsection (2)(b) is—

(a) eight weeks beginning with the day when the question was served on the respondent, if the question relates to discrimination under—

(i) any provision of Part 2,

(ii) section 35A or 35B, or

(iii) any other provision of Part 3, so far as it applies to vocational training;

(b) a reasonable period, as regards any other question.”.

Definitions

33.—(1) Section 82(1) of the 1975 Act (general interpretation provisions) is amended as follows.

(2) After the definition of “designate” insert—

“references in Parts 2 and 3 to subjecting a person to a detriment do not include subjecting a person to harassment;”.

(3) After the definition of “Great Britain” insert—

“references to subjecting a person to harassment, and to acts of harassment, shall be construed in accordance with section 4A;”.

(4) After the definition of “university” insert—

““vocational training”—

(a) means all types, and all levels, of—

(i) vocational training, advanced vocational training and retraining, and

(ii) vocational guidance, and

(b) includes practical work experience undertaken for a limited period for the purposes of a person’s vocational training (as defined by paragraph (a));”.

Cadet forces

34. In section 85 of the 1975 Act (application to Crown), omit subsection (5) (which makes an exception for discrimination in respect of admission to various cadet forces).

Amendments to Equal Pay Act 1970: office holders

35.—(1) The 1970 Act is amended as follows.

(2) In section 1 (requirement of equal treatment for men and women in same employment), after subsection (6), insert—

“(6A) This section applies to—

(a) the holding of an office or post to which persons are appointed to discharge functions personally under the direction of another person, and in respect of which they are entitled to remuneration, or

- (b) any office or post to which appointments are made by (or on the recommendation of or subject to the approval of) a Minister of the Crown, a government department, the National Assembly for Wales or any part of the Scottish Administration,

as it applies to employment by a private person, and shall so apply as if references to a contract of employment included references to the terms of appointment, and as if references to the employer included references to the person responsible for paying any remuneration that a holder of the office or post is entitled to in respect of the office or post.

(6B) For the purposes of subsection (6A), the holder of an office or post—

- (a) is to be regarded as discharging her functions under the direction of another person if that other person is entitled to direct her as to when and where she discharges those functions;
- (b) is not to be regarded as entitled to remuneration merely because she is entitled to payments—
 - (i) in respect of expenses incurred by her in carrying out the functions of the office or post, or
 - (ii) by way of compensation for the loss of income or benefits she would or might have received from any person had she not been carrying out the functions of the office or post.

(6C) For the purposes of subsection (6A)—

- (a) “office or post” does not include a political office (see section 1A), and
- (b) appointment to an office or post does not include election to an office or post.”.

(3) After section 1 insert—

“Meaning of “political office” in section 1(6C)(a)

1A. The following are political offices for the purposes of section 1(6C)(a)—

- (a) any office of the House of Commons held by a member of it,
- (b) a life peerage within the meaning of the Life Peerages Act 1958, or any office of the House of Lords held by a member of it,
- (c) any office mentioned in Schedule 2 (Ministerial offices) to the House of Commons Disqualification Act 1975,
- (d) the offices of Leader of the Opposition, Chief Opposition Whip or Assistant Opposition Whip within the meaning of the Ministerial and other Salaries Act 1975,
- (e) any office of the Scottish Parliament held by a member of it,
- (f) a member of the Scottish Executive within the meaning of section 44 of the Scotland Act 1998, or a junior Scottish Minister within the meaning of section 49 of that Act,
- (g) any office of the National Assembly for Wales held by a member of it,
- (h) in England, any office of a county council, a London borough council, a district council or a parish council held by a member of it,
- (i) in Wales, any office of a county council, a county borough council or a community council held by a member of it,
- (j) in relation to a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994, or a community council established under section 51 of the Local Government (Scotland) Act 1973, any office of such a council held by a member of it,
- (k) any office of the Greater London Authority held by a member of it,
- (l) any office of the Common Council of the City of London held by a member of it,

- (m) any office of the Council of the Isles of Scilly held by a member of it, and
 - (n) any office of a political party.”.
- (4) In section 2, after subsection (5), insert—
- “(5A) In this section “employer”, in relation to the holder of an office or post to which section 1 above applies by virtue of subsection (6A) of that section, shall be construed in accordance with that subsection.”.
- (5) In section 7A(2)(b), for “subsections (8) to (11)” substitute “subsections (6A) to (11)”.

Amendments to Equal Pay Act 1970: pregnancy and maternity leave

36.—(1) The 1970 Act is amended as follows.

(2) In section 1(2) (meaning of “equality clause”), after paragraph (c) insert—

“(d) where—

- (i) any term of the woman’s contract regulating maternity-related pay provides for any of her maternity-related pay to be calculated by reference to her pay at a particular time,
- (ii) after that time (but before the end of the statutory maternity leave period) her pay is increased, or would have increased had she not been on statutory maternity leave, and
- (iii) the maternity-related pay is neither what her pay would have been had she not been on statutory maternity leave nor the difference between what her pay would have been had she not been on statutory maternity leave and any statutory maternity pay to which she is entitled,

if (apart from the equality clause) the terms of the woman’s contract do not provide for the increase to be taken into account for the purpose of calculating the maternity-related pay, the term mentioned in sub-paragraph (i) above shall be treated as so modified as to provide for the increase to be taken into account for that purpose;

- (e) if (apart from the equality clause) the terms of the woman’s contract as to—
 - (i) pay (including pay by way of bonus) in respect of times before she begins to be on statutory maternity leave,
 - (ii) pay by way of bonus in respect of times when she is absent from work in consequence of the prohibition in section 72(1) of the Employment Rights Act 1996 (compulsory maternity leave), or
 - (iii) pay by way of bonus in respect of times after she returns to work following her having been on statutory maternity leave,

do not provide for such pay to be paid when it would be paid but for her having time off on statutory maternity leave, the woman’s contract shall be treated as including a term providing for such pay to be paid when ordinarily it would be paid;

- (f) if (apart from the equality clause) the terms of the woman’s contract regulating her pay after returning to work following her having been on statutory maternity leave provide for any of that pay to be calculated without taking into account any amount by which her pay would have increased had she not been on statutory maternity leave, the woman’s contract shall be treated as including a term providing for the increase to be taken into account in calculating that pay.”.

(3) In section 1(3), for “An equality clause shall not” substitute “An equality clause falling within subsection (2)(a), (b) or (c) above shall not”.

(4) In section 1, after subsection (5) insert—

“(5A) For the purposes of subsection (2)(d) to (f) above—

- (a) “maternity-related pay”, in relation to a woman, means pay (including pay by way of bonus) to which she is entitled as a result of being pregnant or in respect of times when she is on statutory maternity leave, except that it does not include any statutory maternity pay to which she is entitled;
 - (b) “statutory maternity leave period”, in relation to a woman, means the period during which she is on statutory maternity leave;
 - (c) an increase in an amount is taken into account in a calculation if in the calculation the amount as increased is substituted for the unincreased amount.
- (5B) For the purposes of subsections (2)(d) to (f) and (5A) above, “on statutory maternity leave” means absent from work—
- (a) in exercise of the right conferred by section 71(1) or 73(1) of the Employment Rights Act 1996 (ordinary or additional maternity leave), or
 - (b) in consequence of the prohibition in section 72(1) of that Act (compulsory maternity leave).”.
- (5) In section 6, after subsection (1) insert—
- “(1AA) Subsection (1)(b) does not affect the operation of an equality clause falling within section 1(2)(d), (e) or (f).”.

5th September 2005

Alun Michael
Minister for Industry and the Regions
Department of Trade and Industry

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, which are made under section 2(2)(a) and (b) of the European Communities Act 1972 and come into force on 1st October 2005, implement (in Great Britain) Council Directive 2002/73 EC of 23 September 2002 (“the Directive”) and include provision for matters arising out of or relating to such implementation. The Directive is concerned with the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions.

The Directive necessitates amendment of the Sex Discrimination Act 1975 (“the 1975 Act”), in particular to reflect the provisions of the Directive which deal with the definition of indirect discrimination, harassment, and genuine occupational requirements, and also necessitates amendments to the 1975 Act making it clear that discrimination on the grounds of pregnancy and maternity leave is unlawful sex discrimination.

Regulation 3 sets out a revised definition of indirect discrimination, on grounds of sex, in those areas with which the Directive is concerned. It also applies the amended definition to indirect discrimination against married persons.

Regulation 4 sets out a definition of discrimination on the grounds of pregnancy and maternity leave.

Regulation 5 sets out a definition of harassment, including sexual harassment, on the grounds of a person’s sex, or on the grounds of gender reassignment, which will apply in the areas with which the Directive is concerned. It also provides that a person may not be treated less favourably because of their submission to or rejection of conduct amounting to harassment.

Regulation 6 makes a consequential amendment.

Regulation 7 makes it unlawful for an employer to subject to harassment an employee or an applicant for employment.

Regulation 8 sets out the extent to which it is discriminatory to deprive a woman of the benefit of her terms and conditions of employment during maternity leave. These provisions do not apply to pay (the payment of money regulated by the contract of employment) as this is dealt with in the Equal Pay Act 1970 – see regulation 36.

Regulation 9 modifies the genuine occupational qualification exception which allows gender reassignment discrimination in cases where the jobholder is liable to be called upon to perform intimate physical searches pursuant to statutory powers.

Regulation 10 makes it unlawful for a principal to subject a contract worker to harassment.

Regulation 11 contains an expanded definition of “work at an establishment in Great Britain”.

Regulation 12 makes a consequential amendment.

Regulation 13 extends the 1975 Act to office holders.

Regulation 14 makes it unlawful for partnerships to subject to harassment partners or applicants for partnership and removes the exception allowing partnerships to discriminate in the provision of death or retirement benefits.

Regulation 15 makes it unlawful for trades unions to subject to harassment members or applicants for membership and removes the exception allowing trades unions to discriminate in the provision of death or retirement benefits.

Regulation 16 makes it unlawful for qualifying bodies to subject persons to harassment.

Regulation 17 amends the provisions relating to vocational training and makes it unlawful for training providers to subject persons to harassment.

Regulations 18 and 19 make it unlawful for employment agencies and the Training Commission and other such bodies to subject persons to harassment.

Regulation 20 replaces section 19 of the 1975 Act which permits certain discrimination in relation to employment and qualifications for purposes of an organised religion where the discrimination is necessary for limited religious reasons. The regulation also repeals section 6 of the Priests (Ordination of Women) Measure 1993 (No. 2).

Regulations 21 and 26 provide that, where there has been a relationship in which certain acts of discrimination, or harassment, would have been unlawful, it is also unlawful to subject a person to harassment after that relationship has ended. Regulation 21 applies to relationships which are governed by Part 2 of the 1975 Act (for example, an employment relationship), and regulation 26 applies to relationships to which certain provisions of Part 3 of the 1975 Act apply (for example, the relationship between a barrister and pupil).

Regulation 22 makes it unlawful for institutions of further and higher education to discriminate in respect of selection arrangements and to subject persons to harassment.

Regulation 23 removes the exception allowing discrimination in physical education training courses.

Regulations 24 and 25 make it unlawful for barristers and advocates, or their clerks, to subject to harassment a pupil or a tenant, or a person applying to be a pupil or tenant.

Regulation 27 makes it the duty of the Equal Opportunities Commission (“the EOC”) to work towards the elimination of harassment (in addition to its existing duty in respect of discrimination), adds harassment to the matters which can be the subject of a code of practice and adds harassment to the matters in respect of which the EOC can require information for the purposes of a formal investigation.

Regulation 28 adds harassment to the claims which may be presented to an employment tribunal. It also provides that discrimination or harassment claims made by or against barristers and advocates may be presented to an employment tribunal.

Regulation 29 ensures that the burden of proof in harassment claims heard in the employment tribunal is the same as that for discrimination claims heard there.

Regulation 30 adds harassment to the claims which may be presented to a county court.

Regulation 31 ensures that the burden of proof in harassment claims heard in the county court is the same as that for discrimination claims heard there, in areas with which the Directive is concerned.

Regulation 32 ensures that, in certain cases, respondents must reply to a claimant’s preliminary questions within eight weeks of being served with them.

Regulation 33 explains the meaning of certain expressions used in the Regulations and inserted in the 1975 Act.

Regulation 34 removes the exception allowing discrimination in admission to cadet forces.

Regulation 35 extends the Equal Pay Act 1970 to office-holders.

Regulation 36 amends the Equal Pay Act to set out the extent to which it is discriminatory to pay a woman less than she would otherwise have been paid due to pregnancy or maternity leave.

A Regulatory Impact Assessment of the effect these Regulations will have on business costs, and Transposition Notes showing how Council Directive 2002/73/EC has been implemented in Great Britain, are available to the public, free of charge, from the Women and Equality Unit, 3rd Floor, Department of Trade and Industry, 1 Victoria Street, London SW1H 0ET. Copies of each have also been placed in both Houses of Parliament.

STATUTORY INSTRUMENTS

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